

Laying a Foundation to Introduce Evidence (Preparing and Using Evidence at Trial) »

APPENDIX A

Sample Trial Preparation Systems

The following are sample trial preparation systems. No one system is preferred by all attorneys or suited to all cases. You may want to adapt elements of each in developing your own system, depending on the case and your preferences.

SAMPLE SYSTEM #1: Commonly Used in Cases of Varying Complexity When Preparing for Trial in Earnest

TRIAL BINDER

Use with dividers and tabs; may include (using tab divisions):

Things to do;

Thoughts;

Pleadings;

Exhibit list/log;

Motions in limine;

Witness list;

Voir dire;

Opening statement;

Closing argument;

Jury instructions;

Research;

Chronology;

Key exhibits; and

Miscellaneous.

Judge's Perspective

Jury instructions can be organized into three sections: (1) introductory instructions, general rules of evidence, and burdens of proof; (2) instructions regarding the causes of actions, defenses, and damages; and (3) concluding instructions, such as selecting a foreperson and introduction to the special verdict form. Grouping the instructions in this manner allows jurors to see the big picture of the case, be less overwhelmed by the number of instructions, and assist counsel in organizing their final arguments.

Internet searches of potential jurors has been a common practice in civil jury trials. Some trial courts notify jurors, in jury selection, that lawyers may use social media to discover personal information about them. It has been speculated that one of the reasons courts alert jurors about these searches is to give jurors an opportunity to place privacy settings on their social media. While jurors have voiced objection to this practice of Internet searches, it appears to be an accepted practice, at least in civil matters. Given the new realities of juror social media communication, the American Bar Association Standing Committee on Ethics and Responsibility, in Formal Opinion 466 (2015), recommended that trial courts consider advising jurors that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their electronic social media and websites. Presently, no pattern jury instruction has been adopted in California informing jurors of attorney monitoring of jurors' social media. Nonetheless, the positive results of uncovering juror information factored against the potential negative backlash should jurors protest that their privacy has been breached should be anticipated by counsel.

EXHIBIT BOX

Centralize location for documents and other exhibits you expect to use at trial, and index it for ready access; should include:

Original exhibits (premarked when necessary);

Accompanying evidence memos (see [step 7](#), above), or other research briefs or materials on admissibility; and

Sufficient copies of exhibits for you, court, and all other counsel.

NOTE ► When planning to read multiple interrogatories or requests for admission, determine whether local rule or practice will require you to prepare in advance cut-and-paste extracts of the designated portions (see [step 32](#), above) and, if so, include them in exhibit box.

WITNESS BINDER

Prepare for *each* expected witness; should include:

Witness's personal data sheet, including:

Home address;

Work address;

Home telephone number; and

Work telephone number;

Copy of deposition transcript and summary;

Copy of prior witness statements;

Copy of expected trial exhibits about which witness may testify;

Interrogation outline;

Copy of notice to attend trial or return on subpoena; and

Thoughts.

WITNESS LIST

List *all* expected witnesses; use this list to:

Decide the order of calling witnesses; and

Verify that witnesses' trial attendance has been ensured through:

Proper notice;

Subpoena; or

Agreement.

EXHIBIT LIST

List *all* exhibits expected to be used at trial; should indicate:

Whether there has been an accounting yet for the original exhibit;

Identity of witnesses to be questioned about the exhibit; and

How and when the exhibit will be put into evidence.

Make copy of each document to bring to trial.

SAMPLE SYSTEM #2: Commonly Used for Setting Up Files When Case Is First Accepted

SET UP FILES

Use a method for setting up and organizing your files *from the outset* to meet your trial objectives, *e.g.*, by establishing as many files as you need for:

Correspondence;

Pleadings;

Motions and demurrers;

Discovery documents, including a chronological index sheet;

Witness materials, *e.g.*:

Statements and declarations; and

Deposition transcripts and summaries;

Documents, including:

An index of document files (list source of each document so that you can quickly refer to this information if you need it to lay a foundation to introduce a document); and

Summaries of any voluminous documents;

Your attorney notes;

Legal research; and

Strategy ideas, *e.g.*:

Voir dire;

Opening and closing statements; and

Other trial tactics.

NOTE ► Consider using a computer software program to organize your case materials.

ORGANIZE PHYSICAL EVIDENCE

Consider the kinds of demonstrative and physical evidence you will want to introduce at trial.

REVIEW YOUR CASE FILE

As you review file, analyze uses and sources of potential evidence in light of elements of each side's case that you have to prove and disprove.

Outline Your Case

Consider preparing an issue outline covering:

Every *element* you must establish to prevail, *e.g.*:

If you represent *plaintiff*: Review the elements of the causes of action you pleaded.

If you represent *defendant*: Review the elements of your answer, affirmative defenses, cross-claims, or counterclaims.

Any changes since complaint and answer filed, *e.g.*, because of court orders or new law.

All *facts* you need to prove for each element of your claim or defense.

All *evidence* you need to offer to prove the facts. Do not try to rely only on negative inferences that might be drawn from a jury's disbelief in a witness's testimony to

prove your case. See [Moran v Foster Wheeler Energy Corp. \(2016\) 246 CA4th 500, 518.](#)

Divide outline into categories that allow you to quickly identify evidence needed at trial to prove or disprove an issue, *e.g.*, by:

Issues and subissues;

Percipient witnesses;

Foundational witnesses (if needed to authenticate evidence and these witnesses are different from percipient witnesses);

Expert witnesses; and

Applicable law.

Under each category, list:

Specific issue and evidentiary and legal subissues supporting it;

Various items of proof for each issue or subissue, *e.g.*:

Names of percipient witnesses;

Names of foundational witnesses;

Documents; and

Demonstrative evidence; and

Law applying to *each* issue or subissue.

NOTE ► For discussion and sample issue outline form, see [Civ Proc During Trial §§3.22, 3.67.](#)

Outline Opposing Side's Case

Use outline you developed to prove your case and fill in with elements, facts, and evidence you believe other side will use to try to prevail.

Outline Your Rebuttal

Use outline you developed to prove other side's case and note how you would rebut each point and with what evidence.

REVIEW YOUR EVIDENCE

Use the issue outline (see above) and sort through all available evidence to:

Select what you will use; and

Identify any need for additional evidence.

ARRANGE EVIDENCE

Arrange evidence in the order in which you intend to present it.

NOTE ► For more detailed treatment, see [Civ Proc During Trial, chap 3](#).

Cross-Reference: See [steps 2-5](#), above.

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APPENDIX B

General Rules Governing Prima Facie Admissibility

AUTHENTICITY

GENERAL RULE

Counsel must make:

A prima facie showing that the proffered writing is what the proponent claims it to be; and

An accounting of any material post-execution alterations of the writing ([Evid C §1402](#)).

HOW TO AUTHENTICATE

Authenticate by introducing evidence, or by other means provided by law, including ([Evid C §§1410, 1421](#)):

Presumptions (see, e.g., [Evid C §1452](#) (official seals; see *Jacobson v Gourley* (2000) [83 CA4th 1331](#), 1334), [§1552](#) (printed representations of computer information, programs, and images presumed accurate representation of stored information));

Judicial notice ([Evid C §§450-460](#));

Stipulations;

Responses to requests for admission or interrogatories ([CCP §§2030.210-2030.240](#), [2033.210-2033.230](#)); and

Court determination of substance, genuineness, or authenticity of documents destroyed or damaged by public calamity ([CCP §§1953.10-1953.13](#)).

Judge's Perspective

Remember that if the document is offered as proof of the events or statements contained in it, a hearsay exception must also be established.

BURDEN OF PROOF

Proponent has burden of proof. [Evid C §403\(a\)](#). See generally [Civ Proc During Trial §§10.5-10.12](#).

