Idaho 42nd Annual Commercial Law & Bankruptcy Seminar

Evidence:
Admissibility and Authentication things to remember
&
Refreshing our recollection on what Hearsay is and is not

Hon. Benjamin Hursh
U.S. Bankruptcy Court
District of Montana

Bob Faucher
Holland & Hart LLP
800 W. Main Street
Suite 1750
Boise, ID 83702
rfaucher@hollandhart.com

Seamus McCulloch
U.S. Bankruptcy Court
District of Montana

Outline
Idaho Seminar 2024
Hon. Benjamin Hursh[1]

Back to Basics:
Admissibility and Authentication things to remember
&
Hearsay: Refreshing our Recollection on what it is and is not

Seamus & Bob Demonstration #1

I. Introduction.

A. A case is built on "facts."
1. Black's Law Dictionary (11th ed. 2019) defines . . . fact:
a. Something that actually exists; an aspect of reality <it is a fact that all people are mortal>. Facts include:
i. tangible things,
ii. actual occurrences, and relationships,
iii. states of mind such as intentions and the holding of opinions.
b. An actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation <the jury made a finding of fact>. — Also termed historical fact.
2. Tangible things are easy – the car is red; Occurrences – Devin Bray began work at Hawley Troxell on September 10, 2023; Relationships – Seamus McCulloch is Judge Hursh's Law Clerk

B. Facts must be established with evidence.

C. Black's Law Dictionary (11th ed. 2019) defines evidence as:
1. Something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact <the bloody glove is the key piece of evidence for the prosecution>.

[1] This outline was prepared in connection with a Powerpoint presentation for the Idaho State Bar in February 2024. The remarks are intended as practical insight/observations from the bench based on my experience. The remarks are coupled with references to resources in the outline for practitioners to consider consulting in the future. The remarks fall into 3 buckets: (1) authentication/foundation is an important step that should not be overlooked, particularly as move towards complete digitization; (2) many statements that trigger a hearsay objection are admissible because they are not hearsay; and (3) preparation and anticipation will make your job and mine easier.

2. The collective mass of things, esp. testimony and exhibits, presented before a tribunal in a given dispute <the evidence will show that the defendant breached the contract>.

D. Important caveat – evidence must be admissible.

1. Black's Law Dictionary (11th ed. 2019) defines admissible evidence as:
   a. Evidence that is relevant and is of such a character (e.g., not unfairly prejudicial, based on hearsay, or privileged) that the court should receive it. — Also termed competent evidence; proper evidence; legal evidence.
   b. The character of evidence matters and depending on the character, it may not be admissible.

E. In an age of information overload, sifting through voluminous productions and finding a key piece of evidence you need to prove your case is a futile exercise if you fail to get it admitted.

II. General Requirements for admitting evidence.

A. <u>To be admissible, evidence must be relevant</u>:

1. Evidence is relevant if:
   a. it has any tendency to make a fact more probable or less probable than it would be without the evidence; and
   b. the fact is of consequence in determining the action.[2]

2. No formula for determining relevance – matter of judicial discretion.
   a. By furnishing no standards for the determination of relevance, Fed. R. Evid. 401 implicitly recognizes that questions of relevance cannot be resolved by mechanical resort to legal formulae. Thus, the judge's own experience and conceptions, rather than legal precedents, will often furnish the basis for determinations.[3]
   b. A district court is accorded a wide discretion in determining the admissibility of evidence under the Fed. R. Evid. Assessing the probative value of [the proffered evidence], and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403 …[4]
   c. Create a record – judge should articulate reasons underlying ruling – and counsel's objections should be short, clear and state the basis (rule) underlying objection.

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[2] Fed. R. Evid. 401.

[3] 2 Weinstein's Federal Evidence § 401.03 (2023).

[4] *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (quoting *United States v. Abel,* 469 U.S. 45, 54, (1984)).

B. [To be admissible] Not subject to exclusion pursuant to:
   1. Other rules of Evidence.
   2. Rules of Criminal or Civil Procedure.
   3. US Constitution.
   4. Fed. Statute.
   5. Scholar (Wigmore) has identified 2 policies that dictate exclusion of evidence:
      a. Exclusion of evidence that although relevant but not trustworthy aids in ascertaining the truth because evidence that is not trustworthy may cause confusion or prejudice.
      b. Policy of ascertaining the truth competes with other policies, such as policy recognizing the sanctity of privilege which protects confidential communications.

C. Capable of authentication.
   1. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.[5]
   2. Methods of authentication[6] (limited examples):
      a. Testimony that an item is what it is claimed to be.
      b. A document was recorded or filed in a public office as authorized by law.
         i. County Clerk and Recorder, Real Estate.
         ii. Secretary of State, UCC.
   3. As a prerequisite to admissibility, the proffering party must identify the exhibit by showing that the information it contains or otherwise reveals is relevant to the pertinent factual issues.
      a. A document that appears to contain relevant information is inadmissible unless the proffering party shows that the document is somehow related to the dispute before the court.
      b. For example, by showing that it is a record generated by a party and that it concerns transactions at issue in the litigation.[7]
   4. The proponent of an item of evidence has the burden of introducing evidence sufficient to show that the item is what the proponent claims it to be.
      a. A prima facie showing that the item is what the proponent claims it to be.

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[5] Fed. R. Evid. 901(a) ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.").
[6] Fed. R. Evid. 901(b).
[7] 5 Weinstein's Federal Evidence § 901.02 (2023).

b. It is the general rule that, once evidence has been authenticated by one party, it has been authenticated with regard to all parties.

5. Flaws in authentication go to weight, not admissibility.

D. Authentication through questioning – laying foundation.

1. Fact Pattern A.
   a. Authenticating the Promissory Note.
2. Fact Pattern A.
   a. Authenticating the Text Message.
3. Additional Materials: Authentication Other Items.

III. Hearsay.

A. What is it?

1. Fed. R. Evid. define "Hearsay" as a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.[8]

   a. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.[9]

   b. A "declarant" is a person who makes a statement.[10]

   c. Subject to certain requirements neither a prior statement by a witness nor admission by a party opponent are hearsay – by definition.[11]

2. One treatise parses hearsay into the following four elements and all four must be present to constitute hearsay:[12]
   a. the evidence is an assertive statement or act;
   b. the assertion was made out of court by a human being;
   c. at trial, that person is still considered an out-of-court declarant; and
   d. the evidence is being used at trial to prove the truth of the assertion.

3. Hearsay rule is codification of common law rules. Historically, trilogy of safeguards to ensure trustworthiness of testimonial evidence included:

   a. Witness took oath – in a society that fears divine punishment oath was important safeguard;
   b. Witness present at trial – opportunity for trier of fact to observe witness and right to confront witnesses; and
   c. Witness subject to cross examination – opportunity to test recollection of perceptions highlight problems with testimony and draw out contradictions, gaps.[13]

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[8] Fed. R. Evid. 802.
[9] Fed. R. Evid. 801.
[10] *Id.*
[11] *Id.*
[12] 1 Evidentiary Foundations § 10.02 (2023).
[13] These continue to be important and adhered to, but the Fed. R. Evid. include series of exceptions and endeavor to strike a balance that permits the receipt of evidence that is likely to

4. Examples.

a. Seamus testifies: "I was in Washington D.C. on January 6, 2021, with Bob and Patrick. We went for a walk on the mall. When we met in the lobby of our hotel, I noticed Patrick was wearing a headdress with horns. It seemed like a strange choice of attire to me, but it's a free country."

