

# Digital Evidence for DSS Attorneys

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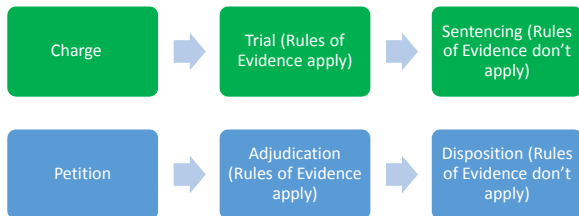
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## Criminal Cases vs. A/N/D Cases




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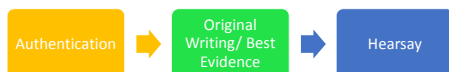
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## Analytic Framework for Digital Evidence




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## Authentication: The Principal Issue

"[T]he novel question regarding the admissibility of web-based evidence . . . is going to be authentication. . . . [M]ost of the rest of the evidentiary problems are the common problems lawyers face all the time."

- G. Michael Fenner, The Admissibility of Web-Based Evidence, 47 Creighton L. Rev. 63 (2013)

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## Authentication: Split of Authority

"The . . . authentication rule[s] . . . require a demonstration that a piece of evidence is what its proponent claims it to be. But the generality of this rule has sent courts off in different directions, with some courts more skeptical of the origins of digital communications in light of the ease with which people can create accounts."

- Hugh Kaplan, Two State Courts Provide Guidance on Authenticating Texts, Facebook Messages, Bloomberg BNA Criminal Law Reporter, April 24, 2015

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## Authentication Basics

- Authentication is identification
  - N.C. R. Evid. 901(a) ("The requirement of authentication or identification . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.")
- Authentication is "a special aspect of relevancy"
  - Adv. Comm. Note, N.C. R. Evid. 901(a)
- Authentication is a low hurdle

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## Methods of Authentication

- Rule 901(b) gives examples:

(1) Testimony of a witness with knowledge. – Testimony that a matter is what it is claimed to be.

(4) Distinctive characteristics and the like. – Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(7) Public records or reports. – Evidence that a writing . . . is from the public office where items of this nature are kept.

- Rule 902 lists self-authenticating evidence

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## Types of Digital Evidence

- Email
- Text messages
- Social media posts
- Data seized from a device
- Web pages

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## Authenticating Communications: Problem 1

A social worker receives an unsolicited email from fancynancy101@gmail.com: "I just went over to [mother's] house. The power is off and there's no food there. I'm worried about [daughter]. Sincerely, Nancy Neighbor." You eventually call Nancy as a witness at an A/N/D adjudication hearing, but she says (1) that mother's house was warm and well-stocked with food, (2) that she never said otherwise, and (3) that she doesn't have an email account. You want to introduce the email through the social worker. Can the social worker authenticate it?

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### Methods of Authenticating Communications

- Testimony of a witness with knowledge
- Distinctive characteristics
  - Name or “signature” alone normally is not enough to authenticate
  - Ownership of originating account is significant support for authentication
  - Other circumstantial evidence may be needed

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### Authenticating Communications: Problem 2

A petition alleges that a father beat his son with barbed wire. The key witness is the father’s ex-girlfriend. A week before the A/N/D adjudication hearing begins, she receives threatening text messages referencing her “snitching” to DSS and saying things like “I’ll kill you if you keep talking.” She has screenshots of the messages, is prepared to testify that the messages came from the father’s phone number, and will say that the father “called in between the [text message] conversations talking mess.”

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### Authenticating Communications: Problem 3

Grandma testifies that her daughter-in-law has been mistreating her grandson ever since her son went to prison. Daughter-in-law’s counsel wants to cross-examine Grandma about printouts from Grandma’s Facebook account suggesting animosity towards daughter-in-law. (One of the posts says: “ima f\*\*\* that . . . b\*\*\*\* up.”) Grandma acknowledges that the statements came from her account but testifies (1) that she has shared her user name and password with others; (2) that her account has been hacked before; and (3) that she does not remember writing the statements at issue.

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**Sharing passwords**

*Among internet users in committed relationships, the % who have ever shared a password with their partner*

Share passwords	
<b>Total</b> (n=1,268)	<b>67</b>
a Male	66
b Female	69
a 18-29	64
b 30-49	70
c 50-64	66
d 65+	69
a White	72 <sup>bc</sup>
b African-American	52
c Hispanic	49
a <\$50,000/year	56
b \$50,000+/year	76 <sup>a</sup>
a Parent	71 <sup>b</sup>
b Not a parent	65

Pew Research Center's Internet Project survey, August 7-September 18, 2013.

