

“Self Authenticating” Evidence in the Digital Age: A Discussion on Rule 902(11)/(13)/(14) and ESI

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Evidence 101: So, How do you get it in?



Step 1:
Relevance
FRE 401,
402

Step 2:
Authenticate
FRE 901(a),
Foundation?

Step 3:
Hearsay &
exceptions
FRE 801(d),
803, 804,
807

Step 4:
Privilege &
prejudice
FRE 104,
403

Authentication v. Foundation

- ▶ The process of authentication is often referred to as “laying a foundation.”
- ▶ The phrase “lack of foundation” simply means that you have failed to ask a necessary predicate question(s) of the witness.
- ▶ You need preliminary questions to demonstrate the witness’ knowledge of or familiarity with the facts, documents or data.

Laying the Foundation

- ▶ Witness–Knowledge?
- ▶ “Documents”– Is it what it purports to be?
- ▶ Real Evidence–Identity?
- ▶ Demonstrative Evidence–Clarification or Explanation? Note “Illustrative Evidence” Rule 12/1/24.
- ▶ Expert Evidence– Helpful to jury, scientific/technical? Witness must be qualified, reasonable and reliable. See Rule 702.

Laying the Foundation

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ESI (Digital Evidence Defined)

- ▶ ESI is defined as any "information that is stored in a medium from which it can be retrieved and examined." 2006 Advisory Committee Note to Rule 34(a).

Remember: Authentication Alone is not Enough for Admission

- ▶ “It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain.” *Advisory Committee Note to Evidence Rule 901.*
- ▶ *Authentication is just one of the “steps” to admission of evidence.*

Authentication of Electronic Evidence

Bar for authentication is not particularly high

- *U.S. v. Tank*, 200 F.3d 627 (9th Cir. 2000): prima facie showing of authenticity is “evidence sufficient to allow a reasonable juror to find” in favor of authenticity or identification.
- *U.S. v. Gagliardi*, 506 F.3d 140 (2d Cir. 2007); *Lexington Ins. Co. v. W. Pa. Hosp.*, 423 F.3d 318 (3d Cir. 2005)
- Weight vs. Admissibility
 - *U.S. v. Ortiz*, 776 F.3d 1042 (9th Cir. 2015): courts may admit “evidence that meets the minimum requirements for authentication” under the FRE and let opposing counsel “argue that the jury should give the evidence minimal weight.”

Authentication of Electronic Evidence

❖ Is it What the Proponent Says it is?

❖ Key Rules:

- FRE 901, the general rule including, “Evidence About a Process or System” (901(b)(9): “Evidence describing a process or system and showing that it produces an accurate result.”
- FRE 902: Self- Authenticating Evidence, where no extrinsic evidence of authenticity is required.

FRE 902: Self-Authenticating Documents:

- ▶ (11) Certified Domestic Records of a Regularly Conducted Activity;
- ▶ (12) Certified Foreign Records of a Regularly Conducted Activity;
- ▶ (13) Certified Records Generated by an Electronic Process or System;
- ▶ (14) Certified Data Copied from an Electronic Device, Storage Medium or File.

Evidence 201: Admitting Electronic Evidence

- ▶ Don't forget your FRE 902(11) certificate – and notice re Certified Domestic Records of a Regularly Conducted Activity (i.e. “Business Records”)!
 - ▶ *See also*, 902(12) (Certified Foreign Records), 902(13) (Certified Electronic Process or system Records, and 902 (14) (Certified Data Copied from an Electronic Device, Storage Medium or File).

Certification Requirements

- ▶ Reasonable Written Notice of Intent to Offer,
and
- ▶ Make the Records and Certificate Available for
Inspection.

Interplay with FRE 803(6)

- ▶ “Business Records” or “Records of a Regularly Conducted Activity” as an exception to the rule against hearsay.
- ▶ May be self authenticated under Rule 902 (11) or (12).