COMPETENCY OF WITNESS

GENERAL RULE

To qualify as a witness, a person must be able to ([Evid C §701](#)):

Express themselves on the matter in an understandable way, either directly or through an interpreter; and

Understand a witness's duty to tell the truth.

CHILD WITNESS

No particular age limit exists for children. Comment to [Evid C §700](#); [Evidence Benchbook §27.8](#).

ISSUE OF FACT

Whether witness is competent raises issue of fact that judge decides as a preliminary matter. See [Trial Objections §18.5](#).

BURDEN OF PROOF

Objecting party has burden of proving prospective witness's lack of capacity. *People v Craig* (1896) 111 C 460, 469; [People v Knox \(1979\) 95 CA3d 420](#), 431.

LAY OPINION

GENERAL RULE

A lay witness's opinion testimony must be ([Evid C §800](#)):

Rationally based on the witness's perception; and

Helpful to a clear understanding of the witness's testimony.

EXAMPLES

Lay opinions may relate to (see [Trial Objections §§20.3-20.4](#)):

Speed;

Distance;

State of health;

Age;

Sanity ([Evid C §870](#)); and

Value of property ([Evid C §§811-823](#)).

PERSONAL KNOWLEDGE

GENERAL RULE

To testify, witness must have personal knowledge of a particular matter, unless they are testifying as an expert witness on that subject. [Evid C §§702, 801](#).

WHAT IT REQUIRES

Personal knowledge requires witness to have a present recollection of an impression derived from the witness's exercise of their senses. This, in turn, requires both:

Capacity at the time to perceive the facts; and

Capacity at the time of trial to recollect their perceptions.

HOW TO DEMONSTRATE IT

Personal knowledge may be shown by any otherwise admissible evidence, including the witness's own testimony. [Evid C §702](#).

WHAT TRIAL COURT DOES

Court makes preliminary finding of personal knowledge in considering admissibility (for discussion of personal knowledge, see [step 21](#), above; [Evidence Benchbook §§27.13-27.22](#)):

If counsel opposing evidence objects, court must make preliminary finding before witness is allowed to testify before the jury; but

Jury may reconsider issue of personal knowledge during deliberations.

RELEVANCY

GENERAL RULE

Only relevant evidence is admissible, and unless otherwise excluded, all relevant evidence is admissible. [Evid C §§350-351](#).

NOTE ► [Evidence Code §§351.3, 351.4](#) prohibit, in criminal actions and civil actions for personal injury or wrongful death, evidence of a person's immigration status. For other civil actions, immigration status must not be disclosed in open court unless the evidence has first been deemed admissible after an in chambers hearing. This places the burden on the party seeking to introduce immigration status evidence to request advance rulings on this issue or otherwise risk a mistrial should immigration status be disclosed.

DEFINED

Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" ([Evid C §210](#)), including:

Evidence bearing on the credibility of a witness or hearsay declarant ([Evid C §210](#); [People v Jimenez \(2016\) 246 CA4th 726](#), 733); and

Evidence created solely for the trial or to aid jurors in understanding a witness's testimony ([People v McDaniel \(1976\) 16 C3d 156](#), 174; [Culpepper v Volkswagen of Am., Inc. \(1973\) 33 CA3d 510](#), 521).

BURDEN OF PROOF

Proponent of evidence bears burden of proof. [Evid C §§350, 403](#). See [Trial Objections §§17.1-17.7](#).

Judge's Perspective

Because of the number of issues and subissues in any trial, the relevancy of an item of evidence may not be immediately obvious to the court, even when it is pointed out by proffering counsel.

Counsel must be prepared to explain in clear terms both the issue to which the item relates and the relevancy of the item to that issue. It is best to rely on the elements of the complaint and pertinent jury instructions.

California Civil Jury Instruction 117 (CACI), added in 2018, states that a party's wealth or poverty is irrelevant. Although this admonition against considering the parties' financial status has been included in paragraphs in the Bias instruction (CACI 113, as "socioeconomic status"), this is the first instruction that highlights the need to treat all parties equally regardless of wealth. This instruction should level the playing field even more by explicitly removing irrelevant factors such as wealth or poverty in determining the believability of a party.

SCIENTIFICALLY ACCEPTED TECHNIQUE

GENERAL RULE

Admission of evidence obtained through scientific technique depends on establishing its reliability. [*People v Kelly* \(1976\) 17 C3d 24, 30, superseded by statute on other grounds as stated in *People v Wilkinson* \(2004\) 33 C4th 821; *People v Leahy* \(1994\) 8 C4th 587, 594; *People v Bui* \(2001\) 86 CA4th 1187, 1194; Evid C §801\(b\).](#)

WHAT IT REQUIRES

To establish reliability of the technique, proponent must show that it:

Has gained general acceptance in the particular scientific community to which it belongs (*People v Kelly, supra*); or

Is of a type that reasonably may be relied on by an expert ([Evid C §801\(b\)](#)); and that

The correct scientific procedures were used in this case ([People v Venegas](#) (1998) 18 C4th 47, 92).

The proponent must also show that the technique on which the expert relied provided a "reasonable basis" for the expert's opinion. [Sargon Enters., Inc. v University of S. Cal.](#) (2012) 55 C4th 747, 772.

WHAT TO SHOW

To satisfy these foundational requirements, proponent frequently will need the testimony of a properly qualified expert.

To admit specific test results, proponent frequently will have to show substantial similarity of underlying conditions. For discussion of substantial similarity, see below.

Further Research: See generally [Civ Proc During Trial §13.109](#).

SECONDARY EVIDENCE

GENERAL RULES

The content of a writing may be proved by the original or by otherwise admissible secondary evidence. [Evid C §§1520-1521](#). Secondary evidence of such content, however, is excluded if the court determines that ([Evid C §1521](#)):

A genuine dispute exists concerning material terms of the writing and justice requires the exclusion; or

Admission of the secondary evidence would be unfair.

Photographic copies made as business records are admissible as the original. [Evid C §1550](#).

ORAL TESTIMONY

In addition, oral testimony is *not* admissible to prove the writing's content, unless ([Evid C §1523](#)):

The proponent does not have possession or control of a copy of the writing, and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence (see, *e.g.*, [Dart Indus., Inc. v Commercial Union Ins. Co. \(2002\) 28 C4th 1059](#), 1068);

The writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole; or

The proponent does not have possession or control of the original or a copy of the writing and either:

The writing or a copy was not reasonably procurable by the proponent by use of the court's process or other available means; or

The writing is not closely related to the controlling issues and it would be inexpedient to require its production.

CRIMINAL ACTIONS

In a criminal action, secondary evidence must also be excluded if the original is in the proponent's possession, custody, or control and the proponent has not made the original reasonably available for inspection at or before trial ([Evid C §1522](#)), but this section does not apply to:

A "duplicate" as defined in [Evid C §260](#);

A writing that is not closely related to the controlling issues in the action;

A copy of a writing in the custody of a public entity; or

A copy of a writing that is recorded in the public records, if a statute makes a record or a certified copy of it evidence of the writing.

BURDEN OF PROOF

Objecting: Opponent of evidence has burden of proof; and

Satisfying the secondary evidence rule: Proponent of evidence has burden of proof.

Further Research: See [Trial Objections, chap 24](#).

SUBSTANTIAL SIMILARITY

GENERAL RULE

The facts or conditions reflected in or underlying the *demonstrative* evidence must be substantially similar to those giving rise to the issue to which the evidence is relevant. [Culpepper v Volkswagen of Am., Inc. \(1973\) 33 CA3d 510](#), 521 (film of accident reconstruction experiment); [People v Kaurish \(1990\) 52 C3d 648](#), 692 (photographs comparing methods of serological testing); 2 Witkin, *Evidence, Demonstrative, Experimental, and Scientific Evidence* §38.

