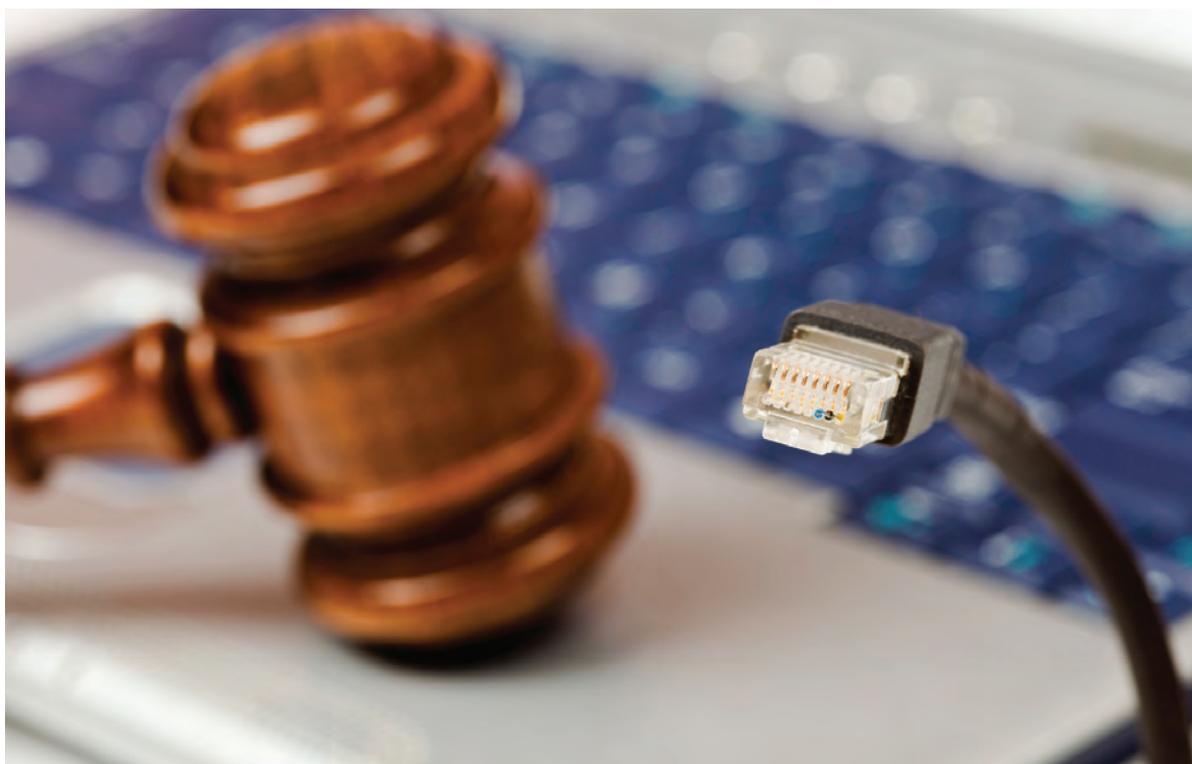


A PRIMER ON ADMITTING WEB PAGES INTO EVIDENCE

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While our counterparts in medical and other professions have used advanced technology to make strides in their fields over the past 20 years, many in the legal community have shown resistance to embracing new technology. Take the Internet for example; it can be a valuable tool in the courtroom, even helping you win your case. In this article, we hope to demonstrate this by teaching tech-users and resisters alike some strategies for getting web pages admitted into evidence and sometimes, more importantly, keeping them out!

Authenticating Web Pages Using Nevada Revised Statute 52.015

Nevada Revised Statute 52.015 requires that evidence be authenticated before it is admitted. This requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. The party offering evidence need only make a prima facie showing of authenticity so that a reasonable juror could conclude that the document is what it purports to be. A proper foundation does not need to be established through personal knowledge, but can rest on any means of authentication permitted by Nevada Revised Statutes 52.025 through 52.105 and 52.115 through 52.175. Although this is not a particularly high standard to meet, counsel often fails to meet even this minimal showing when attempting to introduce web pages.

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Authenticating a printout of a web page, in its simplest form, requires that the proponent offer evidence that:

- (1) the printout accurately reflects the computer image of the web page as of a specified date;
- (2) the website where the posting appears is owned or controlled by a particular person or entity; and
- (3) the authorship of the web posting is reasonably attributable to that person or entity. *Christopher B. Mueller and Laird C. Kirkpatrick*, 5 Federal Evidence § 9:9 (3d. ed. 2007).

Thus, as a simple example, counsel seeking to admit the printout of a web page could offer the testimony of a witness who confirms that the exhibit in question accurately reflects what she saw after she typed in a particular website URL, logged onto the website and then reviewed what was there.

Authenticating Web Pages Through Judicial Notice

Another approach to authenticating a web page might employ NRS 47.130, pursuant to which a court may take judicial notice of “adjudicative facts.” Adjudicative facts are not subject to reasonable dispute – they are either:

- (1) generally known within the territorial jurisdiction of the trial court; or
- (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Accordingly, a court may take judicial notice of the contents of a website assuming its authenticity has not been challenged and it is capable of accurate and ready determination.