Notice Example 1

Case 3:18-cr-04683-GPC Document 347 Filed 03/18/22 PageID.4487 Page 6 of 7

AUTHENTICATION PURSUANT TO FED. R. EVID. 902(11) & (13)

19 The United States intends to authenticate business records and records generated by
20 an electronic process, pursuant to Federal Rule of Evidence 902(11) and 902(13) and
21 consistent with Rule 803(6), using a certification from a custodian of records relating to
22 those business records. Specifically, the United States intends to so authenticate records
23 obtained from the following entities: the American Registry of Internet Numbers, Amobee
24 (successor-in-interest to Adconion and Frontline Direct), Telic, GoDaddy, Hostwinds,
25 Cogent Communications, Tucows (successor-in-interest to Enom), the Goodman Law
26 Firm, Mandatus, LegalZoom (successor-in-interest to Earth Class Mail), Native Rank
27 (successor-in-interest to GetAds), and CPH Resources. The certificates of the custodians
28 of records have been produced as discovery as they were received; additional certificates
1 encompassing the entirety of certain rolling productions will be produced as soon as they
2 are received.
3

Notice Example 2

17 AUTHENTICATION PURSUANT TO FED. R. EVID. 902(11) & (13)

18 The United States intends to authenticate business records and records generated by
19 an electronic process, pursuant to Federal Rules of Evidence 902(11) and 902(13) and
20 consistent with Rule 803(6), using a certification from a custodian of records relating to
21 those business records. Specifically, the United States intends to so authenticate the trial
22 exhibits set forth below obtained from the following entities: the American Registry of
27 CPH Resources. The certificates of the custodians of records have been previously
28 produced as discovery, and are attached hereto as Exhibit 1. The table below identifies the
1 record holder, the trial exhibit number of the Certificate of Authenticity, and the trial
2 exhibits (by number) sought to be authenticated.

3 COA Exhibit No.	Records Holders	Records	Trial Exhibit Nos.
4 207	Broadcloud	LOA	585
5 218	Goodman Law Firm	Email – MyCrim Host	530
6 224	Moniker	Domain	306

Sample 1 – Business Email

Case 3:18-cr-04683-GPC Document 398-1 Filed 04/29/22 PageID.6085 Page 3 of 25

From: Jake Bychak <jake.bychak@adconiondirect.com>
Sent: Monday, April 8, 2013 1:14 PM
To: Mark Manoogian <mark.manoogian@adconiondirect.com>; Abdul Mohammed <abdul.mohammed@adconiondirect.com>
Subject: RE: Ips for Review - Techv

Lets give it a test. We need IPs!

Jake Bychak | Senior Operations Manager

Phone: +1 [REDACTED] Mobile: +1 [REDACTED]

jake.bychak@adconiondirect.com

From: Mark Manoogian
Sent: Monday, April 08, 2013 11:24 AM
To: Jake Bychak; Abdul Mohammed
Subject: RE: Ips for Review - Techv

Jake,

This range from Tech V is an option.