ITS APPLICATION

It applies to certain types of *demonstrative* evidence, *e.g.*, evidence of experiments, reenactments of an event.

WHAT IT REQUIRES

It requires a preliminary showing that the conditions reflected in the proffered evidence are substantially similar to the conditions existing at the time of the disputed act or event.

WHAT IT DOES NOT REQUIRE

It does not require conditions to be absolutely identical. *Culpepper v Volkswagen of Am., Inc.*, *supra*. See [Hasson v Ford Motor Co. \(1977\) 19 C3d 530, 550, overruled on other grounds in Soule v General Motors Corp. \(1994\) 8 C4th 548](#).

BURDEN OF PROOF

Proponent has burden of proof.

Further Research: See generally [Trial Objections](#); [Evidence Benchbook](#); [Civ Proc During Trial §§10.5-10.12](#); [Effective Intro of Evidence, chap 23](#) (experiments and scientific tests).

Cross-Reference: See [steps 1, 7](#), above.

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APPENDIX C

List of Trial Objections

Objections to Competency of Witness (see Appendix B, above)

Unable to express and be understood ([Evid C §701](#))

Unable to understand duty to tell truth ([Evid C §701](#))

Judge at this trial ([Evid C §703](#))

Juror at this trial ([Evid C §704](#))

Without personal knowledge ([Evid C §702](#))

Officer not in distinctive uniform when arrest made ([Veh C §40804](#))

Objections to the Form of Question ([Evid C §765](#), unless otherwise indicated)

Ambiguous, confusing, unintelligible

Argumentative

Already asked and answered

Judge's Perspective

The urge to have the last word frequently arises in the examination of witnesses. Counsel often believe that whoever has the last word wins, even if it serves only to reemphasize something already brought out in prior examination. Use of the "already asked and answered" objection can be helpful in these situations. In [People v ConAgra Grocery Prods. Co. \(2017\) 17 CA5th 51](#), 146, the appellate court affirmed a trial judge who halted recross examination after having had enough of the repetitive examination of witnesses.

Assumes fact in dispute or not in evidence

Compound

Leading ([Evid C §767](#))

Judge's Perspective

When an adverse witness is examined under [Evid C §776](#), which allows leading questions, the examination by opposing counsel is actually a direct examination and must follow the rule that no leading questions can be asked of the witness. [People v Spain \(1984\) 154 CA3d 845](#), 853. Assuming the witness will be called as a witness for the defense, consideration should be given to make the witness testify for counsel's case at this time to avoid recalling the witness at a later date. This will save time and allow the testimony to be considered all at once. [Bitsekas v Parechanian \(1924\) 67 CA 148](#), 150.

Misquotes witness

Calls for narrative answer

Calls for speculation, *e.g.*, not in witness's personal knowledge ([Evid C §§702, 801](#))

Too general

Objections to Foundation of Offered Evidence

Lacks authentication (see [Appendix B](#), above)

Inadmissible secondary evidence (see [Evid C §§1520-1567](#))

Corpus delicti not proven (see [Trial Objections, chap 27](#))

Expert:

Not qualified ([Evid C §720\(a\)](#))

Basing opinion on improper matter ([Evid C §801](#))

Foundation insufficient ([Evid C §§403, 405](#))

Illegally obtained (US Const amends IV, XIV; Cal Const art I, §13)

Objections to Substance of Offered Evidence

Altered document ([Evid C §1402](#))

Communication made during mediation process ([Evid C §§1115-1128](#))

Cross-examination exceeds scope ([Evid C §§761, 773](#))

Excludable in court's discretion ([Evid C §352](#))

Expert:

Basing opinion on improper matter ([Evid C §801](#))

Testifying on improper matter ([Evid C §801](#))

Expression of sympathy or benevolence ([Evid C §1160](#))

Hearsay ([Evid C §1200](#))

Immigration status ([Evid C §§351.2-351.3](#))

Improper impeachment ([Evid C §§780, 785](#))

Improper rehabilitation ([Evid C §§780, 785](#))

Irrelevant ([Evid C §§210, 350-351](#); see [Appendix B](#), above)

Opinion inadmissible ([Evid C §§800, 802-803](#))

Regarding liability insurance ([Evid C §1155](#))

Prior inconsistent statement of excused witness ([Evid C §770](#))

Privileged (see Privilege and Related Objections, below)

Recollection refreshed by unproduced writing ([Evid C §771\(a\)](#))

Settlement negotiations inadmissible ([Evid C §§1152-1154](#))

Subsequent safety measures inadmissible ([Evid C §1151](#))

Unduly confusing or time-consuming ([Evid C §352](#))

Unduly prejudicial or inflammatory ([Evid C §352](#))

Violates parol evidence rule ([CCP §1856](#); [Com C §2201](#))

Privilege and Related Objections

Self-incrimination ([Evid C §940](#))

Attorney-client privilege ([Evid C §§950-954](#))

Marital privileges ([Evid C §§970-980](#))

Physician-patient privilege ([Evid C §992](#))

Psychotherapist-patient privilege ([Evid C §§1012, 1024](#) (dangerous patient exception))

Clergy-penitent privilege ([Evid C §§1030-1034](#))

Sexual assault victim-counselor privilege ([Evid C §1035.4](#))

Domestic violence victim-counselor privilege ([Evid C §1037.2](#))

Official informer ([Evid C §1042](#))

Political vote ([Evid C §1050](#))

Trade secret ([Evid C §1060](#))

Reporter's unpublished information ([Evid C §1070](#))

Attorney work product ([CCP §§2018.010-2018.080](#))

Judge's Perspective

It is extremely difficult to resolve an objection of attorney-client privilege or attorney work product during a jury trial. These matters should be handled before trial in a motion in limine. Moreover, the issue could be avoided entirely if counsel undertook a meet and confer before trial to inquire if there are any attorney-client or work

product issues that could be resolved. See [Evid C §915](#). On the prohibition against a trial court reviewing the actual *contents* of a communication claimed to be protected by the attorney-client privilege, see [Costco Wholesale Corp. v Superior Court \(2009\) 47 CA4th 725](#), 739; [DP Pham LLC v Cheadle \(2016\) 246 CA4th 653](#), 666.

Objections to Conduct of Counsel (see, e.g., [Trial Objections, chap 29](#))

Bringing inadmissible matter before jury

Asking insinuating and improper questions

Concealing or suppressing evidence

Making impermissible references to insurance

Making derogatory remarks to counsel, party, or witness

Communicating with juror

Misstating law

Judge's Perspective

The distinction between proper rebuttal and impermissible withholding of properly discoverable evidence, or sandbagging, was explored in [People v Hughes \(2020\) 50 CA5th 257](#), 283. In a criminal case involving second degree murder in the deaths of three people hit by an intoxicated driver, the prosecution surprised defense counsel during trial with new tactical evidence in the form of accident reconstruction notes previously withheld from the defendant. The appellate court found that this withholding of evidence constituted impermissible sandbagging and that the trial judge erroneously denied a motion for a mistrial. The lesson from *Hughes* is that an expert's notes that differed from previous discovery should be turned over in discovery; waiting to use it in rebuttal could be properly considered impermissible sandbagging. The appellate court found that a jury instruction about late discovery was insufficient and that the request for a mistrial should have been granted. *Hughes* emphasizes the obligation of turning over discovery in a timely manner, including relevant notes, and that true sandbagging cannot be cured through a newly added jury instruction.