Authenticating Archived Web Pages Using Screen Shots from Archive.org

When web pages relevant to litigation change or are deleted, Internet archives, such as the Internet Archive’s¹ Wayback Machine² – provided by archive.org – can sometimes be used to obtain copies of previous versions of the website from a particular point in the past. To make use of archived material from the Wayback Machine, an attorney must obtain a certification or other authenticating evidence from the archive administrator, showing how the archive captures information, confirming that it is effectively a business record and demonstrating that the archival process is an authenticable computerized process. See <http://www.archive.org/legal> (instructions regarding obtaining an affidavit).

On a related note, individuals or businesses wanting to strategically avoid archival of their websites by Internet Archive should be sure to remove their site from the Wayback Machine by placing a robots.txt file at the top level of their website. (For instructions on how to remove a website from the Wayback Machine, see <http://www.archive.org/about/exclude.php>).

Authenticating Web Pages Through Self-Authentication

Screenshots from government websites can sometimes be admitted into evidence without authentication if they can be self-authenticated pursuant to NRS 52.135. NRS 52.135 states that “Books, pamphlets or other publications purporting to be issued by public authority are presumed to be authentic.” Courts have generally held that records from government websites are





self-authenticating under Federal Rule of Evidence 902(5), which is the Federal equivalent of NRS 52.135. See, e.g., *Estate of Gonzales v. Hickman*, No. ED CV 05-660 MMM (RCx), 2007 WL 3237727, *2 n. 3 (C.D. Cal. May 30, 2007) (unreported) (finding report issued by the Inspector General of the State of California on the Office of the Inspector General's website to be self-authentic).

Less Orthodox Methods for Authenticating Web Pages

Although the most common ways to offer web pages into evidence involve prior authentication under 52.015, judicial notice or self-authentication, there are other alternatives to consider, especially if the screenshot of the web page at issue is from the opposing party's website. In this case, an attorney may attempt to authenticate the screenshot:

- (1) at the opposing party's deposition;
- (2) through the use of a request for admission; or
- (3) by asking the opposing party to stipulate to the authenticity of the screenshot of the web page.

Combining Methods for Authenticating Web Pages

It is important to note that attorneys should not rely on only one method for authentication. If multiple methods are used, it is more likely that a court will deem the web page sufficiently authentic. For example, in *E.E.O.C. v. E.I. Du Pont de Nemours & Co.*, the United States District Court for the Eastern District of Louisiana held that a web page printout was sufficiently authenticated where:

- (1) the printout contained the address from which it was printed;
- (2) the printout contained the date on which it was printed;
- (3) the court accessed the website and verified that the page existed; and
- (4) the web page was maintained by

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a government agency and thus was self-authenticating. E.I. Du Pont, No. Civ. A. 03-1605, 2004 WL 2347559 (E.D. La. Oct. 18, 2004) (unpublished).

Strategies for Challenging the Authenticity of Web Pages

While the Internet is the source of an enormous amount of legitimate information, it also contains plenty of questionable material. As a result, attorneys may find occasion to challenge the authenticity of web pages in an attempt to keep them out of evidence. The simplest approach is to return to the requirements for establishing a web page's authenticity, outlined previously, using the requirements as a checklist for testing the integrity of opposing counsel's proposed admission.

First, the printout of the web page must accurately reflect the computer image of the web page, as of the specified date. Thus, where some question exists, counsel may attempt to show that the proffered exhibit does not accurately reflect the content of the site from which the information came. Second, the proffering attorney must establish that the website where the posting appears is owned, or controlled, by the person or entity to whom the web page or related content is being attributed. A careful whois.com search may help raise doubts about such ownership and control, thus reducing the likelihood the web page will be admitted. Finally, the proffering attorney must establish that the authorship of the web posting in question is attributable to that person or entity. With a number of sites, such as Wikipedia, or blogs containing anonymous postings, it is often difficult to establish authorship of material occurring on the site and, as a result, opposing counsel may argue this point. Furthermore, there nearly always remains the possibility that Internet information has been hacked or manipulated by a third party.

In the face of a challenge to the authenticity of a web page, a judge can always personally review the web page in question. If the information is no longer online to review, the court may consider whether or not others reported viewing it and whether or not the attributed party posted the same information elsewhere. Alternatively, the proffering lawyer can obtain a NRS

52.260 certification from a webmaster establishing that a particular file, of identifiable content, was placed on a website at a specific time.

Conclusion

While Internet usage now permeates modern life, some courts still view web page evidence with suspicion. The fact is, just due to the incredible amount of information available on the Internet, some of it is going to be of questionable quality; so some of the court's skepticism is probably justified. But, assuming the evidence is, in fact, genuine, counsel can generally overcome a court's reluctance and successfully offer web page evidence by employing the proper authentication techniques. ■



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- 1 The Internet Archive is a website that provides access to a digital library of Internet sites and other cultural artifacts in digital form.
- 2 The Wayback Machine makes it possible to surf more than 120 billion pages stored in the Internet Archive's web archive. Visitors to the Wayback Machine can type in a URL (i.e., a website address), select a date range, and then begin surfing on an archived version of the Web.