

# Admissibility of Electronic Evidence: Florida/Federal

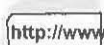
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permission from federal version  
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## Checklist of Potential Authentication Methods



### E-mail

- Witness with personal knowledge. Fla. Stat. § 90.901/Fed. R. Evid. ("FRE") 901(b)(1)
- Expert testimony or comparison with authenticated examples. Fla. Stat. § 92.38/FRE 901(b)(3)
- Distinctive characteristics including circumstantial evidence. Fla. Stat. § 90.901/FRE 901(b)(4)
- Trade inscriptions. Fla. Stat. § 90.902(7)/FRE 902(7)
- Certified copies of business record. Fla. Stat. § 90.902(11)/FRE 902(11)



### Internet Website Postings

- Witness with personal knowledge. Fla. Stat. § 90.901/FRE 901(b)(1)
- Expert testimony or comparison with authenticated examples. Fla. Stat. § 92.38/FRE 901(b)(3)
- Distinctive characteristics including circumstantial evidence. Fla. Stat. § 90.901/FRE 901(b)(4)
- Public records. Fla. Stat. § 90.902(4)/FRE 901(b)(7)
- System or process capable of proving a reliable result. Fla. Stat. § 90.901/FRE 901(b)(9)
- Official publications. Fla. Stat. § 90.902(5)/FRE 902(5)



### Text Messages, Tweets, and the like

- Witness with personal knowledge. Fla. Stat. § 90.901/FRE 901(b)(1)
- Circumstantial evidence of distinctive characteristic. Fla. Stat. § 90.901/FRE 901(b)(4)
- Expert testimony or comparison with authenticated examples. Fla. Stat. § 92.38/FRE 901(b)(3)



### Computed Stored Records and Data

- Witness with personal knowledge. Fla. Stat. § 90.901/FRE 901(b)(1)
- Expert testimony or comparison with authenticated examples. Fla. Stat. § 92.38/FRE 901(b)(3)
- Distinctive characteristics including circumstantial evidence. Fla. Stat. § 90.901/FRE 901(b)(4)
- System or process capable of proving a reliable result. Fla. Stat. § 90.901/FRE 901(b)(9)



### Computer Animations and Computer Simulations

- Witness with personal knowledge. Fla. Stat. § 90.901/FRE 901(b)(1)
- Expert testimony or comparison with authenticated examples. Fla. Stat. § 92.38/FRE 901(b)(3)
- System or process capable of proving a reliable result. Fla. Stat. § 90.901/FRE 901(b)(9)



### Digital Photographs

- Witness with personal knowledge. Fla. Stat. § 90.901/FRE 901(b)(1)
- System or process capable of providing reliable result. Fla. Stat. § 90.901/FRE 901(b)(9)

# 1. Preliminary Rulings on Admissibility

- Before evidence goes to jury, judge must determine whether proponent has offered satisfactory Foundation (Florida: prima facie evidence/FRE: preponderance of evidence) from which jury could reasonably find that the evidence is authentic. Fla. Stat. § 90.105(1)/FRE 104(a)(Federal: Federal rules of evidence, except for privilege, do not apply at the bench hearing)
- When relevance of evidence depends on a disputed antecedent fact being established ("conditional relevance"), judge determines whether there is prima facie evidence to support a finding (Fla.) or a reasonable jury could find that the fact has been proved (FRE), and then submits the question to jury to decide. If jury finds that the antecedent fact has been proved, it considers the evidence. If not, it does not consider it. Example: dispute on authenticity. Fla. Stat. § 90.105(2)/FRE 104(b)

## 2. IS EVIDENCE RELEVANT?

Fla. Stat. § 90.401

Does it tend to prove or disprove a material fact?

**Fla. Stat. § 90.401**

**ADMISSIBLE - Go to Fla. Stat. § 90.402**

**Fla. Stat. § 90.402**

Does any law require exclusion? Yes - Inadmissible  
No - Admissible - Go to Fla. Stat. § 90.403

**Fla. Stat. § 90.403**

Is probative value substantially outweighed by:

- 1) Danger of unfair prejudice?
- 2) Confusion of the issues?
- 3) Misleading the jury?
- 4) Needless presentation of cumulative evidence?

NO

**ADMISSIBLE**

YES

**INADMISSIBLE**

**§ 90.401**

**INADMISSIBLE**

## 3. If relevant, is it authentic? Fla. Stat. §§ 90.901-902/FRE 901-902

- **Fla. Stat. § 90.901/FRE 901(a)** Is the evidence sufficient to support a finding that the matter in question is what proponent claims?

Determining the degree of foundation required to authenticate electronic evidence depends on the quality and completeness of the data input, the complexity of the computer processing, the routines of the computer operation and the ability to test and verify the results.

- **FRE 901(b)**(no similar list in Fla. Stat.)  
Non-exclusive list of examples includes:
  - (1) Testimony of witness with knowledge;
  - (3) Comparison by trier or expert witness;
  - (4) Distinctive characteristics and the like (e-mail address, hash values, "reply" doctrine);
  - (7) Public records or report; and
  - (9) Process or system capable of producing a reliable result.

- **Fla. Stat. § 90.902/FRE 902**  
Methods by which information may be authenticated WITHOUT EXTRINSIC EVIDENCE:

Ways to authenticate e-records:

- 902(1)-(4) Public Records/Documents
- 902(5) Official publications
- 902(6) Newspapers, Magazines, Similar Publications
- 902(7) Trade inscriptions
- 902(11) Certified domestic records of regularly conducted activity (authenticate business records under FRE 803(6)).

