TIPS FOR THE AUTHENTICATION OF DOCUMENTS FOR AN ADMINISTRATIVE HEARING

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Presiding hearing officers have authority to control the receipt of evidence and exclude materials that are determined inappropriate for inclusion in the hearing record. In many jurisdictions, the rules of evidence do not bind hearing officers. Administrative hearing officers routinely rely on evidence that would not be admissible in a court. However, it is essential that the evidence you rely on to reach your conclusion has some indication that it is reliable and trustworthy.[2] You will create the best record in support of your decision if your documentary evidence is properly authenticated by the proper witness.

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[1] The material presented here is based on our experience as hearing officers and should not be attributed to our respective agencies. You should consult the evidentiary rules which govern your hearings because they may be different from the material presented here. These materials may not be reproduced or republished without our express permission.

[2] In some jurisdictions, a finding of fact based solely on hearsay cannot support a legal conclusion. *See Walker v. Unemployment Compensation Board of Review,* 367 A.2d 366 (Pa.Cmwlth. 1976). The Pennsylvania *Walker* rule provides that: (1) Hearsay evidence properly objected to, is not competent evidence to support a finding of the Board; (2) Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding of the Board, if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will not stand.

Why bother with authentication?

Failure to properly authenticate evidence can lead to reversal on appeal. The Federal Rules of Evidence[3] require the authentication of evidence before it can be admitted into the record and provides a helpful place to start:[4]

> **Rule 901. Authenticating or Identifying Evidence**
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> **(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
>
> **(b) Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:
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> **(1) *Testimony of a Witness with Knowledge*.** Testimony that an item is what it is claimed to be.
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> **(2) *Nonexpert Opinion About Handwriting*.** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
>
> **(3) *Comparison by an Expert Witness or the Trier of Fact*.** A comparison with an authenticated specimen by an expert witness or the trier of fact.
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> **(4) *Distinctive Characteristics and the Like*.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
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> **(5) *Opinion About a Voice*.** An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.
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> **(6) *Evidence About a Telephone Conversation*.** For a telephone conversation, evidence that a call was made to the number assigned at the time to:

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[3] Your jurisdiction may have a different rule. The Federal Rules are used here because they have been adopted by many states.

[4] Even if your agency does not require strict compliance with the Rules of Evidence, it is good to be aware of the formal rule before you decide to bend it.

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) ***Evidence About Public Records.*** Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) ***Evidence About Ancient Documents or Data Compilations.*** For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

The purpose of authentication is to establish a foundation for the connection of the evidence to the person, place, thing or event that the party offering the evidence.[5] Some cases indicate that the reason for the requirement that evidence be authenticated is to provide protection against fraud or mistake.[6]

An appeals court may reverse a decision based on evidence that lacks a proper foundation. In *Kopytin v. Aschinger*,[7] the Superior Court of Pennsylvania reversed and remanded a trial decision where it determined that the lower court had erroneously admitted an improperly authenticated video recording into evidence. The Superior Court ruled that because the witness called to authenticate the video recording was not present at the taping and had no personal knowledge of the circumstances surrounding it, the witness was unable to state that the tape was a fair and accurate depiction of the event shown. The Superior

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[5] P.R.E. 901, Comment.

[6] *Commonwealth v. Brooks*, 508 A.2d 316 (Pa. Super 1986); *Commonwealth v. Harrison*, 434 A. 2d 808 (Pa. Super 1981).

[7] 947 A.2d 739 (Pa. Super 2008).

Court noted that the witness testified that his knowledge of the circumstances surrounding the taping came from handwritten notes submitted with the tape by the two persons who shot the video. The Superior Court held that this was insufficient to authenticate the video recording and reversed the trial court's decision and remanded the proceeding for a new trial.

How do I authenticate writings or documents?

There are several ways to authenticate a writing or document. Usually, authentication of a writing or document is accomplished by testimony of a witness with knowledge.[8] The witness may either be the author or someone who observed the signing of the writing. Writings may be authenticated by circumstantial evidence.

How do I authenticate business records?

Business records or "records of regularly conducted activity" [9] are another form of writing or document frequently used in agency proceedings. The authentication of business records differs from authentication of other writings. Usually, authentication of a writing is accomplished by testimony of a witness with knowledge. Evidence rules permitting the use of business records do not require that the authenticating witness be the person who made

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[8] See F.R.E. 901(b)(1).

