

Admissibility of Electronic Evidence

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Checklist of Potential Authentication Methods



E-MAIL

- Witness with personal knowledge (901(b)(1))
- Expert testimony or comparison with authenticated examples (901(b)(3))
- Distinctive characteristics including circumstantial evidence (901(b)(4))
- Trade inscriptions (902(7))
- Certified copies of business record (902(11))



INTERNET WEBSITE POSTINGS

- Witness with personal knowledge (901(b)(1))
- Expert testimony or comparison with authenticated examples (901(b)(3))
- Distinctive characteristics including circumstantial evidence (901(b)(4))
- Public records (901(b)(7))
- System or process capable of proving a reliable result (901(b)(9))
- Official publications (902(5))



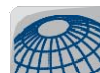
TEXT MESSAGES, TWEETS, AND THE LIKE

- Witness with personal knowledge (901(b)(1))
- Circumstantial evidence of distinctive characteristics (901(b)(4))
- Expert testimony or comparison with authenticated examples (901(b)(3))



COMPUTED STORED RECORDS AND DATA

- Witness with personal knowledge (901(b)(1))
- Expert testimony or comparison with authenticated examples (901(b)(3))
- Distinctive characteristics including circumstantial evidence (901(b)(4))
- System or process capable of proving a reliable result (901(b)(9))



COMPUTER ANIMATIONS AND COMPUTER SIMULATIONS

- Witness with personal knowledge (901(b)(1))
- Expert testimony or comparison with authenticated examples (901(b)(3))
- System or process capable of proving a reliable result (901(b)(9))



DIGITAL PHOTOGRAPHS

- Witness with personal knowledge (901(b)(1))
- System or process capable of providing reliable result (901(b)(9))

1. Preliminary Rulings on Admissibility

- Before evidence goes to jury, judge must determine whether proponent has offered satisfactory foundation (preponderance of the evidence) from which jury could reasonably find that evidence is authentic (104(a)) (FRE, except for privilege, do not apply)
- When relevance of evidence depends on a disputed antecedent fact being established (“conditional relevance”), judge determines whether a reasonable jury could find that the fact has been proved, then submits the question to jury to decide. If jury finds that the antecedent fact has been proved, it considers the evidence. If not, it does not consider it. Example: dispute on authenticity.

2. IS EVIDENCE RELEVANT?

FRE 401

Does it have a tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be?

FRE 401

ADMISSIBLE - Go to FRE 402

FRE 402

Does Constitution, Statute or Rule Require Exclusion?
 Yes - Inadmissible
 No - Admissible - Go to FRE 403

FRE 403

Is probative value substantially outweighed by:

- 1) Danger of unfair prejudice?
- 2) Confusion of the issues?
- 3) Misleading the jury?
- 4) Undue delay?
- 5) Waste of time?
- 6) Needless presentation of cumulative evidence?



NO

ADMISSIBLE



YES

INADMISSIBLE

YES

NO

FRE 401

INADMISSIBLE

3. If relevant, is it authentic? FRE 901–902

- **FRE 901(a)** Is the evidence sufficient to support a finding that the matter in question is what proponent claims?

Determining the degree of foundation required to authenticate electronic evidence depends on the quality and completeness of the data input, the complexity of the computer processing, the routines of the computer operation and the ability to test and verify the results.

- **FRE 901(b)**

Non-exclusive list of examples includes:

- (1) Testimony of witness with knowledge;
- (3) Comparison by trier or expert witness;
- (4) Distinctive characteristics and the like (e-mail address, hash values, “reply” doctrine);
- (7) Public records or report; and
- (9) Process or system capable of producing a reliable result.

- **FRE 902**

Methods by which information may be authenticated WITHOUT EXTRINSIC EVIDENCE:

Ways to authenticate e-records:

- 902(1)-(4) Public Records/Documents
- 902(5) Official publications
- 902(6) Newspapers, Magazines, Similar Publications
- 902(7) Trade inscriptions
- 902(11) Certified domestic records of regularly conducted activity (authenticate business records under FRE 803(6)).

4. Is evidence hearsay?

FRE 801 (a-c)

YES

1. Is it a statement (written/spoken assertion, non-verbal/non-assertive verbal conduct intended to be assertive)?
2. Is statement made by “Declarant” (person, not generated by machine)?
3. Is statement offered for proving truth of assertion?
NOTE: Statement is not offered for substantive truth if offered to prove:
 - a. Communicative/comprehension capacity of declarant;
 - b. Effect on the hearer;
 - c. Circumstantial evidence of state of mind of declarant;
 - d. Verbal acts/parts of acts;
 - e. Utterances of independent legal significance.
4. Is statement excluded from definition of hearsay by 801(d)(1) and (2)?

