



NAVIGATING CREDIBILITY, RELIABILITY & AUTHENTICITY WHEN ASSESSING EVIDENCE

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EVIDENCE: WEIGHING, ANALYZING

Avoiding Common Errors

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EVIDENCE

Testimony

Text Messages

Social Media Posts
and Messages

Emails

Surveillance

Videos

Photographs

Police Body
Camera Footage

Swipe Records

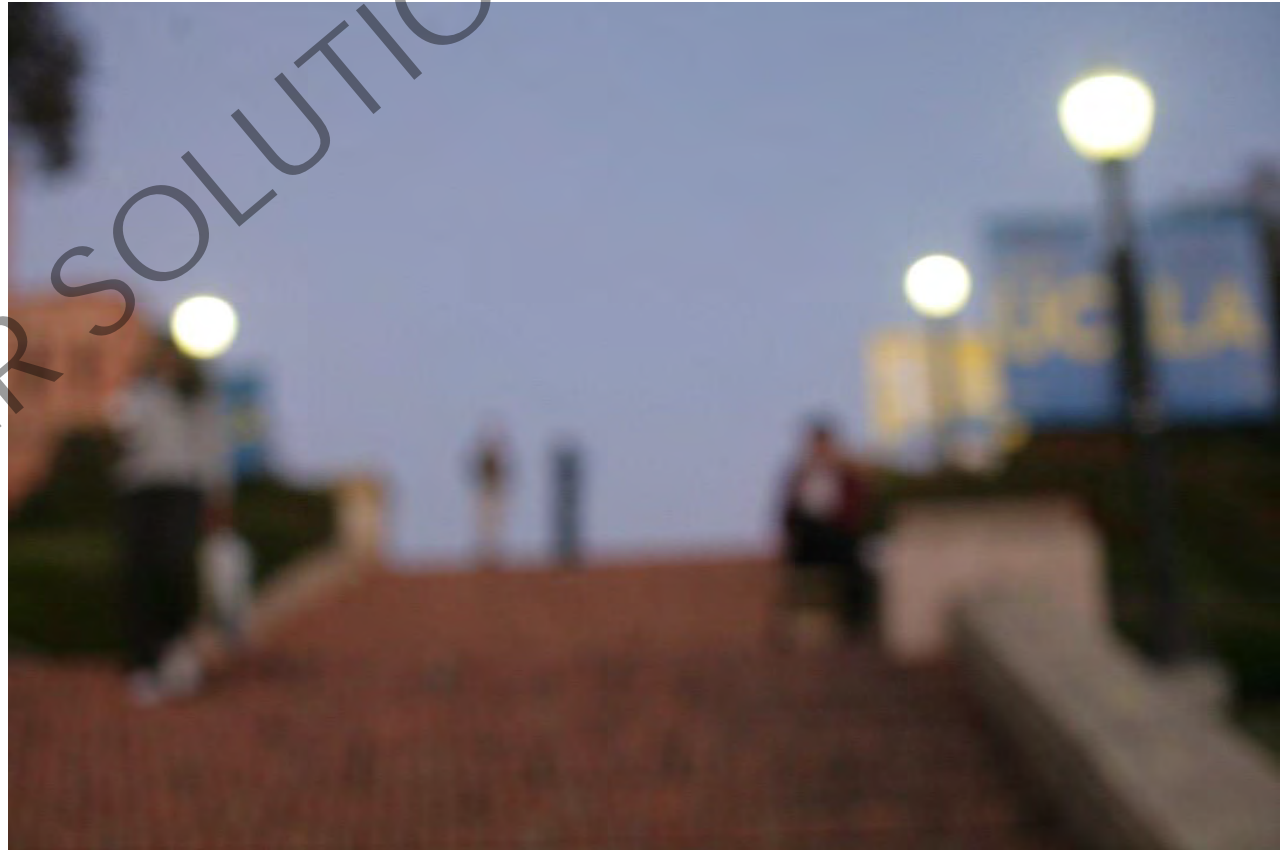
Medical Records

Phone
Records

Audio
Recordings

CAN YOU RELY ON THE EVIDENCE GATHERED?

- Thorough? (Does it tell whole picture?)
- Authenticated?
- Is there an explanation for what was omitted?



SHE TEXTED ME “ALL THE TIME”

Do you have those texts?

May I have those texts?

Oh, they weren't “texts,” they were DMs?

Who else might have seen them?

Was anyone else copied?



THE “HARD” QUESTIONS: YOU CANNOT WEIGH IT IF NO ONE ASKED IT

Details
About The
Sexual
Contact

Seemingly
Inconsistent
Behaviors

Inconsistent
Evidence/
Information

What They
Were
Wearing

Alcohol
Or Drug
Consumption

Probing Into
Reports Of
Lack Of
Memory

YOU CANNOT WEIGH IT IF NO ONE ASKED

LAY A FOUNDATION FOR THE QUESTIONS

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

BE DELIBERATE AND MINDFUL IN YOUR QUESTIONS:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...

WEIGHING EVIDENCE

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TYPES OF EVIDENCE

Direct Evidence

- Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

Circumstantial Evidence

- Evidence based on inference and not on personal knowledge or observation.

