

“It’s really important” is not found in the Evidence Code **[Determining the Admissibility of Evidence]**

1. ELECTRONIC EVIDENCE
 - a. Pervasiveness of electronic evidence in court
 - b. Fundamental concern with electronic evidence is the potential for manipulation
2. ELECTRONIC EVIDENCE – WRITINGS
 - a. EC§ 250
 - i. “Writing” means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.”
 - b. Law Revision Commission Comment EC§ 250:
 - i. “Writing’ is defined very broadly to include all forms of tangible expression, including pictures and sound recordings.”
 - c. RASH/RASPE Methods
 - i. R-A-S-H METHOD FOR WRITINGS
 1. Relevance
 2. Authentication
 3. Secondary Evidence
 4. Hearsay
 - ii. R-A-S-P-E?
 1. Relevant Evidence
 2. Authentication
 3. Secondary Evidence
 4. Privileges
 5. Hearsay Rule Exceptions
3. ELECTRONIC EVIDENCE & RELEVANCE
 - a. EC§ 210
 - i. “Having any tendency in reason to prove or disprove any disputed fact that is of consequence”
 - b. Questions to Determine Relevancy (*From Judge Jackson Lucky’s Electronic Evidence Presentation*)
 - i. What is the evidence?
 - ii. What is it offered to prove?
 - iii. Does it do so?
 - iv. How does it do so?
 - c. EC§§ 350/351/352
 - d. Authentication and Relevance are interrelated
 - i. “Authentication is essentially a subset of relevance. [...] “As with other writings, the proof that is necessary to authenticate a photograph or video recording varies with the nature of the evidence that the photograph or video recording is being offered to prove and with the degree of possibility of error. [...] The first step is to determine the purpose for which the evidence is being

offered. The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case.” (People v. Goldsmith (2014) 59 Cal.4th 258, 267.)

4. ELECTRONIC EVIDENCE & AUTHENTICATION

a. Authentication Generally

- i. “The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered. Essentially, what is necessary is a prima facie case. "As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility." (People v. Goldsmith (2014) 59 Cal.4th 258, 267.)

b. Threshold Burden for Authentication

- i. “The proponent's threshold authentication burden for admissibility is not to establish validity or negate falsity in a categorical fashion, but rather to make a showing on which the trier of fact reasonably could conclude the proffered writing is authentic.” (People v. Valdez (2011) 201 Cal.App.4th 1429, 1435.)

c. Means of Authentication

i. Sources of Authentication through Extrinsic Evidence

1. EC§ 1413 – Witness to the execution of a writing
2. EC§ 1414 – Adverse Party Admission or Reliance
3. EC§ 1415 – Handwriting Evidence
4. EC§ 1416 – Person Familiar with Handwriting
5. EC§ 1418 – Handwriting Expert Witness
6. EC§ 1420 – Evidence of Reply
7. EC§ 1421 – Authentication by Content

- a. “A writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing.”

ii. Sources of Authentication through Self-Authentication

1. EC§ 1530 – Copy of Writing in Official Custody
2. EC§ 1531 – Certified Copy
3. EC§ 1532 – Official Record of Recorded Writing
4. EC§ 1552 – Printed Representation of CGI
5. EC§ 1553 – Printed Representation of Video or Digital Images
6. EC§ 1560-1567 – Business Records

iii. Other Means of Authentication

1. EC§ 450-460 – Judicial Notice
2. CCP§§ 2033.10-2033.080 – Requests for Admission

iv. Broad Means of Authentication

- v. EC §1410: "Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved."

1. "There is no strict requirement as to how a party authenticates a writing. [Citation.] For example, a writing can be authenticated by circumstantial evidence and by its contents." [Citation.]” Ramos v. Westlake Services LLC (2015) 242 Cal. App. 4th 674. 684

