2011

A PRIMER ON
DOCUMENTARY AND DEPOSITION EVIDENCE
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Introduction. This primer sets forth general approaches to evidentiary issues and illustrates the prerequisites for the admission into evidence of several types of documents and kinds of testimony. The primer also discusses the development of testimony, particularly deposition testimony, to satisfy various evidentiary requirements. The primer reflects a maximalist approach; that is, it is based on the assumption that all objections will be raised to all evidence offered. As a practical matter, opposing counsel is unlikely to rely on every objection under the sun, and courts have wide discretion in choosing whether to admit evidence. Thus, not all evidentiary requirements or procedural obstacles need be satisfied for evidence to be admitted in most instances; to the extent such requirements and obstacles are not strictly satisfied, however, the risk that critical evidence will not be admitted is necessarily heightened.

I. The Four Essential Rules of Evidence

A. Relevance: Evidence must be relevant to be admissible; evidence is relevant if it has "any tendency" to make the existence of a fact more probable or less probable than would be the case without considering the evidence. (FRE 401)

B. Personal Knowledge: A witness is competent to testify only concerning matters about which he has personal knowledge; personal knowledge must be shown before the witness can speak about the matter in question.

C. Authentication: As a prerequisite to the admission of evidence, facts must be introduced to permit someone to find that the evidence offered is what its proponent claims it to be. In other words, a party who offers a document into evidence must first introduce facts sufficient to show that the document is what the party says it is.

D. Hearsay: Hearsay is not admissible, unless an exception or qualification to the rule excluding hearsay applies. Hearsay is any out-of-court statement (oral or written) that is offered to prove the truth of the matter asserted in the statement.

II. All Evidence Must Be Sponsored

A. The law of evidence accepts (almost) nothing at face value. Accordingly, whenever documents or deposition testimony is offered—be it on motion or at

[1/] This primer was originally written in the early 1990s and has been updated.

trial—the evidence must be sponsored: someone, with personal knowledge, must vouch for the document or the testimony offered.

B. Whenever testimony or a document is to be offered as evidence, the appropriate *foundation* for the admission of the evidence (the testimony or document) must be supplied. For a document, this means that both the document and supporting testimony (explaining what the document is) must be provided. This "foundational" testimony can be from more than one witness. Moreover, whenever testimony is provided, the testimony itself needs to show its own foundation, that is, it must reveal the competence of the witness to testify about the matter in question. For example, where testimony is used to sponsor a document, the testimony must show that the witness has personal knowledge of the document. Where one part of deposition testimony is sponsored directly as evidence of a fact, the testimony offered must include a showing that the witness has personal knowledge of the matter or is in a position to know about the matter.

C. Sometimes, on motions, lawyers and paralegals are required to sponsor certain kinds of evidence themselves. For example, under requirements in some courts, if one wants to offer as evidence a definition of a word from a particular dictionary, not only must the page of the dictionary be photocopied (along with the cover page, copyright date, edition identification, etc.) but the sponsor of the document must state in an accompanying sworn statement that he or she knows that the exhibit submitted to the court is in fact a copy of the page from that dictionary. Accordingly, in an accompanying affidavit or declaration, the lawyer might say: (i) I am a lawyer for one of the parties; (ii) I obtained a copy of Webster's Ninth New Collegiate Dictionary (1989) and caused page 1178 to be photocopied; (iii) a true and correct copy of that page is attached as Exhibit A hereto. Similarly, when offering deposition testimony as an exhibit, one must sponsor the deposition excerpt by stating in the affidavit or declaration that Exhibit B is a true and correct copy of an excerpt taken from the deposition of Jane K. Doe from this action.[2/] The formality of a sponsoring lawyer or paralegal affidavit is separate from the more substantive issue whether the testimony from that deposition supports the proposition claimed and itself has sufficient foundation.

D. It is not uncommon for deposition excerpts, documents, and other submissions to be provided as exhibits submitted directly to the court without a sponsoring affidavit or declaration. Local practice and rules should be consulted, however, before departing from the formality of a sponsoring lawyer or paralegal affidavit.

[2/] In general, a sponsoring affidavit from a lawyer must state affirmatively why the lawyer is in a position to have personal knowledge of the facts and what the factual basis for the contention stated in the affidavit is. This requirement is breached more often than it is honored.

III. Foundations for the Admission of Documentary Evidence—In General

A. The witness's testimony supporting the document must be competent. The witness must (i) have personal knowledge (FRE 602) and (ii) testify that the document is what its proponent claims it to be (FRE 901).

B. The document must be relevant, i.e., it must have some tendency to make the existence of a fact of consequence to the litigation more probable or less probable than would be the case without considering the document. (FRE 401)

C. The document must not be hearsay or must fall within a hearsay exception.

D. The exhibit must satisfy the best-evidence rule (see infra).

E. If the court expects to hear magic words, the words must be incanted properly.

F. And—importantly—the testimony must actually support the proposition for which it is offered.

IV. Letters received by party

A. The basic evidentiary question concerning a letter received by a party (assuming the party can vouch for its receipt) is whether the letter was sent by the person who appears to have sent it. Therefore, the signature on the letter must be authenticated or other elements of the letter attesting to its genuineness must be demonstrated.

B. Elements of foundation include: letter is relevant; witness received the letter; witness is familiar with signature and recognizes the signature on the letter as the author's; letter is in the same condition today as when it was received. Note that receipt and genuineness of the signature (or the document) can be proven through separate witnesses (e.g., receipt can be shown by client and adverse party can verify the signature even if adverse party does not recall the particular letter).