- Seamus is the declarant;
- Seamus is under oath and is testifying about facts that he perceived;
- He is personally present at trial so the trier of fact can evaluate his credibility; and
- He is subject to cross examination providing an opportunity to highlight inconsistencies, or flaws.

b. Seamus testifies: "Over a year ago, Bob [declarant] told me he was in D.C. on January 6, 2021, with Patrick and Patrick is the Shaman who wore the headdress with horns."

- Bob is the declarant;
- And the statement is offered to prove Patrick is Shaman with headdress and horns – hearsay
- Bob is not under oath, instead Seamus is testifying about what Bob perceived;
- Bob is not personally present so trier of fact cannot observe Bob and evaluate his credibility; and,
- Bob is not subject to cross examination, so no opportunity to highlight inconsistencies or flaws, no way to challenge what he perceived.

c. Seamus testifies: "I was in Washington D.C. on January 6, 2021, with Patrick and Bob. We had planned to go for a walk on the mall, but when I called Bob and he told me Patrick had decided to wear his headdress with horns, I decided to skip the walk and embarrassment. I went to the Smithsonian instead."

- Seamus is declarant;
- Offered to explain why Seamus changed his plans and went to the Smithsonian – not offered to prove Patrick was wearing a headdress with horns;

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be helpful to fact finder without being unduly prejudicial. These exceptions are made under various rationales.

- Seamus is under oath and is testifying about facts that he perceived;
- He is personally present at trial so the trier of fact can evaluate his credibility; and
- He is subject to cross examination providing an opportunity to highlight inconsistencies, or flaws.

5. Exceptions to Hearsay – Regardless of Whether Declarant is Available as a Witness.[14]

   a. 23 subparts specifically outlining exceptions to the rule.
   b. Historically, 24th subpart, "Residual Exception," not Fed. R. Evid. 807.
   c. Despite identification of 23 exceptions to hearsay, no guarantee it's admissible or will not be objected to:
      i. must be relevant; and
      ii. still must establish its admissibility under any other applicable rules.
   d. Not going to discuss in detail, but examples include:
      i. Records that affect interest in property;
      ii. Statements in documents that affect interest in property;
      iii. Market Reports/Commercial Publications.

6. Exceptions to Hearsay – Declarant Unavailable as a Witness.[15]
   a. Unlike Fed. R. Evid. 803, "not available" is a prerequisite to admission of hearsay.
   b. "Not available" refers to the declarant's testimony – not the declarant's presence, although an absent declarant may explain why the declarant's testimony is not available.
      i. Assertion of privilege may make testimony "unavailable;"
      ii. Persistent refusal to testify;
      iii. Declarant professes their memory of the events that are the subject matter of the hearsay has evaporated;
      iv. Absence – Death & Disability;
         - Death
         - Disability – Chronic Medical Problems
         - Temporary Disability
         - Mental Disability
      v. Absent Declarant – inability to procure attendance through subpoena or otherwise.
   c. There are six exceptions – not going to focus on:
      i. Former testimony;

[14] Fed. R. Evid. 803.
[15] Fed. R. Evid. 804.

ii. Statement under belief of imminent death – many subparts practitioner should consider;
iii. Statement against Interest - it was "so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability;"
iv. Statement of Personal or Family History – adoption, marriage, divorce, legitimacy, etc.;
v. Unavailability through Wrongdoing; or
vi. Residual Exception – See Fed. R. Evid. 807.

B. Objections to Hearsay.

1. The hearsay objection is overused. Many lawyers object every time a witness starts to relate what someone else has said.

a. When evidence of a nonhearsay out-of-court utterance is the target of a hearsay objection, the offerer must be ready immediately to explain to the trial judge why the evidence is not hearsay.

b. Otherwise, the judge may erroneously assume that it is and exclude it. Moreover, the judge may be upheld on appeal.[16]

2. Most out-of-court utterances and writings are not hearsay. Most are not even assertions.[17]
a. Of those that are assertions, less than half are offered in evidence to prove their truth.
b. Some out-of-court assertions have direct legal significance as contract terms, words of conveyance, representations, warranties, notice, etc.
c. Many more constitute circumstantial evidence of something other than their truth.[18]

3. There are four types of sentences: declarative, imperative, exclamatory, and interrogatory.

a. As a practical matter, only declarative sentences ordinarily fall within the hearsay definition; they declare or assert facts, including states of mind.
b. Imperative sentences giving orders or making requests;
c. Exclamatory sentences, and interrogatory sentences posing questions usually fall outside the hearsay definition;

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[16] *Id.*
[17] Hearsay Handbook 4th § 2:1.
[18] *Id.*

i. If these sentences are relevant at all, they are ordinarily relevant simply because the sentences were uttered, and

ii. For that purpose, the attorneys can question the in-court witness, the person who heard the declarant utter the sentence.[19]

C. Not all out of Court Statements are offered to Prove Truth of Matter Asserted.

1. When witness testifies "he said . . . ." or "she said . . . ." counsel almost immediately object on hearsay grounds, without even knowing what will follow.

2. If hearsay includes both (a) an out of court statement and (b) it is offered to prove the truth of the matter asserted in the statement – how can counsel or court know if it is hearsay if witness has not finished answering question?

3. From the perspective of the bench, this can be maddening.

4. How do counsel respond when a hearsay objection is made to witness testimony before witness completes answer, or answer is incomplete?

a. If there is an applicable exception, respond and identify exception enumerated in Fed. R. Evid.

i. "Although witness' answer is incomplete, Fed. R. Evid. 803(1) [Present Sense Impression] is applicable exception – present sense impression. He is testifying about statements his wife and daughter made immediately after the event, describing the event."

ii. "Although witness' answer is incomplete, she is beginning to testify about statements testator made immediately prior to and after executing the will and trust documents. Fed. R. Evid 803(3), [Mental State] special exception for statements made by testator immediately before or after executing will."

b. Absent enumerated exception, be prepared to engage with bench.

i. Fed. R. Evid. 103, Preserving a Claim of Error.
A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

[19] *Id.*

(1) if the ruling admits evidence, a party, on the record:
(A) timely objects or moves to strike; and
(B) states the specific ground, unless it was apparent from the context; or
(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

ii. In order to rule on hearsay objection, Bench needs to have a sense of testimony that was cut off by objection, and purpose it serves – because court has not ruled on objection, Fed. R. Evid., not triggered – because no ruling.

iii. To assist me, let's engage – bench trial – be prepared to formally or informally explain to me what witness was going to testify to, and why it is admissible.

"Witness is not being asked about what was said, to prove the truth of the underlying statements, so it is not hearsay. Although she is testifying about an out of court statement, the statement is relevant – not for its truth – but instead to show . . . ."

D. Survey of examples highlighting where out of court statements are not hearsay because the statement is not being offered to prove truth of assertion – or – it may not even be an assertion.

