EVIDENTIARY FOUNDATIONS

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PERSUASIVENESS

- Has the power to convince
- Helpful to the trier of fact
- Not distracting
- Is not objectionable and/or has been admitted by pretrial motion
- Could convince opposing party to stipulate

RELEVANCE

Evidence must be:

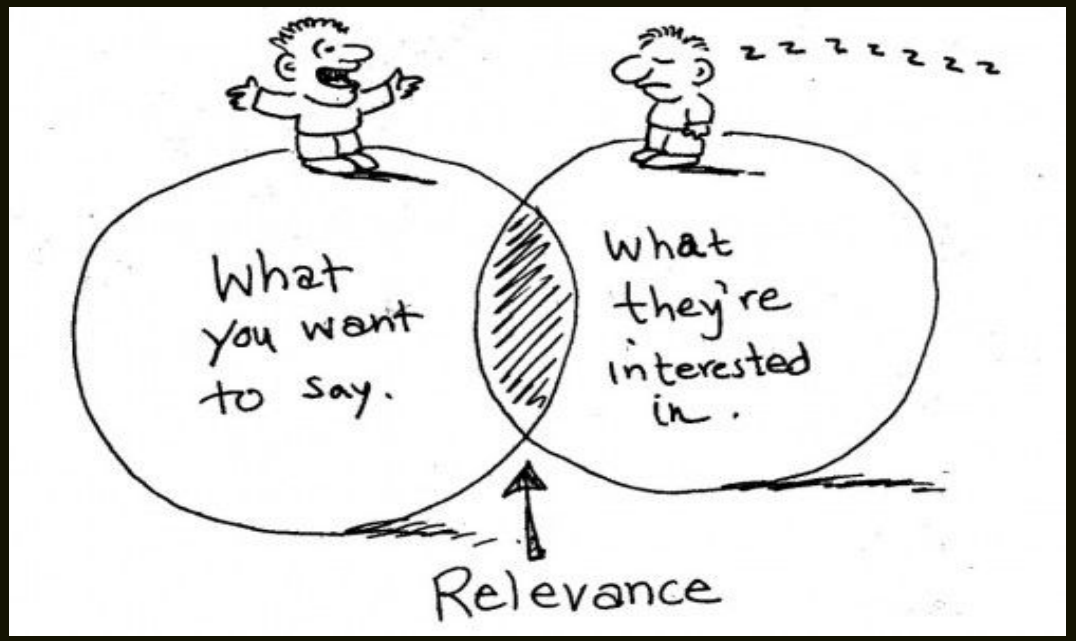
- Relevant –

ELEMENT OF CLAIM OR CREDIBILITY

&

- Authentic –

TRUE AND ACCURATE



Definition of Relevant Evidence (FRE 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."

"Irrelevant evidence is not admissible." (FRE 402)

Rule Excluding Relevant Evidence (FRE 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.”



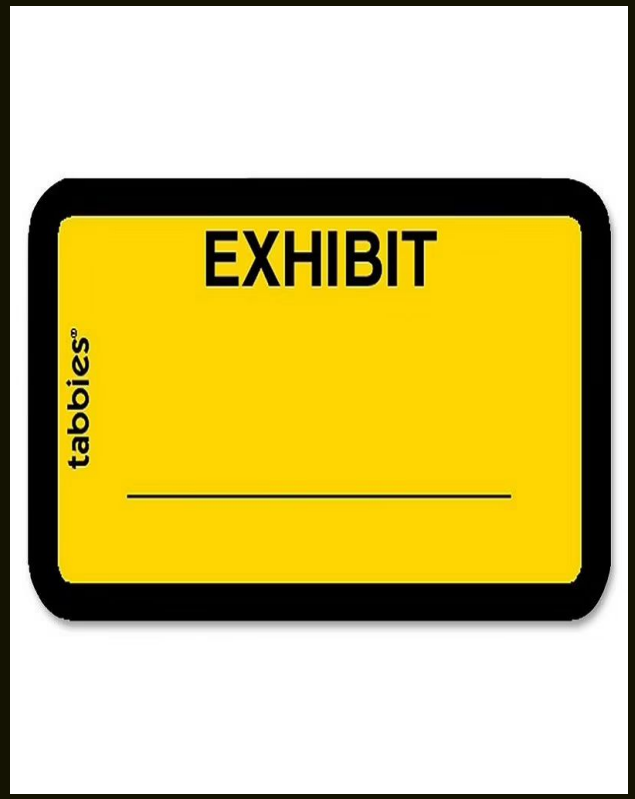
Authenticating or Identifying Evidence (FRE Rule 901)

FRE Rule 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.”

