



Trial Presentation of Electronic Evidence

Panelists

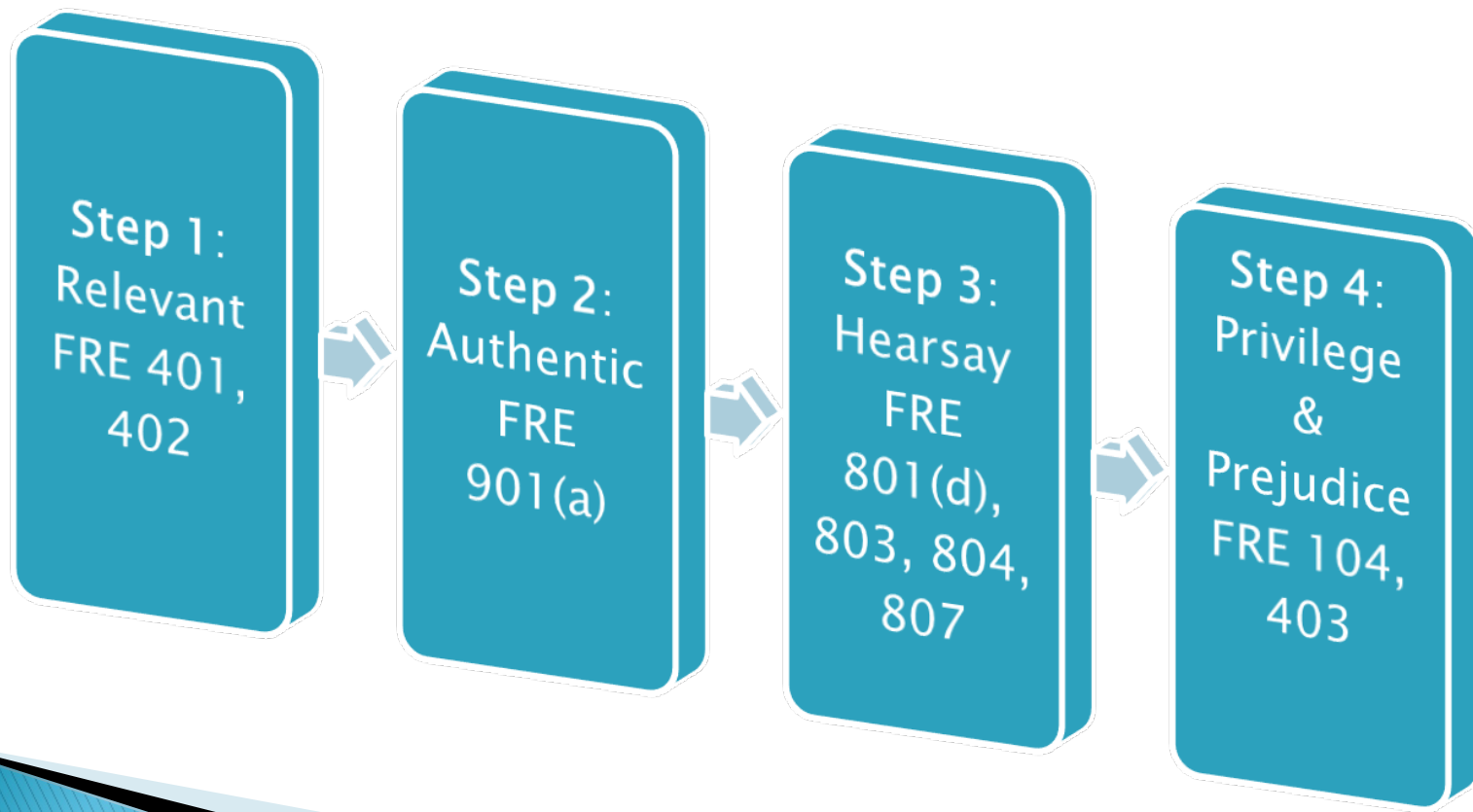
Hon. Anthony J. Battaglia, U.S. District Judge
John C. Ellis, Federal Defenders
Sabrina L. Fève, Assistant U.S. Attorney
Alessandra P. Serano, Assistant U.S. Attorney



Part I: How to Admit Digital Evidence*

*and all other types of evidence
(most of the time)

Admissibility: Four-Step Analysis





Admissibility: Four-Step Analysis

Same analysis regardless of:

- Criminal
- Civil
- Trial
- Summary Judgment



The FRE apply to Rule 56 motions:

- “It is well established that unsworn, unauthenticated documents cannot be considered on a motion for summary judgment.”
 - *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993)
- FR CivP 56(e) “requires that a proper foundation be laid for evidence considered on summary judgment.” Proper foundation means the “exhibits could be admitted into evidence.”
 - *Bias v. Moynihan*, 508 F.3d 1212, 1224 (9th Cir. 2007)



Steps 1 & 4: Relevance & Privilege

- Relevant evidence tends to make a fact of consequence more probable than not (FRE 401)
- Relevant evidence is admissible unless its probative value is substantially outweighed by risk of unfair prejudice or risk that it will confuse issues, mislead the jury, be cumulative, or waste time (FRE 402, 403)
- Applicable privileges (FRE 104)



