

4/17/97

IN THE SUPREME COURT OF MISSISSIPPI

NO. 89-R-99002 SCT

IN RE: MISSISSIPPI RULES OF EVIDENCE

ORDER

This matter has come before the Court sitting en banc upon the Supreme Court Rules Advisory Committee's Petition for the Amendment of Certain Rules and Comments of the Mississippi Rules of Evidence, and the Court having considered the petition, does find that the amendments to such Rules and Comments should be adopted.

IT IS THEREFORE ORDERED THAT M.R.E. 902(11) and its Comment, Rule 803(6) and its Comment and Rule 1001(3) be and are hereby amended as set forth in Exhibits A, B and C hereto.

IT IS FURTHER ORDERED that such amendments shall be effective from and after July 1, 1997.

IT IS FURTHER ORDERED that this Court expresses its sincere gratitude to the Supreme Court Rules Advisory Committee for their continuing diligent, scholarly and professional efforts in advising and assisting the Court in the study and improvement of the Rules of Evidence as well as the other rules of the courts in this state.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to spread this Order upon the minutes of the Court and to forthwith forward a certified copy thereof to West Publishing Company for publication in *The Mississippi Rules of Court* and in the advance sheets of the *Southern Reporter (Mississippi Edition)*.

SO ORDERED, this, the _____ day of April, 1997.

MICHAEL SULLIVAN, PRESIDING JUSTICE

FOR THE COURT

Exhibit "A"

RULE 902

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(11) Certified Records of Regularly Conducted Activities.

(A) The records of a regularly conducted activity, within the scope of Rule 803(6), about which a

certificate of the custodian or other qualified witness shows (i) the first hand knowledge of that person about the making, maintenance and storage of the records; (ii) evidence that the records are authentic as required by Rule 901(a) and comply with Article X; and (iii) that the records were (a) made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (b) kept in the course of the regularly conducted activity; and (c) made by the regularly conducted activity as a regular practice. Such records are not self-authenticating if the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

(B) As used in this subsection, "certificate" means, (i) with respect to a domestic record, a written declaration under oath or attestation subject to the penalty of perjury; and, (ii) with respect to records maintained or located in a foreign country, a written declaration signed in a foreign country which, if falsely made, would subject the maker to criminal penalty under the laws of that country. A certificate relating to a foreign record must be accompanied by a final certification as to the genuineness of the signature and the position in the regularly conducted activity of the executing individual as is required for certification of Foreign Public Documents by subsection (3) of this rule.

(C) (i) Records so certified will be self-authenticating only if the proponent gives notice to adverse parties of the intent to offer the records as self-authenticating under this rule and provides a copy of the records and of the authenticating certificate. Such notice must be given sufficiently in advance of the trial or hearing at which they will be offered to provide the adverse party a fair opportunity to consider the offer and state any objections. (ii) Objections will be waived unless, within fifteen days after receiving the notice, the objector serves written specific objections or obtains agreement of the proponent or moves the court to enlarge the time. (iii) The proponent will be responsible for scheduling a hearing on any objections and the court should hear and decide such objections before the trial or hearing at which they will be offered. If the court cannot rule on the objections before the trial or hearing, the records will not be self-authenticating. (iv) If in a civil case, on motion by the proponent after the trial or hearing, the court determines that the objections raised no genuine questions and were made without arguable good cause, the expenses incurred by the proponent in presenting the evidence necessary to secure admission of the records shall be assessed against the objecting party and attorney.

[Amended January 31, 1990; July 1, 1997.]

Comment

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(11) Certified Records of Regularly Conducted Activities.

This method of self-authenticating the records of regularly conducted activities is suggested by Rule 902(11) of the Uniform Rules of Evidence. It is intended to allow, in proper cases, the introduction of these records without the expense, trial time consumption and inconvenience to witnesses who are called to provide what is often purely formalistic and undisputed predicate evidence. Part (A) permits proof by affidavit of the qualifications of the witness and the usual predicates of authenticity, the Best

Evidence Rule and the Rule 803(6) hearsay exception. Part (B) explains the required certification. Part (C) requires that the proponent have early anticipation of the use of this method so there is time before trial for notice, objections and a hearing. If objections are not decided before the trial, the proponent must plan to call the witness. The sanction for frivolous objections in civil cases is based on the M.R.C.P. 37(c) sanction for failure to admit.

When self-authenticating records are offered against the defendant in criminal cases, the rights of the defendant under the confrontation clauses of Federal and State Constitutions must be considered.

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[Comment amended January 31, 1990; March 20, 1995; July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 902 was amended to add subsection (11) to allow predicates for records of regularly conducted activities to be proven by affidavit. _____ So. 2d _____ (West Miss. Cases).

Exhibit "B"

RULE 803

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(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or self-authenticated pursuant to Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

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[Amended effective March 27, 1991; July 1, 1997.]

Comment

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(6) Records of Regularly Conducted Activity. Rule 801(6) 803(6) is an expansion of the common law business records exception used in Mississippi. The records must be those of a regularly conducted business activity; however, the definition of business is broader than pre-rule practice in Mississippi permitted. It includes records of non-profit institutions and associations. It is important to note that the custodian as well as other qualified witnesses may testify. Thus, it is not necessary to

call or to account for all participants who made the record.

However, the source of the material must be an informant with knowledge who is acting in the course of the regularly conducted activity. This is exemplified by the leading case of *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930) which is still the applicable law today under the rule. That case held that a police report which contained information obtained from a bystander was inadmissible; the officer qualified as one acting in the regular course of a business, but the informant did not.

Rule 803(6) specifically includes diagnoses and opinions as proper subjects of admissible entries, as well as the traditionally admissible entries pertaining to acts, events and conditions. The rule calls for the exercise of judicial discretion if there is an indication of a lack of trustworthiness. This permits the court to take into account the motivation of the informant. The phrase "data compilation" includes, but is not limited to, electronic information storage systems.

The reference to self-authentication under Rule 902(11) is to confirm that the predicate for records under this exception may be by affidavit in appropriate cases.

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[Comment amended effective March 1, 1989; March 27, 1991; March 20, 1995; July 1, 1997.]

Advisory Committee Historical Note

(add to existing note to Rule 803)

Effective July 1, 1997, Rule 803(6) was amended to allow predicate evidence for admission of these records to be presented by affidavit in appropriate cases. _____ So. 2d _____ (West Miss. Cases).

Exhibit "C"

RULE 1001. DEFINITIONS

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(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sign sight, shown to reflect the data accurately, is an "original."

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[Amended July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 1001(3) was amended to correct what was apparently a printing or

typographical error by replacing the word "sign" with the correct word, "sight". So. 2d _____
(West Miss. Cases).