Types of Evidence

- Real Evidence
- Illustrative Evidence
- Demonstrative Evidence
- Documentary Evidence



REAL EVIDENCE

A tangible object with a direct connection to the crime or incident:



- Clothing
- Weapons

- Sometimes called “*physical evidence*”

ILLUSTRATIVE EVIDENCE

Evidence that represents or illustrates the real thing:

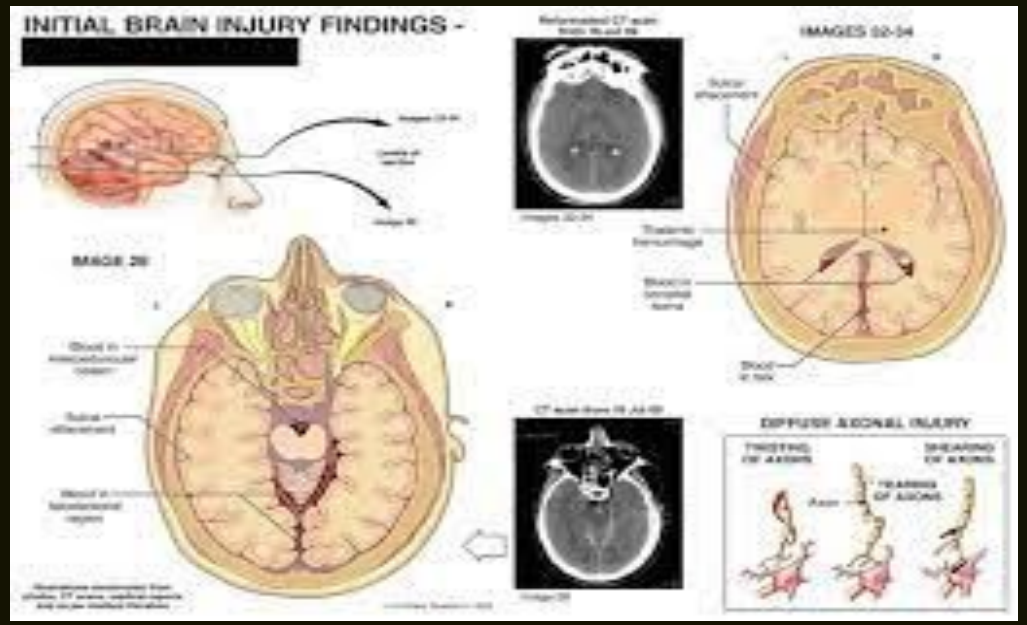
- Photographs
- Videos
- Scale models
- X-rays



DEMONSTRATIVE EVIDENCE

Evidence that carries no independent probative value, and requires the testimony of a witness to give it value:

- Diagrams
- Maps
- Graphs
- Charts



DOCUMENTARY EVIDENCE

Documentary evidence is used to prove a fact that is included in the information the evidence offers.

- Writings on paper:



o Contract

o Will

o Business, hospital, police, and school records

o Emails

PRE-TRIAL PREPARATION AND CONSIDERATIONS

- Identify the factual and legal issues in your case
- Identify what evidence you have and what evidence you need
- Formal discovery
- Think about how you will use the exhibit and list the foundational elements
- Disclosing/providing copies to opposing side
- Marking exhibits for court (based on local rule/practice)
- Develop a system to manage your exhibits

OVERVIEW OF FOUNDATIONAL STEPS

STEP ONE

- Produce the evidence/mark the exhibit for identification.
- Show the exhibit to opposing party or opposing counsel.

STEP TWO

- Ask for permission to approach witness, and show exhibit to witness.

FOUNDATIONAL STEPS CONT'D

STEP THREE

- Lay the foundation for the exhibit.

