

Admissibility of Electronic Evidence

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Potential Authentication Methods

Email, Text Messages, and Instant Messages

- 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 and dependable result (901(b)(9))
- Trade inscriptions (902(7))
- Certified copies of business record (902(11))
- Certified records generated by an electronic process or system (902(13))
- Certified data copied from an electronic device, storage medium, or file (902(14))

Chat Room Postings, Blogs, Wikis, and Other Social Media Conversations

- 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 and dependable result (901(b)(9))
- Official publications (902(5))
- Newspapers and periodicals (902(6))
- Certified records generated by an electronic process or system (902(13))
- Certified data copied from an electronic device, storage medium, or file (902(14))

Digitally Stored Data and Internet of Things

- 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 and dependable result (901(b)(9))
- Certified records generated by an electronic process or system (902(13))
- Certified data copied from an electronic device, storage medium, or file (902(14))

Computer Processes, Animations, Virtual Reality, and 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 and dependable result (901(b)(9))
- Certified records generated by an electronic process or system (902(13))

Digital Photographs

- Witness with personal knowledge (901(b)(1))
- System or process capable of providing reliable and dependable result (901(b)(9))
- Official publications (902(5))
- Certified records generated by an electronic process or system (902(13))
- Certified data copied from an electronic device, storage medium, or file (902(14))

Social Media Sites (Facebook, LinkedIn, Twitter, Instagram, and Snapchat)

- 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 and dependable result (901(b)(9))
- Official publications (902(5))
- Certified records generated by an electronic process or system (902(13))
- Certified data copied from an electronic device, storage medium, or file (902(14))

Know Which Approach Your Jurisdiction Follows

Maryland Approach to Rules 104 and 901:

A higher standard for authentication for social media evidence. In this approach, the burden is on the admitting party to show that the social media evidence was not falsified or created by another user through either:

- Testimony of the creator of the website page or the post
- Search of the internet history or hard drive of the purported creator's computer
- Information obtained directly from social media site

See, Griffin v. State, 19 A. 3d 415, 423 (Md. 2011).

Texas Approach to Rules 104 and 901:

A lower standard for authentication of social media evidence. In this approach, the burden is on the admitting party to show evidence sufficient to support a finding by a reasonable juror that the social media evidence is what its proponent claims it to be through either:

- Direct testimony of a witness with personal knowledge
- Expert testimony or comparison with authenticated evidence
- Circumstantial evidence

See, Tienda v. State, 358 S. W. 3d 633 (Tex. Crim. App. 2012)

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 (104(b)).

Is Evidence Relevant?

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?

YES | **NO**

FRE 401:
ADMISSIBLE – Go to FRE 402

FRE 401:
INADMISSIBLE

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:

- Danger of unfair prejudice?
- Confusion of the issues?
- Misleading the jury?
- Undue delay?
- Waste of time?
- Needless presentation of cumulative evidence?

YES: INADMISSIBLE

NO: ADMISSIBLE

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 include:

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

FRE 902 – Evidence That is Self-Authenticating*

Methods by which information may be authenticated **WITHOUT EXTRINSIC EVIDENCE:**

- (1)-(4) Public records/documents
- (5) Official Publications
- (6) Newspapers, magazines, similar publications
- (7) Trade inscriptions
- (11) Certified Domestic Records of Regularly Conducted Activity (authenticate business records under FRE 803(6))
- (13) Certified Record Generated by an Electronic Process or System
- (14) Certified Data Copied from an Electronic Device, Storage Medium, or File

** 902(11) - (14) are not self-authenticating methods per se; they require a certification.*

Is Evidence Hearsay?

FRE 801 (a-c)

- Is it a statement? (written/ spoken assertion, non-verbal/ non-assertive verbal conduct intended to be assertive.)
- Is statement made by "Declarant?" (person, not generated by machine.)
- Is statement offered for proving truth of assertion? NOTE: Statement is not offered for substantive truth if offered to prove:
  - Communicative/ comprehension capacity of declarant
  - Effect on the hearer
  - Circumstantial evidence of state of mind of declarant
  - Verbal acts/parts of acts
  - Utterances of independent legal significance

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 or rehabilitate a witness that has been impeached
- 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)

** Documents produced in discovery by opposing party are presumed to be authentic under 801(d)(2). Certification of business records under 902(11) and (12) must meet requirements of 803(6).*

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

Hearsay Exception

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 and 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 of personal or family history 804(b)(4)
  - Forfeiture by wrongdoing 804(b)(6)
- Residual "Catchall" Exception – 807

A hearsay statement is not excluded by Rule 802 even if the statement is not specifically covered by Rule 803 or 804 under the following circumstances:

- Statement has equivalent circumstantial guarantees of trustworthiness
- Offered as evidence of a material fact
- More probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts
- Admitting it will best serve the purposes of these rules and the interest of justice

The statement is admissible only if, before the trial or hearing, the proponent gives reasonable notice of intent to offer the statement and its particulars, and the opposing party has a fair opportunity to meet it.