C. Moreover, even if genuineness of the signature cannot be proven, the genuineness of the letter can be established by other means. A well-established way of showing the genuineness of a "reply" letter is to show that the letter (i) was sent in response to some other communication and (ii) was received without undue delay. For example:

Q: After your April 19 meeting with representatives from the primary carriers, did you hear anything further from the Travelers?

A: Yes. About a week later I received a letter from Mr. McMyne.

Q: Is Exhibit X a copy of the letter you received in the mail?

A: Yes it is.

Q: Does this letter respond to matters discussed at the April 19 meeting?

A: Yes.

Q: When did you receive the letter?

A: About a week or two after the April 19 meeting.

Q: Are you familiar with the stationery on which Exhibit X was written?

A: Yes, I am familiar with it. It is Travelers stationery.

Q: What date does the letter bear?

A: May 4, 2004.

Q: And what name is at the bottom of the letter?

A: Michael McMyne.

* * * *

This should be sufficient to establish that Exhibit X is a copy of the letter sent by Michael McMyne of the Travelers on May 4, 2004.[3/] This foundation testimony would probably be sufficient even if the witness was not familiar with Travelers stationery so long as the contents indicate its genuineness.

V. Letters sent by a party or its agent

A. For some kinds of letters, unless the letter has been received by its intended recipient, the letter is not relevant. Take for example a letter notifying an insurance company that an occurrence has taken place. The insured's obligation is not to send a letter; rather, the insured's obligation is to provide notice, which probably means the carrier must receive the letter. What happens if the carrier does not have a copy of the notice letter? Fortunately, there is an evidentiary

[3/] Where a letter responds to an earlier letter addressed to the reply's author or responds to an earlier letter's terms, the proponent of the reply letter may want to offer proof of the earlier letter to buttress the foundation for the reply. *See Consolidated Grocery Co. v. Hammond*, 175 F. 641 (5th Cir. 1910); *see also Winel v. United States*, 365 F.2d 646 (8th Cir. 1966).

presumption called the "mailing rule," which presumes the fact of receipt if a letter is shown to have been sent via regular mail and not returned to the sender.

B. Elements of the foundation for a file copy of a letter include: letter is relevant; witness wrote/typed/dictated the letter which was properly addressed; witness saw the typed original and copy (e.g., photocopy for file) of the letter; witness signed the original letter; original letter was placed in a properly addressed and postmarked envelope, bearing a proper return address; envelope was deposited in the U.S. mails; file copy is true and accurate copy of the original; original letter and envelope were never returned to sender. In addition, in order to satisfy the best-evidence rule the purported recipient of the letter must first be requested to produce the original letter. If the original letter received is shown not to exist, the best-evidence rule is satisfied, and the file copy of the letter can be introduced. (*See infra* Part XIII)

C. Because in most cases a witness will not in fact recall mailing the particular letter or its not having been returned, one can nevertheless establish that such was true for the particular document by relying on an inference that the office's general practice in handling mail was followed in this particular instance (FRE 406). Thus, to rely on this helpful inference, one must first establish the general practice through testimony, which can come from the secretary involved,[4/] such as:

Q: Do you have a standard established office procedure in preparing and handling letters?

A: Yes, we do.

Q: Was that procedure employed in December of 2002?

A: Yes. We have followed the same procedure since I arrived in 1998.

Q: Please describe your routine procedure in preparing and handling letters?

A: Well, after I type the original, I give it to the proper person for signing. Once it is signed, I make two photocopies of the letter; one goes into a "chron" file, and one goes into a correspondence file for the particular matter. I never mail a letter unless it has been signed by the person indicated; their signature in fact tells me that it is ok to mail the letter. I then put the original in an envelope that has the

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[4/] As a practical matter, secretaries are almost never deposed. If the author of the letter testifies instead of the secretary, however, opposing counsel may be entitled to object on grounds of lack of personal knowledge. *E.g., United States v. Vandersee*, 279 F.2d 176 (3d Cir. 1960). For this reason, according to Broun, Laying the Foundation for the Admission of Real and Demonstrative Evidence, Master Advocate's Handbook 159, 165 (NITA 1986), the better practice is to have the secretary testify. Office routine can be established by use of requests for admission under Fed. R. Civ. P. 36.

same address as appears on the letter. The envelope bears the return address of our office. I then seal the envelope and put in our office mailbox.

Q: What happens next?

A: At the end of the day, I take all the letters that have been prepared that day, stamp them with the proper postage on our stamp machine, and tie all the letters together. When I leave the office, I take the mail and put in the mail box located in the lobby of our building, which has a 6:00 o'clock pickup.

Q: Did you go through that procedure on December 13, 2002?

A: Yes. I do that everyday I work, and I worked that day.

Q: Was the letter to Mr. X returned to you?

A: No. If it had been, it would appear in our files. I have checked our files and no returned letter is there.[5/]

* * * *

This testimony would support the inference that the particular letter was mailed with postage pre-paid and was not returned to sender. Accordingly, this is sufficient to allow a reasonable jury to conclude that the letter was in fact received by the addressee.

D. Presumably a similar litany would authenticate a letter sent by facsimile. This litany should include (i) the fact that the facsimile machine prints out an error message if the receiving machine is out of order; (ii) the business practice is to telephone the recipient to confirm receipt or to telephone when an error message is given; (iii) the facsimile cover sheet bears a legend that if the facsimile is received in error to contact the sender or return the facsimile by U.S. Mail; and (iv) the facsimile was not returned in the mail and no telephone call was received by the sender indicating that the facsimile had been received in error. (*See also, infra* Part XIV.)