Step 2: Authentication

- Proponent must produce admissible evidence sufficient to support a finding that the item is what the proponent claims it is
 - FRE 901(a)

Step 2: Authentication

- Bar is not particularly high
 - *US 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.
 - *US 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.”
- “Weight vs. admissibility” is the norm under FRE 104(a), but consider FRE 104(b) implications



Step 2: Authentication & FRE 901

- FRE 901(b)(1): witness with **personal knowledge**
 - *US v. Tank*, 200 F.3d 627 (9th Cir. 2000); *US v. Hunter*, 266 Fed. Appx. 619 (9th Cir. 2008)
- FRE 901(b)(3): **expert comparison w/ authenticated specimen**
- FRE 901(b)(4): **distinctive characteristics** (e.g., hashes)
 - Compare *US v. Vayner*, 769 F.3d 125 (2d Cir. 2014) with *US v. Hassan*, 742 F.3d 104 (4th Cir. 2014); *US v. Brinson*, 772 F.3d 1314 (10th Cir. 2014)
 - Reply Doctrine: *US v. Frantz*, 2004 WL 5642909 (C.D.Cal. 2004)
- FRE 901(b)(7): **public records**
- FRE 901(b)(9): evidence about a **process or system** that shows it produces **accurate results**



Step 2: Authentication & FRE 902

- FRE 902(5): **public agency's publication**
- FRE 902(6): **online news publication**
- FRE 902(11)/(12): **certified domestic/foreign records of a regularly-conducted activity**
 - Need a certification
 - Need to provide timely notice
 - Facebook and other providers will provide a certificate & refuse to come testify
 - *US v. Browne*, 834 F.3d 403 (3rd Cir. 2016)



Step 2: Authentication & FRE 902

Proposed :

- FRE 902(13): certified copy of machine-generated information
- FRE 902(14): certified copy of computer-generated or stored information
 - Drafted specifically for authenticating digital evidence
 - Will be discussed at the September 2017 ESI panel
- Effective Dec. 1, 2017



Step 2: Authentication

- **FRE 201: judicial notice**
 - *US v. Burroughs*, 810 F.3d 833 (D.C. Cir. 2016) (Google maps); *McCormack v. Hiedeman*, 694 F.3d 1004 (9th Cir. 2012) (same); *Liberty Media Holdings LLC v. Vinigay.com*, 2011 WL 7430062 (D.Ariz. 2011) (ARIN website)
- **FRE 1002: best evidence rule**
 - *Compare US v. Bennett*, 363 F.3d 947 (9th Cir. 2004) and *US v. Diaz-Lopez*, 625 F.3d 1198 (9th Cir. 2010)
- **FRCivP 16(c)(2)(C)/36(a)(1)(B): stipulation re authenticity**
- **FRCivP 26(a)(3): pretrial disclosure, 14 days to object**

Step 3: Hearsay

Analysis asks five questions:

- Is the evidence a “**statement**”?
- Did a “**declarant**” make the statement?
- Is the statement offered to **prove the truth of its contents**?
- Is the statement **non-hearsay** under FRE 801(d)(1)?
- Is the statement covered by an **exception** in FRE 803, 804 or 807?

Step 3: Hearsay

Examples of non-hearsay:

- Non-statement evidence “made” by a machine or instrument (e.g. fax header, time/date stamp)
 - *US v. Lizarraga-Tirado*, 789 F.3d 1107 (9th Cir. 2015);
Swirsky v. Carey, 376 F.3d 841 (9th Cir. 2004)
- Evidence not offered for the truth of the statements (e.g., email admitted to show witnesses knew each other)
 - *US v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000); *Stevens v. Moore Business Forms, Inc.*, 18 F.3d 1443 (9th Cir. 1994)

Step 3: Hearsay

Examples of non-hearsay:

- Legally operative documents
 - *Stuart v. UNUM Life Ins. Co.*, 217 F.3d 1145 (9th Cir. 2000); *Kepner-Tegue Inc. v. Leadership Software*, 12 F.3d 527, 540 (5th Cir. 1994) (signed contract or emails between lawyers re the formation thereof are non-hearsay)
- FRE 801(d)(2)): statements of a party opponent/adoptive admission
 - *Sea-Land Service, Inc. v. Lozen Intern., LLC*, 285 F.3d 808, 821 (9th Cir. 2002) (admitting email signed by party opponent); *US v. Hunter*, 266 Fed.Appx. 619 (9th Cir. 2008) (admitting text messages)



Step 3: Hearsay

Hearsay Exceptions:

- FRE 803(1)/(2)/(3): present sense impression/ excited utterance/ mental state or condition
- FRE 803(6): business records
 - *Compare Monotype Corp. PLC v. Int'l Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994) (email is “far less of a systematic business activity) with *Ionian Corp. v. Country Mut. Ins. Co.*, 2011 WL 6070442 (D.Or. 2011); *Volterra Semiconductor Corp. v. Primarion, Inc.*, 2011 WL 4079223 (N.D.Cal. 2011) (admitting email as a business record)
- FRE 803(8)/(17): public records/ market reports & commercial publications