

Analyzing Electronic Evidence

**YOU BETTER
BELIEVE IT MAKES
A DIFFERENCE.**



You have to take each
situation individually.
... Don't make a knee-
jerk reaction.

**Threshold for the
Introduction of
All Evidence Including EE and ESI

Relevance**

Relevant includes inquiries into
authenticity and reliability as
well as pertinence

**Introduction of Electronic
Evidence (EE)**

Authentication
+ Admissibility
= Introduction

+ Publication –
Presentation
+ Argument

**Practice Pointer for
EE & ESI**

Minding your A's and R's

Relevance

Differentiate between
Authenticity and Authorship

Reliability



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

- (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
2. Has a witness with personal knowledge authenticated the evidence? OR
3. Is the evidence authenticated by appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with circumstances? OR
4. Has evidence describing the process or system used to produce the evidence been offered and shown to produce accurate results? OR
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
- 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 three-dimensional 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