E. Similarly, for an email: the witness received the email; the email was in customary format including sender and recipient email addresses; the @domain of the email is consistent with the witnesses' experience concerning electronic communications involving the entity; the signature block if inserted automatically is consistent with other genuine communications; the content of the email is consistent with the knowledge of the author; the witness discussed the email itself

[5/] Adopted from T. Mauet, Fundamentals of Trial Techniques 216 (1980).

or its subject matter contemporaneous to the email in question. *See generally, United States v. Safavian*, 435 F. Supp.2d 36, 40 (D.D.C. 2006).

VI. Business Records (FRE 803(6))

A. Business records include regularly kept records of business activities that record acts, events, conditions, opinions or diagnoses. A good example is minutes of Board of Directors' meetings. Another example is a log that records the number of visitors: when one enters the Smithsonian, the guard notes that one person has entered; the log is a business record that can be offered to show the number of people who entered the museum.

B. Elements of foundation include: Record is relevant; record is "memorandum, report, record or data compilation in any form"; authenticating witness is the "custodian or other qualified witness"; record was made "by a person with knowledge" of the facts or was made "from information transmitted by a person with knowledge of the facts"; record was made "at or near the time" of the "acts, events, conditions, opinions" appearing on it; record was made as part of the "regular practice of that business activity"; and record was "kept in the course of a regularly conducted business activity." The foundation can be established through the testimony of more than one witness.

C. Thus, as an example of the necessary foundation, consider the following steps:

1. Have the custodian of records testify or execute an affidavit/declaration.
2. Have him explain his duties.
3. Establish his general familiarity with the business routines.
4. Make it clear that it is the business custom to make records at the event or shortly afterwards.
5. Have the witness identify the exhibit as a record of which he has custody.
6. Show that this record was made in the ordinary course of business.
7. Establish that the record relates to the business.
8. Have the witness tell who provided the information on the record and that it was the person's duty to gather the information and pass it on to the witness or the person who made the record.[6/]

D. Computer-generated reports require additional foundation: (i) the computer and the program used are generally accepted in the field; (ii) the computer was in good working order at the relevant times; and (iii) the computer operator

[6/] Adopted from J. McElhaney, Trial Notebook 210 (1987).

possessed the knowledge and training to operate the computer properly.[7/] *See also, infra* Part XIV.

E. Business records are hearsay. The records may constitute an out-of-court statement offered to prove its truth, e.g., that on October 5, 156 people visited the museum. Nevertheless, because the likelihood that the document is trustworthy is very high (since it is regularly prepared by and acted upon by a business), and because there is no likelihood that someone would, in this particular instance, have an incentive to falsify the record, the law of evidence is willing to presume the record's accuracy. That presumption can be overcome by showing the source of information or the method or circumstances of preparation indicate lack of trustworthiness.[8/] The latter should be borne in mind especially when a purported business record is offered against you.

F. Not only can a business record establish that some event took place or opinion was expressed, but it can also prove the obverse, i.e., that an event did not take place (FRE 803(7)). If you can show the absence of an entry in a record of a regularly recorded business activity, the fact that no record exists can be offered to show that something did not happen.

VII. Diagrams (e.g., plant sites)

A. Elements of foundation for diagrams include: witness is familiar with scene represented at the relevant time; diagram is sufficiently accurate to illustrate; and diagram is useful in helping witness explain or in helping trier of fact to understand.

B. Witness does not need to have been the author of the exhibit so long as she can testify as to its accuracy from personal knowledge.

[7/] *See* Bocchino and Sonenshein, A Practical Guide to Federal Evidence 133 (NITA 1988); Younger, *Computer Printouts in Evidence: Ten Objections and How to Overcome Them, The Litigation Manual* 204 (1983); Gregory Joseph, *A Simplified Approach to Computer Generated evidence and Animations*, 43 N.Y.L. Sch. Rev. (1999); *United States v. Russo*, 480 F.2d 1228 (6th Cir.), *cert. denied*, 414 U.S. 1157 (1973); 16 Proof of Facts 2d 310-350.

[8/] Business records can also contain hearsay within hearsay, even though the record itself falls within the exception to the exclusion of hearsay under FRE 803(6). Rule 803(6) permits opinions recorded in business records to be admitted where a statement or opinion is from a person who is under a "business duty" to make the statement. Where the statement memorialized in the business record is not necessary to the business and its presence in the business record is fortuitous, the statement is hearsay which needs to qualify for admission under a separate rule. *See* FRE 805; *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930); *Kelly v. Wassermann*, 5 N.Y.2d 425, 158 N.E.2d 241 (1959); *Palmer v. Hoffman*, 318 U.S. 109 (1943). An example is a statement which appears in a hospital record from a witness to an automobile accident. That statement needs an independent basis for admission into evidence.

C. While admissible, traditional film photography does not require the photographer to testify, digital photography is perceived by some courts to be more likely to be manipulated. *See Connecticut v. Swinton*, 268 Conn. 781 (2004). To establish a proper foundation a person competent regarding the photo software may need to testify. In addition, reliability of the "snapshot" and its travel to electronic media and printout may need to be shown, such as (i) the equipment used, (ii) in good working order including software and firmware updates, (iii) proper procedures for extracting the image file from the camera, and (iv) reliability or standardness of the process and software to display or print the captured image.

VIII. Summary charts of evidence (not summaries of voluminous records)

A. Sometimes it is useful to present evidence in chart or graph form. Each fact depicted in such a visual summary must be independently admissible.

