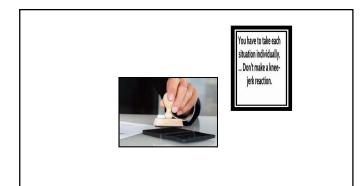
Analyzing Electronic Evidence

YOU BETTER Believe it makes A difference.



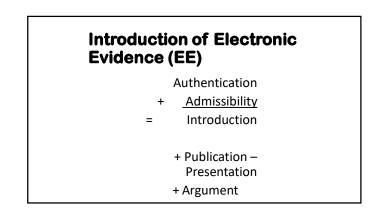
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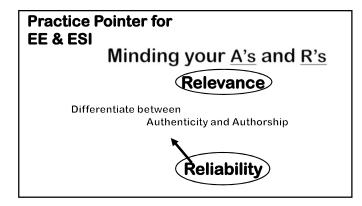
Threshold for the Introduction of

All Evidence Including EE and ESI

Relevance

Relevant includes inquiries into authenticity and reliability as well as pertinence





Requirement of Authentication or Identification-TRE 901

(a) General provision.
 The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence
 sufficient to support a finding that the matter in question is what its proponent claims.

Illustrations – TRE 901(b) Common Authentication Methods for EE

- \cdot (1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be. 901(b)(1)
- (4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances. 901(b)(4)
- (8) Ancient Documents or Data Compilation. 901(8)
- (9) Process or System. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result. 901(b)(9)

Self-Authentication – TRE 902

- (4) Certified Copies of Public Records
- •(5) Official Publications
- •(6) Newspapers and Periodicals
- (11) Certified Records of Regularly Conducted Activity

Authentication Checklist

- 1. Is the evidence self-authenticating because of its nature?
- Public records and reports, ancient records and compilations, certified copies of public records OR
- Has a witness with personal knowledge authenticated the evidence? <u>OR</u>
 Is the evidence authenticated by appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with circumstances? <u>OR</u>
- 4. Has evidence describing the process or system used to produce the evidence been offered and shown to produce accurate results? <u>OR</u>
 5. Has other evidence been offered sufficient to support a finding that the evidence is what its proponent claims?

Self-Authentication Issues Presenting Unique Problems

Newspapers and Periodicals

 Situations in which method of self-authentication and hearsay exception overlap but are not exact

· EE is self-authenticated, but not covered by hearsay exception

· Hearsay within hearsay in EE

Impeachment of hearsay declarant in EE

Role of the Judge

The proponent of the evidence controls what will be required to authenticate the evidence by determining what the evidence is being offering to prove.

Judge should always inquire FWP.

Role of the Judge

Differentiate between authenticity and authorship; while authenticity is a condition precedent to *any* admissibility, authorship is essential to authenticity only when necessary to make the evidence relevant.

But remember Rule 403, the Scales of Justice Rule.

Common Admissibility Issues for EE/ESI

- Relevance, Prejudice TRE 401 403
- Hearsay TRE 801 806
- \cdot Confrontation US Const., amend. VI, TRE Const. Art. 1, Section 8
- Original Writing TRE 1001 1005
- Summaries TRE 1006
- Character TRE 404
- Opinion TRE 701-706
- Privilege TRE 501- 512
- Personal Knowledge TRE 602

Judge's 10-Step Basic Checklist for Authenticating and Admitting EE

- 1. Is the EE or ESI relevant?
- 2. Has the EE or ESI been authenticated by proponent?
- 3. Is the EE or ESI hearsay?/testimonial statement?
- 4. Is the EE or ESI privileged?
- 5. Is the EE or ESI an original or duplicate sufficient to satisfy the original
- writing requirement?
- 6. Is the EE or ESI a summary?
- 7. Is the EE or ESI impacted by rule of completeness?
- 8. Is the PV of the EE or ESI substantially outweighed by dangers?
- 9. Does the EE or ESI contain otherwise inadmissible evidence? (i.e., character, opinion, etc.)
- 10. Are there issues related to the presentation of the EE or ESI that requires judicial control, including limiting instructions?

Unique Challenges Presented by Specific Types of EE and ESI

Social Media Evidence

Prevalence
 Reliability
 Privacy
 Format

Computer-Generated Evidence

Act of Entry

 Declaration-based vs. Automated Content
 Absence of Authentication/Hearsay Overlap

Animations and Simulations

 Authentication
 Demonstrative vs. Substantive Use
 Qualification of Witness and System
 TRE 403 Concerns

Emails, Texts, Tweets, Snap Chats

 Authentication vs. Authorship
 Hearsay Issues
 Original Writing Issues

Cell Data Tracking Information

Reliability
 Qualifications
 of Witness

Next Challenge: Virtual Reality

"[J]urors outfitted in special high-tech goggles, headphones, and body suits, perhaps sitting upon simulators in a special room complete with wind and heat or cold. The participants would view threedimensional films or computer-generated simulations close-up through special goggles, listen to stereo sound that accompanies the film, and wear special body suits that selectively adjust temperature and pressure to create the sensation of actually being in the movie that they are watching."

Application