Objections to Conduct of Judge (Canon 3 of the California Code of Judicial Ethics); see also, *e.g.*, [Trial Objections, chap 29](#))

Commenting on evidence

Examining witness to convey opinion of witness's credibility

Disparaging counsel, party, or witness

Coercing compliance with personal preferences

Interfering with production of proof

Objections to Conduct of Jury (see [CCP §§232-234, 611, 613, 1209](#); [Civ Proc During Trial §§17.23-17.32](#))

Concealing relevant matters during voir dire

Receiving or disseminating evidence out of court, including via all forms of electronic and wireless communication

Inattentiveness during trial

Judge's Perspective

It is incumbent on counsel to understand the underlying rationale for each evidentiary objection and why it is in the best interest of the client to object. Trial objections should be fine-tuned, have a sound legal basis, be necessary in counsel's considered opinion, and be sparingly made. Jurors can come to believe that a consistently losing objector must have a weak case. Although some trial practice books recommend an ancillary objection to throw off the smooth presentation of opposing counsel's case, the negative consequences of objecting simply to object far outweigh the benefits. Ill-considered objections can also delay the proceedings.

All objections are not created equal. Many objections that focus on the defects of the question (compound question, vague, unintelligible, and ambiguous) should be used sparingly. Generally, if this type of objection is sustained, it will prompt superior follow-up questions and only assist the examiner in proving their point (in the same way that demurrers have the unanticipated result of educating counsel to improve their

complaint). Counsel should focus on objections that seek to exclude the answers to questions (foundation, hearsay, settlement, attorney-client privilege, and improper expert opinion) when the potential answers could damage counsel's case.

Further, because courts often are reluctant to interrupt court proceedings for sidebar conferences, carefully crafted objections with appropriate legal grounds can best inform the court to rule without interrupting the proceedings.

Cross-Reference: See [steps 1, 7](#), above.

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APPENDIX D Sample Evidence Memorandum

Exhibit:	Contract dated June 15, 2011
Relevance:	Written statement of parties' understanding of obligations on June 15, 2011; signed by both sides
Manner of Authentication:	Direct of Rue; Cross of Molton
Witnesses to Question About Exhibit:	Rue, Molton, Ramsey
Source of This Exhibit:	Document production by Molton on February 1, 2012
Location of Original:	Molton file
Possible Objection(s)/ Response:	Document altered; commission amount was erased and changed. Response: Not material to dispute (Evid C §1402); dispute here concerns amount of goods to be delivered, not commission schedule.

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APPENDIX E

Sample Designation of Deposition

Action No. _____

CAPTION

Defendant's Designation of
Portions of Deposition
Transcripts to Be Read

Deponent: John Jones

Vol. I (January 9, 2012)

1:10-2:14

2:17-2:25

3:5-5:15

26:9-29:3

Vol. II (January 10, 2012)

110:12-110:16

111:1-117:8

125:13-127:18

Deponent: Sally Jones

Vol. I (January 11, 2012)

1:10-10:18

10:22-12:10

13:1-25:2

Dated: _____

__ [Firm Name] __

By: _____

Attorney for Defendant

Cross-Reference: See [step 10](#), above; see also [steps 26-27](#), above.

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APPENDIX F Sample Exhibit Log

Plaintiff's Exhibits

<u>Number</u>	<u>Description</u>	<u>Marked for Identification</u>	<u>In Evidence</u>	<u>Comment</u>
1	Rue letter to Molton, 6/9/2011	7/10/2012	7/10/2012	Copy substituted for original 7/10/2012
2	Molton letter to Rue, 6/12/2011	7/10/2012	7/10/2012	
3	Contract dated 6/15/2011	7/11/2012	7/12/2012	Subject to motion to strike

Cross-Reference: See [steps 15, 22, 25](#), above.

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APPENDIX G Foundations, Objections, and Sample Records for Specific Types of Evidence

Judge's Perspective

The common objection that an "insufficient foundation" has been laid for the pending question must include a statement of what is missing from the foundation. See [Parlier v Fireman's Fund Ins. Co. \(1960\) 178 CA2d 357](#). This is a common-sense rule to ensure that the judge understands the point of the objection. Whether to object on

foundational grounds should also be a tactical decision. If foundational requirements cannot be met, counsel has successfully excluded the proffered evidence. However, if all of the elements are present but just insufficiently explained, counsel could actually be assisting opposing counsel in demonstrating to the jury the reliability of the evidence. On occasion, the failure to object on foundational grounds may diminish the weight of the proffered evidence in the eyes of the jury because of the casual way it was introduced.

BUSINESS RECORDS

FOUNDATION REQUIRED

To admit business records, you must establish an exception to the hearsay rule (see [Evid C §1271](#)) and authenticity of the records (see [Evid C §§1271, 1561-1562](#)) by showing that:

Writing was made in regular course of business ([Evid C §1271\(a\)](#));

Writing was made at or near the time of the act, condition, or event ([Evid C §1271\(b\)](#));

Custodian or other qualified witness identifies the document and how it was prepared ([Evid C §1271\(c\)](#));

Writing appears trustworthy on the basis of the source of information and method of preparation ([Evid C §1271\(d\)](#)); and

Copy produced in court is a true copy of the records as kept at the place of business ([Evid C §1561\(a\)\(2\)](#)).

See [People v Zavala \(2013\) 216 CA4th 242](#), 248 (computer printout of call records automatically stored and maintained by reliable computer program fell within business records exception); [Sanchez v Hillerich & Bradsby Co. \(2002\) 104 CA4th 703](#), 718 (attorney's declaration that contained no information about how reports were prepared or on what source of information they were based, or any evidence that reports were trustworthy, did not provide foundation for their admissibility as business records).

SAMPLE RECORD: Business Records

Q: I am handing you a document now marked as Defendant's Exhibit E for purposes of identification. Would you please read the document and tell us whether or not you recognize it?

A: Yes, I do.

Q: Could you tell us what it is?

A: It's the accident report I prepared as a result of this accident. [*Identifies document and who prepared it.*]

Q: Why did you prepare this?

A: It is the procedure at our company that an accident report will be prepared any time an employee is injured on the job. [*Shows writing was made in course of business.*]

Q: Who has the responsibility for preparing those reports?

A: I do.

Q: Was that also true at the time of the accident involving Mr. Gray?

A: Yes.

Q: Is there a procedure you follow in preparing a report such as Exhibit E?

A: Yes.

Q: Could you describe for us what that procedure is?

A: As soon as I learn of an accident, I immediately go to the accident site to talk to the injured employee, if that is possible, and to any witnesses to the accident. I then record in my report what each of these people tells me. I also take a camera with me to photograph anything that might be helpful in recording what happened. [*Shows ordinary course of business.*]

Q: Did you follow that procedure in preparing this Exhibit E?

A: Yes, I did. [*Shows that writing made as a record of an event and mode of preparation.*]

Q: How long was it after the accident that you arrived at the accident site?

A: Within the hour.

Q: How much later was it that you had prepared this report?

A: I did the entire report on the same day. [*Shows that writing made near time of event.*]

Q: How accurate is this record with respect to recording what you observed and heard at the accident site?

A: Very accurate. [*Shows trustworthiness.*]

Q: After this accident report, Exhibit E, was prepared, what did you do with it?

A: The original went into the file that I maintain on all accident reports. A copy of it went to my boss.

Q: Has this report, Exhibit E, been altered or modified in any way since the day you prepared it?

A: No.

Further Research: See [Effective Intro of Evidence, chap 13](#) (business records).

EXCITED UTTERANCE (HEARSAY)

HEARSAY DEFINED

Hearsay evidence is a statement ([Evid C §1200](#)):

Made by someone other than a witness while testifying at the hearing; and

That is being offered to prove the truth of the matter stated.

