

21. EXHIBITS AND DEMONSTRATIONS

1. Exhibits come in five types, which may be called different things in different jurisdictions:
 - a) Real evidence -- the actual items involved in the crime or event, e.g., guns, drugs and money.
 - b) Illustrative evidence -- diagrams, scale models, and mannequins
 - c) Writings -- a contract, birth certificate, or gun registration form.
 - d) Recordings -- a recorded confession or a video surveillance tape.
 - e) Pedagogical exhibits -- charts and lists designed to help the jury organize complicated evidence, e.g., time lines, bullet point lists, sequence of steps taken by doctor to diagnose ailment.

2. Exhibits are subject to the regular rules of evidence. They must be relevant, not unduly prejudicial, not confusing or misleading, and not contain evidence that is privileged, would violate the opinion rule, or constitutes inadmissible hearsay.

3. AUTHENTICATION REQUIREMENT. Every exhibit must be authenticated. That just means someone must explain to the jury what it is and where it came from. Authentication usually consists of testimony by a witness with personal knowledge that the exhibit is what it appears to be. This is not complicated.

a) Most exhibits are authenticated by a witness with personal knowledge under Rule 901(b)(1):

- Real evidence: Call a witness who testifies he saw the defendant with the gun at the scene, that they recognize the gun, and it is the one they saw.
- Illustrative: Call a witness who testifies she was present and saw the defendant throw a gun into the river, and that a model gun (or a photo of a gun) is a fair and accurate depiction of the original gun. It does not have to be 100% accurate, as long as differences are explained and not misleading.
- Writing: Call a police officer who testifies he prepared the report about the event, and this document is that report.
- Recording: Call the dispatcher who testifies she was on duty and took the 9-1-1 call reporting the shooting and the recording is of that call.
- Pedagogical: Call the pathologist who testifies he performed that autopsy, calculated the angle of the bullets, and prepared a diagram to help him explain why a bullet in the leg caused death

b) A slightly more complicated way to authenticate an exhibit is by circumstantial evidence, usually by identifying unique characteristics under Rule 901(b)(4). This method is used most often for real evidence through something called a chain of custody:

1) Patrol Officer testifies "I arrested the defendant and took a gun from his waistband and gave it to Detective."

2) Then Detective testifies, "I got a gun from Patrol Officer and put it in an evidence bag, marked it with the case file number, 012345, and sent it to Ballistics Tech."

3) Then Ballistics Tech testifies, "I received a bag with a gun from Detective marked 012345, tested it for prints, returned it to the bag and gave it back to Detective."

4) Then Detective testifies, "I got the bag numbered 012345 back from Ballistics Tech, locked it up and brought it to court today."

c) Writings can be authenticated circumstantially by handwriting comparison under Rules 901(b)(2)-(3), or by circumstantial evidence because a writing is part of an ongoing conversation and refers to matters only a particular person would know about. This is sometimes known as the "reply letter" doctrine, where a witness sends a letter (or a text) to someone and gets a reply.

d) Recordings can also be authenticated circumstantially because a witness can identify the time, place and participants because of their unique characteristics under Rule 901(b)(4). If no witness is available, a foundation can be laid under Rule 901(b)(9), usually by a security company that describes how the surveillance equipment is set up, operated, and tested so that it makes accurate recordings that are correctly time-stamped. This kind of surveillance recording is sometimes called a "silent witness" because no speaking witness is available to identify the time, place and actors in the recording.

e) Many documents -- and almost all official documents -- are self-authenticating under Rule 902. That means no witness needs to testify.

4. CONDITION. Exhibits subject to alteration and tampering -- real evidence, samples that were scientifically tested, computer records and recordings -- must also be shown to still be in their original condition, free from any alteration or tampering that could affect their probative value. This, too, may be established by direct or circumstantial evidence. E.g.,

a) DIRECT: "I prepared this report myself, and this is exactly the same as when I wrote it, with no changes or alterations."

b) CIRCUMSTANTIAL: A chain of custody, just like the above, except each witness also testifies that he or she did not alter its condition.

5. ADDITIONAL RULES ABOUT WRITINGS

a) You need a hearsay exception.

b) Records created, stored, or printed out from a computer are treated like any other written record. A print-out from a computer may be authenticated by circumstantial evidence, direct evidence, or testimony about business custom. Documents created by computer programs may contain discrepancies between earlier and later versions caused by auto-correct or auto-date features and may be customized for trial as long as these discrepancies are explained, they do not undermine authentication. For example, a print-out made from a school data base of student information that shows only the information for one person is okay as long as the process is explained.

c) Rules 1001 through 1008 call themselves the “original document rule,” but don’t actually require you to produce the original unless it is a contract, deed or will because Rule 1004 says the rule does not apply unless a document is a “central or controlling issue” in the case. Even when a document might be a central issue, Rule 1003 says that duplicates and copies are admissible unless there is a genuine dispute concerning authenticity, and Rule 1001(d) says that any print-out from a data base is an original.

d) The “rule of completeness” provides that when one part of a writing or series of related documents is introduced, the opponent may request that other related parts of the document or series to be introduced simultaneously to avoid giving the jury a misleading impression. Rule 106.