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# Authentication and Hearsay: Which Trumps?

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BY STEPHEN A. SALTZBURG

Suppose that a document is offered by the government as a defendant's statement to prove the truth of its contents, and the defendant objects that he or she did not write or adopt the statement. To decide admissibility, does the trial judge use Federal Rule of Evidence 104(a) or 104(b)? Or does the judge use both? The answer should be clear after 40 years of experience with the evidence rules, but it remains cloudy for many courts and lawyers.

## The Difference

Federal Rule of Evidence 104(a) sets forth this standard:

> **(a) In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

It makes clear that the judge may rely on inadmissible evidence such as hearsay that would be excluded under Rule 802 in making a ruling.

Rule 104(b), on the other hand, sets forth a different standard:

> **(b) Relevance that Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

On its face, Rule 104(b) makes clear that it operates similarly to Rule 901(a), which states that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."

So, Rule 104(a) permits a judge to consider inadmissible evidence in making an evidence ruling while Rules 104(b) and 901(a) require the judge to focus on evidence that actually is admitted. In the discussion that follows, each mention of Rule 104(b) should be assumed to also apply to Rule 901(a).

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## A Sample Case

*United States v. Harvey*, 117 F.3d 1044 (7th Cir. 1997), illustrates the conflict that may arise when a defendant objects that a statement is not his or hers. The defendant, Roderick Harvey, set up a campsite for himself and his dog, Drigo, in the Shawnee National Forest, which is located in southern Illinois. He was charged with cultivating several plots of marijuana that law enforcement officials discovered near the campsite.

When law enforcement officials first discovered the marijuana plots during aerial surveillance, Harvey was in a hospital and rehabilitation center recovering from serious injuries suffered when he collided with a truck while riding a bicycle. He was in the center for approximately six weeks after the marijuana was discovered, and from the outset he expressed concern about his dog being left somewhere in Shawnee National Forest.

It took law enforcement officials two weeks after spying the marijuana plots from the air to actually reach them on foot in an isolated, rugged location. They came upon some plants that were six to seven feet tall and were near a well-developed campsite containing two tents. The officers saw no people at or around the campsite but encountered a large, emaciated German shepherd that growled and barked at them.

The officers returned to the campsite a couple of days after first reaching it and installed vibration-activated video surveillance equipment that they periodically checked for more than a month without finding any evidence of a human presence at the site.

Two days after Harvey left the center, officers conducting live surveillance of the campsite saw him at the site moving around with the aid of crutches. The officers arrested Harvey, searched the campsite, and found freshly-cut marijuana and a black satchel near where Harvey had been sleeping in one of the tents.

Two notebooks found inside the satchel contained diary-like entries and things-to-do lists. There were references to planting dates, planting conditions, and the grow plots around the campsite. One crossed-out entry stated "20 plants into ground up top today." Officers also found another entry that referred to the National Organization for the Reform of Marijuana Laws (NORML), numerous entries mentioning a dog named Drigo, miscellaneous papers bearing Harvey's name, and a copy of a magazine generally devoted to the cultivation of marijuana. Officers testified that Harvey asked about his dog "Drago" (the name as recalled by one of the arresting officers) and the status of his camping gear while being transported to federal court.

Harvey objected at trial to the admission of the diary entries, but the trial judge admitted them over objection despite the fact that the government did not offer any handwriting evidence at trial. On appeal, the government argued that the entries were admissible because only the individual who planted the marijuana could have made them. The court of appeals found this argument to be unpersuasive:

> The Government's overall objective in this case was to prove that Harvey was responsible for the marijuana plants around the campsite. To prove that, the Government offered the written materials found there. But to authenticate those materials as Harvey's writing, the Government argues that only Harvey could have written them because only the planter of the marijuana would keep those kinds of records. The Government, in other words, assumes that Harvey planted the marijuana—the very point it must ultimately prove. This is circular reasoning at its worst. The references to the marijuana plants suggest the materials were written by the planter of the marijuana, but those references hardly imply that Harvey is the author/planter.

(*Id.* at 1049.)

The court nonetheless found no abuse of discretion on the part of the trial judge and explained as follows:

> Rule 901(b)(4) allows evidence to be authenticated by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." The written materials were found in an isolated and remote area where law enforcement agents observed no one other than Harvey. The materials were within Harvey's campsite; indeed, they were next to Harvey's own bed. The writings also make numerous references to Harvey's beloved dog, Drigo. These distinctive characteristics and circumstances are sufficient to support a finding that the materials were written by Harvey.

(*Id.* (alteration in original).)