FOUNDATION REQUIRED

Hearsay is not admissible unless you provide facts that satisfy one of the hearsay exceptions ([Evid C §1200\(b\)](#)); the most common exceptions are, *e.g.*:

Business records ([Evid C §§1270-1272](#));

Statements of an adverse party ([Evid C §§1220-1227](#));

Prior statements of witnesses ([Evid C §§1235-1238](#));

Spontaneous statements or excited utterances ([Evid C §§1240-1242](#)); and

Statements of mental or physical state ([Evid C §§1250-1252](#)).

SAMPLE FOUNDATIONAL REQUIREMENTS—EXCITED UTTERANCE

Statement that ([Evid C §1240](#); see [Rufo v Simpson \(2001\) 86 CA4th 573](#), 590; [People v Gutierrez \(2000\) 78 CA4th 170](#), 181 (writing may qualify as spontaneous declaration)):

Purports to narrate, describe, or explain an act, condition, or event perceived by declarant; and

Was made spontaneously while declarant was under stress of excitement caused by such perception.

SAMPLE RECORD: Excited Utterance

[This example is from a murder case.]

Q: Did the other bystander say anything about what was happening while it was happening?

A: She sure did. *[Shows time of utterance.]*

Q: Where was she looking at the time she spoke?

A: Right at the defendant and the victim.

Q: Please describe her tone of voice.

A: She was shouting. Her voice was shaking. *[Shows that declarant was excited.]*

Q: How did she look?

A: Agitated. Angry. Like I said, she was shaking and pointing at the two guys. *[Shows that declarant was excited.]*

Q: What did she say?

A: "My God. He's pushing him into the bay!" *[Shows that statement was about event.]*

Further Research: See [Evid C §§1240-1242](#); [Trial Objections, chap 19](#); [Effective Intro of Evidence, chap 49](#) (spontaneous and contemporaneous statements).

MEDICAL RECORDS

FOUNDATION REQUIRED

To admit medical records, you must provide the same foundation as for business records, *i.e.*, by showing that:

Writing was made in regular course of business ([Evid C §§1271\(a\), 1561-1562](#));

Writing was made at or near the time of the act, condition, or event ([Evid C §1271\(b\)](#));

Custodian or other qualified witness identifies the document and how it was prepared ([Evid C §§1271\(c\), 1561-1562](#));

Writing appears trustworthy on the basis of the source of information and method and time of preparation ([Evid C §§1271\(d\), 1561-1562](#)); and

Copy produced in court is a true copy of the records as kept at the place of business ([Evid C §§1561, 1562](#)).

SAMPLE RECORD: Medical Records

Q: What is your occupation?

A: I am the Records Manager of medical records at Valley Hospital. [*Shows witness is qualified.*]

Q: What are your duties as the hospital's Records Manager?

A: Primarily, to file the records of each patient so that they can be located later if needed, to make sure that the records are not seen or taken by unauthorized persons, and also to see that all the central parts of the record have been completed by the doctors, nurses, and other personnel of the hospital before the records are filed. [*Shows trustworthiness and regular course of business.*]

Q: Are you here in court today in response to a subpoena duces tecum served on you as the custodian of records of Valley Hospital?

A: Yes, I am.

Q: What documents did the subpoena require you to bring with you?

A: The medical records of James Gray.

Q: Do you have those records with you?

A: Yes, I do.

Q: Where did you get them?

A: From the medical records library at Valley Hospital.

Q: Are these the original records for Mr. Gray as they are kept by the hospital, or are they copies?

A: These are the original records. [*Identifies records.*]

Q: Did you search for all the records that were described in the subpoena?

A: Yes, I did.

Q: Are these all those records?

A: So far as I could tell.

Q: Are you familiar with the method by which these records were prepared?

A: Yes.

Q: Who prepares or writes the entries on the various pages that make up these records?

A: The entries are made by the nurses, doctors, and other hospital personnel who see the patient.
[Shows regular course of business, and who prepared record.]

Q: Were these entries made at or near the time of the acts, conditions, and events recorded?

A: Yes, they were. [Shows writing made at or near time of event.]

Q: Were these records prepared by those persons in the ordinary and regular course of business?

A: Yes. [Shows prepared in regular course of business.]

MODELS/MAPS/DIAGRAMS

FOUNDATION REQUIRED

Model

A model must substantially and approximately represent what it purports to represent. [People v McDaniel \(1976\) 16 C3d 156, 174](#); [People v Kynette \(1940\) 15 C2d 731, 755, overruled on other grounds in People v Bonelli \(1958\) 50 C2d 190](#).

Map

A map must be a faithful representation of area depicted. [People v Glab \(1936\) 15 CA2d 120, 124](#).

COMMON WAYS TO LAY FOUNDATION

Judicial notice (maps);

Stipulation; and

Witness testimony.

TYPICAL WITNESS

Lay Witness

Witness who uses the visual aid to illustrate testimony.

Expert Witness

Witness who is familiar with matter depicted.

FREQUENT OBJECTIONS AND AUTHORITIES RE ADMISSIBILITY

Evidence Admitted

Pistol similar to that used in crime ([*People v Ham* \(1970\) 7 CA3d 768, 779](#), [*disapproved on other grounds in People v Compton* \(1971\) 6 C3d 55](#));

Reconstructed model of bomb ([*People v Kynette* \(1940\) 15 C2d 731, 755](#), [*overruled on other grounds in People v Bonelli* \(1958\) 50 C2d 190](#));

Use of mannequin to illustrate bullet trajectories ([*People v Robillard* \(1960\) 55 C2d 88, 98](#), [*overruled on other grounds in People v Morse* \(1964\) 60 C2d 631](#));

Map of area of homicide ([*People v Sassounian* \(1986\) 182 CA3d 361, 400](#)).

Excluded as Irrelevant

Introduction of gun for illustrative purposes (error when dissimilar to gun used in alleged crime ([*People v Vaiza* \(1966\) 244 CA2d 121, 126](#)));

Map drawn by counsel ([*People v Jones* \(1962\) 205 CA2d 460, 467](#)).

Excluded Under Evid C §352

Scale model of tract (excluded as misleading ([*County of San Mateo v Christen* \(1937\) 22 CA2d 375, 378](#)));

Illustrative skeleton (excluded, apparently as unduly prejudicial ([*Dameron v Ansbro* \(1918\) 39 CA 289, 298](#))).

Admitted Over Evid C §352 Objection

Scale model. [*Church v Headrick & Brown* \(1950\) 101 CA2d 396, 414](#).

SAMPLE RECORD: Authenticating Map

Q: Were you present at the intersection of Market and Hyde Streets on July 4, 2011, when a car hit a child?

A: Yes, I was. [*Shows opportunity to perceive.*]

Q: While you were at the scene, did you observe whether there were painted crosswalks for people walking across Market Street?

A: Yes, I did. [*Shows personal knowledge.*]

Q: And did you also observe whether there were traffic lights governing the flow of pedestrian traffic on Hyde Street crossing Market Street at that location?

A: Yes, I did.

Counsel: Your Honor, may I approach the witness with an exhibit?

Court: You may.

Q: Mr. Jones, I'm handing you an exhibit marked as Defendant's Exhibit C for purposes of identification. For the record, the exhibit is a map bearing the heading "Market Street." Would you please take the time to review this exhibit and then tell us whether or not it fairly and accurately shows the location of the sidewalk and traffic lights at the intersection of Market and Hyde Streets at the time of the accident there on July 4, 2011?

A: Yes, it does. [*Authenticates map.*]

[*At this point, the exhibit can be offered into evidence.*]

MOTION PICTURES/VIDEO RECORDINGS

RELEVANCY

To demonstrate and/or clarify testimony of witnesses;

To record and report experiments or demonstrations; and

In some instances, to show underlying circumstances or injuries, *e.g.*, bank security recording of actual bank robbery or video recording of party's confession.