B. Elements of foundation include: witness has personal knowledge of the facts or the facts have already be admitted into evidence; witness prepared the chart; and chart will aid the finder of fact in understanding the facts.

IX. Summaries of voluminous records (FRE 1006)

A. Summaries of writings, recordings, or photographs which cannot be conveniently examined in court can be admitted without first producing in court and getting into evidence all the writings, recording, or photographs. The voluminous writings, recordings, or photographs, however, must themselves be admissible.[9/]

B. Summaries should be prepared by someone who possesses sufficient expertise to ensure both the admissibility of the summary and the likelihood that the accuracy of the summary will be credited.[10/]

C. Summaries based on voluminous writings that cannot be conveniently examined in court are admissible into evidence, despite the best-evidence rule. (FRE 1006; *see infra*). Nevertheless, the underlying data or writings must be available for inspection by the opposing party.[11/]

[9/] Such voluminous records may often themselves be admissible under the business-records rule, *see supra.*

[10/] That a summary of voluminous records was prepared specifically for litigation is not a bar to its admission. *See Trout v. Pennsylvania R.R. Co.*, 300 F.2d 826, 830 (3d Cir. 1962).

[11/] If all the underlying data or documents have been produced in discovery, this requirement is probably satisfied. *See U.S. v. Foley*, 598 F.2d 1323, 1337-38 (4th Cir.), *cert. denied*, 444 U.S. 1043 (1979).

X. Signed Legal Documents (contracts, receipts, bills, etc.)

A. Where the fact of signature itself is significant, i.e., where it must be shown that the party executed the document, a witness with knowledge of the authenticity of the signature is required: this can be a witness to the signing of the document, someone who from past experience is familiar with the signature and can identify the signature on the document as genuine, the signing party, or a handwriting expert.

B. Elements of foundation include: document is relevant; document bears a signature; signature is that of the party or its agent; document is in the same condition now as when it was executed.

XI. Certified Records (FRE 902)

A. Certified copies of public records are self-authenticating. A certified record typically bears an imprinted seal or a stamp with a signature stating the document is a true and correct copy of the public record.

B. There is an exception to the hearsay rule for public records and reports, somewhat similar to the business-records exception. (FRE 803(8)) A public record or report prepared by a public officer or agency is admissible where, in accordance with the public-official's duty, the record or report either (i) sets forth the activities of the official or the agency or (ii) describes facts, events, or occurrences required to be observed and reported by the public official or officer. This includes factual findings which are derived from an investigation made pursuant to law. Such findings may be offered into evidence as proof that the facts described in the findings are true.

C. Note also that, like business records, (i) the absence of a public record can be offered to show that the record never existed and (ii) the absence of an entry into a public record can be offered to show the non-occurrence of events that otherwise are invariably recorded. (FRE 803)

XII. Ancient Documents

A. The courts have developed a rule of thumb that presumes that a document is authentic where it is shown that the document (i) is 20 or 30 years old (depending on the jurisdiction), (ii) its appearance is not suspicious in appearance, and (iii) was found in a place where it would likely be kept.

B. The age of a writing can be shown by testimony of a witness with knowledge, expert testimony, physical appearance of the writing, or its contents considered in conjunction with the surrounding circumstances.[12/]

XIII. Copies (The "Best Evidence" Rule)

A. To prove the contents or terms of a writing, an original is required to be offered into evidence; unless the absence of the original is satisfactorily explained, secondary evidence of the terms of the writing is not admissible. For example, unless I explain why I cannot offer the original, I cannot testify as to what a contract stated, because my testimony goes to proving the actual words in the written document. Under the rule, my recollection is considered to be a feeble substitute for the written document itself.[13/]

B. An "original" within the meaning of the best-evidence rule include (i) the writing itself or any counterpart intended to have the effect of an original by the party executing it and (ii) any image from a negative or other output which copies the original visually (i.e., photocopies). (FRE 1003) A "duplicate original," such as a photocopy, is admissible to the same extent as an original unless there is a genuine question as to the authenticity of the original or if it is unfair to admit the duplicate original in lieu of the actual original.

C. The "best evidence" rule is not a rule that requires you to offer the very best evidence you have; rather, it is more accurately called the requirement-of-an-original rule or the "original writing" requirement.[14/] An original (or duplicate original) is not required, however, where (i) the original is lost or destroyed (but not destroyed in bad faith); (ii) the original is not obtainable by judicial process (through a subpoena); or (iii) the opponent has control of the document and, after

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[12/] *See* Weinstein & Berger, *Weinstein's Evidence*, 901(b)(8)[01] (1983); 50 Proof of Facts 2d 321.

[13/] If the writing, recording, or photograph is *collateral*, i.e., does not concern the controlling issue in the suit, the best-evidence rule will not apply. This is because of one principle underlying the rule, a fear of fraud; where a document is not important, the law presumes that there is no incentive to create a fraudulent document, and thus the requirement that an original be produced in inapplicable.

[14/] Note that the best-evidence rule does not apply if the evidence does not go to proving the contents of a writing. If a witness has firsthand knowledge of facts that also are memorialized in a writing, the rule does not bar the witness's testimony about those facts. The rule would bar testimony from the witness that the writing in question also contained the facts within the witness's personal knowledge. For example, that I paid for a particular item can be shown by my receipt or by my testimony that I paid for it. If I want to prove payment by the receipt, under the best-evidence rule, the original (or a duplicate original) must be offered into evidence. If I want to prove payment by testifying that I paid, no further evidence is required. If I want to testify as to what the receipt says, my testimony is a "copy" and thus the best-evidence rule would require the introduction into evidence of the receipt.

proper request, has failed to produce the original.[15/] Accordingly, if the original no longer exists because, for example, the recipient of a letter destroyed it, an unsigned, file carbon copy then satisfies the rule. Transcriptions of text messages likewise can overcome a best-evidence objection if a proper showing is made. *State v. Espiritu*, 176 P.3d 885 (Haw. 2008).