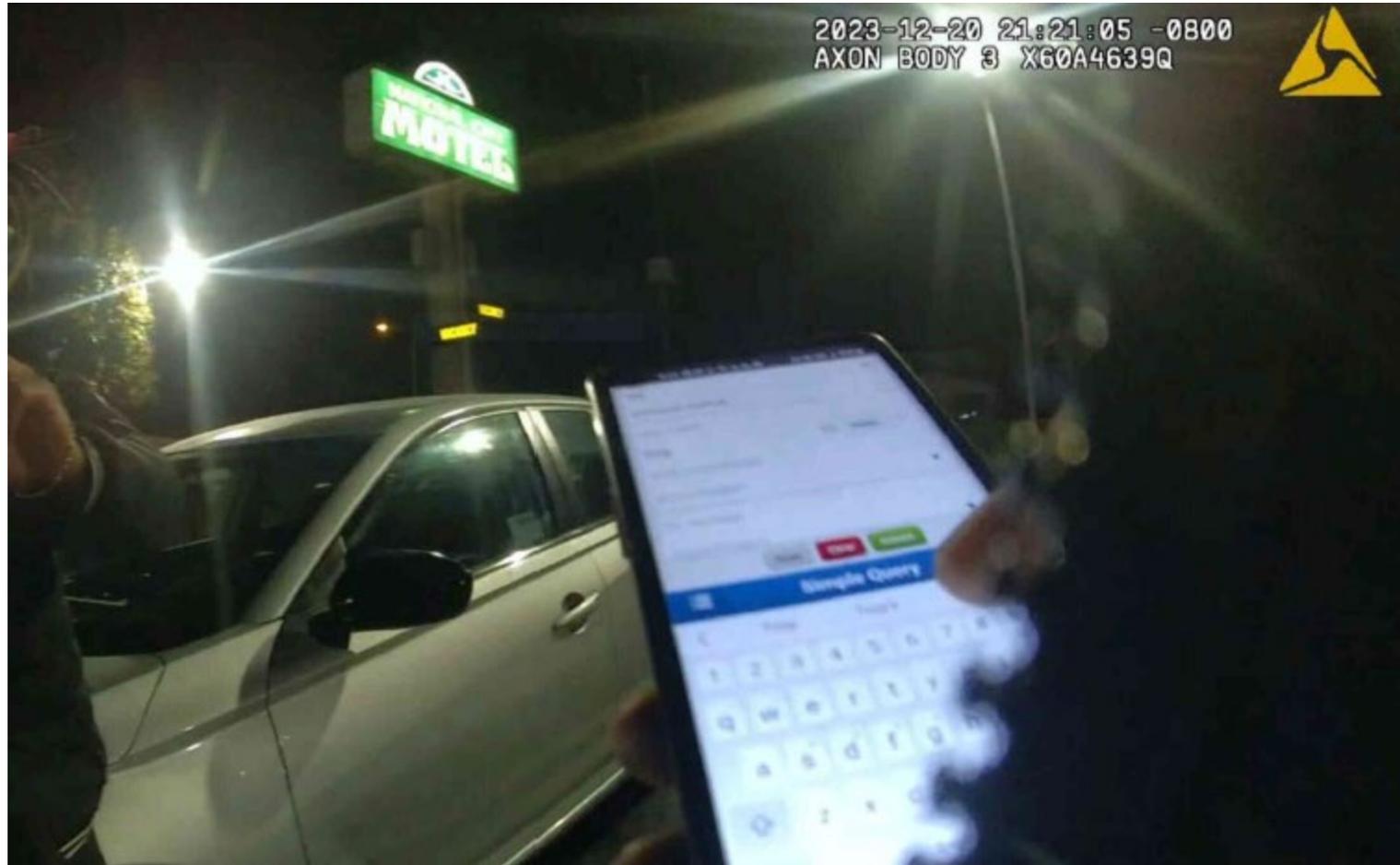
As of now it is \$350/C for two months. We can get LOA and rdns done before we pay.

Abdul, is this something we would want to announce with Hostwinds if we want to pursue it?

If we do want it, we could potentially test again.

AMOBEE0083901

Sample 2 – Video Metadata



Sample 3 – Social Media Posts

12/22/23, 12:24 PM

Trabajos San Diego | Facebook



Trabajos San Diego

Join group

Share

[About](#)

[Discussion](#)

About this group

Ayudarnos a buscar empleo

Private

Only members can see who's in the group and what they post.

Visible

Anyone can find this group.

History

Group created on December 8, 2022 [See more](#)

Members · 2.2K

Practice Pointer 1: Think Strategically

- The jury's focus or concern is what the evidence says – not its foundation.
 - Try to spare them legalese/dog and pony show
 - Expedite the delivery using available tools
 - Consider stipulations

Practice Pointer 2: Litigate Effectively

- Lay the foundation for your foundation.
 - Lodge pertinent documents pre-trial, e.g.:
 - FRE 902(11) notice
 - FRE 902(11)/(13) COAs
 - FRE 1006 summaries
 - At a minimum provide copies at the start of trial
 - Raise foundational issues pre-trial
 - Motions *in limine*
 - FRE 104 Hearing
 - “a court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.”
 - Trial brief →

