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**Electronic Evidence Issues in District Court**

**Discussion Questions**

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1. Juvenile delinquency court. 15 year-old Johnnie is accused of communicating threats to 14 year-old George. During the adjudication hearing, George testifies that he received a text message on his cell phone which read, "i m waching u. Nxt tim I ctch u alon, u die!" George testifies that his cell phone showed that the message came from a telephone number he recognized as belonging to Johnnie.
    a. Johnnie's lawyer objects to George relating the content of the message, arguing hearsay.
    ____Sustained __**X**__ Overruled

    **Notes: Not hearsay because not offered for the truth of the matter asserted. Offered to show the verbal act that is the crime. GS 14-277.1. *See State v. Weaver,* 160 NC App 61 (2003)(statement of a bribe was evidence of the verbal act; not offered for truth of matter asserted but offered to prove statement was made).**

    b. Johnnie's lawyer objects to George relating the display of Johnnie's phone number, arguing hearsay.
    ____Sustained __**X**__ Overruled

    **Notes: Not hearsay because not a statement made by a person. *See* G.S. 8C, Rule 801. "Hearsay rules apply to computer-stored statements but not to computer-generated statements." Imwinkelried, *Evidentiary Foundations,* section 10.02[4].**

    c. Should the testimony be excluded on other grounds?
    __**X**__ Yes ____No

**Notes: Probably an authentication problem. In order for statement to be relevant, state needs to link the statement to Johnnie and offer proof that the statement is what it purports to be - a text message from the defendant. *See* Imwinkelried,**

**section 4.05 (oral testimony about a statement, like written statements, must be authenticated by identifying the speaker).**

**To authenticate, perhaps treat like caller-ID. Judge can take judicial notice of fact that cell phones can send and receive text messages. *See* Rule 201 regarding judicial notice. Then George can explain how he knows his phone is reliable (accuracy in recent past or on particular date in question) and how he recognized Johnnie's number (past communications, content, or other circumstantial evidence). Rule 901(b)(4). *See In re F.P.*, 2005 PA Super 220, 878 A.2d 91(2005)(rejecting argument that proponent of text of instant messages must prove source of messages by calling representative of internet service provider or computer forensics expert; authenticity can be proved through circumstantial evidence of author's identity).**

**Probably also have a best evidence (original writing) problem. If the threat is in "writing" and the identifying information also is in "writing", George cannot testify as to content of the writings without producing the original. *See* Rule 1001 (original of computer-stored information is the printout from the computer). *See State v. Springer*, 283 NC 627 (1973)(testimony by investigator as to contents of computer printout was inadmissible under the best evidence rule).**

2. The prosecutor then hands George transcripts provided by the cell phone company of the text messages to and from George's phone during the time in question. The prosecutor asks George if the transcripts accurately reflect the text messages he sent and received. When George stated "yes", the prosecutor offers the transcripts into evidence.
    a. Johnnie's lawyer objects, arguing "lack of appropriate foundation"
    __**x**__Sustained ____Overruled

**Notes: Need more foundation for both authentication and hearsay problems. AUTHENTICATION: George cannot testify that the records are what they purport to be because he has no personal knowledge of how the records were created. Regarding authentication of records/printouts of text messages, *see State v. Taylor*, 178 NC App 395 (2006)(printouts authenticated by strategic care specialist from Nextel, who testified about Nextel's recordkeeping regarding text messages, and by the manager of the Wireless Express store, where victim purchased cell phone which received the calls from defendant. Manager also was person who printed out records). In *Taylor*, court rejected argument that records cannot be authenticated without some showing that defendant actually typed and sent the messages. The court held there was sufficient circumstantial evidence linking the statements in the record to the defendant. *See also State v. Williams*, unpublished, 662 SE2d 577 (NC App, July 1, 2008)(records of instant messages sent between cell phones appropriately authenticated even without proof that defendant typed the messages,**

**where content of messages was circumstantial evidence sufficient to link defendant to the messages).**

**HEARSAY: The records are hearsay because the writings are out of court statements offered for truth of matter asserted. Problem can be solved by cell phone company witness laying foundation for hearsay exception Rule 803(6)(records of regularly conducted activity). *See In re West,* 60 NC App 388 (1983)(foundation appropriate where witness familiar with record keeping process of company testified about the method of creating the computerized records in general; rejected argument that proponent must produce person who actually entered data into the computer terminal); *State v. Price,* 326 NC 56, *vacated on other grounds,* 498 US 802 (1990)(error to allow telephone records to be introduced without foundation sufficient to fit records within business record exception; need witness familiar with records and the methods under which they were made, so as to satisfy the court that the methods, the source of information, and the time of preparation, render the evidence trustworthy).**