D. The best-evidence rule has particular pertinence when an insurance policy is lost and the insured is nonetheless claiming coverage thereunder. Under the best-evidence rule, to prove the words of an insurance policy, one must produce the original policy or satisfactorily explain its absence. To demonstrate that the original is not produced because it is lost, one must first show that a diligent search was made and the original was not found.[16/] Once that foundation is laid, other, secondary evidence of the contents of the policy may be offered to prove what the policy said.[17/]

XIV. Electronic Evidence ("ESI"): data, email, websites, facsimiles, pdfs, databases, etc.

A. Electronically stored information is not materially different from other kinds of evidence in terms of authentication, admissibility, and hearsay. As with other evidence, a foundation for admission must be established. However, one needs to peek under the hood to understand how to establish the appropriate foundation and to avoid hearsay objections.

B. As for hearsay, it is important to think about whether the content of a statement is being used to prove the truth of a matter and, at least according to some courts, whether the "statement" is generated by a human witness. Some authority holds that the header information on a facsimile (fax) transmission is not subject to the hearsay rule at all, because it is entirely machine generated. *See* FRE 801(b). (Authentication and the like still must be proved.) *See also US v. Khorozion*, 333 F.3d 498, 506 (3d Cir. 2003). The argument is that these data are "non-assertive" printouts.

C. Authenticity of electronic evidence must be established, but as with other evidence the authenticating witness need not have personal knowledge of the creation of the particular piece of evidence. *See* FRE 901(b)(1). The court's job

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[15/] Where the other side possesses the original, unless demand for production of the original is made, an unsigned, file carbon copy will not be accepted into evidence. *See Padgett v. Brezner*, 359 S.W.2d 416, 422-23 (Mo. App. 1962).

[16/] Accordingly, the effort to respond to carrier document requests for production of all the insurance policies should be contemporaneously documented to provide evidence that a diligent search for the policy was made and the original was not found.

[17/] That an original existed and was executed must be established before secondary evidence of the content of the writing will be. *See Pineland Club v. Robert*, 171 F. 341, 347 (4th Cir. 1909).

is as a gatekeeper to admissibility, that is, to find a foundation on which a reasonable jury could conclude that the evidence is what it purports to be. *E.g., US v. Branch*, 970 F.2d 1368, 1370 (4th Cir. 1992). If a witness has personal knowledge of the business practices leading to the creation, acquisition, maintenance, and preservation of the evidence, that may be sufficient. *E.g., US v. Kassimu*, 188 Fed. Appx. 264 (5th Cir. 2006); *Lorraine v. Markel*, 241 F.R.D. 534 (D. Md. 2007) (per Magistrate Judge Paul Grimm). Accordingly, radio telegrams were admitted into evidence based on distinctive characteristics, such as the radio operator's initials, and the letterhead. *US v. Reilly*, 33 F.3d 1396, 1404 (3d. Cir. 1994). Likewise, proper electronic mail addresses, the absence of an "error in delivery" response message, the pertinent content of the text, and other indicia can establish a foundation for authentication. *E.g., US v. Siddiqui*, 235 F.3d 1318, 1322-23 (11th Cir. 2000).

D. E-mails may not fall automatically under the business-records exception to hearsay, *e.g., Monotype Corp. v. Int'l Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994), though a text message might constitute an "excited utterance" or *res gestae*. Emails can be used also as past recollection recorded (*see infra*) or to refresh present testimony of a witness (in which event the email itself is not admitted into evidence, but the witness's newly refreshed recollection is). Note that emails may contain hearsay within hearsay, such that if part of the email is admissible as a business record other portions might not be. In other words, each message within an email string may need an independent foundation and proof taking it out of the hearsay exclusion. *See State of New York v. Microsoft*, 2002 WL 649361 (D.D.C.). The business practice of assigning email names along with the domain name of the company may satisfy the foundation for authenticity, i.e., testimony about mmayerson@orrick.com and naming conventions may help establish a foundation for johndoe@orrick.com as being indicative of an email from the Orrick email system. *See* Fed. R. Evid. 907(7) (trade inscriptions); *Discover Re Mgrs, Inc. v. Preferred Employers Group, Inc.*, 2006 U.S. Dist. LEXIS 71817 at *22 (D. Conn).

E. Printouts from a website might be treated the same as photographs, but some foundation for what was found at the proper website address and that it was printed out and recognized for what it is might need to be established. *E.g., Actonent, Ltd. v. Allied Health & Beauty Care*, 219 F.3d 836, 848 (8th Cir. 2000) (finding HTML to be akin to other visual depictions of evidence).

1. Whether material on a website is properly attributable to the website's owner as a statement by it can be challenged. *E.g., Boim v. Holy Land Found.*, 511 F.3d 707 (7th Cir. 2007); *United States v. Jackson*, 208 F.3d 633, 637 (7th Cir. 2000). Other people's material re-posted on a website does not necessarily indicate an adoptive admission. And just because one has an email address on an email or a chat does not necessarily mean that

a particular person is the one who sent the communication. *Commonwealth v. Purdy*, 945 N.E.2d 372 (Mass. 2011).