FOUNDATION REQUIRED

The proof necessary to authenticate a video recording varies with the nature of the evidence that the video recording is being offered to prove and with the degree of possibility of error. [*People v Goldsmith* \(2014\) 59 C4th 258, 267.](#)

Content must fairly and reasonably depict material facts in dispute or facts substantially similar to those facts. [*People v Carpenter* \(1997\) 15 C4th 312, 386](#), overruled on other grounds in [*People v Diaz* \(2015\) 60 C4th 1176, 1190](#); [*Greeneich v Southern Pac. Co.* \(1961\) 189 CA2d 100, 107](#).

Computer animation of events is admissible without foundation that computer animation is generally accepted in the scientific community. [*People v Duenas* \(2012\) 55 C4th 1, 20](#); [*People v Hood* \(1997\) 53 CA4th 965, 969](#).

COMMON WAYS TO LAY FOUNDATION

Stipulations; and

Witness testimony:

Lay; and/or

Expert.

Typical Witness

Person having personal knowledge of facts in dispute, who testifies that film or recording fairly depicts those facts or facts substantially similar to them.

Generally, witness is not actual maker of film or recording, unless special technique is used.

FREQUENT OBJECTIONS AND AUTHORITIES RE ADMISSIBILITY

Objection—Irrelevant

Film of train running over crossing relevant in determining train crew's reaction time. [*Greeneich v Southern Pac. Co.* \(1961\) 189 CA2d 100, 107](#).

Objection—Filming Was Surreptitious and Misleading

Evidence excluded: Investigator got plaintiff drunk and fraudulently induced plaintiff to ride horseback. [*Redner v WCAB* \(1971\) 5 C3d 83, 93](#).

Evidence admitted: Movies of plaintiff that minimized effect of injuries created a conflict in evidence for jury to reconcile. [*Harmon v San Joaquin Light & Power Corp.* \(1940\) 37 CA2d 169, 173](#).

Further Research: See [Civ Proc During Trial §§13.94-13.98](#).

PHOTOGRAPHS

FOUNDATION REQUIRED

"No photograph or film has any value in the absence of a proper foundation. It is necessary to know when it was taken and that it is accurate and truly represents what it purports to show. It becomes probative only upon the assumption that it is relevant and accurate." [People v Chism \(2014\) 58 C4th 1266](#), 1303. The proof necessary to authenticate a photograph recording varies with the nature of the evidence that the photograph is being offered to prove and with the degree of possibility of error. [People v Goldsmith \(2014\) 59 C4th 258](#), 267.

Content of photograph must fairly depict material facts in dispute or facts substantially similar to those facts. *Berkovitz v American River Gravel Co.* (1923) 191 C 195, 201; [PG&E v Hacienda Mobile Home Park \(1975\) 45 CA3d 519](#), 530.

COMMON WAYS TO LAY FOUNDATION

Stipulation;

Request for admission;

Witness testimony; and

[Evid C §1553](#)(a) (rebuttable presumption that printed representation of images stored on video or digital medium is accurate representation of images it purports to represent).

TYPICAL WITNESS

Typical witness is someone having personal knowledge of the facts in dispute, who then testifies that a photograph fairly depicts those facts. See, e.g., [People v O'Brien \(1976\) 61 CA3d 766](#), 780 (photograph of reenactment). See also [People v Smith \(1963\) 223 CA2d 394](#), 407.

Generally, the witness is not the actual photographer, unless a special photographic technique is used or the fairness or the content of the photograph is seriously contested.

FREQUENT OBJECTIONS AND AUTHORITIES RE ADMISSIBILITY

Evidence Admitted

Photos of plaintiff's decedent's corpse in wrongful death case held relevant to issues (*Olson v Meacham* (1933) 129 CA 670, 673).

Admission of photographs of highway taken 2 years after collision of automobiles upheld as competent evidence to show condition of highway (*Barone v Jones* (1947) [77 CA2d 656](#), 661).

Photograph of similar but not identical equipment admissible (*People v Slocum* (1975) [52 CA3d 867](#), 891).

Changes in photographed area did not render photograph inadmissible (*Bateman v Doughnut Corp.* (1944) [63 CA2d 711](#), 718).

Photograph of accident reconstruction admissible (*Wilson v City & County of San Francisco* (1959) [174 CA2d 273](#), 277).

Photographs of working conditions consisting of asbestos dust in plant were admissible without foundation of date or place of photograph (*Smith v ACandS, Inc.* (1994) [31 CA4th 77, 92](#), [disapproved on other grounds in Camargo v Tjaarda Dairy](#) (2001) [25 C4th 1235](#), 1242).

Red-light camera photographs adequately authenticated regarding party's failure to stop at a red light signal, although no technician from company that maintained system testified (*People v Goldsmith* (2014) [59 C4th 258](#), 267).

Photographs of defendant posing with handguns were properly admitted on the basis of a foundation provided by a police officer who monitored defendant's Instagram account and obtained incriminating photos from his cell phone (*In re K.B.* (2015) [238 CA4th 989](#), 997).

Automated teller machine (ATM) photographs were properly admitted as a business record when authenticated by a bank's financial fraud investigator, who testified that the ATM system videotaped the transaction and extracted still photos (*People v Peyton* (2014) [229 CA4th 1063](#), 1075).

Excluded as Insufficient

Red-light traffic camera evidence was inadmissible when a defense expert testified without rebuttal that the printed representation of computer-generated information and

the video or digital images admitted into evidence were inaccurate and unreliable ([People v Rekte \(2015\) 232 CA4th 1237](#), 1244).

Excluded as Irrelevant

Photos of plaintiff's decedent's corpse in wrongful death case held not relevant to issues ([Krouse v Graham \(1977\) 19 C3d 59](#), 79).

Photo of location not involved in dispute held inadmissible without foundation of substantial similarity ([PG&E v Hacienda Mobile Home Park \(1975\) 45 CA3d 519](#), 530).

Admitted Over Evid C §352 Objection

Photos of murder victim admissible to show victim's injuries, savagery of attack, and defendant's mental state at time crimes were committed ([People v Brooks \(2017\) 3 C5th 1](#), 54; [People v Heard \(2003\) 31 C4th 946](#), 973; see also [People v Winbush \(2017\) 2 C5th 402](#), 458).

Photos of murder victim admissible to show intent, malice, and felony ([People v Jentry \(1977\) 69 CA3d 615](#), 626).

Photo of murder victim relevant to show location and manner in which victim was killed ([People v Harris \(1989\) 47 C3d 1047](#), 1095; see also [People v Perry \(2006\) 38 C4th 302](#), 317).

Videotape showing murder victim's mutilated genitals not unduly prejudicial ([People v McDermott \(2002\) 28 C4th 946](#), 998; see also [People v Sanchez \(1995\) 12 C4th 1, 63](#), overruled on other grounds in [People v Doolin \(2009\) 45 C4th 390](#); [People v Allen \(1986\) 42 C3d 1222](#), 1255).

Further Research: See generally 2 Witkin, Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§9-15, 18; [Trial Objections §31.4](#).

Excluded Under Evid C §352

Inflammatory picture's prejudicial effect outweighs probative value ([People v Love \(1960\) 53 C2d 843](#), 854, superseded by statute on other grounds as stated in [People v Brady \(2010\) 50 C4th 547](#); [Akers v Miller \(1998\) 68 CA4th 1143](#), 1147).

Gruesome color photos of murder victims held cumulative and unduly prejudicial ([People v Smith \(1973\) 33 CA3d 51, 69, disapproved on other grounds in People v Wetmore \(1978\) 22 C3d 318, 327](#)).