#### 4. Is evidence hearsay?

Fla. Stat. § 90.801/FRE 801

1. Is it a statement (written/spoken assertion, non-verbal/non-assertive verbal conduct intended to be assertive)?
2. Is statement made by "Declarant" (person, not generated by machine)?
3. Is statement offered for proving truth of assertion?

NOTE: Statement is not offered for substantive truth if offered to prove:

- a. Communicative/comprehension capacity of declarant;
- b. Effect on the hearer;
- c. Circumstantial evidence of state of mind of declarant;
- d. Verbal acts/parts of acts;
- e. Utterances of independent legal significance.

4. Is statement excluded from definition of hearsay by Fla. Stat. § 90.801(2)(a)-(c)/FRE 801(d)(1) and (2)?

##### Prior witness statements – 90.801(2)/FRE 801(d)(1)

- Prior testimonial statement
- Prior consistent statement to rebut allegations of recent fabrication
- Statement of identification

##### Admission by party opponents – 90.803(18)/FRE 801(d)(2)

- Individual admission
- Adoptive admission
- Admission by person with authority
- Admission by agent/employees
- Co-conspirator statements

(Note: Admissions in Fla. are hearsay exceptions, not exclusions as in FRE)

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

#### HEARSAY EXCEPTION

##### Availability of Declarant Irrelevant – Fla. Stat. § 90.803/FRE 803

- Present Sense Impression 803(1)
- Excited Utterance 803(2)
- State of Mind Exception 803(3)
- Statements for Purposes of Medical Diagnosis or Treatment 803(4)
- Past Recollection Recorded 803(5)
- Business Records 803(6)
- Absence of an entry in records kept in the regular course of business 803(7)
- Public Records or Reports 803(8)
- Records of Vital Statistics 803(9)
- Absence of public record or entry 803(10)
- Records/ Documents affecting interest in property 803(14) & (15)
- Statements in Ancient Documents 803(16)
- Market Reports, Commercial Publications 803(17)
- Character Reputation Testimony 803(21)
- Record of Felony Convictions (Fed only) FRE 803(22)

##### Declarant Unavailable – Fla. Stat. § 90.804/FRE 804

- Unavailability – Fla. Stat. § 804(1)(a)-(e) FRE 804(a) (privilege, refused to testify, lack of memory, death/illness, or beyond subpoena power)
- Unavailability Exceptions – Fla. Stat. § 90.804(2)/FRE 804(b)
  - Former Testimony
  - Dying Declaration
  - Statement Against Interest
  - Statement re family history
  - Statement of deceased or ill declarant similar to one previously admitted (Fla. only)
  - Forfeiture by wrongdoing (Fed only)

Federal Residual "Catchall" Exception-- FRE 807



## 5. Original Writing Rule – Best Evidence Rule

Fla. Stat. § 90.951-.958; FRE 1001 – 1008

- Is the evidence “original”, “duplicate”, “writing”, “recording”, “photograph”  
Fla. Stat. § 90.951/FRE 1001
- The original writing is required to be produced except as otherwise permitted by statute. (Fla.) or rule (Fed.). Fla. Stat. § 90.952- 90.957/FRE 1002, 1004, 1005, 1006, 1007
- Duplicates are co-extensively admissible as originals unless there is a genuine issue of authenticity of the original or circumstances indicate that it would be unfair to admit duplicate in lieu of original. Fla. Stat. § 90.953(2)-(3)/FRE 1003
- Permits proof of the contents of writing, recording or paragraph by use of “secondary evidence” – any proof of the contents of a writing, recording or photograph other than the original or duplicate. (Fla. Stat. § 90.954/FRE 1004) if:
  - i. Non-bad faith loss/destruction of original/ duplicate
  - ii. Inability to subpoena original/duplicate
  - iii. Original/duplicate in possession, custody, control of opposing party
- iv. “Collateral record” (i.e., not closely related to controlling issue in case)
- Admission of summary of voluminous books, records, photos, or documents. Fla. Stat. § 90.956/FRE 1006
- Testimony or deposition of party against whom offered or by that party’s written admission. Fla. Stat. § 90.957/FRE 1007
- If admissibility depends on the fulfillment of a condition or fact, question of whether condition has been fulfilled is ordinarily for court to determine under Fla. Stat. § 90.105(1)/FRE 104(a). Fla. Stat. § 90.958(1)/FRE 1008
- But, the issue is for the trier of fact, if it is a question:
  - (a) whether they asserted writing ever existed;
  - (b) whether another writing, recording or photograph produced at trial is the original; or
  - (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact.Fla. Stat. § 90.958(2)(a)-(c)/FRE 1008

## 6. Practice Tips

- 1 Be prepared. Consider admissibility foundation when planning discovery.
  - 2 Consider requesting a breadth and form of ESI that will contain authenticating metadata and information.
  - 3 Memorialize each step of the collection and production process to bolster reliability and maintain chain of custody.
  - 4 Use every opportunity during discovery to authenticate potential evidence by admission or testimony.
  - 5 Be prepared to provide the court with enough information to understand the technology issues as they relate to the reliability of the evidence at hand.
  - 6 Be creative and consider whether there are case management tools that might assist the court and the other parties in addressing evidentiary problems concerning some of the more complex issues (such as “dynamic” data in a database or what is a “true and accurate copy” of ESI).
  - 7 Keep your audience in mind... will this be an issue for the judge or the jury? (e.g., Fla. Stat. § 90.105(1) or (2)/FRE 104(a) or (b)).
- Examples:**
- a) Documents produced by opposing party are presumed to be authentic – burden shifts
  - b) Fla. and Fed.R.Civ.P. Requests for Admissions
  - c) Request stipulation of authenticity from opposing counsel