



**LEGAL ADMISSIBILITY
OF DOCUMENTARY EVIDENCE
IN CIVIL AND CRIMINAL PROCEEDINGS
By Tania Correia, Legal Consultant**

What is a "document" in this context?

"There is a document whenever there is writing or printing capable of being read, no matter what the material may be upon which it is impressed or inscribed". [R -v- Daye \(1908\) 77LJK8 659](#)

This description illustrates that documents cover any record of evidence or information and are not limited to pieces of paper.

Distinguish between Admissibility and Weight of Evidence

It is important to distinguish between the legal admissibility of documentary evidence and the weight that documentary evidence is given in the court room.

Also note that in a civil action the burden of proof is "on the balance of probabilities" but the prosecution in criminal action faces a much higher burden of proof, that is, "beyond reasonable doubt".

The Weight of Evidence

The fact that a document is copied may reduce its weight as evidence, unless there is sufficient authentication evidence to convince the court that it is an accurate copy.

Authentication in this context is proving to the court that a document is what it purports to be, i.e. proving the original of, for example, a scanned image and also showing that it has not been altered since the date it was scanned into an EDMS system.

Such authentication evidence would normally be in the form of an audit trail, i.e. showing how the original document was turned into an electronic image stored in the system and then produced to the court. If an audit trail like this cannot be produced, electronic images or any other evidence may be rejected.

Arguments also take place over the content of a document rather than the authenticity of a document. In these cases there is unlikely to be any problems about producing copies of the various documents (either electronic or as a hard copy). However, in some fraud actions, this may not be the case, for example, if a signature is at issue then it is obviously better to produce the original document rather than an electronic image or even a photocopy of it. Also, in some cases it may be important to know that a hand-written comment was made in blue ink, obviously the original document would carry the most weight as evidence but a colour electronic image may also be just as important. A black and white photocopy would not carry much weight as evidence in this example.

Electronic images or TIFFS are treated as secondary evidence in the same manner as a photocopy or a microfilm image.

It follows that these will be given the same weight of evidence as microfilm copies and images which means that evidence as to how they were created and stored and used is very important because it will add to their weight as evidence and make them more important than say, photocopies or microfilm images.

All copy documents (hard copies, microfiches or images) will be treated by the court as secondary evidence and will not carry much weight if their authenticity can be questioned.

Admissibility of Evidence

Arguments over the admissibility of evidence can lead to investigations into the system which produced the paper, the method of storage, operation and access control, and even to the computer programmes and source code.

It may also be necessary to satisfy the court that the information is stored in a "proper" manner.

Such arguments can be used by the defence and/or defendants as a tactic to discredit evidence and make it inadmissible so it is very important that the party using electronic information in the court room has an audit trail which deals with all the matters referred to in the previous paragraph.

Civil Proceedings

In civil litigation, there are no prior requirements which must be met before a document (which would include a scanned image) can be admitted in evidence.

Provided the Civil Court rules are followed, the relevant documents are shown to the other side prior to the trial and the Judge is satisfied that admitting the evidence will not prejudice a fair trial, admissibility is usually not a big issue.

There is statutory guidance as to what constitutes a document and how it should be admitted.

Section 13 of the Civil Evidence Act 1995 states that "document" means anything in which information of any description is recorded, and 'copy', in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly.

This section replaced s.10(1) of the Civil Evidence Act 1968 which said virtually the same but in a more long winded way. Section 10(1) is reproduced below because it is more descriptive as to what can be considered a document.

A document under section 10(1) of the Civil Evidence Act 1968 is said to include in addition to a document in writing (a) any map, plan, graph or drawing; (b) any photograph; (c) any disk, tape, soundtrack or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced there; and (d) any film negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom.

It is interesting to note that whilst the form of words may have changed over the years, the description of a document given in the R -v- Daye in 1908 has not really changed over the decades.

Section 8 of the Civil Evidence Act provides that where a statement in a document is admissible, it may be proved by producing a copy of the document (even if the original is still in existence) and the number of copies between that particular copy and the original is irrelevant.

Section 9 of the Civil Evidence Act 1995 goes on to provide that documents which form part of the records of a business are automatically admissible and in the absence of an entry in those records can be proved by an appropriately signed certificate.

The only "health warning" with regard to business records is that all business documents are not records. If a document is not a comprehensive record of what has occurred, or, even if comprehensive, was not intended to serve as a primary source of information on that matter, it will not be a record (H -v- Shearing Chemicals (1983) 1AllER.849).

Therefore, most computer generated records will come under section 8 (i.e. be a copy) rather than under section 9).

It is also worth noting that a computer database containing relevant information is considered by the civil courts to be a "document" Derby -v- Weldon (No.9)[1991]1WLR.652 and Alliance & Leicester Building Society -v- Ghahremani (1992)32 RVR.138.

Issues relating to authenticity are generally not a problem in most civil proceedings if the evidence has been disclosed during a process called discovery (where the parties exchange documents in their possession, power and control relating to the issues) because the rules of the Supreme Court and the relevant County Court rules provide that where lists of documents are exchanged a document which is asserted on the list to be a copy is presumed to be a true copy unless its authenticity is specifically disputed by the other party. If, however, the document is disputed, evidence as to its authenticity will be required.

Criminal Proceedings

In criminal proceedings, it will always be necessary to be able to produce some founding testimony as to the source and authenticity of the document especially if it is a image, otherwise the courts may refuse to admit the evidence.

The provisions of section 69 of the Police and Criminal Evidence Act 1984 apply to all computer records. This means that in criminal cases, any use of, for example, a scanned image as evidence must be accompanied by the certificate required under section 69. This certificate, is given by a person responsible for the computer system in question and must state that either the computer system was at all times operating properly, or that any defect in its operation was not such as to affect the accuracy of the record. Section 69 is not concerned with the accuracy of the information supplied to the computer, all the section requires is positive evidence that the computer has properly processed, stored and reproduced whatever information it received.

Section 1 of the Criminal Evidence Act 1965 states that "in any criminal proceedings where direct oral evidence of fact would be admissible, any statement contained in a document intending to establish that fact, shall on production of the documents, be admissible as evidence of that fact, if the documents forms part of the records of a business".

Section 71 of the Police and Criminal Evidence Act 1984 also provides that microfilm copies of a document or part of it may be produced as evidence (whether or not the original document is still in existence) provided it is authenticated in such a manner as the court may approve.

The other statute which is of relevance to this subject is the Criminal Justice (International Corporation) Act 1990. The section we are concerned with is section 3 which enables, inter alia, a letter of request to be used to gather evidence and obtain assistance outside of the U.K. Such evidence would be admissible in criminal proceedings.

The Courts always have discretion to exclude evidence which has doubtful value. A prosecutor or party to litigation will always need to be prepared to offer further evidence about the source of electronic evidence and the processing and storage it has undergone since it was first recorded. It has been held that a person producing a recording as evidence must describe its provenance and history so as to satisfy the judge that there is a prima facie case that the evidence is authentic (R -v- Robson and Harris 1972 1WLR 651).