

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2018

Order Amending Rule 902 to the Vermont Rules of Evidence

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 902 of the Vermont Rules of Evidence be amended to read as follows (new matter underlined):

RULE 902. SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic public documents not under seal.* (A) A document purporting to bear the signature in his official capacity of an officer or employee of the State of Vermont, or of any political subdivision, department, or agency thereof. (B) A document purporting to bear the signature in his official capacity of an officer or employee of any other entity included in paragraph (1) hereof, if accompanied by a certificate under oath of such person that he acts in that capacity or if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents.* A document made authentic by treaty between the United States and a foreign country or, if no treaty applies, a document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated

as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified copies of public records.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any statute of the United States or the State of Vermont or rule prescribed by the Supreme Court.

(5) *Official publications.* Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and periodicals.* Printed materials purporting to be newspapers or periodicals.

(7) *Trade inscriptions and the like.* Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) *Acknowledged documents.* Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial paper and related documents.* Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) *Presumptions created by statute.* Any signature, document, or other matter declared by any statute of the United States or of the State of Vermont to be presumptively or prima facie genuine or authentic.

(11) *Certified domestic records of regularly conducted activity.* The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, made under oath, certifying that the record:

- (A) was 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) was kept in the course of the regularly conducted activity; and
- (C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) *Certified foreign records of regularly conducted activity.* The original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if

accompanied by a written declaration by its custodian or other qualified person certifying that the record:

- (A) was 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) was kept in the course of the regularly conducted activity; and
- (C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(13) Blockchain records. Any digital record electronically registered in a blockchain if it is accompanied by a written declaration of a qualified person, made under oath, stating the qualification of the person to make the certification and:

- (A) the date and time the record entered the blockchain;
- (B) the date and time the record was received from the blockchain;
- (C) that the record was maintained in the blockchain as a regular conducted activity; and
- (D) that the record was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Reporter's Notes – 2018 Amendment

Rule 902(13) is added to reflect the enactment of 12 V.S.A. § 1913, a statute pertaining to the admissibility of evidence contained in blockchain records. Rule 902(13) mirrors the language and conditions set forth in § 1913(b)(1), a section declaring that blockchain records are self-authenticating.

To qualify for self-authentication under the statutory provision, the record has to comply with very similar conditions to those established by Rule 902(11) for domestic records of business activities. That is, the record must be accompanied by a written declaration of a qualified person that the record was made in the course of regularly conducted activity and maintained in the blockchain as a regular conducted activity. In fact, many of these records could probably qualify for self-authentication under Rule 902(11), but the nature of blockchain technology may raise some questions as to whether blockchain records may be defined as “domestic.”

The proposed amendment tracks the language of the statutory provision. The amendment is not a departure from the current standards for self-authentication. It simply clarifies the availability of self-authentication for records of regular conducted activity maintained in the blockchain because the applicability of Rule 902(11) otherwise may be subject to question.

Note that, for purposes of this rule, the presumption of authenticity applies only to the information specified in 12 V.S.A. § 1913(b)(3) (A)-(D), and that the presumption does not extend to the truthfulness, validity, or legal status of the contents of the fact or record. See 12 V.S.A. § 1913(b)(4).

Pursuant to 12 V.S.A. § 1913(b)(2), a digital record that meets the requirements for self-authentication laid out in (b)(1), “shall be considered a record of regularly conducted business activity pursuant to Vermont Rule of Evidence 803(6) unless the source of information or the method or circumstance of preparation indicate lack of trustworthiness.”

This provision does not expand the hearsay business record exception; instead, it includes blockchain records under the requirements set forth in the business records exception. The boundaries of Rule 803(6) remain unchanged. Note that the exception provided in the 12 V.S.A. § 1913(b)(2) is contingent upon the record satisfying the requirements for self-authentication stated in § 1913 (b)(1). These requirements include a determination that the record was made and maintained in the blockchain as part of a regular conducted activity. Therefore, the statutory provision does not expand the admissibility of records beyond what ordinarily would be admitted under this exception. As with other records that may qualify for admission under Rule 803(6), the statutory provision gives the court discretion to exclude the evidence if the source, method, or circumstance suggest lack of trustworthiness.

2. That this rule is prescribed and promulgated effective _____. The Reporter's Notes are advisory.

3. That the Chief Justice is authorized to report this rule to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this ____ day of _____, 2018.

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

PROPOSED