[9] F.R.E. 803(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the opponent does not show that the source of information nor or the method or circumstances of preparation indicate a lack of trustworthiness.

the entries in the record or even have personal knowledge of the facts reported in the record. The witness authenticating the business record must only offer testimony relating to the creation of the record to authenticate the business record. Authentication of business records may be accomplished as follows:

Business Records Authentication Questions

Q: Could you please state and spell your name for the record?

Q: By whom are you employed and in what capacity?

Q: How long have you held that position?

Q: Do you have in your possession a document marked for identification as Exhibit No. 1?

Q: Could you please identify the document marked as Exhibit No. 1?

Q: Are you familiar with how the document market as Exhibit No. 1 is created?

Q: How is the document marked as Exhibit No. 1 created?

Q: Is the information contained in the document marked as Exhibit No. 1 recorded at or near the time of the act/event/condition?

Q: Is the information contained in the document marked as Exhibit No. 1 created by or from information transmitted by a person with knowledge of the act/event/condition recorded?

Q: Is the information contained in the document marked as Exhibit No. 1 kept in the course of the regularly conducted activities of the business?

Q: Is it the regular practice of the business to make a record of the information contained in the document marked as Exhibit No. 1?

Is a properly authenticated document automatically admissible?

The short answer is no. Proving that a document is what it purports to be does not automatically lead to the conclusion that the document is relevant to the issues in the case.[10] A presiding officer may refuse to admit a company record if the source of the information or other circumstances indicate a lack of trustworthiness.[11] For example, in *Makris v. Bureau of Professional and Occupational Affairs,*[12] the Pennsylvania Commonwealth Court held that the Bureau had properly excluded a business record from evidence where the proponent testified that he had not immediately produced it because it had been hidden and it took him a period of time to locate. Additionally, another witness testified that her signature on the form had been forged.

Nor is every part or every statement made in a document necessarily admissible even though the document has been properly authenticated. Your witness must be able to provide meaningful testimony about the content document to support a fact relevant your resolution of the dispute

Evidentiary Issues in Common Documents

Account Statements, Customer Contact Records and Payment Agreement Records

Account statements, customer contact records and payment agreement records are often maintained within a company's computer system. To be proper business records, these records should be presented in the form that they are used routinely in the regular course of business. However, depending on the number of records that must be presented, it may be inconvenient to present this information in the form in which it is used by the company. Most modern evidentiary codes permit the use of summaries or charts to prove

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[10] *Stotz v. Shields*, 696 A.2d 806 (Pa.Super. 1997); *Commonwealth v. Zook*, 615 A.2d 1 (Pa.1992); *Commonwealth v. Brooks*, 508 A.2d 316 (Pa.Super. 1986).

[11] F.R.E. 803(6)(E).

[12] 599 A.2d 279 (Pa.Cmwlth. 1991).

the content of voluminous records, if the underlying business records would be otherwise admissible:

> The proponent may use a summary, charge or calculation to prove the content of voluminous writings, recordings or photographs that cannot be conveniently examined in court… [13]

It is important that company records be legible and copies clear. A summary or chart should be identified as such. The authenticating witness should be able to testify as to the mode of preparation and the way records were selected for inclusion in the document.

Technical Reports

Field reports and other investigation reports by technicians or engineers can be particularly tricky if the right witness is not presented to authenticate the document and offer testimony. For example, a customer service representative may be able to authenticate a technical document as a business record but is not likely to be competent to testify about the meaning of the facts stated in the document. Nor can the authenticating witness testify about the conclusions or opinions made in the report without personal knowledge.[14] The author of the report is obviously the best witness to authenticate the report and testify about its content.

Photographs

Photographs should be authenticated by the person who took the picture and can testify about when, where and under what circumstances the photograph was taken or by someone who was present when the photograph was taken. The authenticating witness must have sufficient knowledge to testify that the photograph fairly and accurately represents whatever the photograph shows. Many presiding officers will require original color photographs as photocopies are not always clear.

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[13] F.R.E. 1006.

[14] *Duquesne Light Co. v. Woodland Hills School District*, 724 A.2d 936 (Pa.Cmwlth. 1998).

Public Records

Certain public documents need not be authenticated. However, like other types of records, an otherwise admissible government document may be excluded from evidence on other grounds.

Conclusion

Writing a good order requires a full and complete record. Reliable and properly authenticated documentary evidence will not only create a record that allows you to craft a thoughtful and well-reasoned decision but will help to protect your decision from reversal on appeal.