1. Statements that typically do not constitute hearsay because the statements are not offered to prove the truth of the matter asserted.

a. Generally, questions are not hearsay because they are not assertions.

i. *Bolen v. Paragon Plastics, Inc.*, 754 F.Supp. 221, 226 (D.Mass. 1990) ("Paragraph ten of Bolen's affidavit states that 'At this meeting, in relation to the possible sale of the Wisk Account, representatives of Lever Brothers asked 'what about the Bolens?' Beinhocker attacks this paragraph on the grounds that it constitutes hearsay. . . According to the very definition of hearsay, an inquiry is not an assertion, and therefore does not constitute hearsay.").

ii. However, In 9th Circ., *United States v. Torres*, 794 F.3d 1053, 1059–1061 (9th Cir. 2015) (defendant's testimony that his friend (Fernando) repeatedly asked him to run

errands for him on U.S.-side of border was hearsay—Fernando intended the implied assertion, and defendant offered Fernando's requests to show that he was manipulating defendant into unknowingly importing drugs concealed in defendant's truck and wanted to control that truck).

b. Imperative statements are not assertions of fact.

i. *United States v. Waters*, 622 F.3d 1075, 1087 (9th Cir. 2010) ("'Tell the truth' is an imperative and not an assertion of fact. It therefore does not fall within the meaning of 'statement' in Rule 801(a) and cannot be hearsay, because a nonassertion cannot have been offered to prove the truth of the matter asserted").

ii. *United States v. Ned*, 637 F.3d 562, 569 (5th Cir. 2011) ("testimony that defendant '[told me to] go to the front door' is not an assertion of fact, but rather non-assertive oral conduct that is not hearsay").

iii. *Fireman's Fund Ins. Co. v. Wilner*, 2012 WL 628504 (E.D. N.Y. 2012) ("'use the blowtorch' is an imperative—a command that Kelly do something. The statement does not assert any fact, which means that it simply is not hearsay").

iv. *United States v. Reilly*, 33 F.3d 1396, 1410 (3d Cir. 1994) ("Instructions to an individual to do something are ... not hearsay ... because they are not declarations of fact and therefore are not capable of being true or false.").

c. Verbal acts not hearsay – A verbal act is an utterance of an operative fact that gives rise to legal consequences. Verbal acts, also known as statements of legal consequence, are not hearsay, because the statement is admitted merely to show that it was actually made, not to prove the truth of what was asserted in it.[20]

i. *In re Boulware*, 384 F.3d 794, 806 (9th Cir. 2004) ("state court judgment is only hearsay 'to the extent that it is offered to prove the truth of the matters asserted in the judgment' and is not hearsay 'to the extent that it is offered as legally operative verbal conduct that determined the rights and duties of the parties' ") (citing *United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004)).

[20] 5 Weinstein's Federal Evidence § 801.11.

ii. *United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004) (checks are self-authenticating and constitute legally operative verbal acts that are not barred by the hearsay rule).

iii. *United States v. Chung*, 659 F.3d 815, (9th Cir. 2011) ("we hold that the district court properly admitted the list [list included in letters/correspondence] over Defendant's objection because it was not offered for the truth of the matters asserted and therefore was not hearsay. The list contained no declaration of fact capable of being proven true or false. Thus, the district court did not abuse its discretion by admitting the list.").

iv. *Vincent Farms. Inc. v. Sygenta Seeds, LLC*, 2018 WL 264388 (D. Idaho Jan. 2, 2018) ("a contract is 'a legally operative document that defines the rights and liabilities of the parties in this case,' it is excluded from the definition of hearsay.").

d. Clarification of Conduct (Verbal Parts of Acts) – Verbal utterances that help to clarify or define ambiguous conduct are not hearsay. Witness C may testify to having seen A handing money to B, for example. Words that accompany the transfer are not hearsay if they impart legal coloration to it and become part of the act (part of the res gestae).

i. *United States v. Romano*, 684 F.2d 1057, 1066 (2d Cir. 1982), Cert denied, 459 U.S. 1016 (1982) ("'an utterance which was contemporaneous with an independently admissible nonverbal act ... and which relates to that act and throws some light upon it' is admissible").

e. Statements Showing State of Mind – Knowledge or Notice.

i. *Stevens v. Moore Bus. Forms, Inc.*, 18 F.3d 1443, 1449 (9th Cir. 1994) (excerpts from union leader's declaration not hearsay to extent admitted to show his knowledge).

ii. *Kunz v. Utah Power & Light Co.*, 913 F.2d 599, 605 (9th Cir. 1990) (defendant's press releases were not hearsay when offered to show that landowners had notice of potential flooding conditions).

f. Statements Showing State of Mind – Intent/Motivation.

i. *Smith v. Wilson*, 705 F.3d 674, 678–679 (7th Cir. 2013) ("We note as well that Smith misses the point when he characterizes the rumors as "hearsay": they were offered not to prove the truth of the matter asserted (i.e., that Smith overcharged), but rather for the non-hearsay purpose of explaining Wilson's subsequent actions").

g. Statements Showing State of Mind – Beliefs or Thoughts

i. *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1434–1435 (10th Cir. 1993) (manager's testimony that he turned down applicants "because he heard about vandalism and low morale among those individuals," incorporated out-of-court statements, but was properly admitted to demonstrate defendant's state of mind in making hiring decisions, not to prove the truth of the matter overheard).

IV. Conclusion – 3 Takeaways.

A. In connection with preparing for a hearing or trial, revisiting the rules of evidence prior to a hearing or trial will serve you well – no matter how experienced you are, a rules refresher will reinforce what you already know and may reduce the probability of an unforced error at the hearing or trial;

B. Reviewing your exhibits and the exhibits filed by the opposing party and anticipating objections and your response will serve you well; and,

C. Consider the testimony you plan to elicit at a hearing or trial and anticipate objections – particularly those that might be on based on hearsay – and be prepared to identify an enumerated exception in the rules of evidence or explain to the Court why it is not hearsay.

Bibliography

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Fact Pattern A

The Story of Tim & Peter:
When one friend decides to be a creditor and the other friend decides to be a debtor, what could go wrong?

Fact Pattern A

At some point in 2018, Peter began to experience financial troubles. Peter approached Tim, a college friend, and asked whether he would be willing to lend him "transition" funds while Peter finalized the terms of a personal loan with a Bank. Although Tim had no prior experience with personal loans, he agreed to assist Peter in part because Peter described his needs as "near term" and assured Tim the loan would be repaid as soon as the terms of the Bank loan were finalized.

The two agreed on a loan in the principal amount of $50,000. Peter offered to draft a promissory note outlining the terms of their agreement, although the parties presented conflicting testimony as to who ultimately drafted the Note at issue. The Note, as originally written, provided that Tim agreed to "provid[e] a bridge loan to Peter in the amount of $50,000." The $50,000 principal, plus an additional $5,000 was to be repaid no later than September 4, 2018. If payment was not made by September 4, 2018, a late fee of $2,500 would be assessed. If repayment was not made by October 1, 2018, a daily late fee of $100/day would begin to accrue.

Peter failed to make any payment on the loan. Peter filed for Chapter 11 on January 20, 2020. Debtors' Schedules list an unsecured "personal loan" of $50,000 received from Tim as an undisputed claim.

Tim filed a proof of claim with a total amount of $104,500.00 ("Claim"). In support of the Claim, Tim attached the promissory note signed by Peter and himself, along with an Itemized Statement, which listed each individual amount comprising the Claim. The Itemized Statement indicates the Claim is comprised of the principal amount of the loan ($50,000), the additional $5,000 the parties agreed upon, the $2,500 late fee, and the $100/day late fee that accrued between October 1, 2018 through Debtors' date of filing.

Peter objected to the Claim. He argued that the Claim should be disallowed in its entirety because the agreed upon $100/day late fee "amounts to a usurious interest rate of approximately 55%." Tim responded arguing the Claim should be allowed because the late fee was included at Peter's suggestion and it was drafted by Peter who had a history of business dealings, while Tim a retired pipefitter, did not. Further, Tim contends the Note is not usurious because it does not provide for interest. Instead, Tim argues that the Note had three components: (1) the agreed upon repayment amount of $55,000; (2) a $2,5000 late fee; and (3) the $100/day late fee.

Peter replied that it was Tim, not Peter, who drafted the terms of the Note and that all charges provided for in the Note beyond the principal amount of $50,000 are usurious.