3. Instead of communicating the threat by text messaging, Johnnie is accused of posting the threat on George's MySpace page. George testifies that he allowed Johnnie access to his page as a "friend", before the two began fighting. He testifies that Johnnie posted many comments to his page before this particular threat. George knew the post was from Johnnie because Johnnie's picture appears beside any comment he posts.
    a. Johnnie's lawyer objects to George's testimony as to the statement on the MySpace page, arguing inadmissible hearsay.
    ____Sustained __**X**__ Overruled

**Notes: Same as Question 1 above. Not hearsay because not offered for the truth of the matter asserted. Offered to show the verbal act that is the crime. GS 14-277.1. *See State v. Weaver,* 160 NC App 61 (2003)(statement of a bribe was evidence of the verbal act; not offered for truth of matter asserted but offered to prove statement was made).**

    b. The lawyer also objects to the testimony of the content of the statement, arguing a violation of the best evidence rule.
    __**X**__ Sustained ____Overruled

**Notes: Probably a best evidence problem. George cannot testify as to the contents of the writing if the contents are at issue. *See State v. Springer,* 283 NC 627 (1973)(testimony by investigator as to contents of computer printout was**

**inadmissible under the best evidence rule). Original would be a computer printout of the page. Rule 1001(3).**

4. The prosecutor then hands George a paper, and George identifies the paper as a print out from his home computer of the MySpace page containing the threat and Johnnie's photograph. When the prosecutor asks to admit the print out into evidence, Johnnie's lawyer objects.
    a. Lack of appropriate authentication
    ____Sustained __**X**__Overruled

**Notes: Clearly a discretionary call. Is the evidence sufficient to support a finding that the evidence is what it purports to be? North Carolina has no case law addressing this issue. Courts in other states have been willing to allow authentication of printouts of online chats or conversations through combination of Rule 901(b)(1)(witness with personal knowledge) and 901(b)(4)(circumstantial evidence and distinctive characteristics). *See Lorrain v. Markel American*, 241 F.R.D. 534, 554 (U.S. Dist. Maryland 2007)(a treatise on electronic evidence issues in general – definitely should read entire case if you want to learn more about broad range of evidentiary issues raised by "electronically stored evidence). *See also State v. Bell*, 145 Ohio Misc.2d 55, 882 NE2d 502 (2008)(given low standard of proof for authentication, printouts of MySpace chats between victim and defendant were properly authenticated by victim's testimony about her participation in the chats memorialized in the printouts, her knowledge concerning the defendant's "user-name" which appeared throughout the document, and about the way she printed out the documents from her home computer, along with the circumstantial evidence within the content of the chats themselves. Issues raised by defendant regarding the fact that the on-line content of the chats could have been altered by the victim or someone else, and that the postings could have been made by someone other than defendant, go to weight of evidence rather than authenticity); *Ford v. State*, 274 Ga. App. 695, 617 SE2d 262 (2005)(computer printout of page from on-line chat room held similar to a videotape for purposes of authentication; person who participates in the chat can authenticate by testifying that printout reflects the conversation which actually took place. Court pointed out that proponents need not rule out all possibilities inconsistent with authentication, or to prove beyond a reasonable doubt that the evidence is what it purports to be).**

***Compare People v. Cannedy*, California Superior Court, 4th District, unpublished opinion (2009 WL 477299)(court held proffered testimony was insufficient to authenticate printout from AOL chat room because person offering testimony to authenticate did not actually print out the document being introduced**

**and did not participate in a conversation with the person alleged to have posted the statement. Statement was an "away message" posted by the alleged author on her site; witness visited her site and read the "away message". Court held that even though witness was familiar with previous postings by the person alleged to have made the current post, the document could not be authenticated without more "evidence of authorship"); *US v. Jackson*, 488 F. Supp.2d 866 (D. Neb. 2007)(transcripts created of on-line conversation between undercover officer and defendant not appropriately authenticated where there were no original transcripts of the conversations and officer testified that he had "cut and pasted" portions of the conversation into a Word document in order to save the text. Court found Word document unreliable due to fact it did not contain entire conversation).**

b. Printout is inadmissible hearsay
____Sustained __**X**__ Overruled

**Notes: Not hearsay because not offered for truth of matter asserted; introduced to show threat was made. See response to Question 1.**

c. Printout violates best evidence rule
____Sustained __**X**__Overruled

**Notes: Printout is an original, as long as person who printed it can testify that the printout "reflects the data accurately". Rule 1001(3).**

5. Child custody modification case. Primary custodial parent is moving to Oregon because his employer is transferring him to a new location.

