

A graphic featuring a wooden gavel resting on a wooden surface, with a blurred Texas state flag in the background. The text is overlaid on the image.

## Texas Supreme Court Update

### *Opinions Issued October 9, 2020*

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**Authentication:** *“Unofficial” copies of filed documents from the court clerk’s online docket are self-authenticating and are competent evidence when included as a standalone exhibit to a summary judgment motion or response.*

Many clerk’s offices make “unofficial” copies of court documents available online free of charge while offering an “official” certified copy for a fee. In [Fleming v. Wilson](#), a legal malpractice defendant relied on one of these unofficial, uncertified copy of a judgment as evidence to support a summary judgment motion. That motion was based on the assertions the malpractice plaintiffs were collaterally estopped from pursuing their malpractice claims by the judgment consummating the settlement of the underlying suits. The “unofficial” copy was not a self-authenticated public record under rule 902 because it was not certified. The nonmovants argued that any document not self-authenticated under rule 902 had to be authenticated by extrinsic evidence per rule 901. The trial court overruled the plaintiff’s objection that the unofficial copy of the judgment lacked any probative value because it was not properly authenticated.

Authentication under rule 901 *generally* requires the proponent of the instrument to “produce evidence ... that the item is what the proponent claims.” Tex. R. Evid. 901(a). According to the nonmovants, this meant the movant must adduce *extrinsic* authenticating evidence – that is, evidence *other than* the “unofficial” copy of the judgment itself – before the “unofficial” copies of the judgment could be probative summary judgment evidence.

By *per curiam* opinion, a unanimous Texas Supreme Court that these “unofficial” copies required no extrinsic authentication, even though they were not self-authenticating under rule 902. Rules 901 and 902 did not create mutually exclusive categories of documents that were not, or were respectively, self-authenticating. Just because a document was not self-authenticating under rule 902 did not mean it required extrinsic authentication under rule 901. The opinion bolstered this conclusion by pointing out that rule 901 explicitly required extrinsic authenticating evidence for some of its examples, like specimens used for comparison or voice identifications, but not for others. Public records showing that a “public record or statement is from the office where items of this kind are kept” are authenticated. Tex. R. Evid. 901 (b)(7). Satisfying this requirement does not require extrinsic evidence if the face of the document satisfies this test.

Despite the “unofficial” watermark, the “unofficial” copy of the judgment met 901(b)(7)’s criteria because it bore the notation that it had been filed with the district clerk. The opinion also pointed out that no one had questioned the actual genuineness or accuracy of the document. Further, the unofficial copy of the judgment showed it had been signed by the same judge who entertained the summary judgment motion. Thus, the documents could be deemed “authentic” under rule 901(b)(4) due to the “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.” The opinion concluded that the trial court did not abuse its discretion by treating the “unofficial” copies of the judgments as authentic under either 901(b)(4) or 901(b)(7).

The opinion also rebuffed the contention that their consideration was constrained by the summary judgment rule itself. Rule 166a(f) requires parties to a summary judgment motion or response to attach or serve “[s]worn or certified copies of all papers or parts thereof referred to *in an affidavit*.” (Emphasis added). However, this rule did not apply because the unofficial judgment was not an exhibit to an affidavit. Instead, it was tendered as a standalone exhibit on which

courts may rely under rule 166a(c) if they are “authenticated or certified.” Because the unofficial copy of the judgment was deemed authenticated under rule 901, it was competent summary judgment evidence under 166a(c).

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