Exhibit 1

Promissory Note

Promissory Note

This Promissory Note, dated June 27, 2018, between Peter [redacted] borrower) and Tim [redacted] lender) details the terms of agreement.

1. Tim [redacted] is providing a bridge loan to Peter [redacted] for the amount of $50,000.

2. Repayment of the loan is due on September 4, 2018.

3. The loan repayment due, on September 4, 2018, will total $55,000.

4. If the loan is not repaid, on or before September 4, 2018 there will be a late fee of $2500. If Repayment is Not Made By October 1, 2018 There will Be An Additional Penalty of $100.00/Day

Tim [redacted] Lender

[redacted]

Dated: 6/27/18

Peter [redacted] Borrower

[redacted]

Dated: 6/27/2018

If Something Happens to Either Through Death or Disability to The Borrower, Peter [redacted] His Beneficiary Name [redacted] Would Be Responsible For Repayment of Loan.

State of Montana
County of Ravalli

This instrument was signed or acknowledged before me on June 27, 18 by Tim [redacted] & Peter [redacted]
(Name of signer)

Angela C Olsen
(Notary Signature)
[Affix seal/stamp to the left or below]

SEAL

ANGELA C OLSEN
NOTARY PUBLIC for the
State of Montana
Residing at Florence, Montana
My Commission Expires
October 01, 2019

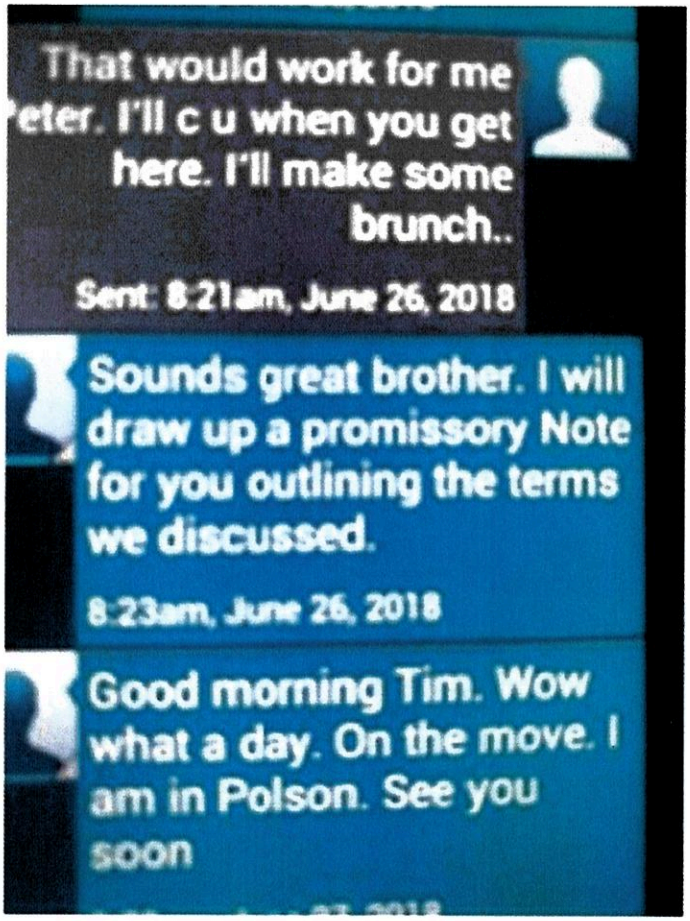
[redacted]

Exhibit 2

Text Message

Fact Pattern A - Exhibit 2[1]

Assume that at the top of the
text's image the phone number
406-867-5309
appears



[1] This text message is Bates 00112. The messages that precede and follow this one were 0056-00111, and 00113-00147. All messages were exchanged in discovery between the parties.

Bob and Seamus

1-4

Authentication & Hearsay

Fact Pattern A

Authenticating Exhibit 1 Promissory Note & Hearsay Objection

Bob: Tim's counsel

Seamus: Witnesses Tim/Peter

Devin: Peter's counsel

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Bob & Seamus #1

Bob: I'm going to hand you a document marked as Exhibit 1, are you familiar with it?

Tim: I am.

Bob: Your Honor, I move for the admission of Exhibit 1.

*****

Bob & Seamus #2

Authenticating Exhibit 1 Promissory Note

Bob: I'm going to hand you a document marked as Exhibit 1, are you familiar with it?

Tim: I am.

Bob: How are you familiar with it?

Tim: I signed it after Peter and I agreed I would loan him $50,000.

Bob: So that is your signature in the lower left-hand corner of the document?

Tim: Yes.

Bob: What is the date under signature?

Tim: June 27, 2018.

Bob: So you signed this document on this date?

Tim: I did.

Bob: Who prepared this document?

Tim: Peter.

Bob: And are there any other signatures on this document?

Tim: Yes. Peter signed it on the same day I signed it.

Tim: Your Honor, I move for the admission of Exhibit 1.

Court: Exhibit 1 is admitted.

***** *Bob & Seamus #3*

Authenticating Exhibit 2 Text Message[1]

Bob: I'm going to hand you a document marked as Exhibit 2, are you familiar with it?

Tim: Yes. This is a text message I received from Peter.

Bob: Is that all that it represents?

Tim: Yes.

Bob: Please look at the gray box. Who sent the text that appears in the gray box?

Tim: I sent that.

Bob: Who did you sent it too?

Tim: Peter

Bob: How did you send it?

Tim: I sent it from my phone.

Bob: What is the phone number associated with your cell phone.

Tim: 406-867-5309.

Bob: Does anyone else have access to your phone?

Tim: I don't understand the question.

Bob: Could someone pickup your phone if you laid it down and send a text?

Tim: Oh no!, I have a password on my phone and I have never shared it with anyone.

Bob: Now lets discuss what we are looking at. Is it the actual text message?

Tim: No, it is an image from the screen of my phone that shows the text message that was sent.

Bob: Were you responsible for providing my office with copies of all the text messages you exchanged with Peter?

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[1] 1 Evidentiary Foundations § 4.02 (2023). This resource has detailed discussions and examples of how to authenticate private writings, including social media and texts. As documents are increasingly digitized, employ digital signatures, or emails are encrypted the process of authentication will be more complicated.

Tim: Yes I was.

Bob: Does the copy or image you are looking at in Exhibit 2, accurately reflect the screen shot from your phone?

Tim: Yes it does.

Bob: Does it include the date?

Tim: Yes.

Bob: What is the date on this text message?

Tim: June 26, 2018.

Bob: Is that significant?

Tim: It was the day before we signed the promissory note.

Bob: Who sent the text at the top of the image with the gray background?

Tim: I sent it.

Bob: How do you know?

Tim: I remember sending it and it says, "that works for me, Peter." The text is from me.

Bob: Did Peter respond?

Tim: Yes.

Bob: How do you know Peter responded?

Tim: Peter and I have been friends for almost 20 years, and we regularly exchange texts using my phone number and his phone number.

Bob: The recipient of this text, what is the phone number appearing at the top of the screenshot image?

Tim: It is 406-489-4608

Bob: Is that the phone number that Peter has used in his communications with you for the last 20 years.

Tim: Your Honor, I move for the admission of Exhibit 2.

Prior Inconsistent Statements for Impeachment (Bob doing cross on Peter later in hearing using Exhibit 2)

Bob: As I understood your testimony on direct examination, you testified that Tim drafted the promissory note?

Peter: Yes.

Bob: And you further testified that you had no input on the terms of the promissory note that Tim drafted, such as the rate of interest?

Peter: Yes.