Dad testifies that he purchased a house in the new town and that the house is located within a school district with very high quality schools. He testifies that he knows the schools are high quality because of the research he has done "on line".

a. Mom objects, arguing dad has no personal knowledge of the quality of the schools in the new town.
__**X**__ Sustained ____Overruled

**Notes: If testimony is being offered to prove that the new location has high quality schools, probably not admissible. Even though the evidence is relevant to the best interest determination, Rule 602 prohibits a witness from testifying about a matter absent evidence sufficient to show the witness has personal knowledge of the matter. Reading about a topic probably not sufficient to give someone personal knowledge, especially with regard to factual information. In addition, Rule 703 prohibits**

**opinion testimony by a lay person unless the opinion is "rationally based on the perception of the witness".**

**However, testimony probably would be admissible to establish dad's reasons for moving to this particular location, as opposed to proving the fact that the schools actually are high quality.**

6. Dad testifies he was particularly influenced by information on a website located at www.greatschools.net . He states that the site listed test scores of students attending the schools within the new district and that the scores were shown to be well above the national average.
    a. Mom objects, arguing hearsay
    ____Sustained __**X**__ Overruled

**Notes: Content of website would not be hearsay if not offered for truth of matter asserted. So, if dad is explaining his motivation for moving to this particular area, no hearsay problem. *See State v. Gainey*, 355 NC 73 (2002)(statements not hearsay if offered to explain conduct rather than truth of matter asserted). However, it would be hearsay if dad was offering testimony to prove the test scores are above the national average. No obvious hearsay exception for this statement. (Rule 803(18) creates an exception for 'learned treatises' but only if used by expert witness). Also could use Rule 803(17)(published compilations "generally used and relied upon by the public or by persons in particular occupations"), if there is testimony to support the reliance finding.**

    b. Mom objects, arguing best evidence rule
    ____Sustained __**X**__ Overruled

**Notes: No best evidence rule problem if testimony is not offered to prove the content of the writing. If dad is testifying about his motivation for moving, there is no best evidence problem. If however, he wants to prove the test scores, he will need to introduce the original of the webpage, meaning the computer printout of the page, along with testimony that the printout reflects the information he read on-line. Rule 1001(3).**

7. Dad offers a document which he explains is a printout from his home computer of the information found on the website www.greatschools.net
    a. Mom objects, arguing lack of appropriate foundation
    __**X**__ Sustained ____Overruled

**Notes: Dad needs to offer more testimony to authenticate the page, but circumstantial evidence of authentication may be enough. In addition, this seems to be an attempt to prove the truth of the matter contained on the page; that the schools have high test scores. So there will need to be a foundation for a hearsay exception as well. That foundation probably will require testimony from persons other than father.**

**AUTHENTICATION OF WEB PAGES: reported appellate cases in other states range from allowing printouts from websites with nothing more than the testimony of the person who looked up the website on the internet and printed the page from a home computer, *see Watson v. Watson*, 196 SW3d 695 (Tenn. Ct. App. 2005)(trial court explained "schools, government, everybody else posts information on the internet" so no reason to exclude page from www.greatschools.net), to not allowing printouts of internet pages under any circumstances. *See St. Clair v. Johnny's Oyster and Shrimp, Inc.*, 76 F. Supp.2d 773 (S.D. Texas 1999)(trial court stated "There is no way Plaintiff can overcome the presumption that the information he discovered on the internet is inherently untrustworthy."). *See also* lengthy discussion in *Lorraine v. Markel,* 241 F.R.D. 534, 554 (2007) and list of cases from federal and state courts in AUTHENTICATION OF ELECTRONICALLY STORED EVIDENCE, INCLUDING TEXT MESSAGES AND E-MAIL, 34 A.L.R.6th 253 (2008).**