2. One may be able, however, to have the court take judicial notice of a public website and attribute it to the site's owner.[18]

F. Postings on social media websites need a foundation concerning log-in information and the rights to post and other indicia of authenticity.[19] Identification of the "posting" with the log-in identity, and a tie between the log-in identify and the person, should be provided.[20] The use of web site information in the context of the particular case will affect what is needed to be offered as an appropriate foundation.[21] And the datum that is being offered from an authenticated record might need to be shown to be reliable.[22]

1. If data were "scraped" from a reliable website (particularly from an HTML page or PDF file), then the source data probably will need to be authenticated and the data-scraping process must be validated (such as the use of software that parses the HTML file or PDF, *e.g.*, BeautifulSoup, Needlebase, or Able2ExtractPDF).

G. The opponent's website or Facebook postings, if authenticated, might also be outside of the hearsay exclusion on grounds of admission of party opponent.[23]

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[18] *E.g., Renaissance Greeting Cards Inc. v. Dollar Tree Stores, Inc.*, 405 F. Supp.2d 680, 684 n.9 (E.D. Va. 2005); *Lan Lan Wang v. Pataki*, 396 F. Supp. 446 and n.2 (S.D.N.Y. 2005)); *Doron Precision Sys., Inc. v. FAAC, Inc*, 423 F. Supp. 2d 173 (S.D.N.Y. 2006).

[19] *E.g., United States v. Jackson*, 208 F.3d 633 (7th Cir. 2000); *United States v. Tank*, 200 F.3d 627 (9th Cir. 2000) (chat room log).

[20] *E.g. Perfect 10, Inc. v. Cybernet* Ventures, 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002); *United States v. Burt*, 495 F.3d 733, 738-39 (7th Cir. 2007).

[21] *See Saadi v. Maroun*¸ 2009 U.S. Dist. LEXIS 120879 (M.D. Fla. Nov. 4, 2009) (defamation claim); *Bass v. Miss Porter's Sch.*, 2009 U.S. Dist. LEXIS 99916 (D. Conn. Oct. 27, 2009) (use and postings on www.Facebook.com).

[22] *E.g., St. Clair v. Johnny's Oyster & Shrimp*, 76 F. Supp. 2d 773, 774 (S.D. Tex. 1999) (self-reported data on a website is not trustworthy); *compare EEOC v. DuPont*, 2004 U.S. Dist. LEXIS 20753 (E.D. La.) (printout from census-bureau table reliable); Fed. R. Evid. 902(5) (self-authentication of government records); *Williams v. Long*, 585 F. Supp. 2d 679, 686-88 & n.4 (D. Md. 2008) (collecting cases on self-authentication of government websites). See also Fed. R. Evid. 803(17) (exception to hearsay rule for market quotations, compilations, generally relied upon).

[23] *E.g., Van Wesitrienen v. Americontinental Collection Corp.*, 84 F. Supp. 2d 1087, 1109 (D. Or. 2000); *Telewizja Polska USA v. Echostar Satellite Corp*, 2004 U.S. Dist. LEXIS 20856 (N.D. Ill. 2004).

H. Newspapers or periodicals retrieved from the internet may be self-authenticating. Fed. R. Evid. 902(6). *See also* Fed. R. Evid. 101(b)(6) (printed material may include electronically stored or web-published material).

I. Material recorded in databases and the output or reports from databases may prove particularly challenging. There may be data entry software, database manipulation software, and report-writing software, each of which can be questioned. How queries were formulated, safeguarding of data against changes, and the like all can end up as subjects at trial. Probably the most detailed decision parsing admissibility of a database record is *In Re Vinhnee*, 336 B.R. 437 (BAP 9th Cir. 2005). This case should be revisited any time information from a database is going to be used at trial.

J. Elements of foundation for databases according to the *Vinhnee* court include: the business uses a computer; the computer is reliable; the business has developed a procedure for inserting data into the computer; the procedure has built-in safeguards to ensure accuracy and identify errors; the business keeps the computer in a good state of repair; the witness has the computer read out certain data; the witness uses the proper procedures to obtain the readout; the computer is in working order at the time the witness obtains the readout; the witness recognizes the exhibit as the readout; if the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

1. Safeguards and data integrity include proof of computer policy and system control procedures, including control of access to the database, control of access to the program, recording and logging of changes, and audit procedures to assure continuing integrity of the data. 336 BR at 442-47.

K. The *Vinhnee* court also imposed essentially a chain-of-custody requirement: "the record being proffered must be shown to continue to be an accurate representation of the record that originally was created." 336 BR at 444. The court ruled that the focus is "on the circumstances of the preservation of the record during the time it is in the file so as to assure that the document being proffered is the same as the document that originally was created." *Id.* "How access to the pertinent database is controlled and, separately, how access to the specific program is controlled are important questions. How changes in the database are logged or recorded, as well as the structure and implementation of backup systems and audit procedures for assuring the continuing integrity of the database" are important. *Id.* at 445.

1. Possibly, judicial notice can be taken of the accuracy of the computer system, in which case proper procedure for judicial notice should be

invoked, probably at the pre-trial conference to obviate the need for witness testimony. Fed. R. Evid. 201. Thus, government websites might be the subject of proper judicial notice. *E.g.*, *Denius v. Dunlap*, 330 F.3d 919 *8th Cir. 2003); *In re Katrina Canal Breaches Consol. Litig.*, 2008 U.S. Dis. LEXIS 86538 at *2 (E.D. La.) (collecting cases).