Practice Pointer 2: Litigate Effectively

3. Electronic Evidence

The government's case-in-chief will include electronic evidence in the form of emails, database search results, automated records, and electronic business records. The government is seeking to authenticate this evidence via FRE 901(b)(1) testimony and FRE 902(11) & 902(13) certificates that were previously produced and noticed, and to admit the records as either non-hearsay under FRE 801(a), as business records under FRE 803(6), or as coconspirator/party opponent statements under FRE 801(d)(2) (discussed in a separate section below).

a. *Authenticating Electronic Evidence*

In general, a "proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." FRE 901(a). To support such a finding, the proponent "need only make a prima facie showing of authenticity" and "establish a connection between the proffered evidence and the defendant." *United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000). Disputes over authentication should be about whether it is reasonably likely that the evidence is what the proponent says (e.g., a Company A email), not over the evidence's probative value. The courts can therefore properly "admit[] evidence that meets the minimum requirements for authentication under the Federal Rules of Evidence" and let opposing counsel "argue that the jury should give the evidence minimal weight." *United States v. Ortiz*, 776 F.3d 1042, 1045 (9th Cir. 2015).

The seminal electronic evidence case, *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D.Md. 2007), which catalogued the myriad ways in which electronic evidence may be admitted and was written prior to enactment of FRE 902(13) in December 2017, noted at the time that the most common methods for authenticating email are FRE 902(b)(1) (person with personal knowledge), 901(b)(3) (comparison with authenticated exemplar), 901(b)(4) (distinctive characteristics, including circumstantial evidence),⁹ and 902(11) (business records certifications). *Id.* at 554-55.

⁹ FRE 901(b)(4) also encompasses the "reply doctrine," which holds that, once an email "is shown to have been mailed, sent or made," an email "shown by its contents to be in

LLC, 2021 WL 2641521, *4-5 (W.D. Wash. 2021); *see also* Wright and Miller § 7147. The Advisory Committee Notes to the 2017 Amendments that codified FRE 902(13) note the shared public policy underlying both FRE 901(11) and 902(13): "As with the provisions on business records in Rules 902(11). . . , the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary."

b. *Hearsay Exclusions and Exceptions for Electronic Evidence*

The government's case-in-chief will include records produced by Company A's automated Blackmail software that tracks the volume of emails delivered in a 24-hour period. The government anticipates that current and past employees of Company A who testify will lay the foundation for what this software does and how it operates. This foundation will show that the Blackmail reports are admissible machine statements that are automatically computer and do not fall within the category of "statements" subject to FRE 801, which only applies to "a *person's* oral assertion, written assertion, or nonverbal conduct." FRE 801(a). "[M]achine statements aren't hearsay." *United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1110 (9th Cir. 2015). Machine or automated statements are also not subject to the Confrontation Clause. *Id.*; *United States v. Cazares*, 788 F.3d 956, 979 (9th Cir. 2015). In this vein, GPS coordinates automatically generated by software tools like Google Earth and "Reverse Look-Up Reports" of cell phones associated with tracking numbers are non-hearsay and not subject to the Confrontation Clause. *Id.*; *United States v. Gonzalez*, 615 Fed.Appx. 405 (9th Cir. 2015).

Electronic business records that are human generated, while hearsay, are commonly subject to an exemption under FRE 803(6), which applies to reports, records, and data compilations made as a regular practice of a business activity. *See United States v. Lishewski*, 860 Fed.Appx. 512, 516 (9th Cir. 2021) (emails properly admitted under FRE 803(6)); *United States v. Wilkins*, 538 F.Supp.3d 49, 67 (D.D.C. 2021) (records from online advertising websites, social media websites, cellular telephone companies, and internet service providers admissible non-hearsay under FRE 803(6) and 902(11)).

Practice Pointer 3

- How you collect evidence determines how you authenticate it, e.g.
 - Facebook records can be collected from:
 - Facebook
 - Client/defendant
 - Online
 - Cooperating witness
 - Discovery
 - FRE 902(11)/(13) will not apply to all sources
 - Evidence received in discovery still needs authentication

Questions?