The court of appeals then turned to the question of what standard a trial judge must use in deciding on admissibility:

> If the notes and diaries were truly written by Harvey, they would also not be hearsay because they would be statements made by a party-opponent. *See* Fed. R. Evid. 801(d)(2)(A). The question for us, however, is whether the finding of authenticity under Rule 901 is sufficient to make the written materials nonhearsay under Rule 801. Some cases seem to treat the inquiries under the two rules as identical, meaning that authenticated statements by a party-opponent are automatically not hearsay. Indeed, the admissibility of hearsay is routinely treated as a preliminary question under Rule 104(b) which, like Rule 901, requires only "evidence sufficient to support a finding."
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> On the other hand, *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987), states that the Federal Rules of Evidence "nowhere define the standard of proof the court must observe in resolving these [preliminary] questions." The *Bourjaily* Court therefore held that preliminary facts relevant to Rule 801(d)(2)(E)—the coconspirator exception to the hearsay rule—must be proven under a "preponderance of the evidence" standard. Since *Bourjaily*, we have stated more generally that "[w]hen making preliminary factual inquiries about the admissibility of evidence under a hearsay exception, the district court must base its findings on the preponderance of the evidence." *United States v. Franco*, 874 F.2d 1136, 1139 (7th Cir. 1989). The admission of evidence under Rule 801 may therefore require a higher standard of proof than the prima facie showing required to authenticate evidence under Rule 901.

(*Id.* at 1049–50 (alterations in original) (citations omitted).)

In the end, the court of appeals failed to decide which rule governed and instead concluded that "[r]egardless of whether the authentication and hearsay thresholds are identical, we find that the written materials satisfy the higher preponderance of the evidence standard." (*Id.* at 1050.) It appears that other courts believe that it is sufficient for the judge to find simply that Rule 104(b) is satisfied and that it is not to satisfy the higher standard of Rule 104(a). One example is *United States v. Gil*, 58 F.3d 1414 (9th Cir. 1995). In still other cases, courts address the evidence question as simply a hearsay question without focusing on authentication. One example is *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014).

## Getting to the Right Answer

So the question is which standard applies. The right answer is that the trial judge must use both Rule 104(b) and Rule 104(a). A simple example can help to explain this.

Assume (1) the government charges a defendant with operating a website that is used to transmit child pornography and that there are pictures and statements on the website, (2) the government wants to admit the pictures, (3) the government wants to admit the statements for their truth, and (4) the defendant objects on hearsay and authentication grounds.

Assume also that the trial judge has a hearing at which the government calls a law enforcement officer to testify that "I spoke with three longtime friends of the defendant, who told me that the defendant told each of them that the website was his." If the trial judge believes the officer, the judge could find by a preponderance of the evidence that the website was operated by the defendant, even though the officer's testimony is inadmissible hearsay. Rule 104(a) allows this. If the trial judge makes the preponderance finding, this would be sufficient for the judge to find that Rule 801(d)(2)(A) is satisfied as to the statements. But nothing in Rule 104(a) allows the judge to admit the officer's testimony regarding what the three friends said, and it is highly unlikely that their statements would satisfy any hearsay exception. Therefore, there would be no admitted evidence to tie the defendant to the website, the government could not authenticate the photos as being posted by the defendant, and, therefore, the judge could not admit the photos into evidence because Rule 104(b) requires admissible evidence connecting the photos to the defendant.

Can it really be that the statements could be admitted because the judge assessed them under the hearsay rule and Rule 104(a), but the photos could not be admitted because they are physical evidence and only relevant if tied to the defendant under the Rule 104(b) standard? This would seem to make little or no sense, and the gut reaction of any experienced judge or lawyer is that it must be wrong. They are right. It is wrong.

## Why Is It Wrong?

It is wrong because the prosecution is not entitled to ask the jury to use evidence as being a genuine or authentic anything without sufficient evidence for the jury to find by a preponderance of the evidence that it is what the government claims. In other words, the prosecution cannot ask the jury to infer or conclude something without an adequate evidentiary basis.

If the trial judge were to admit the statements based on the officer's hearsay testimony at a hearing, the prosecution would have succeeded in offering no admissible evidence to justify asking the jury to find that the statements were made by the defendant. The statements would be in evidence, would prove nothing, and might in the end have to be stricken as irrelevant or as confusing under Rule 403.

## What Is Right?

The bottom line is that any party wanting the jury to find that something is what that party claims it is must satisfy Rule 104(b). To say, for example, that a website is the defendant's, there must be sufficient evidence for the jury to find not just that there is a website with material on it, but also that the defendant operated that website. The proponent of the evidence must offer sufficient foundational facts for the jury to find by a preponderance of the evidence that the website is the defendant's. Under Rule 104(b), the judge is not a fact finder—the judge is a fact screener who decides whether there is sufficient evidence for the jury to make the required finding.

If, however, evidence is properly authenticated but is also hearsay (such as the statements on the hypothetical website), the judge must use the *Bourjaily* standard discussed in *Harvey* and, in order to satisfy Rule 801(d)(2)(A), make the requisite finding by a preponderance of the evidence that the defendant made the statements. In making this ruling, the judge is a fact finder.

## Conclusion

The simple hypothetical demonstrates that the proponent of any evidence always must satisfy Rule 104(b) in order to be permitted to ask a jury to conclude that evidence is what the proponent claims it is. When the evidence is hearsay, the proponent must also satisfy the hearsay rule and offer evidence (that need not itself be admissible) that enables the judge to find by a preponderance of the evidence that there is an exemption or exception that supports admission. The fact that evidence is hearsay does not remove the need for authentication; it means that in addition to authenticating the evidence and thereby satisfying Rule 104(b), the proponent must also satisfy the hearsay rule and satisfy Rule 104(a). ■