Photo of nursing home patient's severe bed sore excluded in action against physician for elder abuse ([Akers v Miller \(1998\) 68 CA4th 1143, 1146](#)).

SAMPLE RECORD: Authenticating Photograph

Q: Let me hand you a document marked as Plaintiff's Exhibit 10 for purposes of identification. Do you recognize this document?

A: Yes.

Q: Would you tell us what it is?

A: It's a picture I took of my car several days before the accident. [*Identifies photograph and shows that witness has personal knowledge.*]

Q: When was this picture taken?

A: April 18, 2007. It was on my birthday.

Q: Could you tell us whether or not Exhibit 10 accurately and fairly depicts the physical condition of your car just before the collision on April 20, 2007?

A: Yes it does. [*Shows that photo fairly depicts condition at issue.*]

Q: Was there any change in the condition of your car between the time that this photograph was taken and the time of the collision on April 20, 2007?

A: No.

Judge's Perspective

Opposing counsel frequently object that the foundation for a photograph must include such items as the type of camera used, the type of film and size of lens, the identity of the photographer, the time of day, and the lighting conditions. This information is, in fact, generally not required for the exhibit to be admitted. Although photographs are generally admissible if they are fair and accurate, because of the potential impact of photographic evidence, any objections to their admission should be handled before the taking of evidence.

SAMPLE RECORD: Evid C §352 Objection

Proffering

Counsel: Your Honor, we would ask that People's Exhibit 6, the photograph taken of the decedent at the scene of his death, be received in evidence.

Opposing

Counsel: Objection, Your Honor. May we approach the bench?

[*At this point, all counsel go to sidebar.*]

We would object to admission of this exhibit, Your Honor, on the grounds that it is irrelevant or, in the alternative, that its very slight probative value is substantially outweighed by the undue prejudice that it will create. As you can see from looking at the photograph, it graphically depicts with considerable color and great detail the effect of the decedent being shot in the face with a shotgun at close range. There is no dispute in this case that the decedent was shot by the defendant.

The issue is whether that shooting was a result of self-defense. Because the photograph contains nothing to help the jury resolve that issue, we ask that it be excluded as irrelevant.

If the prosecution can make any colorable argument of relevancy, we request that the court exercise its discretion under [Section 352](#) to exclude the photograph, because its display to the jury is very likely to generate undue and unfair prejudice against the defendant.

Proffering

Counsel: Your Honor, we believe the photograph should be admitted into evidence because it shows how close the defendant was to the decedent when the shot was fired. In addition, the angle of the shot indicates that it came from slightly to the side, rather than directly from the front, contradicting defendant's theory that the decedent was lunging at the defendant when the shot was fired.

Court: I am going to exclude the exhibit. After looking at the exhibit itself and hearing the argument of counsel, I have determined that the exhibit's probative value is slight and is substantially outweighed by the danger of undue prejudice to the defendant.

Further Research: See [Civ Proc During Trial §§13.91-13.93](#), [13.117](#).

REAL EVIDENCE

"REAL" EVIDENCE DEFINED

Physical evidence is something that is:

Historical, not created for trial; and

Substantive, tending to prove an issue in the case.

Examples: Gun used in a murder, surgical instrument removed from plaintiff's abdomen.

FOUNDATION REQUIRED

Foundation is necessary to show that the real or physical evidence is:

Relevant ([Evid C §350](#));

What it purports to be; and

In the same relevant condition as during the incident or period in question ([People v Wong \(1973\) 35 CA3d 812](#), 835).

COMMON WAY TO LAY FOUNDATION

Typically, testimony of witness is used to:

Identify the object; and

Determine that it is in the same relevant condition.

SAMPLE RECORD: Gun in Murder Case

[The witness is the investigating detective.]

Q: Do you recognize defendant's Exhibit G for identification, Detective Kerr?

A: Yes I do.

Q: What is it?

A: It's the handgun I found at the end of the pier.

Q: How do you know that?

A: Well, it looks just the same and it's got my initials and the date of the incident right here where I scratched them into the grip that day. *[Gun is what counsel purports.]*

Q: Please tell us whether or not it looks to be in the same condition as when you found it.

A: It looks just the same, like I said. [*Gun in same condition.*]

Counsel: Your Honor, we ask that defense Exhibit G be received in evidence.

RECORDINGS

RELEVANCY

Recorded prior statement of party or witness (see, e.g., [People v Jones \(2017\) 3 C5th 583](#), 611; [People v Polk \(1996\) 47 CA4th 944](#), 952).

Recorded reenactment of underlying circumstances (see, e.g., [People v Pedroza \(2007\) 147 CA4th 784](#), 795).

FOUNDATION REQUIRED

Recording must accurately report material facts in dispute or facts substantially similar to those facts.

COMMON WAYS TO LAY FOUNDATION

To lay foundation, introduce:

Stipulations; and

Witness testimony.

Typical Witness

Person having personal knowledge of facts in dispute, who testifies that recording accurately reports those facts or facts substantially similar to them. [Allen v Leonard \(1969\) 270 CA2d 209](#), 219 (evidence excluded).

OBJECTION TO EVIDENCE UNDER EVID C §352

Admitted

Recording admitted over objection that it contained gruesome depiction of pain. See [People v Welch \(1972\) 8 C3d 106](#), 114.

Excluded

Recording should have been excluded as cumulative. See [Weisbart v Flohr \(1968\) 260 CA2d 281](#), 293.

ADMITTED OVER OBJECTION THAT PORTIONS ARE INAUDIBLE

The following support admissibility:

Brief absence of sound during moving reenactment did not prejudice defendants because defendants could testify to what was said during lapse ([People v Dabb \(1948\) 32 C2d 491](#), 499).

Mostly inaudible tape that contained some understandable dialogue did not require exclusion ([People v Jones \(2017\) 3 C5th 583](#), 611; [People v Polk \(1996\) 47 CA4th 944](#), 951).

Further Research: See [Effective Intro of Evidence, chap 11](#) (authentication), for sample questions.

Judge's Perspective

A conversation taped without the consent of the other party may raise a question over the admissibility of the tape. California law provides that taping a conversation without notice to or consent of the other party is a misdemeanor under [Pen C §§632](#) and [632.7](#) and [Coulter v Bank of America \(1994\) 28 CA4th 923](#), 930. Thus, counsel should be prepared to object to the admission of such evidence. See [CC §3517](#).

Because of the proliferation of electronic devices with recording capabilities, statements are recorded in unconventional ways and are later sought to be introduced in court for impeachment, ignoring the requisite foundations such as the necessity of preparing a transcript (see [Cal Rules of Ct 2.1040](#)), lodging it with the court, and giving opposing counsel an opportunity to object.

WRITINGS

"WRITING" AND "ORIGINAL" DEFINED

Writing. Under [Evid C §250](#), the term "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."

Original. Under [Evid C §255](#), the term "original" means:

(1) With respect to a writing, "the writing itself or any counterpart intended to have the same effect by a person executing or issuing it";

(2) With respect to a photograph (see Photographs, above), an original "includes the negative or any print therefrom"; and

(3) With respect to data stored in a computer or similar device, an original includes "any printout or other output readable by sight, shown to reflect the data accurately."

FOUNDATION REQUIRED

You must show that:

Writing is what you say it is ([Evid C §§1400-1401](#)); *Ramos v Westlake Servs. LLC* (2015) 242 CA4th 674, 684; [People ex rel Owen v Media One Direct, LLC](#) (2013) 213 CA4th 1480, 1484;

If you use a copy, you fall under an exception to the secondary evidence rule (see [Appendix B](#), above); and

If writing includes hearsay, you meet requirements for an exception to the hearsay rule (see, e.g., [Grail Semiconductor, Inc. v Mitsubishi Elec. & Electronics USA, Inc.](#) (2014) 225 CA4th 786, 798 (page from website as business record); [Rufo v Simpson](#) (2001) 86 CA4th 573, 591 (letter, diary entries)). See also Excited Utterance, above.