**More moderate cases examine specific situations in light of standard for authentication under Rule 901: is there evidence – circumstantial or otherwise - sufficient to support a reasonable belief that the page is what it purports to be? Many courts have been satisfied with statements from persons conducting the internet search, affirming that the printouts are true and correct copies of the information the person saw on the website, as long as there are no circumstances raising questions about authenticity. Especially if documents are of a kind deemed self-authenticating pursuant to Rule 902 – such as "publications purporting to be issued by public authority" or containing "trade inscriptions or label affixed in course of business and indicating ownership or control". In *U.S. E.E.O.C. v. DuPont,* 65 Fed. R. Evid. Serv. 706 (E.D. La. 2004), the court allowed introduction of printout of table from the web site of the US Census Bureau on the basis that 1) the document contained the domain address of the web site and date of printing, 2) the trial judge accessed the web site by using the domain address and observing the site himself, and 3) Rule 902(5) provides that publications purporting to be issued by a public authority are self-authenticating. *See also Jarritos Inc., v. Los Jarritos*, 2007 WL 1302506 (N.D. Cal. 2007)(web page authenticated by plaintiff's attorney testifying that he typed the domain address listed on the printout into his personal computer and the page appeared, he personally printed the page, and the page**

**contained a picture of defendant's restaurant with picture of sign containing name of defendant's restaurant); US v. Tank, 200 F.3rd 627 (9th Cir. 2000)(affidavit by proponent that printouts were true and correct copies of pictures and other items posted on his own website, or true copies of items printed from the Internet by him, along with circumstantial indicia of authenticity, such as the dates of printing and the domain address found on each printed copy, was sufficient to authenticate web page printouts). ***See *Tener Consulting v. FSA Mainstreet, LLC*, 2009 N.Y. Slip Op. 50857(U)(2009 WL 1218891)(while trial court erred by allowing introduction of documents downloaded from government website without "at least the same type of authenticated required for a photograph", appellate court cured the defect by visiting the site itself and stating that it "verified that the printouts are identical to the documents as they appear on [the government agency's] website."**

***But compare Whealen v. Hartford*, 2007 WL 1891175 (C.D. Cal. 2007)(no authentication where proponent did not submit declaration of person who conducted the internet search, or by the company that created the website, stating that the printouts were true and accurate copies of the information on the website); *U.S. v. Jackson*, 208 F.3d 633 (7th Circ. 2000)(trial court correctly held that internet postings proclaiming that the members of the organization creating the website actually committed the crimes defendant was accused of committing were not appropriately authenticated where defendant failed to show the confessions were actually posted by the organization rather than by the defendant himself, who is a skilled computer user.)**

**And, several opinions have held that authentication requires some proof that the information was actually posted by the organization maintaining the website. *See Nighlight Systems, Inc. v. Nitelites Franchise Systems*, 2007 WL 4563875 (N.D. Ga. 2007)(authentication requires both someone who can testify that the printout accurately reflected the content and image of the page printed from the website but also someone with personal knowledge that the content was posted on the website by the company); *Skalr v. Clough*, 2007 WL 2049698 (N.D. Ga. 2007)(same); *Wady v. Provident Life*, 216 F. Supp. 2d 1060 (C.D.Cal. 2002)(authenticating witness needs personal knowledge of who maintains the website, who authored the documents, or the accuracy of the statements in the site).**

**HEARSAY: Assuming dad can authenticate without calling the webmaster or other person from GreatSchools.net, the document is hearsay – a written statement offered to prove truth of matter asserted. Dad needs someone from the company to establish that the document falls within Rule 803(6)(regularly conducted activity) or by someone who can supply foundation for Rule 803(17)(market report or commercial publication "generally used and relied upon by the public or persons in particular occupations). *See Whitely v. State*, 1 So.3rd 414**

**(Fla.App. 1 District 2009)(Department of Corrections website printout was hearsay; state needed to produce record custodian to provide foundation for business records exception); *Jianniney v. State*, 962 Ad 229 (Delaware 2008)(Mapquest printout was not admissible to prove time to travel from one destination to another without foundation to show hearsay exception; might fit within "published compilations, generally used and relied upon by the public", but need foundation to show reliability and use by public). In *Jianniney*, the appellate court noted the trial court probably could have taken judicial notice of driving routes and distances provided by Mapquest. See Rule 201 regarding Judicial Notice.**

8. Mom testifies that dad is being transferred only because he asked his employer to move him away from mom. She states that dad threatened to do this when mom told dad that she wanted more visitation time with the child. She offers a document which she identifies as a print out from her home computer of a series of email messages between her and dad. One of the messages reads, "If you push me on this, I will move to the other side of the country where you will never see the child."
    a. Dad objects, arguing lack of appropriate foundation
    __**X**__ Sustained ____Overruled

**Notes: Need more to authenticate the text of the email messages. Her testimony about printing probably enough to satisfy the original writing rule, but need more information to link emails to dad to make the evidence relevant.**