Bob: Now, you and Tim would exchange text messages, correct?

Peter: Yes.

Bob: Did you receive a text message from Tim on June 26, 2018?

Peter: I don't remember. Maybe.

Bob: I'm going to hand you what I've marked as Exhibit 2. Do you recognize Exhibit 2?

Peter: Yes, it appears to be a screenshot of a text exchange between Tim and myself.

Bob: And what is the date on the text message?

Peter: It says June 26, 2018.

Bob: And is that Tim's phone number?

Peter: I believe so.

Bob: And in this text exchange, didn't you say, and I quote "Sounds great brother. I will draw up a promissory note for you outlining the terms we discussed."

Peter: It appears so.

*****

Bob & Seamus #4

Hearsay Objection No. 1

Bob: Why did you sign this Promissory Note?

Tim: I had agreed to loan Peter $50,0000 and we both agreed that we should put something in writing. Since Peter had more business experience than me, he said he'd type something up for us to sign.

Tim: Now, the Promissory Note has 4 typed lines, numbered 1-4, that identify some terms, but there are also handwritten terms on this document, correct?

Tim: Yes.

Bob: Were those handwritten terms included at the time you signed it?

Tim: Yes. Peter added those after he arrived at my house and before we went to the notary.

Bob: Lets review the terms. Did you and Peter agree on a date when he would repay the $50,000?

Tim: Yes. We agreed that he would repay the $50,000 by September 4, 2018.

Bob: Did you discuss any other terms regarding repayment?

Tim: Well, along with the $50,000, we agreed he would also pay an additional $5,000.

Bob: Any late fees?

Tim: We did not discuss any late fee when we first agreed on the other terms, but when he came to my house to sign it, we started talking and I was nervous because I was withdrawing funds from my retirement account to help him. I expressed my concerns and Peter said . . . . .

Devin: Objection. Hearsay. He is testifying about what Peter said.

(Pause - Segue to Powerpoint)

Bob: Your honor, may I be heard?

Court: You may.

Bob: First, the testimony being solicited by this line of questioning will not be offered to prove the truth of the matter asserted in the testimony. Instead, the testimony will be offered to explain Tim's subsequent conduct that resulted in the inclusion of the handwritten term. Since its not being offered to prove the truth of the matter asserted in the statement, it is not hearsay.

Court: Counsel, to assist me with my ruling, could you give me a sense of what you anticipate his testimony will be?

Bob: Your honor, if permitted to complete his answer, the witness will testify he had concerns about making the loan, and inclusion of the handwritten term resulted from Peter's expressions of confidence that the bank loan would be approved and made, ensuring the loan Tim made would be repaid. The testimony will explain why he agreed to the additional term and ultimately completed the loan despite his misgivings.

Court: Objection is overruled because testimony is not being offered not to prove truth of matter asserted in statement. Instead, the testimony is being offered to explain his subsequent actions. [2]

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[2] *People v. Samuels* (2005) 36 Cal.4th 96, 122, 30 Cal.Rptr.3d 105, 113 P.3d 1125 (This is an example of " 'one important category of nonhearsay evidence—evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement.' ") [out-of-court statement properly admitted to explain witness's subsequent actions].)

Bob: Prior to the objection, you began to testify about the late fees, please continue – why did you agree to the handwritten late fee provision after the original terms were agreed to?

Tim: We did not discuss any late fee when we first agreed on the other terms, but when he came to my house to sign it, we started talking and I was nervous because I was withdrawing funds from my retirement account to help him. I expressed my concerns and Peter said . . . "Buddy, I am so confident I am going to get this Bank loan I will agree to pay you $100/day if I am late." Peter's confidence regarding approval of the Bank loan to repay me assuaged my concerns about making the loan to him. I was convinced he would receive the bank loan so I completed the shot term loan from me to him.

E-Discovery: Authenticating Common Types of ESI Chart

Hon. Paul Grimm, U.S. District Court Judge
District of Maryland

Gregory P. Joseph, Joseph Hage Aronson, LLC

Westlaw Practical Law Litigation

E-Discovery: Authenticating Common Types of ESI Chart

HON. PAUL W. GRIMM, US DISTRICT COURT JUDGE, DISTRICT OF MARYLAND, AND GREGORY P. JOSEPH, JOSEPH HAGE ARONSON LLC, WITH PRACTICAL LAW LITIGATION

Search the Resource ID numbers in blue on Practical Law for more.

While all authentication methods recognized by the Federal Rules of Evidence (FRE) are available to authenticate electronically stored information (ESI), some methods apply to ESI more easily than others. This Chart provides a snapshot of the methods that counsel most often use to authenticate common types of ESI.

	Emails and Text Messages	Chat Room or Instant Messages	Social Media Postings	Websites	YouTube, Voicemail, and Other Audio and Video Recordings	Databases
FRE 901(b)(1) (witness with personal knowledge)	See Authenticate Email and Text Messages	See Authenticate Chat Room or Instant Message (IM) Communications	See Authenticate Social Media Postings	See Authenticate Websites	See Establish That a Recording is Unaltered	See Authenticate Databases
FRE 901(b)(3) (comparison with other authenticated evidence)	See Authenticate Email and Text Messages				See Authenticate YouTube, Voicemail, and Other Audio and Video Recordings	
FRE 901(b)(4) (circumstantial evidence)	See Authenticate Email and Text Messages	See Authenticate Chat Room or Instant Message (IM) Communications	See Authenticate Social Media Postings	See Authenticate Websites	See Authenticate YouTube, Voicemail, and Other Audio and Video Recordings	
FRE 901(b)(5) (familiarity with voice)					See Establish Speaker Identity	
FRE 901(b)(9) (accuracy of recording process)	See Authenticate Email and Text Messages	See Authenticate Chat Room or Instant Message (IM) Communications	See Authenticate Social Media Postings	See Authenticate Websites	See Establish That a Recording is Unaltered	See Authenticate Databases
FRE 902(5) (public authorities' publications)				See Authenticate Websites		

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	Emails and Text Messages	Chat Room or Instant Messages	Social Media Postings	Websites	YouTube, Voicemail, and Other Audio and Video Recordings	Databases
FRE 902(6) (newspapers and periodicals)				See Authenticate Websites		
FRE 902(11) and (12) (business records)	See Authenticate Email and Text Messages	See Authenticate Chat Room or Instant Message (IM) Communications	See Authenticate Social Media Postings	See Authenticate Websites	See Authenticate YouTube, Voicemail, and Other Audio and Video Recordings	See Authenticate Databases
FRE 201 (b) (judicial notice)				See Authenticate Websites		
Implicit Authentication by Production	See Practice Note, E-Discovery: Authenticating Electronically Stored Information: Authentication by Production (w-002-6960)					

For more information on these authentication methods, see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Ways to Authenticate ESI (w-002-6960).

AUTHENTICATE EMAIL AND TEXT MESSAGES

To authenticate an email or text message, counsel may rely on:

- The testimony of a witness with personal knowledge that the message is what counsel claims it is (FRE 901(b)(1)). This witness may be:
  - the sender (or author) of the message; or
  - an individual who observed the sender writing the message (see *United States v. Fluker*, 698 F.3d 988, 999 (7th Cir. 2012)).
- A comparison of the message with other authenticated evidence, such as another message that:
  - resembles the proffered message in a relevant manner; and
  - the court has found to be authentic.

(FRE 901(b)(3); see *United States v. Safavian*, 435 F. Supp. 2d 36, 40 (D.D.C. 2006).)

