

District of Massachusetts
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Evidence Problems –“How do I get this in?”

Authentication and Hearsay Evidence Problems

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Applicable FED. R. EVID. provisions:

FED. R. EVID. 401:

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

FED. R. EVID. 403:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

FED. R. EVID. 801:

The following definitions apply under this article:

(a) Statement. “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. “Declarant” means the person who made the statement.

(c) Hearsay. “Hearsay” means 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.

(d) *Statements That Are Not Hearsay.* A statement that meets the following conditions is not hearsay:

* * *

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

* * *

FED. R. EVID. 803:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

* * *

(5) *Recorded Recollection.* A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge * * *.

FED. R. EVID. 807:

(a) *In General.* Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) it is offered as evidence of a material fact;
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
- (4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

FED. R. EVID. 901:

(a) In General. 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.

(b) Examples. The following are examples only — not a complete list — of evidence that satisfies the requirement:

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

* * *

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

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(9) *Evidence About a Process or System*. Evidence describing a process or system and showing that it produces an accurate result.

Problem 1. (based on *Rodriguez v. State*, 273 P.2d 845 (Nev. 2012):

(a) Rodriguez and co-defendant Sanders are charged with sexual assault. The victim's cell phone was recovered from Sanders' cousin, who testifies that he got it from Sanders. Twelve text messages were sent to the victim's boyfriend from the phone within hours of the assault, saying things like "your girl is going to suffocate, idiot" and describing the assault in graphic detail. Pictures of Rodriguez, definitely taken after the phone was stolen, are on the cell

phone. Are the twelve text messages admissible against Rodriguez as evidence that he participated in the assault?

(b) Now add the following: There is (authenticated) surveillance video of Sanders and Rodriguez together on a bus, with Sanders operating the cell phone while Rodriguez watched. Two of the twelve messages can be traced to the time period on the bus. Does that make a difference with those two? With the other ten?

Problem 2. (based on *State v. Petersen*, 834 N.W.2d 872 (Iowa 2013):

(a) Thomas Petersen is charged with first-degree murder of his wife, Judy. The government tries to introduce two text messages from Judy to her sister. The first says, "He was making threats toward himself and me." Sister answers, "Threats . . . such as? In general? Specific?" Judy answers, "He said he had to make a decision when he got arrested kill two sheriffs or play it cool then planned on attending a funeral in two weeks and it wasn't his." Assume proper authentication of the messages. Are they admissible as evidence of premeditation?

(b) Does it matter that the first message, in full, read: "I talked to our parents about what happened this weekend. He was making threats toward himself and me. Anyay Yall stay safe and we r so excited about seeing yall in May. I made car reservations yesterday. The kids talk about it on a daily basis." What if it instead read, "MADE THREATS!!" and the second message said, "Said planned on attending funeral in two weeks AND IT WASN'T HIS!!"

Problem 3. (based on *United States v. Blackett*, 481 Fed. Appx 741 (3d Cir. 2012):

Charge of offering a bribe to a juror. Smith, the juror in question, is on the stand. The prosecution wants a text message from the juror read into the record that says: "You see why I tell you I ain't want to be no damn juror. Some dude just come by my house and tell me he going pay me money to say not guilty." Smith says that she remembers typing a text message to her sister while she was a juror but can't recall exactly what she wrote in the message. She looks at a transcript of the quoted message and says that it was "fairly accurate what she texted." Admissible?