Original Writing Rule FRE 1001-1008

- Is the evidence "original," "duplicative," "writing," or "recording" (Rule 1001)
- 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, and 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 (Rule 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 (Rule 1004) if:
  - Non-bad faith loss/destruction of original/duplicate
  - Inability to subpoena original/duplicate
  - Original/duplicate in possession, custody, or control of opposing party
  - "Collateral record" (i.e., not closely related to controlling issue in the case)
- Admission of summary of voluminous books, records, or documents (Rule 1006)
- Testimony or deposition of party against whom offered or by that party's written admission (FRCP 30, 33, 36) (Rule 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 Rule 104(b) (Rule 1008)
- But, the issue is for the trier of fact, if it is a question:
  - Whether the asserted writing ever existed
  - Whether another writing, recording, or photograph produced at trial is the original; or reflects the contents, the issue is for the trier of fact

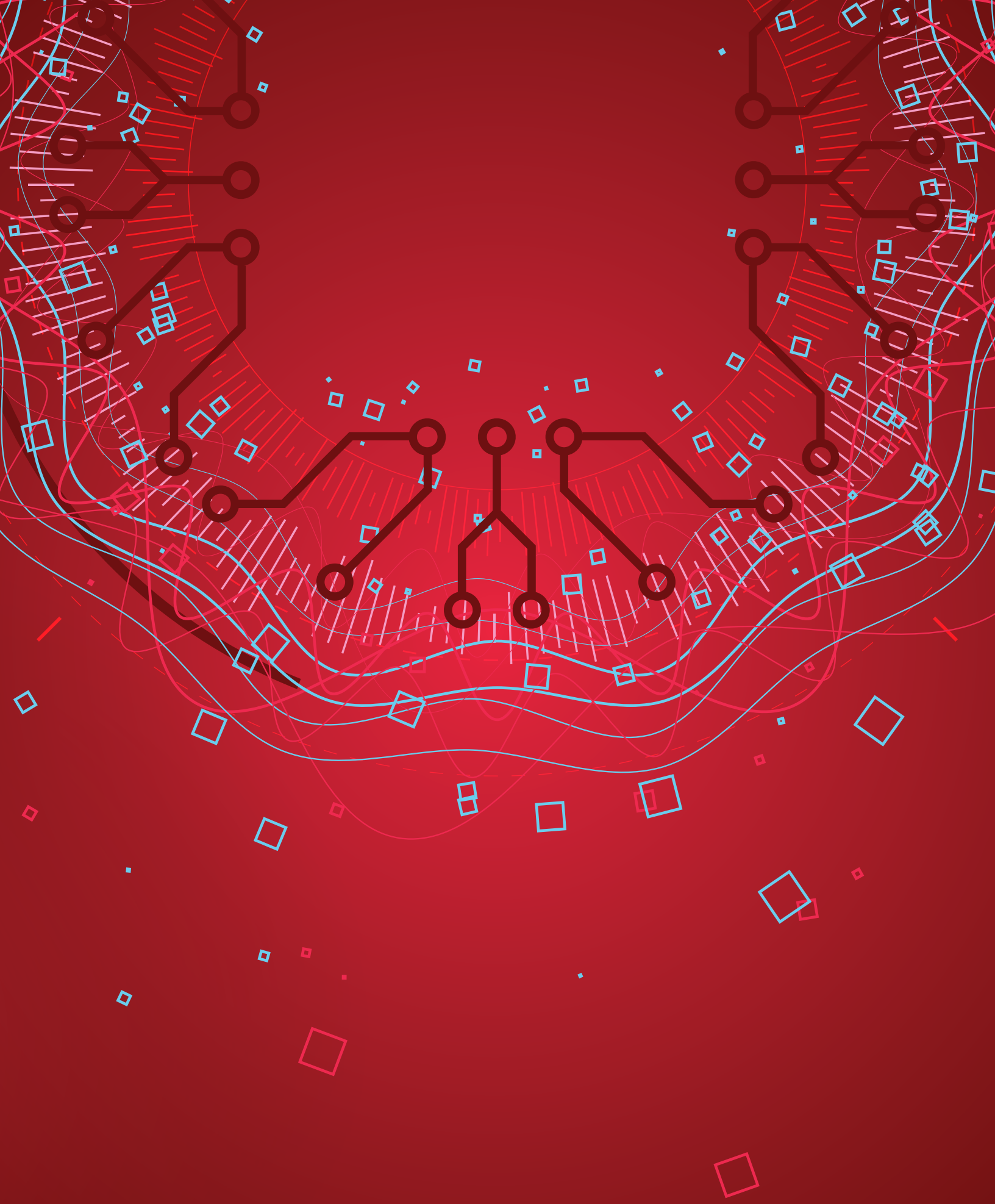
Practice Tips

- Be prepared and start with a defensible and comprehensive records management program
- Think strategically about the case and the evidence from the beginning of the case
- Memorialize each step of the collection and production process to bolster reliability
- Use every opportunity during discovery to authenticate potential evidence

Examples:

- For pretrial disclosures under FRCP 26(a)(3), you have 14 days to file objections or possible waiver
- Document produced by opposing party are presumed to be authentic under Rule 801(d)(2) – burden shifts
- FRCP 36 Requests for Admissions
- Request stipulation of authenticity from opposing counsel

- 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
- 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)
- Keep your audience in mind. Will this be an issue for the judge or the jury? (e.g. Rule 104(a) or (b)



Electronic copies of the chart are available at no charge. To obtain a copy or for more information, contact Kevin Brady, Redgrave LLP, at kbrady@redgravellp.com.