Judge's Perspective

Reliance on the Internet in court is often met with foundation objections. In [People v Espinoza](#) (2018) 23 CA5th 317, a criminal case involving the alleged smuggling of prescription drugs into a jail, the confiscated drugs were not tested but were identified through comparison with a website. The conviction for drug smuggling was affirmed and the objection to the use of a website was overruled; the court found that the

website qualified as a "published compilation" under the exception to the hearsay rule in [Evid C §1340](#). 23 CA5th at 319. The drug website is an authoritative reference even though it was available without any special authorization. Counsel seeking admission of website evidence could use *Espinoza* by analogizing the website evidence to other arguably authoritative websites.

SAMPLE RECORD: Authenticating a Contract

Q: During the course of this meeting, which you attended, was any sort of document prepared?

A: Yes, there was. [*Shows that witness has personal knowledge of the document.*]

Q: Who prepared the document?

A: Mr. Molton.

Q: Did Mr. Molton say anything with respect to what the document was at the time he was preparing it?

A: Yes.

Q: What did he say?

A: He said he was putting together a short memorandum of understanding that both he and Mr. Rue could sign to confirm their agreement. [*Shows content of the document.*]

Q: When you were at this meeting, did you see the document that Mr. Molton prepared?

A: Yes, I did.

[*At this point, attorney hands a copy of the document to opposing counsel.*]

Q: With the court's permission, I would ask that this document be marked as plaintiff's Exhibit 1 for purposes of identification.

[*Counsel hands original document and copy to clerk, who then marks it, hands a copy to judge, and returns original to counsel.*]

Counsel: Your Honor, may I approach the witness with the exhibit?

Court: Go ahead.

Q: I am handing you a document that has now been marked Plaintiff's Exhibit 1 for purposes of identification. Would you please review this document and then tell us whether you recognize it?

[Counsel generally returns to table while witness looks at document.]

A: Yes. It is the memo that Mr. Molton prepared at the meeting. [*Identifies document.*]

Q: Did you see Mr. Rue sign his name to this memorandum?

A: Yes, I did.

Q: Is that his signature at the bottom of the exhibit?

A: Yes, it is.

Q: Did Mr. Molton also sign this document, Exhibit 1, in your presence during that meeting?

A: Yes, he did. That is his signature at the bottom of the document.

SAMPLE RECORD: Authenticating a Letter

Q: Let me hand you a document that has been marked as Plaintiff's Exhibit 2 for purposes of identification. Would you tell us whether you recognize this document?

A: Yes, I do.

Q: What is it?

A: It is the letter I mailed to Mr. Rue immediately after our telephone conversation on June 12, 2011.

Q: Whose signature is that on the bottom?

A: It's mine.

Further Research: See [Effective Intro of Evidence, chap 11 \(authentication\)](#), [chap 54](#) (electronic and social media evidence), for sample questions.

X-RAYS

RELEVANCY

To show present and past physical conditions; and

To provide comparison between normal body and injured body.

FOUNDATION REQUIRED

The standards applicable to X-rays are the same as those applicable to authenticating normal photographs ([Sim v Weeks \(1935\) 7 CA2d 28](#), 40):

X-ray was taken of person and conditions that are subject of dispute; or

X-ray depicts conditions that are substantially similar to those conditions; and

The manner in which films were taken must indicate reliability.

COMMON WAYS TO LAY FOUNDATION

Stipulation;

Testimony of witness; and

Judicial notice of general acceptance of standard X-ray techniques as a method of portraying the condition of the human body (*Reynolds v Struble* (1933) 128 CA 716, 725).

Typical Witness

Treating doctor;

Radiologist;

X-ray technician;

Medical expert witness; or

Custodian of medical records.

FREQUENT OBJECTIONS AND AUTHORITIES RE ADMISSIBILITY

Objection—Lack of Personal Knowledge

Counsel may object that the doctor ordering, but not actually performing, the X-ray lacks sufficient personal knowledge to authenticate the genuineness and reliability of the resulting film.

This objection generally will be overruled when X-rays are routine and doctor has overall familiarity with patient or taking of that X-ray.

Evidence Admitted Over Objection

Doctor who requested X-rays could testify regarding posture of plaintiff (*Simpson v Steinhoff* (1933) 131 CA 660, 663).

X-rays of normal pelvis were admissible for comparison ([DeMartini v McDonnell](#) (1936) 14 CA2d 405, 406).

Objection—Improper Opinion Testimony

Counsel may object that custodian, technician, or medical provider authenticating film lacks adequate expertise to express an opinion regarding medical significance of film. See, e.g., [Lamb v Moore](#) (1960) 178 CA2d 819, 824.

SAMPLE RECORD: Authenticating X-Rays (Treating Doctor)

Q: Dr. Smith, did you conduct a physical examination of Mr. Jones in your office on April 11, 2011?

A: Yes, I did. He came in complaining of injuries to his arm.

Q: As part of your examination, did you order that an X-ray be taken of his arm?

A: Yes, I did. [*Shows that X-rays were of Mr. Jones's arm.*]

Q: And was an X-ray film actually prepared on the same day?

A: Yes, it was.

Q: Who prepared it?

A: It was prepared by the radiologist who works in the clinic where my office is located.

Q: And when was it that you first saw the X-ray film that was prepared by the radiologist?

A: The same day. I called the radiologist and told him what I needed. I then sent Mr. Jones next door to the X-ray facility, with instructions to bring the completed X-ray film back immediately for me to review. He was back in about 30 minutes, and I then reviewed the films. [*Shows that X-rays were of Mr. Jones's arm.*]

Q: Did you bring that X-ray film with you to court today?

A: Yes, sir.

Q: How do you know that the film you brought with you is the same film?

A: Several reasons. First, the film, at the time it was prepared, had a small insert in the corner that recorded Mr. Jones's name and the date. That information is actually part of the photograph itself. When I looked at the film when I received it back from the X-ray facility, I looked at this insert to make certain

that they had sent me the right film. This film has Mr. Jones's name on it, with the date of April 11, 2011. In addition, when I was done examining the film on April 11, I placed it in the office chart for Mr. Jones, as is my normal practice. It is my office procedure to have all X-rays stay with the file, so that they are always available for review. When I went to get Mr. Jones's file this morning, so that I could produce it in response to the subpoena I received to be here, the X-ray was located in the file. Finally, I've looked at the film, and I remember it as being what I reviewed when Mr. Jones was in my office. [*Shows reliability.*]

[*At this point, counsel can have the document introduced into evidence.*]

A: It was prepared by the radiologist who works in the clinic where my office is located.

Q: And when was it that you first saw the X-ray film that was prepared by the radiologist?

A: The same day. I called the radiologist and told him what I needed. I then sent Mr. Jones next door to the X-ray facility, with instructions to bring the completed X-ray film back immediately for me to review. He was back in about 30 minutes, and I then reviewed the films. [*Shows that X-rays were of Mr. Jones's arm.*]

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[*At this point, counsel can have the document introduced into evidence.*]

Judge's Perspective:

The major difficulty with X-rays isn't getting them into evidence—it's getting the witness to be able to explain them in a meaningful way.

Most courts and jurors simply do not understand what the witness is talking about when they point to various imperceptible shadows, opacities, irregularities, and the like on a particular film. Counsel should work carefully with the witness in this area. Have the witness orient the jury to what they are viewing before specific details in the

exhibit are referenced. It is also essential that all jurors can see the exhibit during the witness's examination to eliminate confusion during jury deliberations.