



EVIDENCE IN NURSING LICENSURE ACTIONS AND PRACTICAL SOLUTIONS

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Evidence – Black’s Law Dictionary 457 (11th ed. 2019)

Something that tends to prove or disprove the existence of an alleged fact.

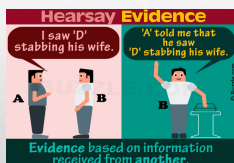
Evidence includes:

1. testimony,
2. documents, and
3. tangible objects.

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Hearsay – FRE 801

Hearsay is a statement (may be oral, written or nonverbal actions) that the declarant does not make while testifying, that is offered to prove the truth of the matter asserted.



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Hearsay (cont.)

1. What is the purpose of the "hearsay" evidence?
2. Is the statement used for the truth of the matter asserted?
3. Any applicable exception that applies?

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Business Records Exception – FRE 803(6)

A memorandum, report, record or data compilation, in any form.

To qualify as a business record, the record must be a reporting of acts, events, conditions, opinions or diagnosis:

1. made at or near the time of the recorded event;
2. by, or from information transmitted by, a person with direct knowledge of the recorded event;
3. kept in the course of a regularly conducted business activity; and
4. it was the regular practice to make such document.

The foundation must be laid by testimony of the records custodian or other qualified witness familiar with the method or process of keeping such records unless stipulated or self-authenticating. *Israel v. State*, 993 So. 2d 952 (Fla. 2008).

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Hospital/Medical Records Exception - FRE 803(4)

1. Hospital and medical records are specifically included as business records.
2. Must be reliable information related to medical diagnosis or treatment, medical history, past or present symptoms, or their general cause.

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Public Records Exception - FRE 803(8)

Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies. Limited to:

1. records setting forth the activities of the office or agency;
2. matters observed pursuant to duty imposed by law as to matters which there was a duty to report (except police report); and
3. information in report must be based on observations of the public officials.

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Public Records Exception (cont.)

Agency investigative file: material in the file generated by others, e.g. that of other commenting agencies, are not subject to the exception.

Police reports: facts related in witness interviews are not matters observed by the officer.

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Authentication

Authentication of evidence is satisfied by the proponent offering evidence sufficient to support a finding that the matter in question is what the proponent claims it to be.

A. Evidence may be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances including:

1. Appearance;
2. Content; or
3. Unique characteristics.

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Authentication

- B. Evidence may be authenticated by:
1. extrinsic evidence, or by
 2. self-authentication.

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Authentication-FRE 901

The following examples satisfy the authentication requirement:

1. Testimony of a witness with knowledge;
2. appearance;
3. content; or
4. distinctive characteristics based on context.

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Self-Authentication - FRE 902

Self-authentication includes evidence that requires no extrinsic evidence of authenticity in order to be admitted. The most common forms of self-authenticated evidence include:

1. (Public Documents with Seal) - A document bearing a seal and signature of the custodian attesting to the authenticity of the seal.
2. (Public Documents without Seal) - A document not bearing a seal but purporting to bear a signature affixed in an officer's or employee's official capacity.
4. (Certified Copy of Records) - A copy of a public record certified as correct by the custodian or authorized person.
5. (Official Publications) - Books, pamphlets, or other publications issued by a governmental authority.
11. (Certified Business Record) - A business record certified by the custodian or other qualified person that the record meets the four requirements of a business record.

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Social Media

Methods of authentication include:

1. Testimony of a witness with knowledge - a witness with firsthand knowledge of the creation of a social media post, either the author of the post, or a witness who saw the author create the post.
2. Records custodian - presentation of a records custodian affidavit sufficient to render posts as authenticated business records.



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Social Media (cont.)

Issues with evidence obtained from social media sites include:

1. Identifying who posted the information;
2. The information being posted can be edited by all who see it; and
3. The information posted includes an easy way to share it with people not included within the scope of the original post.

Because of the unique dynamics of communication on social media, any unprotected post can "go viral," quickly—and often uncontrollably—across the internet. This poses a problem with identifying the original information source.

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Electronic Evidence

1. Audio recordings - Partially inaudible or unintelligible audio recordings are not per se inadmissible. Instead, the admissibility of a partially inaudible or unintelligible audio recording is determined by whether the condition of the recording degrades its usefulness to the extent the evidence is misleading or irrelevant.
2. Screenshots - A screenshot of a website, without more, is not sufficient to establish when the website was created.
3. Text messages - Text messages may be authenticated by original sender or recipient. A digital forensics expert may be useful as well.

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Electronic Evidence cont.

- 3. Text messages - Text messages may be authenticated by original sender or recipient. A digital forensics expert may be useful as well.
- 4. Electronic business records - Admissible as business records provided the four criteria for business records exception are met. The person laying the foundation does not need to have personal knowledge of the entries, but must have knowledge of the record keeping system.

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Practice Tips

- 1. Prepare, Prepare, Prepare: Preparation is key to getting evidence successfully admitted.
- 2. Self-represented parties: Self-representation does not relieve a party of the responsibility to comply with evidentiary rules.
- 3. Preserving the record: Anticipate what objections there might be to an exhibit. If there is case law or a statute on the issue, bring it to the judge's attention.

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QUESTIONS?



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