- Circumstantial evidence regarding the message's:
  - appearance, such as the presence of the purported sender's email address on the message;
  - content, such as information in the message known to a small group of people that includes the purported sender;
  - internal patterns, such as the use of the nicknames or other abbreviations in the message; or
  - other distinctive characteristics.

(FRE 901(b)(4); see *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 546 (D. Md. 2007).)

- The accuracy of the electronic recordation system (such as a server) to disprove a claim that a proffered message has been altered, which can be established by showing that:
  - all texts sent from the subject device are saved on a server; and
  - the server is secure, so files on the server cannot be edited or manipulated.

(FRE 901(b)(9).)

- The message itself as a self-authenticating business record if a qualified person (such as the person who created the record, a person who developed and implemented the business practice that lead to its creation, or the records custodian) certifies that it was:
  - created by someone with knowledge of the subject event at or near the time of the event as part of an ordinary business activity; and
  - kept in the course of ordinary business activity.

(FRE 803(6) and 902(11), (12).)

For more information on authentication under FRE 901(b) and 902, see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Ways to Authenticate ESI (w-002-6960).

ESTABLISH THE SENDER'S IDENTITY

If another party disputes the identity of the sender of an email or text message, counsel may rely on:

- The headers (to, from, and date fields) and footers (electronic signatures) of the message. Examples of this evidence include:
  - for emails, the purported sender's known email address appears in the "From" header field or in the electronic signature (see *Hardin v. Belmont Textile Mach. Co.*, 2010 WL 2293406, at *5 (W.D.N.C. June 7, 2010));
  - for emails, that the purported sender had access to the email account used to send the email at the relevant time (see *Fluker*, 698 F.3d at 999);

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- for texts, the telephone number listed as the sender of the text is the purported sender's known telephone number or is a telephone number to which the purported sender had access at the relevant time; or
- for texts, the sender's name (as stored in the recipient's phone and displayed on the face of the subject text) is the purported sender's name, initials, nickname, or moniker.

(FRE 901(b)(4).)

- The body of the message, such as:
  - the purported sender's use of initials, a nickname, a screen name, an alias, or a moniker (see *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014) and *Lorraine*, 241 F.R.D. at 546);
  - the purported sender's customary use of emojis or emoticons;
  - a writing style that is similar or identical to the purported sender's manner of writing; or
  - content known only to the purported sender or a small subset of individuals that includes the purported sender, such as contact information for relatives or loved ones, photos of the sender or the sender's possessions, or the sender's personal information (see *Rowe v. DPI Specialty Foods, Inc.*, 2015 WL 3533844, at *4 n. 28 (D. Utah June 4, 2015)).

(FRE 901(b)(4).)

- Details about the device on which the subject message was found, for example:
  - the purported sender owned or possessed the device on which the messages were located (see *United States v. Mebrtatu*, 543 F. App'x 137, 140-41 (3d Cir. 2013) and *United States v. Lundy*, 676 F.3d 444, 454 (5th Cir. 2012));
  - the device contains other emails or texts that are linked to the purported sender by name, email address, phone number, or other information (see *Mebrtatu*, 543 F. App'x at 140-41); or
  - the device contains other messages for which authorship was sufficiently authenticated.

(FRE 901(b)(4).)

- Forensic information that supports a finding that the purported sender sent the subject message, such as:
  - an email's hash values (*Lorraine*, 241 F.R.D. at 546-47); or
  - testimony from a forensic expert that the email or text metadata reveals that it was sent from a particular device when the purported sender possessed the device.

(FRE 901(b)(4).)

- Information beyond the message itself, including that the purported sender:
  - told the recipient to expect a message before its arrival;
  - orally repeated the contents to the recipient soon after the message was sent;
  - discussed the contents of the message with a third party; or
  - acted according to (or in response to) the message.

(FRE 901(b)(4).)

For more information on authentication under FRE 901(b), see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Authenticating ESI Under FRE 901(b) (w-002-6960).

ESTABLISH THE RECIPIENT'S IDENTITY

If another party disputes the identity of the recipient of an email or text message, counsel may rely on evidence that:

- The sender received a reply to the email from the purported recipient's known email address or an email address to which the purported recipient had access at the relevant time (FRE 901(b)(4)).
- The sender received a reply to the text from the purported recipient's known telephone number or a telephone number to which the purported recipient had access at the relevant time (FRE 901(b)(4)).
- The purported recipient's subsequent conduct or communication reflects his knowledge of the contents of the message (FRE 901(b)(4)).
- A device in the possession and control of the purported recipient received, or was used to access, the subject message (FRE 901(b)(4)).
- The recipient is the proponent of the email (see *Held v. Northshore Sch. Dist.*, 2014 WL 6451297, at *4 (W.D. Wash. Nov. 17, 2014); and see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Authentication by Production (w-002-6960)).

For more information on authentication under FRE 901(b), see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Authenticating ESI Under FRE 901(b) (w-002-6960).

AUTHENTICATE CHAT ROOM OR INSTANT MESSAGE (IM) COMMUNICATIONS

To support a claim that a particular individual sent a chat room or IM communication, counsel may rely on:

- The testimony from a participant in the communication who personally knows that the transcript fairly and accurately reflects the conversation (FRE 901(b)(1); see *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir. 2012)).
- A comparison by the trier of fact between the communication and other authenticated items (FRE 901(b)(3)).
- Circumstantial evidence, including evidence that:
  - the purported sender used the same screen name on other occasions;
  - the purported sender acted according to the communication;
  - the purported sender identified himself as the individual using the screen name;
  - the communication includes a customary signature, nickname, or emoticon associated with the purported sender;
  - the communication includes particularized information that is either unique to the purported sender or known only to a small group that includes the purported sender;
  - the communication appears on the purported sender's computer or other device; or

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- the purported sender discussed the same subject matter elsewhere.

(FRE 901(b)(4); see *United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998).)

- The communication itself as a self-authenticating business record if a qualified person (such as the person who created the communication, a person who developed and implemented the business practice that lead to its creation, or the records custodian) certifies that it was:
  - created by someone with knowledge of the subject event at or near the time of the event as part of an ordinary business activity; and
  - kept in the course of ordinary business activity.

(FRE 803(6) and 902(11), (12).)

- Testimony from the recipient of the message, if the recipient can testify that she:
  - knows that the purported sender uses the platform used to send the message;
  - recognizes the account from which the message was sent and associates it with the purported sender; and
  - finds the manner of communication consistent with prior communications from the purported sender.

(*United States v. Barnes*, 803 F.3d 209, 217 (5th Cir. 2015).)

- For more information on authentication under FRE 901(b) and 902, see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Ways to Authenticate ESI (w-002-6960).

AUTHENTICATE SOCIAL MEDIA POSTINGS

To authenticate social media postings, counsel may rely on:

- Testimony from a witness with personal knowledge of the posting, such as testimony from:
  - the purported creator of the social network account and related postings; or
  - an individual who observed the purported creator establish or post to the page.

(FRE 901(b)(1).)

- Circumstantial evidence of authenticity, such as evidence that:
  - the posting includes non-public details of the purported creator's life, like biographical information or nicknames that are not generally known or accessible;
  - the posting includes references or links to the purported creator's loved ones, relatives, or co-workers;
  - the posting includes content that only the purported creator (or a small group that includes the purported creator) knows;
  - the posting includes photos, videos, or other content that the purported creator would likely post;
  - the posting includes comments in the purported creator's style or structure;
  - the purported creator acted according to the contents of the post;
  - the purported creator previously used the social media account to communicate with others;
  - the purported creator knows the password to the account;
  - the purported creator had exclusive access to the social media account (or the computer on which it was created) at the relevant time;
  - the social media account is connected to the purported creator's email account (see *Brinson*, 772 F.3d at 1320-21 and *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014));
  - based on a forensic evaluation of the purported creator's computer hard drive, the social media account was created or accessed on that computer; or
  - the posting was made from a computer or device with an internet protocol address (IP address) associated with the purported creator.