**Authenticating Communications: Problem 4**

A social worker is a Facebook friend of a dad who shares custody of his three children. One Sunday evening, the dad posts: "Great weekend. Been drunk the whole time!" The social worker saves a screenshot of the post because she knows that the dad had custody of the children that weekend. If the social worker testifies that the dad's profile picture is a wolf; that a picture of a wolf accompanied the post; and that she has communicated with him through the account before, is that enough to authenticate the post?

**Authenticating Communications: Problem 5**

A petition alleges that a mother has neglected her children as a result of her deep involvement in a gang. Her name is Allison Abrams, but her "street name" is Alley for Real. An officer searches Facebook for "Alley for Real" and finds an account with that name which contains pictures of the mother wearing gang colors and making gang signs. The account holder lists a date and month of birth that matches the mother's. Is that sufficient to authenticate the photographs?

## Factors in Authenticating Electronic Communications

- Purported author acknowledges authorship of communication
- Purported author acknowledges ownership of account
- Account name contains purported author's name
- Account profile contains picture of purported author
- Account profile contains identifying data associated with purported author (DOB, physical address, etc.)
- Account has been used by purported author in the past
- Purported author has had exclusive control of account in the past
- Account was created on purported author's device or from purported author's home
- Account normally accessed on purported author's device or from purported author's home
- When the communication was sent, account was accessed on purported author's device or from purported author's home
- Communication contains words, phrases, or signature characteristic of purported author
- Communication concerns events only known to, or of special interest to, purported author
- Communication is connected in time or content to other communications clearly written by purported author
- Timing of communication connects to events in life of purported author

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## Authentication: Seized from Device

### Usually authenticated by testimony about retrieval and retention

- "[T]he government properly authenticated the videos and images [of child pornography] under Rule 901 by presenting detailed evidence as to the chain of custody, specifically how the images were retrieved from the defendant's computers."
- United States v. Salcido, 506 F.3d 729 (9th Cir. 2007)
- "Because the objects at issue here—the [child pornography] images found on defendant's computer devices—are a direct part of the charges against defendant, they are properly characterized as real evidence. To authenticate real evidence, the proponent need only establish a chain of custody."
- People v. Brown, 313 P.3d 608 (Colo. Ct. App. 2011)

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## Seized from Device: Problem 1

A petition alleges that a father has sexually abused his daughter and has recorded the abuse. A detective is prepared to testify that he followed sound forensic practices in recovering certain images from the father's computer, which he then securely saved, accurately printed out, and brought to court. The father contends that the images are not properly authenticated and may have been computer-generated or otherwise altered.

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### Seized from Device: Problem 2

A petition alleges that a mother provided alcohol to her 14-year-old daughter on the daughter's birthday. A social worker is prepared to testify that she went to the mother's house and the mother showed her digital pictures of the daughter's party. One of the pictures showed the daughter with a beer bottle, so the social worker asked for copies of the pictures, received permission to copy them, and copied them to a USB drive she had in her purse. She carried the drive around for a few days, then downloaded the files to her work computer and printed out the relevant picture.

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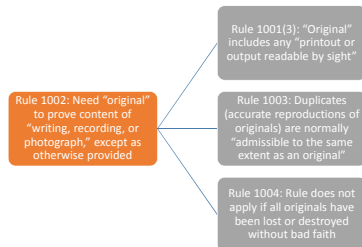
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### Original Writing/Best Evidence Rule




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### Original Writing Rule: Problem 1

A petition alleges that a mother used illegal drugs while having custody of her children. A witness is prepared to testify that he received a Snapchat from the mother with a short video of the mother smoking what appeared to be a joint and inviting the witness to come over and join her. Per Snapchat policy, the video disappeared after a few seconds.

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### Original Writing Rule: Problem 2

A petition alleges that parents left middle school aged children at home for a weekend without supervision. A teacher is Facebook friends with one of the kids. The teacher is prepared to testify that she received this Facebook message from the child on the weekend in question: "Hi Ms. Jones, it's Jenny. My parents are out of town this weekend!" She didn't get it immediately and didn't recognize its significance, so she deleted it.

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### Hearsay

- Common hearsay exceptions and exclusions in digital evidence cases
  - Admission of a party opponent
  - Business records
  - Non-hearsay

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### Hearsay: Problem 1

At a TPR hearing, you contend that a mom has failed to comply with the requirements established by the court, and in fact, called a social worker to threaten her. The mom denies that she called the social worker at all. An officer obtained the mom's cell phone records, which show that she dialed the social worker's number around the time that the social worker received the threats. Are the records hearsay?

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