



# A Case in Proof

## As technologies evolve, proving authenticity of voice recordings will become increasingly difficult

**P**roving one's case in court involves more than just stating the facts. Unless and until the judge reasonably concludes the evidence you want to admit is admissible, no one's stating anything.

Myriad rules now govern admissibility, including the Federal Rules of Evidence (FRE), the U.S. Constitution, and acts of Congress. While under common law, evidence had to be pristine before it could be admissible, American law evolved, embracing the principle that more is better. The FRE mandate admits evidence with defects bearing on weight and not admissibility as long as the evidence is relevant and authentic, barring other means to prohibit its introduction.

### Relevant

Relevancy is defined by a broad standard. The FRE state that "evidence is relevant when the evidence makes the occurrence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This is a pretty low threshold. As long as the evidence is material (a fact of consequence) and relevant (makes it more probable or less probable), under this standard, it's coming in.

### Authentic

Evidence is authentic when the party seeking to introduce it into evidence can support a finding that it is what he says it is. This can be done several ways. A witness can testify to its authenticity or a chain of custody can be established. In the case of recordings, even if the recordings contain anomalies, the anomalies will not be dispositive if the proponents can provide an explanation.

Once the judge believes a reasonable jury could find a recording to be authentic, it becomes admissible. After it is admitted, if the opposing party still has a genuine concern as to its authenticity, the burden shifts to the opponent to prove the recording is not authentic. This may be accomplished through cross-examination, rebuttal witnesses, closing arguments, and jury instructions.

### Establishing Authenticity

With the proliferation of emerging technologies, including tools to manipulate digital files, does authenticity become easier or harder to establish? It depends. Fausto

Tito Poza, an audio forensic consultant and expert witness, says the nature of the recording will influence its ease of manipulation; sometimes it is easier to alter an analog recording than it is to alter a digital one.

Just because a particular technology exists, doesn't mean people have the requisite skills to use it effectively. Many of us are familiar with software programs like Photoshop that allow us to manipulate digital photographs. Although there are more than 5 million registered Photoshop users, not all of them have the skills to swap the head of a favorite celebrity with an ex-spouse's head on last year's Christmas picture and make it look authentic.

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Digital recordings, because of their dynamic nature, may be more difficult to manipulate than photographs. While with a photo, manipulators need to be concerned with elements such as color, size, and shadow, with audio, one needs to be concerned not only with the words but also with subtleties like background noises.

ProTools by Digidesign, a software application for recording and editing audio, is most often used to create and manipulate sound for films, records, and other entertainment industry projects. Users can cut sentences, change word order, clean recordings, and even generate background noise. With prices starting at \$300, the software is well within the reach of users who may have less-than-benevolent purposes. It even keeps extensive metadata in its files, according to Francois Quereuil, worldwide segment marketing manager for Digidesign, but it is not impossible to manipulate these logs.

Even with the skills one needs to effectively alter a digital recording, some experts believe the convergence of digital technologies with the liberal standards of the FRE is trouble waiting to happen. Although we've not yet reached the tipping point, doing so may be inevitable.

There is no easy way to tighten the standard without keeping good recordings out, according to Basil Dezes, dean of the University of West Los Angeles School of Law. Poza agrees. He goes further, believing the standard will not change before an unjust outcome with tragic results is discovered, perhaps in a capital murder case. ☒

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