Prior witness statements – 801(d)(1)

- Prior testimonial statement 801(d)(1)(A)
- Prior consistent statement 801(d)(1)(B) to rebut allegations of recent fabrication
- Statement of identification 801(d)(1)(C)

Admission by party opponents – 801(d)(2)

- Individual admission 801(d)(2)(A)
- Adoptive admission 801(d)(2)(B)
- Admission by person with authority 802(d)(2)(C)
- Admission by agent/employees 802(d)(2)(D)
- Co-conspirator statements 801(d)(2)(E)

If HEARSAY, then it is INADMISSIBLE unless covered by a recognized exception:

HEARSAY EXCEPTION

NO

Availability of Declarant Irrelevant – 803

- Present Sense Impression 803(1)
- Excited Utterance 803(2)
- State of Mind Exception 803(3)
- Statements for Purposes of Medical Diagnosis or Treatment 803(4)
- Past Recollection Recorded 803(5)
- Business Records 803(6)
- Absence of an entry in records kept in the regular course of business 803(7)
- Public Records or Reports 803(8)
- Records of Vital Statistics 803(9)
- Absence of public record or entry 803(10)
- Records/ Documents affecting interest in property 803(14) & (15)
- Statements in Ancient Documents 803(16)
- Market Reports, Commercial Publications 803(17)
- Learned Treatises 803(18)
- Character Reputation Testimony 803(21)
- Record of Felony Convictions 803(22)

Declarant Unavailable – 804

- Unavailability – 804(a)(1-5) (privilege, refused to testify, lack of memory, death/illness beyond subpoena power)
- Unavailability Exceptions – 804(b)
 - Former Testimony 804(b)(1)
 - Dying Declaration 804(b)(2)
 - Statement Against Interest 804(b)(3)
 - Statement re family history 804(b)(4)
 - Forfeiture by wrongdoing 804(b)(6)

Residual “Catchall” Exception -- 807

5 Original Writing Rule – FRE 1001 – 1008

- Is the evidence “original”, “duplicate”, “writing”, “recording” (1001)
 - iv. “Collateral record” (i.e., not closely related to controlling issue in case)
- Rule 1002 requires the original to prove the contents of a writing, recording or photograph unless “secondary evidence” (any evidence other than original or duplicative) is admissible. Rules 1004, 1005, 1006, 1007.
- Duplicates are co-extensively admissible as originals unless there is a genuine issue of authenticity of the original or circumstances indicate that it would be unfair to admit duplicate in lieu of original (1003)
- Permits proof of the contents of writing, recording or paragraph by use of “secondary evidence” – any proof of the contents of a writing, recording or photograph other than the original or duplicate (1004) if:
 - i. Non-bad faith loss/destruction of original/duplicate
 - ii. Inability to subpoena original/duplicate
 - iii. Original/duplicate in possession, custody, control of opposing party
- Admission of summary of voluminous books, records or documents (1006)
- Testimony or deposition of party against whom offered or by that party’s written admission (FRCP 30, 33, 36) (1007)
- If admissibility depends on the fulfillment of a condition or fact, question of whether condition has been fulfilled is for fact finder to determine under 104(b) (1008)
- But, the issue is for the trier of fact, if it is a question:
 - (a) whether they asserted writing ever existed;
 - (b) whether another writing, recording or photograph produced at trial is the original; or
 - (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact.

6 Practice Tips

- 1 Be prepared. Start with a defensible and comprehensive records management program.
 - 2 Think strategically about the case and the evidence from the beginning of the case.
 - 3 Memorialize each step of the collection and production process to bolster reliability.
 - 4 Use every opportunity during discovery to authenticate potential evidence.
 - 5 Be prepared to provide the court with enough information to understand the technology issues as they relate to the reliability of the evidence at hand.
 - 6 Be creative and consider whether there are case management tools that might assist the court and the other parties in addressing evidentiary problems concerning some of the more complex issues (such as “dynamic” data in a database or what is a “true and accurate copy” of ESI).
 - 7 Keep your audience in mind... will this be an issue for the judge or the jury? (e.g., Rule 104(a) or (b)).
- Examples:**
- a) For pretrial disclosures under F.R.C.P. 26(a)(3), you have 14 days to file objections or possible waiver;
 - b) Documents produced by opposing party are presumed to be authentic – burden shifts
 - c) F.R.C.P. 36 Requests for Admissions
 - d) Request stipulation of authenticity from opposing counsel

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