- vi. EC §1411
 - 1. “Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing”
- d. Sources of Authentication
 - i. EC §1410
 - ii. EC §450-460
- e. *People v. Goldsmith* (2014) 59 Cal.4th 258
 - i. Substantive v. Demonstrative Evidence
 - 1. “The ATES evidence was offered as substantive proof of defendant’s violation, not as demonstrative evidence supporting the testimony of a percipient witness to her alleged violation. We have long approved the substantive use of photographs as essentially a “silent witness” to the content of the photographs. (*People v. Bowley* (1963) 59 Cal.2d 855, 860 [31 Cal.Rptr. 471, 382 P.2d 591].) As we stated in *Bowley*, “[t]o hold otherwise would illogically limit the use of a device whose memory is without question more accurate and reliable than that of a human witness.” (*People v. Goldsmith* (2014) 59 Cal.4th 258, 267.)
 - ii. EC§ 1552/1553
 - 1. “Because sections 1552 and 1553 provide a presumption for both “the existence and content” of computer information and digital images that the printed versions purport to represent (§§ 1552, subd. (a), 1553, subd. (a)), the presumptions operate to establish, at least preliminarily, that errors in content have not been introduced in the course of printing the images and accompanying data. As the court in *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1450 [121 Cal.Rptr.2d 627] (*Hawkins*) explained, the presumptions essentially operate to establish that “a computer’s print function has worked properly.” (*People v. Goldsmith* (2014) 59 Cal.4th 258, 269.)
- f. Altered Writings
 - i. EC§ 1402
 - ii. Law Revision Committee Comment to EC§ 1400
 - iii. *People v Chism* (2014) 58 Cal.4th 1266
 - 1. Prosecution authenticated photographs introduced at trial despite omissions of portions of the original images.
- g. Forged Writings
 - i. *People v Flinner* (2020) 476 P.3d 824
 - 1. Prosecution authenticated documents purported to be forgeries created by Defendant to frame others for murder while making Defendant appear innocent.
- h. *People v Beckley* (2010) 185 Cal.App.4th 509
 - i. Beckley appears to be an archaic view of the reliability of electronic evidence
 - 1. Required evidence of authorship and/or expert testimony regarding lack of manipulation of electronic writing
 - ii. Distinguished (*People v Valdez*) or not endorsed (*In re K.B.*) by subsequent case law
 - 1. “Here, in contrast, evidence of the password requirement for posting and deleting content distinguishes Beckley, as does the pervasive consistency of the content of the page, filled with personal

photographs, communications, and other details tending together to identify and show owner-management of a page devoted to gang-related interests.” (People v. Valdez (2011) 201 Cal.App.4th 1429, 1436.)

2. “To the extent Beckley's language can be read as requiring a conventional evidentiary foundation to show the authenticity of photographic images appearing online, i.e., testimony of the person who actually created and uploaded the image, or testimony from an expert witness that the image has not been altered, we cannot endorse it.(In re K.B. (2015) 238 Cal.App.4th 989, 997.)
- i. People v. Valdez (2011) 201 Cal.App.4th 1429
 - i. Authentication of MySpace page by circumstantial evidence
 - ii. “The contents of a document may authenticate it. (§ 1421.) Valdez does not dispute he is the person depicted in the gang signal photograph.”
 - iii. “Rather, the writings on the page and the photograph corroborated each other by showing a pervading interest in gang matters, rather than an anomalous gesture. Importantly, this consistent, mutually reinforcing content on the page helped authenticate the photograph and writings, with no evidence of incongruous elements to suggest planted or false material. Other key factors include that the evidence strongly suggested the page was Valdez's personal site, as discussed above, and that the page was password protected for posting and deleting content, which tended to suggest Valdez, as the owner of the page, controlled the posted material.”
 - iv. Contrast to People v Beckley (2010) 185 Cal.App.4th 509
 - j. In re K.B. (2015) 238 Cal.App.4th 989
 - i. Authentication of Instagram photographs by circumstantial evidence; any competent witness with sufficient familiarity with the social media account creation process could provide the court with adequate foundation to authenticate the social media.”
 - ii. “In making the initial authenticity determination, the court need only conclude that a prima facie showing has been made that the photograph is an accurate representation of what it purports to depict. The ultimate determination of the authenticity of the evidence is for the trier of fact, who must consider any rebuttal evidence and balance it against the authenticating evidence in order to arrive at a final determination on whether the photograph, in fact, is authentic. As our Supreme Court explained in Goldsmith, “[t]he fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.’ [Citation.]” (Goldsmith, supra, 59 Cal.4th at p. 267.)”
 - k. Kinda v. Carpenter (2016) 247 Cal.App.4th 1268
 - i. Authentication of Yelp posts by circumstantial evidence; only a prima facie showing of facts sufficient for a finding is necessary for authentication without considering any dubious or conflicting inferences.
 - ii. “The Evidence Code defines an inference as "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600, subd. (b).) An inference is "not evidence but rather the result of reasoning from evidence....

“It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists.” [Citation.]”

- iii. “The trial court's scrutiny of whether the AT&T record indicated defendant on the account to which the IP address was assigned is perplexing because, on its face, the AT&T record contains enough information for a jury to reasonably infer defendant was the account holder, and defendant's counsel had already conceded the AT&T record linked the third Yelp post to defendant's office router or network. [...] In light of these foundational facts, the inference that the billing address and physical location were the same is equally if not more plausible than the inference that they were different. Although not binding on the trier of fact, the rationale for granting the discovery motion earlier in the case, based on the court's "reasonable interpretation" of the circumstantial evidence, provides an example of how the issue could be, and in fact was, resolved in plaintiffs' favor. There is no indication that the trial court found the AT&T record was not authentic or did not respond to the subpoena. The record was, therefore, admissible, and any dubious or conflicting inferences to be drawn would "go to the document's weight as evidence, not its admissibility.”