2. In rejecting admissibility of an American Express credit card billing record, the *Vinhnee* court said: "The declaration merely identified the makes and models of the equipment, named the software, noted the some of the software was customized, and asserted that the hardware and software are standard for the industry, regarded as reliable, and periodically updated. There is no information regarding American Express' computer policy and system control procedures, including control of access to the pertinent databases, control of access to the pertinent programs, recording and logging of changes to the data, backup practices, and audit procedures utilized to assure the continuing integrity of the records. All of these matters are patient to the accuracy of the computer in the retention and retrieval of the information at issue." 336 BR at 448-449.

3. *Vinhnee* is an extreme example of a court's embracing the skepticism of the law of evidence and taking absolutely nothing at face value. And the depth of the court's analysis shows that the judges were *not* people *inexperienced* with computers, but rather shows that they had a very good grasp of data creation, data maintenance, databases, and reporting software.

L. The trial witness or authenticating declarant on summary judgment can be from a qualified custodian and need not herself be an expert, but enough information must be presented preliminarily to show that the person is sufficiently knowledgeable about the elements of proof required. Thus, how it is the case that the person is knowledgeable, such as her training, experience, job title, and personal familiarity with the computer system, is necessary foundation for the witness or declarant to offer any testimony.

XV. Deposition Testimony in Your Case

A. For deposition testimony from your case to be offered into evidence, a minor procedural requirement must be satisfied before the evidentiary issues can be addressed. Federal Rule of Civil Procedure 32 provides that at trial or on motions depositions may be offered into evidence against any party who was present or represented at the deposition and any party who failed to attend the deposition and

had reasonable notice thereof.[24/] Accordingly, in proffering deposition testimony, the (i) appearance page and (ii) notice with the certificate of service are needed to establish the procedural prerequisites for admissibility against a party in your case.[25/]

XVI. Former Testimony

A. To use testimony taken in the past in another case ("former testimony"), two principal requirements must be satisfied: authentication and hearsay.

B. Authentication may be established by certification of the copy from the court reporter or by application of an official-records statute for trial testimony. The parties may, of course, stipulate to the authenticity of the transcript or one can propound Requests for Admission (Fed. R. Civ. P. 36) addressing foundational requirements.

C. The key hurdle to admission is hearsay. There are two approaches to consider: one is the special rule for the admission of former testimony (discussed at "D") and the second consists of the other hearsay exceptions. Among other hearsay exceptions under which the testimony could be admitted are: (i) prior inconsistent statements used to impeach credibility (FRE 801(d)(1) & 613); (ii) admissions from party opponents, which are discussed separately infra (FRE 801(d)(2)); and (iii) past recollection recorded (FRE 803(5)).[26/] For example, if a statement qualifies as an admission of a party opponent under FRE 801(d)(2), the additional requirements of the special former-testimony rule do not need to be satisfied.

D. The special former-testimony hearsay exception in FRE 804(b)(1) has several elements that must be satisfied for the testimony to be admitted into evidence. Trial or deposition testimony from another proceeding is admissible if: (i) the witness is unavailable;[27/] (ii) the prior testimony was taken under oath and in

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[24/] *See* Perwin, *Use of Depositions in Federal Trials: Evidence or Procedure?*, 16 Litigation 37 (Fall 1989).

[25/] Note also that it may be useful to state in an authenticating declaration accompanying the deposition testimony that no copies of the notice were returned through the mail; this litany would invoke the "mailing rule" discussed above and create a presumption that each party in fact received a copy of the notice. *See also* Fed. R. Civ. P. 32(d)(1).

[26/] The residual exception to the hearsay rule has also been invoked as a basis for admitting former testimony. *See In Re Screws Antitrust Litigation*, 526 F. Supp. 1316, 1319-20 (D. Mass. 1981); FRE 804(b)(5). Where the residual exception is to be invoked, the other side is entitled to reasonable notice of the proponent's intent to rely on this exception. *See generally* Harris, *Catch (24)*: *Residual Hearsay*, The Litigation Manual 714 (1989).

[27/] "Unavailability" is determined by FRE 804(a) or Fed. R. Civ. P. 32(a)(3), which invoke Fed. R. Civ. P. 45 and subpoena statutes such as 15 U.S.C. § 23. *See* Perwin, *Use of Depositions in Federal Trials:*

compliance with law; (iii) the party against whom the testimony is offered or a predecessor in interest had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

E. The most important question under the former-testimony rule is whether the party against whom the testimony is to be introduced was "represented" at the deposition. This requirement can be met by showing that someone else with a similar interest in the subject matter of the testimony and a similar motive in its development had the opportunity to examine the witness.[28/] To offer former testimony of a deponent in one case in a later action involving a different party, the appearance page and an identification of all the parties in the case (i.e., parties who did not attend the deposition) is necessary to establish the basis for arguing that one or more of the parties were predecessors in interest. To show that parties who did not attend the deposition had an opportunity to examine the witness, a copy of the deposition notice (and certificate of service) would be helpful. Moreover, the subject matter of the former proceeding should be described by a witness with knowledge.

F. One of the most important categories of former testimony used in insurance-coverage actions is drafting history. In establishing the foundation for drafting history, one must first show its relevance. This can be done by comparing the policy provisions at issue with the standard forms. Next, one needs to offer admissible former testimony. The content of that testimony must demonstrate the witness's competence, knowledge of the drafting process, and explain the relationship between drafting and the promulgation of the final policy form. The foundation will be buttressed if there is evidence that the particular carrier against whom the testimony is to be offered in the current action participated in the drafting, received minutes, etc. This fact alone may establish admissibility if the drafters are found to have been the "party's agent or servant" and the statement to be introduced concerned "a matter within the scope of the agency . . . made during the existence of the relationship" under the admission by party-opponent rule in FRE 801(d)(2).

