**EVIDENTIARY ADMISSIBILITY
AND RELIABILITY
OF
PRODUCTS GENERATED FROM
COMPUTERS**

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<u>Examples</u> where court room acceptance of computer generated products might be critical:

- ° breach of contract
- ° negligence
- ° civil / criminal violations by governmental
    officials
- ° etc.

Federal Rules of Evidence
https://www.uscourts.gov/sites/default/files/Rules%20of%20Evidence

… to administer every proceeding fairly, eliminate unjustifiable expense and delay, and to promote the development of evidence law ***to the end of ascertaining the truth and securing a just determination***.

- State court rules of evidence and procedure may
    vary but most closely mirror

Core issues considered for admissibility:

• **relevance** – any tendency to prove or disprove a
      consequential fact in the litigation
• **authenticity**
• **best evidence rule**
• **hearsay**
• **probative value -** must outweigh any prejudicial
      effect

Authentication

- an item is what it purports to be
    … required for all non-testimonial evidence

Methods:
    1. witness with first hand knowledge testifies it is
       what proponent claims
    2. evidence of distinctive characteristics
    3. establish chain of custody
    4. self-authenticating (book, newspaper, notarized)

- judge finding overturned only if *abuse of discretion*

Best Evidence Rule

- item introduced must be "original"
    … not a summary, copy subject to human error, etc.

- applies to all recordings, photos, and writings such as
documents, contracts, and data sets

    … photocopy of an original? Fine but proof?

    … printout of the version of the dataset at the time
      of the event under contention? Fine but proof?

Are computer-generated records treated any differently by the courts than traditional forms of evidence?

• Who is is the author of the data set or website? One? Many? Who authored what and when?
• Is the program that authored the records reliable?
• Were the records altered, manipulated, doctored, or damaged after creation?
• Completeness and integrity of email, chat, and instant message strings?

How do you convincingly show any of this?

Hearsay rule almost always applies to files stored in computers and the printouts generated from those files.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Normally disallowed unless …

To be admissable, computer generated products must typically qualify under one of the hearsay exceptions.

Hearsay Exceptions

a. Business Records Exception (exception 6)

Requirements:
• record or data compilation in any form (i.e including electronic)

• made at or near the time by a person with knowledge

• if kept in the ordinary course of a regularly conducted business activity

• and if it was the regular practice of that business to make the record or data compilation

• all as shown by the testimony of the custodian or by a certification that complies with Rule 902(11) or (12)

•unless circumstances indicate lack of trustworthiness

PLUS record or data compilation must be AUTHENTIC

1. Method 1 – Witness Testifies

Most jurisdictions.
• showing input procedures to the computer
• showing tests used to assure accuracy & reliability of the computer operations and the information supplied to it, **and**
• record generated and relied upon in the ordinary course of business

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2. A few jurisdictions.

• custodian testifies computer-generated records kept in the ordinary course of business

3. Some judges.

• judicial notice of some off-the-shelf programs

Judicial Notice:

• fact must be so well-known, obvious, or self-evident that it can't be reasonably doubted or it can be verified by a reliable source that leaves little doubt as to its truth

- use of MapQuest to determine if site of a crime was in a particular a county is in Utah?
- use of Wikipedia to determine if a movie is classified as a Zombie movie?

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b. Public Records Exception (exception 8)

Requirements:

• record or data compilation

• in any form

• maintained by a public office or agency

• as a public record

• setting forth
(A) activities of the office or agency, or
(B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report …, or
(C) … factual findings resulting from an investigation made pursuant to authority granted by law…

• unless the sources of information or other circumstances indicate lack of trustworthiness

Additional Means of Admitting Computer Generated
Evidence

a. Demonstrative Evidence - used for explanatory
evidence

b. Evidence relied on by an expert (for limited
purposes in some jurisdictions)

Problem of "trash science"
• Frye v. United States (1923) - reqr'd "general acceptance"
in science community, conflicted with intent of fed rules -
novel testimony should not be summarily dismissed

U.S. Supreme Court attempts to fix:
• Daubert v. Merrell Dow Pharmaceuticals (1993)
• Kumbo Tire Co. v. Carmichael (1999)
    See for instance, Scientific Experts and the Courts
    http://www.aaas.org/spp/dspp/sfrl/per/per26.htm#cover
    READ THIS - 3 pages

Federal Rules Revised (Dec 2000) - emphasis on judicial gate keeping,
several conditions specified for judges to consider to ensure reliability
Appellate review test - abuse of discretion (Joiner)

CONCLUSIONS
Evidentiary differences between digital files of data
and conventional record evidence:

1) Hearsay rule almost always applied to electronic
data files and the products generated from them.

2) Authentication as a condition precedent to
admissibility tends to be more complex and difficult.

3) Reliability and believability of computer printouts
may be more difficult to convey to a jury and the
general public.