(FRE 901(b)(4).)

- Evidence that the social media platform reliably and accurately tracks the account holder's activity, such as:
  - expert testimony on how a person accesses that type of social network account and what methods account holders may use to prevent unauthorized access; or
  - evidence from the social networking website that connects the purported creator with the account.

(FRE 901(b)(9).)

- An argument that the posting is self-authenticating as a business record under FRE 902(11) or (12). Although establishing that a posting is a self-authenticating business record may support a finding that it is unaltered, it likely will not authenticate the post regarding the particular author (see *Hassan*, 742 F.3d at 134).

For examples of how select courts evaluate the authenticity of social media posts, see Practice Note, Social Media: What Every Litigator Needs to Know: Authenticating Social Media (3-568-4085). For more information on authentication under FRE 901(b) and 902, see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Ways to Authenticate ESI (w-002-6960).

AUTHENTICATE WEBSITES

To authenticate a website, counsel may:

- Request judicial notice, if the version depicted in the exhibit is identical to the current version of the website (FRE 201(b); and see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Judicial Notice (w-002-6960)).
- Rely on the website as self-authenticating, if it is:
  - a government website (FRE 902(5));
  - a newspaper or other periodical website (FRE 101(b)(6) and 902(6)); or
  - a website certified as business record by a qualified person (FRE 803(6) and 902(11), (12)).

For more information, see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Self-Authenticating ESI Under FRE 902 (w-002-6960).

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ESTABLISH DYNAMIC WEBSITE INFORMATION

When an exhibit depicting a website is not identical to the current version of the website, counsel must establish that the exhibit accurately depicts the website as it existed at the relevant time. Counsel may rely on:

- Testimony from the individual who created or was in charge of maintaining the website that the exhibit accurately reflects the webpage content at the relevant time (FRE 901(b)(1); *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 2006 WL 1320242 (M.D. Fla. May 12, 2006)).
- Testimony from a witness who:
  - typed in the web address on the exhibit on the relevant date and time;
  - viewed the webpage's contents; and
  - contends that the exhibit fairly and accurately reflects what she saw at that time.

(FRE 901(b)(1); *Buzz Off Insect Shield, LLC v. S.C. Johnson & Son, Inc.*, 606 F. Supp. 2d 571, 594 (M.D.N.C. 2009).)

- Circumstantial evidence that:
  - the exhibit contains distinctive website design, logos, photos, or other images associated with the website or its owner;
  - the contents of the webpage are of a type ordinarily posted on that website or websites of similar people or entities;
  - the owner of the webpage has published some or all of the same contents elsewhere;
  - the contents of the webpage have been republished elsewhere and attributed to the website; or
  - the exhibit displays on its face the website address and a date and time stamp (*Foreword Magazine, Inc. v. OverDrive Inc.*, 2011 WL 5169384, at *8-11 (W.D. Mich. Oct. 31, 2011)).

(FRE 901(b)(4).)

- A printout from the Wayback Machine or similar website archival service that depicts how the website appeared on a particular date. Some courts require that counsel present a witness from the archival service to establish that it employs a process that produces accurate results (FRE 901(b)(9)). However, other courts take judicial notice of these sites (FRE 201(b)). For more information, see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Archival Websites (w-002-6960).

For more information on authentication under FRE 901(b), see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Authenticating ESI Under FRE 901(b) (w-002-6960).

ESTABLISH THE CREATION DATE FOR WEBSITE CONTENT

If counsel must establish the date on which website content first appeared or when content was created, (rather than that the content was present on a site at a certain date or time), counsel may rely on:

- Testimony from a witness with knowledge of when the content (such as a video) was created (FRE 901(b)(1); see *Sublime v. Sublime Remembered*, 2013 WL 3863960 (C.D. Cal. July 22, 2013)).
- Circumstantial evidence related to the date on which the content was uploaded or created (FRE 901(b)(4); see *United States v. Bloomfield*, 591 F. App'x 847, 848-49 (11th Cir. 2014)).

For more information on authentication under FRE 901(b), see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Authenticating ESI Under FRE 901(b) (w-002-6960).

AUTHENTICATE YOUTUBE, VOICEMAIL, AND OTHER AUDIO AND VIDEO RECORDINGS

To authenticate YouTube, voicemail, and other audio and video recordings, counsel may rely on:

- A certification under FRE 803(6) that qualifies the recording as a self-authenticating business record, although many courts are reluctant to accept this method (FRE 902(11), (12); see *Randazza v. Cox*, 2014 WL 1407378, at *4 (D. Nev. April 10, 2014) and *Hassan*, 742 F.3d at 133; see also Authenticate Email and Text Messages).
- A comparison of the recording with other authenticated evidence, such as another recording that:
  - resembles the proffered recording in a relevant manner; and
  - the court has found to be authentic.

(FRE 901(b)(3).)

- Circumstantial evidence (FRE 901(b)(4); see also *Ciolino v. Eastman*, 2016 WL 70449, at *2 (D. Mass. Jan. 6, 2016)).
- Evidence that:
  - the recording has not been altered (see Establish That a Recording is Unaltered); and
  - a particular individual is the speaker heard on the recording (see Establish Speaker Identity).

For more information on authentication under FRE 901(b) and 902, see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Ways to Authenticate ESI (w-002-6960).

ESTABLISH THAT A RECORDING IS UNALTERED

To authenticate audio or video recordings and establish that the recording is unaltered, counsel may rely on:

- Witness testimony from an individual who:
  - overheard or observed the recording being made; and
  - confirms that the recording accurately reflects her observations and recollection.

(FRE 901(b)(1); see *United States v. Castillo-Chavez*, 555 F. App'x 389, 395-96 (5th Cir. 2014) and *Leo v. L.I.R.R. Co.*, 307 F.R.D. 314, 321-22 (S.D.N.Y. 2015).)

- Evidence that the recording's chain of custody is intact (FRE 901(b)(4); see *McLaurin v. New Rochelle Police Officers*, 439 F. App'x 38, 40 (2d Cir. 2011) and *Bruins v. Osborn*, 2016 WL 697109, at *1 (D. Nev. Feb. 19, 2016)).
- The reliability and accuracy of the recording device, which counsel may establish through testimony from the individual who operated the device that:
  - the recording device functioned properly;

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- the individual operating the recording device was competent to do so; and
- the recording device reliably recorded audio content at the relevant time.

(FRE 901(b)(9).)

For more information on authentication under FRE 901(b), see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Authenticating ESI Under FRE 901(b) (w-002-6960).

ESTABLISH SPEAKER IDENTITY

To establish that a particular individual is the speaker in an audio or video recording, counsel may:

- Rely on:
  - a comparison of the recording with other authenticated evidence (FRE 901(b)(3));
  - circumstantial evidence like that often used to authenticate social media postings (FRE 901(b)(4); see Authenticate Social Media Postings); or
  - testimony from a lay or expert witness familiar with the purported speaker's voice who can identify her as the speaker in the recording (FRE 901(b)(5)).
- Invite the judge or jury to compare the recorded voice with the purported speaker's voice, if the judge or jury is familiar with the speaker's voice (FRE 901(b)(5); see *Ricketts v. City of Hartford*, 74 F.3d 1397, 1410 (2d Cir. 1996)).