5. ELECTRONIC EVIDENCE & SECONDARY EVIDENCE RULE

a. EC§ 1401

- i. A writing must be authenticated before the writing or secondary evidence of its content is admitted

1. “Secondary evidence rule does not excuse compliance with authentication requirement.” (People v. Goldsmith (2014) 59 Cal.4th 258, 271.)

b. Secondary Evidence

- i. No best evidence rule

c. Content of a writing may be proved by:

- i. Original (EC 1520, EC 255)
- ii. Secondary evidence (EC 1521(a))
- iii. Testimony [Generally Inadmissible Unless Exception Applies!] (EC 1521(b), EC 1523)
 1. Limited Circumstances provided in EC 1523
 - a. Original or not copy unavailable and original destroyed or lost without fraudulent intent
 - b. Original or copy not reasonably procurable
 - c. Writing consists of numerous accounts
 2. Meeks v. Autozone, Inc. (2018) 24 Cal.App.5th 855, 863-866.
 - a. Testimony about contents of unavailable text messages may be admissible

d. Original

- i. The writing itself
- ii. Photographic negative or print
- iii. Any accurate printout of computer data

e. Secondary Evidence

- i. Not defined by statute
- ii. Proof of document's content that is not oral
 1. Duplicates

2. Handwritten transcriptions

6. ELECTRONIC EVIDENCE & HEARSAY

- a. *People v. Lugashi* (1988) 205 Cal.App.3d 632, 640.
 - i. *People v. Lugashi* “addressed the foundational evidence required for the business records exception to the hearsay rule in section 1271, for the admission of computer-generated credit card records. Defendant argued that “only a computer expert, who could personally perform the programming, inspect and maintain the software and hardware, and compare competing products, could supply the required testimony. However, a person who generally understands the system's operation and possesses sufficient knowledge and skill to properly use the system and explain the resultant data, even if unable to perform every task from initial design and programming to final printout, is a “qualified witness” for authentication purposes.” (As cited in *People v. Rodriguez* (2016) 16 Cal.App.5th 355.)
- b. *People v. Hawkins* (2002) 98 Cal.App.4th 1428
 - i. Computer-generated information is not hearsay because “[t]he Evidence Code does not contemplate that a machine can make a statement.”
 - ii. “[T]he evidentiary issues concerning this machine-generated evidence are foundational, and that the test of admissibility is whether the machine was operating properly at the time of the reading, and that the mechanical recordings of information are subject to impeachment through evidence of machine imperfections or by cross-examination of the expert who explained or interpreted the information in the device.” (As cited in *People v. Nazary* (2010) 191 Cal.App.4th 727.)
- c. *People v. Dawkins* (2014) 230 Cal.App.4th 991
 - i. “It is settled computer systems that automatically record data in real time, especially on government-maintained computers, are presumed to be accurate. Thus, a witness with the general knowledge of an automated system may testify to his or her use of the system and that he or she has downloaded the computer information to produce the recording. No elaborate showing of the accuracy of the recorded data is required. Courts in California have not required “testimony regarding the “acceptability, accuracy, maintenance, and reliability of ... computer hardware and software” in similar situations. [...] The rationale is that while mistakes may occur, such matters may be developed on cross-examination and should not affect the admissibility of the printout or recording of the data itself.”

7. JUDICIAL NOTICE - GENERAL

- a. Matters so undisputably true that no evidence is needed to establish their truth. The acknowledgement by the court of a generally accepted or undisputed fact or the existence of a document.
 - i. Conclusively establishes a fact without formal proof.
 - ii. If the matter can be “reasonably questioned,” the matter should not be judicially noticed.
 - iii. Generally, documents judicially noticed are relevant for the existence of the document itself, not the truth of the matter asserted.
- b. EC§ 451: “Judicial notice of the matters specified in Section 451 is mandatory, whether or not the court is requested to notice them.”

