

EVIDENTIARY FOUNDATION



Rahul Gupta
Sr. DDA, Major Fraud – Cybercrime

NEW DEPUTY TRAINING II





EVIDENCE

EC 140 – What is Evidence?

- Evidence means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.

4 TYPES OF EVIDENCE

- REAL
- TESTIMONIAL
- DEMONSTRATIVE
- DOCUMENTARY





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EVIDENTIARY BASICS

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EC 350 – Only Relevant Evidence is Admissible

EC 351 – Except as otherwise provide by statue, “all relevant evidence is admissible.” [EC 352]

EC 210 – What is Relevant Evidence?

- Evidence having any tendency to prove or disprove any disputed fact that is of consequence to the determination of the action.



FOUNDATION BASICS

EC 403(a) – Preliminary Facts

- The proponent of evidence has the burden of producing evidence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds there is evidence sufficient to sustain a finding of the existence of the preliminary fact:

- (1) Relevance
- (2) Personal knowledge of a witness
- (3) Authentication of a writing [see EC 1400.1401]
- (4) Statement or conduct of a witness, and the preliminary fact is whether the person made the statement or engaged in the conduct.

**Burden of proof for preliminary fact is a preponderance of evidence – “to enable a reasonable jury to conclude it is more probable that the fact exists than it does not.” [EC 115, P vs. Simon, 184 Cal.App.3d 125 (1986)]*

EC 402(b) – court may determine outside the presence of jury

SOCIAL MEDIA EVIDENCE



WHAT IS SOCIAL MEDIA

- Digital photos and videos are writings (EC 250) *P vs. Goldsmith* (2014) 59 Cal.4th 258

Cases to rely upon:

- *P vs. Goldsmith* (2014) 59 Cal.4th 258
- *P vs. Valdez*, (2011) 201 Cal.App.4th 1429
- In RE KB (2015) 238 Cal.App.4th 989
- *Kinda vs. Carpenter* (2016) 247 Cal.App.4th 1268

Case Defense will rely upon:

P vs. Beckley (2010) 185 Cal.App.4th 509

Defense View of Social Media

“Anyone can put anything on the Internet...hackers can adulterate the content of any web-site from any location at any time.”

- *P vs. Beckley* (2010) 185 Cal.App.4th 509, at 515, quoting *St. Clair vs. Jonny's Oyster & Shrimp, Inc* (S.D. Tex. 1999) 76 F. Supp.2d 773, 775).



P vs. VALDEZ 201 Cal.App.4th 1429

■ Facts: TLF gang member, aka “Yums” on trial for attempted murder. DA introduced pages of Def’s Myspace account.

■ Issue: Lack of authentication, hearsay, 352

■ Held: Social media properly authenticated, distinguishes *Beckley*.

*“The contents of a document may authenticate it... the writings on the page and the photograph corroborated each other by showing a pervading interest in gang matters...this **consistent, mutually reinforcing content on the page** helped authenticate the photographs and writings.”*



P vs. VALDEZ 201 Cal.App.4th 1429

“hacking may occur ... on the Internet ... But the proponents threshold for authentication is not to establish validity or negate falsity in a categorical fashion, but rather to make a showing on the which the trier of fact reasonably could conclude the proffered writing is authentic.”

**distinguishes Beckley*



IN RE KB 238 CAL.APP.4TH 989



■ **Facts:** SFPD sees a post of Def holding a firearm in an apt with camo curtains Posted on Instagram. Officers find firearms and Instagram photos.

■ **Held:** Social media properly authenticated, distinguishes *Beckley*.

“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.”

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KINDA vs. CARPENTER 247 CAL.APP.4TH 1268

Facts: Victim biz sues landlord for posting anonymous negative Yelp reviews. IP addresses come back to landlord's residence and place of work. Trial court required Victim to prove Def made the postings to establish authentication. Appellate court reversed.



KINDA vs. CARPENTER 247 CAL.APP.4TH 1268

COURT: “[B]efore it comes into evidence, you have to give me some connection that you can prove he posted them. If you can’t do that, I’m not going to let it into evidence and we don’t even have to have this discussion.

PLAINTIFFS ATTORNEY: “Well, it’s an issue of fact, Your Honor, and I think I can show that there’s sufficient connect the dots—I mean what are the odds that somebody decided to drive over to his house, park in front of his house, and as the expert testified—

THE COURT: Yeah, you’re going to have to. You need to understand that **I am concerned about the authenticity of this, if that’s the correct word.** You have to tie it back to him. And unless somebody persuades me that there is sufficient evidence that ties it back to him, then it’s not going to come in.”