Evidence or Procedure?, 16 Litigation 37, 39 (Fall 1989); *United States v. International Business Machines*, 90 F.R.D. 377 (S.D.N.Y. 1981); *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 572 (Del. 1988) ("[It] would put form over substance to have asked plaintiff to attempt to contact those people where it is highly unlikely they would have voluntarily appeared and they were beyond the subpoena power of the court.").

[28/] Where the former testimony is sought to be offered against the same parties, their representatives, or their successors in interest, and the action involved the same subject matter, the deposition is admissible as if it had been taken in the current proceeding. Fed. R. Civ. P. 32(a)(4).

XVII. Admissions by Party Opponents

A. Admissions by party opponents are statements that can be offered as substantive evidence even where the admission is from an out-of-court statement (and thus technically hearsay). There are three kinds of admissions: judicial admissions, evidentiary admissions, and testimonial admissions. Judicial admissions are statements in formal court pleadings, e.g., an answer to a complaint that admits that a carrier issued to the insured a specific insurance policy; a judicial admission is usually conclusive. Evidentiary admissions are statements from written discovery, interrogatories and requests for admissions; because written-discovery responses are verified by the party from personal knowledge, the responses are considered statements of the party itself. Testimonial admissions are statements made in depositions that satisfy the requirements for an "admission by party-opponent" under FRE 801(d)(2). Both evidentiary and testimonial admissions may be explained by the party against whom the admission is offered; the weight of the admission versus its explanation is a matter for the jury.

B. Under FRE 801(d)(2), there are several ways of showing that a statement is an admission that can be introduced into evidence against a party. The most important are: (i) a statement by a person authorized by the party to make a statement concerning the subject and (ii) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the agency or employment relationship. Thus, a statement made by an employee during and in the scope of her employment may be offered against the employer as an admission.

C. Accordingly, whenever a document contains a helpful statement from an employee of the opposing party, one should always establish that the person had personal knowledge about the subject matter of the statement and that the statement was made within the scope of the employee's employment in the period of his employment. Once that foundation is laid, the statement may be offered to prove the truth of the matter asserted in the statement.

D. Where a document is from an agent (and not an employee) of the opposing party, the fact of the agency relationship must be established by witnesses with personal knowledge or other competent evidence, and the scope of the agency must be defined. Once those predicates are established, the foundation still needs to be laid that the person making the statement had personal knowledge about the subject matter, and the statement was made within the scope of the agency relationship in the period of the agency.

E. If a witness is a former employee, her testimony will not directly constitute a "present" admission of the party opponent; however, if she had created documents containing admissions while employed by the opposing party, her present

testimony can establish the foundation for considering statements in the document to be admissions by the party-opponent.

XVIII. Past Recollection Recorded

A. Where there is a writing that contains statements about a matter when an incident recorded was fresh in a witness's mind and the witness can no longer remember the details, the writing may be admissible in lieu of the witness's present (foggy) testimony. The written statement would be hearsay, but falls within a hearsay exception. (FRE 803(5))

B. Where a document contains statements (more or less) contemporaneously describing events by a person with personal knowledge, if the witness in his deposition (or at trial) cannot recall the factual basis for those statements, the foundation should be laid for admission of the statements in the document as "testimonial" evidence. Where (i) the witness is presently unable to recall, (ii) the witness made or adopted the statements in the document when the witness had personal knowledge and the matter was fresh, and (iii) the witness at the time believed the statements to be true, the statements can be *read* into evidence as if the statements in the document were the witness's testimony in his deposition (or at trial). In short, the witness's past recollection, which is recorded in the document, is offered as his present testimony.

C. Elements of foundation include: statement is relevant; witness is unable now to testify fully and accurately about the subject matter; the statement would have been admissible if the witness had now been able to testify to the statement from his or her present, independent recollection[29/]; the document in which the statement appears was made at a time when the facts recorded were fresh in the witness's memory; witness testifies that the statement (or such statements generally, see FRE 406) was true when made; the document is authenticated as an accurate record of the statement; document was prepared by witness or under his supervision.[30/]

[29/] Note that hearsay recorded as a statement in a document offered as substitute testimony must still satisfy an exception to the hearsay exclusion before it can be admitted into evidence.

[30/] Past recollection recorded is sometimes confused with another doctrine called "refreshing present recollection." Under the former, a document is used as substitute testimony. Under the refreshing-present-recollection rule, the witness is presently testifying, but a document is shown to him to bring the details back to his mind. After the details are "refreshed," the document is removed and the witness is examined as to his present, newly refreshed personal knowledge. Thus, the refreshing-recollection rule is invoked when one wants a witness's present testimony; the past-recollection-recorded rule is invoked when one wants the witness's "testimony" that has previously been recorded in a document.

D. Once the foundation is established, the portion of the document containing the relevant statement is then read to the jury in lieu of the witness's testifying. At a deposition it might be sensible to read into the transcript the relevant statement as substitute testimony. Because the statement in the document is being offered only as substitute testimony, however, the document itself does not come into evidence, unless it is offered by the adverse party.

The foundation for refreshing recollection includes: (i) the witness knows the facts, but has a memory lapse while testifying; (ii) witness testifies that referring to his report or other writing will refresh his memory; (iii) witness is given and reads the pertinent part of the report or writing; (iv) witness states that his memory has now been refreshed; and (v) the witness, without further reference to the report or writing, testifies from his personal knowledge about what he knows.