- c. EC§ 452: “Section 452 includes matters both of law and of fact. The court may take judicial notice of these matters, even when not requested to do so; it is required to notice them if a party requests it and satisfies the requirements of Section 453.
 - (a) decision, constitutional, and statutory law of any State of the US
 - (b) regulations and legislative enactments issued under authority of US or public entity
 - (c) official acts of US and any state within US
 - (d) Records of any court of this state or any other US federal or state court
 - (e) Rules of court of
 - (f) the law of an organization of nations
 - (g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute
 - (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.
 - d. "Universally known" facts. Subdivision (f) requires the court to take judicial notice of indisputable facts and propositions universally known. "Universally known" does not mean that every man on the street has knowledge of such facts. A fact known among persons of reasonable and average intelligence and knowledge will satisfy the "universally known" requirement. Cf. *People v. Tossetti*, 107 Cal. App.7, 12, 289 Pac. 881, 883 (1930).”
 - e. EC§§ 453-458: Procedures for Requesting Judicial Notice
8. JUDICIAL NOTICE – CLASSIFIED ADS
- a. *LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1338-1339
 - i. “Catherine complains the Los Angeles Times help wanted ads were inadmissible hearsay (Evid. Code, § 1200) and should not have been relied upon by the trial court to establish that she could secure a teaching position. However, the court properly ruled the ads were admissible for the nonhearsay purpose of showing that offers to bargain existed. (*Lonergan v. Scolnick* (1954) 129 Cal. App.2d 179, 183 [276 P.2d 8].)”
 - ii. *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 194.
 - 1. Unless there is some hearsay exception, court may not judicially notice the contents of web sites and blogs, as “[t]he truth of the content of the articles is not a proper matter for judicial notice”
9. EXCLUSION OF EVIDENCE v MINIMUM EVIDENTIARY WEIGHT
- a. *Swan v Hatchett* (2023) 92 Cal.App. 5th 1206, 1216.
 - i. ““First, the trial court's rejection of all of Swan's testimony and evidence cannot be squared with its statement that Swan had gross income in 2018 of about \$2.38 million. Nor can it be squared with the court's statement that Swan's income had increased rather than decreased so that it would be unjust to recalculate support using Swan's income established in the prior order and Hatchett's new income. As the trial court acknowledged, finding Swan's evidence and testimony not credible had the effect “`of removing that testimony from the evidentiary mix.” (*Moran v. Foster Wheeler Energy Corp.* (2016) 246 Cal.App.4th 500, 518.) Because neither Hatchett nor the department submitted evidence of Swan's income, if the court had entirely ignored Swan's evidence, it would have had no basis from which to conclude

Swan had a specific amount of gross income or that his income had increased.”

10. FAMILY CODE SECTION 217 HEARINGS

a. Family Code §217

- i. (a) At a hearing on any order to show cause or notice of motion brought pursuant to this code, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), the court shall receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties.
- ii. (b) In appropriate cases, a court may make a finding of good cause to refuse to receive live testimony and shall state its reasons for the finding on the record or in writing. The Judicial Council shall, by January 1, 2012, adopt a statewide rule of court regarding the factors a court shall consider in making a finding of good cause.
- iii. (c) A party seeking to present live testimony from witnesses other than the parties shall, prior to the hearing, file and serve a witness list with a brief description of the anticipated testimony. If the witness list is not served prior to the hearing, the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing.

b. CRC 5.113

(a) Purpose Under Family Code section 217, at a hearing on any request for order brought under the Family Code, absent a stipulation of the parties or a finding of good cause under (b), the court must receive any live, competent, and admissible testimony that is relevant and within the scope of the hearing.

(b) Factors In addition to the rules of evidence, a court must consider the following factors in making a finding of good cause to refuse to receive live testimony under Family Code section 217:

- (1) Whether a substantive matter is at issue—such as child custody, visitation (parenting time), parentage, child support, spousal support, requests for restraining orders, or the characterization, division, or temporary use and control of the property or debt of the parties;
- (2) Whether material facts are in controversy;
- (3) Whether live testimony is necessary for the court to assess the credibility of the parties or other witnesses;
- (4) The right of the parties to question anyone submitting reports or other information to the court;
- (5) Whether a party offering testimony from a non-party has complied with Family Code section 217(c); and
- (6) Any other factor that is just and equitable.

(c) Findings If the court makes a finding of good cause to exclude live testimony, it must state its reasons on the record or in writing. The court is required to state only those factors on which the finding of good cause is based.

(d) Minor children When receiving or excluding testimony from minor children, in addition to fulfilling the requirements of Evidence Code section 765, the court must follow the procedures in Family Code section 3042 and rule 5.250 of the California Rules of Court governing children's testimony.

(e) Witness lists Witness lists required by Family Code section 217(c) must be served along with the request for order or responsive papers in the manner required for the

service of those documents (Witness List (form FL-321) may be used for this purpose). If no witness list has been served, the court may require an offer of proof before allowing any nonparty witness to testify.

(f) Continuance The court must consider whether or not a brief continuance is necessary to allow a litigant adequate opportunity to prepare for questioning any witness for the other parties. When a brief continuance is granted to allow time to prepare for questioning witnesses, the court should make appropriate temporary orders.

(g) Questioning by court Whenever the court receives live testimony from a party or any witness it may elicit testimony by directing questions to the parties and other witnesses