**Can authenticate email by using common law doctrines: reply letter doctrine, content, and action consistent with message (stated differently: authenticate by circumstantial evidence of authenticity). *See State v. Williams*, unpublished opinion, 662 SE2d 577 (N.C. App., July 1, 2008)(no need to show who actually typed messages if testimony contains sufficient information to show message is from person alleged; evidence in that case included actions by sender consistent with messages and self-identification of sender in the messages and afterwards). *See also* discussion in *Lorraine v. Markel*, 241 F.R.D. 534 (2007)(probably need testimony of person with personal knowledge of the transmission or receipt to ensure trustworthiness; listing other cases where authentication upheld on circumstantial evidence). *See also* Imwinkelreid, *Evidentiary Foundations*, section 4.03(4)(b).**

**In this case, mom can testify about how she knows the email was from dad; his email address on printout (and how she knows it is his email), content showing it must have been him (statements of information only he would know, reply to a request sent by her, or actions taken by dad after message consistent with the statements).**

**If mom cannot authenticate by content and other circumstantial evidence, proponent can show chain of custody handling by email servers, using employee of email service. Also have new cryptography technology – a method of encrypting messages. Proponents can use certification authorities to authenticate process of sending/tracing an encrypted email. See discussion in Imwinkelreid, *Evidentiary Foundations*, section 4.04(4)(b).**

**Even when a proponent uses witnesses to establish the handling of a particular email from one computer or email address linked to the alleged sender to that of the receiver, those witnesses cannot testify about who actually typed the message. And, most courts do not require direct evidence that the alleged sender actually typed the message. One court recently stated: "Unless the purported author is actually witnessed sending the email, there is always the possibility it is not from whom it claims. …[A]nyone with the right password can gain access to another's email account and send a message ostensibly from that person. However, the same uncertainties exist with traditional written documents, A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead or stationary can be copied or stolen. We believe email messages and similar forms of electronic communication can be properly authenticated within the existing framework of [state] law, … they are to be evaluated on a case-by-case basis to determine whether or not there has been an adequate foundational showing of their relevance and authenticity." *In re. F.P.*, 878 A.2d 91, 95-96 (Penn. 2005).**

9. Dad testifies that mother has been saying inappropriate things to the child about the move to Oregon. He offers a digital recording he made of a telephone conversation between the mother and the child. Dad testifies that the telephone conversation occurred while the child was at the father's home, on dad's home telephone. Dad heard the conversation and he can identify mom's voice on the recording. Dad's lawyer asks permission to play the recording.
    a. Mom objects, arguing the recording was made in violation of federal law
    ____Sustained __**X**__Overruled

**Notes: Both state law (Electronic Surveillance Act, GS 15A-286 et seq.) and federal law (the Omnibus Crime Control and Public Streets Act, 18 USCA sec. 2510 et seq. (2000)), prohibit persons from intentionally intercepting, or endeavoring to intercept, any oral communication. The law prohibits interception, even within a family residence. *See Kroh v. Kroh*, 152 N.C. App. 347 (2002)(Act applies to prohibit a spouse from tape recording conversations other spouse has with children while in the family home). However, intercepting a communication does not violate state or federal law if one party to the conversation consents to the interception. G.S. 15A-**

**287; 18 USCA sec. 2522(2)(d). A child can consent to interception. *State v. Brown*, 177 N.C. App. 811 (2006)(not specifying a particular minimum age, but referencing another statute allowing children over 12 the right to consent in another context; child in *Brown* apparently over the age of 13). In addition, the court of appeals in *Kroh* adopted the concept of vicarious consent; a parent can consent to a recording on behalf of a child, if the parent "has a good faith, objectively reasonable belief that the interception is necessary for the best interest of the child." *Kroh* court cites cases interpreting federal law to include the same concept of parental vicarious consent. So, no violation in this case if dad can show either that child consented to the recording or that he had a reasonable belief that recording was necessary for the best interest of the child.**

b. Mom objects, arguing lack of appropriate foundation
____Sustained __**X**__ Overruled

**Notes: Tape recordings are relatively easy to authenticate, if there is a witness who can identify the voice on the tape. *See State v. Stager*, 329 NC 278 (1991)(rejecting pre-Rule complicated and lengthy authentication method which involved testimony regarding the reliability of the recording equipment) and *State v. Withers*, 111 N.C. App. 340 (1993)(answering machine tape was authenticated by witness who recognized voice on the tape). Similarly, a person who was present during the conversation while it was recorded can authenticate the recording. *See State v. Martinez*, 149 N.C. App. 553 (2002)(testimony of SBI agent who was present during the conversation between defendant and co-defendant was sufficient to authenticate recording).**