STEP FOUR

- Move for the admission of the exhibit into evidence.

STEP FIVE

- Have the witness use or describe the exhibit.

STEP ONE

“This [exhibit] has been pre-marked as Defendant’s Exhibit A for identification.”

OR

“Please mark this Defendant’s Exhibit A for identification.”

THEN

“Your Honor, I am handing Defendant’s Exhibit A to opposing counsel.”



STEP TWO

“Your Honor, may I approach the witness?”

“[Witness Name], I’m handing you Defendant’s Exhibit A for identification.”

STEP THREE

“Do you recognize what I have handed to you?”

“What is it?”

“How do you recognize it?”

“Is this the [object] you saw on [the date of the incident]?”

STEP FOUR

“Your Honor, we offer Defendant’s Exhibit A into evidence.”

STEP FIVE *USE* the Exhibit:

“Do the words in Defendant’s Exhibit A have any particular meaning to you?”

“Please show the jury where you were standing when you observed____”.

REAL EVIDENCE AUTHENTICITY

Witness should be able to testify that they:

1) Recognize the exhibit, can identify the exhibit

2) The exhibit is what the witness claims it to be

3) Knew what the exhibit looked like on the day in question

4) Makes a consequential fact more/less probable

5) Is certain the exhibit is in the same or substantially the same condition as the day in question. (Chain of custody)



CHAIN OF CUSTODY

WHO, WHERE, AND HOW

- Who: who handled/cared for/had possession over the exhibit
- Where: location of the exhibit
- How: how was this exhibit handled/cared for From the time of its recovery to the time of trial.

ILLUSTRATIVE EVIDENCE AUTHENTICITY

Witness should be able to testify that they are:

- Familiar with the scene portrayed in the illustrative aid (photograph, video, etc.);
- Familiar with the scene at the relevant date (and time, if necessary); and
- Certain that the picture “fairly and accurately” represents the scene as it appeared on the relevant date.

DEMONSTRATIVE EVIDENCE AUTHENTICITY

Witness should be able to testify that:

- They are familiar with the information depicted in the demonstrative aid, and how they are familiar with it.
- The piece of evidence is a fair, true, and accurate depiction.
- The exhibit would aid the trier of fact

DOCUMENTARY EVIDENCE AUTHENTICITY

Witness should be able to testify that:

- They are familiar with the document exhibit, and how they are familiar with it.
- They previously observed the exhibit at or near the relevant time.
- Know whether the document is an original or a copy.
- The exhibit is in the same condition, or substantially the same condition, as it was at the relevant time.

ONCE ADMITTED . . .

Advance your theory of the case:

- “Too much is too much.”
- Only elicit testimony that strengthens your case.
- Use your exhibits in cross examination.
- Remember that either party can use an admitted exhibit.

OBJECTIONS TO EXHIBITS

- Irrelevant (FRE 401, 402) or Immaterial (Evidence which does not make some issue more or less likely to be true or false.)
- Unfair prejudice; confusing; cumulative; waste of time (FRE 403)
- Lack of foundation • Lack of authentication (FRE 901, 902)
- Exhibit is a copy. “[A] genuine question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate.” (FRE 1003)
- The exhibit had not been disclosed earlier.
- Hearsay
- Best evidence

RESPONSES TO OBJECTIONS

Irrelevant or Immaterial:

"The exhibit is relevant because it tends to show…" OR "The exhibit makes it more or less probable that…"

Lack of foundation

"A proper foundation has been laid because…" OR "I will lay a foundation."

Hearsay

"This is not hearsay…" (FRE 801(c)) OR "This is non hearsay…" (FRE 801(d))

OR "It may be hearsay, but there is an exception…" (FRE 803)

Best evidence

- See FRE 1004, exceptions to the Best Evidence Rule: Originals are lost or destroyed; an original cannot be obtained by any available judicial process; opposing party has the original, etc.

KEY TAKEAWAYS

- Consider the admissibility of your evidence while developing the theory of your case.
- Prepare foundation questions ahead of time.
- Anticipate in advance the opposing side's objections and prepare your responses before entering the courtroom.
- Be prepared!