AUTHENTICATE DATABASES

Litigants often locate and produce relevant database information by running a query to locate relevant database records and then producing a report of the query result. To authenticate the report, counsel must authenticate both:

- The contents of the report by relying on:
  - testimony from a witness with personal knowledge of the content (FRE 901(b)(1)); or
  - a certification sufficient to qualify the content as a self-authenticating business record (FRE 803 and 902(11), (12); see *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 632 (2d Cir. 1994)).
- The query and report process by relying on either:
  - testimony from a witness with knowledge of the database system, such as how information is uploaded to the database or how queries are run to find information residing in the database; or
  - evidence that the company relied on the database in conducting its business, which indicates that the database was sufficiently accurate.

(FRE 901(b)(9); see *U-Haul Intern., Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040 (9th Cir. 2009) and *Friends of Mariposa Creek v. Mariposa Pub. Utilities Dist.*, 2016 WL 1587228, at *11 (E.D. Cal. Apr. 19, 2016).)

For more information on authentication under FRE 901(b) and 902, see Practice Note, E-Discovery: Authenticating Electronically Stored Information: Ways to Authenticate ESI (w-002-6960).

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Fact Pattern A

At some point in 2018, Peter began to experience financial troubles. Peter approached Tim, a college friend, and asked whether he would be willing to lend him "transition" funds while Peter finalized the terms of a personal loan with a Bank. Although Tim had no prior experience with personal loans, he agreed to assist Peter in part because Peter described his needs as "near term" and assured Tim the loan would be repaid as soon as the terms of the Bank loan were finalized.

The two agreed on a loan in the principal amount of $50,000. Peter offered to draft a promissory note outlining the terms of their agreement, although the parties presented conflicting testimony as to who ultimately drafted the Note at issue. The Note, as originally written, provided that Tim agreed to "provid[e] a bridge loan to Peter in the amount of $50,000." The $50,000 principal, plus an additional $5,000 was to be repaid no later than September 4, 2018. If payment was not made by September 4, 2018, a late fee of $2,500 would be assessed. If repayment was not made by October 1, 2018, a daily late fee of $100/day would begin to accrue.

Peter failed to make any payment on the loan. Peter filed for Chapter 11 on January 20, 2020. Debtors' Schedules list an unsecured "personal loan" of $50,000 received from Tim as an undisputed claim.

Tim filed a proof of claim with a total amount of $104,500.00 ("Claim"). In support of the Claim, Tim attached the promissory note signed by Peter and himself, along with an Itemized Statement, which listed each individual amount comprising the Claim. The Itemized Statement indicates the Claim is comprised of the principal amount of the loan ($50,000), the additional $5,000 the parties agreed upon, the $2,500 late fee, and the $100/day late fee that accrued between October 1, 2018 through Debtors' date of filing.

Peter objected to the Claim. He argued that the Claim should be disallowed in its entirety because the agreed upon $100/day late fee "amounts to a usurious interest rate of approximately 55%." Tim responded arguing the Claim should be allowed because the late fee was included at Peter's suggestion and it was drafted by Peter who had a history of business dealings, while Tim a retired pipefitter, did not. Further, Tim contends the Note is not usurious because it does not provide for interest. Instead, Tim argues that the Note had three components: (1) the agreed upon repayment amount of $55,000; (2) a $2,5000 late fee; and (3) the $100/day late fee.

Peter replied that it was Tim, not Peter, who drafted the terms of the Note and that all charges provided for in the Note beyond the principal amount of $50,000 are usurious.

Additional Examples of Authentication through Testimony of a Witness

Additional Examples of Authentication

Authenticating Business Records

Bob: I'm going to hand you a document marked as Exhibit 1, are you familiar with it?

Seamus: I am.

Bob: Can you identify this document?

Seamus: These are our meeting minutes.

Bob: Is it the regular practice of your business to create and maintain documents of this type?

Seamus: Yes.

Bob: Are these documents created routinely by persons with knowledge of the recorded event at or near the time the event occurs?

Seamus: Yes.

Bob: What is the purpose of these documents?

Seamus: They are a record of discussions held and actions taken during our board of director's meetings.

Bob: Does your company rely on this type of document during its day-to-day operations?

Seamus: Yes.

Bob: Where was this document stored after being created by your business?

Seamus: Electronically, in our database.

Bob: Was this document under your custody and control until the time it was retrieved?

Seamus: Yes.

Bob: Your Honor, I move for the admission of Exhibit 1.

Authenticating a Photograph

Bob: I'm handing a photograph marked Ex. 2. Have you seen this photograph before?

Seamus: Yes.

Bob: Are you familiar with the location which this photograph depicts?

Seamus: Yes.

Bob: Have you personally been there?

Seamus: Yes.

Bob: How many times?

Seamus: Three, maybe four times.

Bob: Your Honor, I move for the admission of Exhibit 2.

Prior Inconsistent Statements for Impeachment

Bob: As I understood your testimony on direct examination, you testified that Tim drafted the promissory note?

Peter: Yes.

Bob: And you further testified that you had no input on the terms of the promissory note that Tim drafted, such as the rate of interest?

Peter: Yes.

Bob: Now, you and Tim would exchange text messages, correct?

Peter: Yes.

Bob: Did you receive a text message from Tim on June 26, 2018?

Peter: I don't remember. Maybe.

Bob: I'm going to hand you what I've marked as Exhibit 2. Do you recognize Exhibit 2?

Peter: Yes, it appears to be a screenshot of a text exchange between Tim and myself.

Bob: And what is the date on the text message?

Peter: It says June 26, 2018.

Bob: And is that Tim's phone number?

Peter: I believe so.

Bob: And in this text exchange, didn't you say, and I quote "Sounds great brother. I will draw up a promissory note for you outlining the terms we discussed."

Peter: It appears so.

Authenticating a Signature on a Letter

Bob: I'm handing you a document marked Exhibit 4, have you seen it before?

Seamus: Yes.

Bob: Are you personally familiar with the manner in which Mr. Smith signs his name?

Seamus: I am.

Bob: Have you personally seen Mr. Smith sign letters in the past?

Seamus: Yes.

Bob: Looking at the signature at the bottom of exhibit 4, is that Mr. Smith's signature?

Seamus: It is, yes.

Authenticating the Voice on a Tape Recording

Bob: Do you know Mr. Smith?

Seamus: Yes.

Bob: Have you talked to Mr. Smith in the past?

Seamus: I have.

Bob: How often?

Seamus: Probably about once a week.

Bob: Are you familiar with Mr. Smith's voice?

Seamus: I would say so.

Bob: Have you had an opportunity to listen to the tape recording marked as Exhibit 5 prior to this hearing?

Seamus: Yes, I did.

Bob: Can you identify the voice on this tape recording?

Seamus: It's Mr. Smith.

Past Recollection Refreshed/Recorded

Bob: Do you recall the date Joe Smith completed his loan application in your office?

Seamus: I can't remember exactly, no.

Bob: Was it routine and customary for you to prepare a loan application cover sheet for each loan application you accepted from office visits at the end of each business day before sending the applications to central office?

Seamus: Yes, it is.

Bob: I'm handing you a copy of a loan cover sheet that was provided to me by ABC's counsel, and which I have now provided to opposing counsel. Did you prepare that document?

Seamus: I would have, yes.

Bob: Is that your signature?

Seamus: Yes.

Bob: And was the information on the document accurate at the time it was written?

Seamus: Yes.

Bob: Does the document now refresh your memory as to the correct date?

Seamus: I still can't remember, sorry.

Bob: Your Honor, the witness cannot recall the date independently. May I read the document to the jury?