Corroborating Evidence

- Evidence that differs from but strengthens or confirms what other evidence shows.

EVALUATING THE EVIDENCE

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.

Is it authentic?

Is the item what it purports to be?

Is it credible/reliable?

Is the evidence worthy of belief?

What weight, if any, should it be given?

Weight is determined by the finder of fact!

AUTHENTICATING EVIDENCE

1. At 1:18 am, Pat captured a video of Elliott and Sam. In the video, Sam had one arm around Elliott's shoulders, and Elliott's head was resting on Sam's shoulder. In the video, both Sam and Elliott, and at least 2 others, were loudly singing Happy Birthday, although the video cut out before the singers said the name of the person to whom they were singing.
2. Elliott alleged that Sam later sent him a threatening message, and the next day showed up at his dorm, uninvited, twice. Elliott stated he did not have the message, because it was on SnapChat, but had kept a screenshot of the message, although the screenshot cut off part of the message. Sam denied sending any threatening message, and also stated that he never used SnapChat.

IS IT AUTHENTIC?

Question The Person Who Offered The Evidence

Request Originals

Obtain Originals From The Source

Have Others Review And Comment On Authenticity

Are There Other Records That Would Corroborate?

CREDIBILITY AND RELIABILITY

- Do you really need to assess either?
- Why they are different
- How to write about it
- When a party attacks credibility of the other, but on a non-issue (delay in reporting, did not go to law enforcement, minimized the report in comments to a friend or family)
- How to ask questions to get to the bottom of it without being offensive
- How to apply your conclusions to the process

YOU BELIEVE ONE PARTY'S VERSION OF EVENTS OVER ANOTHER – WHY?

- Corroboration?
- Plausibility?
- They were convincing when they shared their story?
- They could not have seen what they said they saw?
- That makes no sense?
- They seemed more trustworthy?
- Some combination of the above?

CREDIBILITY: IT IS
CONVINCING

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RELIABILITY: YOU
CAN TRUST IT

CREDIBILITY? OR RELIABILITY?

- **Reliable evidence:**

- I can trust the consistency of the person's account of their truth.
- It is probably true, and I can rely on it.

- **Credibility:**

- I trust their account based on their tone, and reliability.
- They are honest and believable.
- It might not be true, but it is worthy of belief.
- It is convincingly true.
- The witness is sincere and speaking their real truth.

**A CREDIBLE
WITNESS MAY GIVE
UNRELIABLE
TESTIMONY**



RELIABILITY

- Did the witness correctly observe, process, interpret and recall the information? Is there corroboration?
- vs. Credibility: bias, collusion, motive in outcome, outright (proven) lying, judging the person

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FACTORS WE WERE TAUGHT TO USE: ARE THESE STILL THE RIGHT ONES?

- Corroborating evidence
- Inconsistencies
- Sufficient or insufficient explanation of inconsistencies
- Logic, plausibility
- Pattern or history
- Past record
- Motive to falsify
- Bias for/against a party
- Material omission
- Ability to recollect events

ARE YOU WORTHY?

- *Dyer v. MacDougall*, 201 F.2d 265, 268-69 (2d Cir. 1952) (acknowledging the conduct, manner, and appearance that make up a witness's demeanor).
- *Courtroom Psychology for Trial Lawyers* (1985): People with enlarged pupils are compassionate and those with beady eyes use cold logic; a person who looks up and to the left while thinking is metaphorical . . . a low pitched voice indicates confidence, while a high-pitched voice reduces believability.

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ASSESSING CREDIBILITY AND RELIABILITY

NO FORMULA EXISTS, BUT CONSIDER THE FOLLOWING:

Opportunity to view

Ability to recall

Motive to fabricate

Plausibility

Consistency

Character, background, experience, &
training

Coaching

Bias

CREDIBILITY/RELIABILITY ANALYSIS

STEP BY STEP

1. Determine the material facts – focus only on material facts.
 2. Determine which material facts are:
 - Undisputed – consistent, detailed and plausible, and/or agreed upon by the parties [e.g., Marcy and Jack attended a fraternity party on April 5, 2019]
 - Disputed – unsupported by documentary or other evidence, or are facts about which an element of doubt remains [e.g., Marcy alleged that Jack kissed her without her consent around 1am at the party, and Jack asserted he never kissed Marcy and went home early]
 - State clearly which facts are accepted, and which are rejected, and state the reasons why.
- “While Jack maintained that he never kissed Marcy and went home early, several witnesses corroborated that he was at the party until 3 a.m. In addition, a photo was submitted by a witness showing Jack kissing Marcy. Therefore, I find that Jack’s version of events cannot be credited as being more likely than not to be true.”

PRACTICE ON WEIGHING EVIDENCE

- Expert testimony
- Polygraph examiner's report
- News article that the college has a history of covering up sex assaults
- Case involves DV and allegation of strangulation. Witness discusses respondent's repeated angry outbursts in social situations and class settings.

REMEMBER – CREDIBILITY IS NOT FIRST

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QUESTIONS?

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