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Admissibility of Electronic Writings: Some Questions and Answers*

The defendant allegedly made a statement in the form of an email, text message, or other electronic writing to the alleged victim. The State wants to offer the statement into evidence. The following discussion addresses in question and answer format the admissibility of such an electronic writing.

Generally

1. Are there special rules of evidence that apply to electronic writings?

No. The admissibility of electronic writings depends on traditional rules of evidence. *See, e.g., In re* F.P., 878 A.2d 91 (Pa. Super. 2005) ("We see no justification for constructing unique rules for admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity.")

2. What are the principal evidentiary issues?

There are several. As one court observed, "Whether ESI [electronically stored information] is admissible into evidence is determined by a collection of evidence rules that present themselves like a series of hurdles to be cleared by the proponent of the evidence. Failure to clear any of these evidentiary hurdles means that the evidence will not be admissible." *Lorraine v. Markel American Ins. Co.,* 241 F.R.D. 534, 538 (D. Md. 2007).

An awkward but logical mnemonic for criminal cases is as follows:

Privilege

Relevance

Authenticity

Original Writing

Hearsay

Commentators have used similar mnemonics for evidentiary issues involving writings (e.g., OPRAH, HARPO), but the above order may better reflect how the issues arise in criminal cases.

In criminal cases involving statements in electronic form that were allegedly made by the defendant to the victim, the *authenticity* and *original writing* requirements are the most significant.

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*General references on this topic include: *Lorraine v. Markel American Ins. Co.,* 241 F.R.D. 534 (D. Md. 2007) (reviewing in detail the requirements for admission of electronic writings); Jay M. Zitter, *Authentication of Electronically Stored Evidence, Including Text Messages and E-mail,* 34 A.L.R.6th 253. For materials provided to district court judges, see *Electronic Evidence,* North Carolina Criminal Law Blog (Jan. 14, 2010) (containing links to handouts provided to district court judges), *available at* http://sogweb.sog.unc.edu/blogs/ncclaw/?p=992.

Privilege

3. What does "privilege" mean?

Commentators who use the above mnemonic are likely thinking of evidentiary privileges protecting the information, such as the husband-wife or attorney-client privilege. These privileges may not arise that often in criminal cases, particularly in cases involving electronic writings allegedly created by the defendant and communicated to others.

In criminal cases, the "privilege" issue can be thought of as including whether the State, in obtaining the electronic writing, lawfully overrode the defendant's constitutional and statutory rights—in a rough sense, the defendant's privilege against disclosure. For example, did law enforcement officers seize and search the defendant's cell phone in violation of the defendant's Fourth Amendment rights? In cases in which the victim has received an electronic writing and turned it over to the State, few grounds may exist for suppression of the evidence. Nevertheless, this issue should be addressed first in criminal cases because, if the evidence was unlawfully obtained, it may be subject to suppression regardless of whether it is relevant, authentic, or otherwise meets the evidence rules on admission.

For a discussion of Fourth Amendment issues involving warrantless searches, see Jeff Welty, *Warrantless Searches of Computers and Electronic Devices* (April 2011), *available at* http://sogweb.sog.unc.edu/blogs/ncclaw/wp-content/uploads/2011/05/2011-05-PDF-of-Handout-re-Warrantless-Searches.pdf. For a discussion of searches with warrants, see Jeff Welty, *Warrant Searches of Computers* (May 2011), *available at* http://sogweb.sog.unc.edu/blogs/ncclaw/wp-content/uploads/2011/05/2011-05-11-PDF-Continuously-Updated-Handout-re-Warrant-Searches.pdf. For a discussion of statutory issues, see Jeff Welty, *Prosecution and Law Enforcement Access to Information about Electronic Communications,* ADMINISTRATION OF JUSTICE BULLETIN No. 2009/05 (Oct. 2009), *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0905.pdf.

Relevance

4. What is the standard of relevance?

Relevance is governed by North Carolina Rule of Evidence 401, which defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Electronic writings allegedly made by the defendant will often pass this threshold requirement, but it remains important to consider this step because it is the gateway for admission of any evidence.

Authenticity

5. Why is authentication significant?

Although courts have stated that authentication is a low threshold and that questions about accuracy generally go to the weight, not the admissibility, of the information (*see generally Horne v. Vassey,* 157

N.C. App. 681 (2003)), authentication remains a necessary and significant precondition for admissibility.

First, authenticity is a subset of relevancy. Unless the writing can be linked to the person who purportedly made it, the writing has no probative value and fails the relevancy requirement. *See, e.g., U.S. v. Branch,* 970 F.2d 1368, 1370 (4th Cir. 1992) ("Authentication 'represent[s] a special aspect of relevancy,' Fed. R. Evid. 901(a) advisory committee's note, in that evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims."); *Lorraine,* 241 F.R.D. 534, 539 ("Authentication under Rule 901 is viewed as a subset of relevancy"); N.C. R. EVID. 104 commentary ("if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it").

Second, the requirement of authenticity must be established in accordance with Evidence Rules 901(a) and 104(b). Together, they require that the proponent offer *admissible* evidence of authenticity and that the evidence be *sufficient* to support a finding by the finder of fact that the matter in question is what its proponent claims it to be. *See* N.C. R. EVID. 901(a) (stating that the requirement of authentication must be shown "by evidence sufficient to support a finding that the matter in question is what it purports to be"); N.C. R. EVID. 104(b) ("When the relevance of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."); N.C. R. EVID.. 901 commentary ("This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).") For example, the State ordinarily may not authenticate a text message as having been written by the defendant through an officer's testimony that the victim told the officer that the defendant wrote the message; the victim's statement to the officer is offered for the truth of the matter asserted—that the defendant wrote the message—and is inadmissible under the Confrontation Clause and the hearsay rule unless within an applicable exception. *See Lorraine,* 241 F.R.D. 534, 540 (recognizing requirement of admissible evidence for authentication); *see also Huddleston v. United States,* 485 U.S. 681, 690 (1988) (interpreting federal equivalent of Rule 104(b) and finding that the trial court must decide whether "the jury could reasonably find the conditional fact . . . by a preponderance of the evidence").

6. How can the proponent authenticate electronic writings purportedly created by the defendant, such as email, text messages, Facebook postings, and the like?

The principal authentication issue involves authorship of the writing—that is, whether the defendant created the electronic writing. (There also may be authentication issues with printouts of writings, which the proponent must establish are an accurate depiction of the electronic writing; this issue is discussed below in connection with original writings.)

Generally, the courts have not required direct evidence that the defendant entered the information into a computer or electronic device (e.g., testimony by a witness that he or she saw the defendant send the text message), but the courts have required circumstantial evidence that the defendant did so. Evidence Rule 901(b) lists various ways that the proponent may satisfy the authentication requirement.

In cases involving electronic writings purportedly created by one person and communicated to another, the courts often have relied on Evidence Rule 901(b)(4), which permits authentication by distinctive characteristics of the writing in conjunction with other circumstances. *See, e.g., State v. Taylor,* 178 N.C. App. 395 (2006) (relying on Rule 901(b)(4) in admitting printout of text messages); *U.S. v. Siddiqui,* 235 F.3d 1318 (11th Cir. 2000) (relying on federal equivalent of Rule 901(b)(4)). Distinctive characteristics might include information that only the sender would know (for example, the recipient's nickname or the details of a recent interaction between the sender and recipient). Other circumstances might include subsequent actions by the sender consistent with the electronic writing (for example, an assault by the sender following a message to the recipient threatening the assault).

The proponent also may, but is not necessarily required to, authenticate an electronic writing by showing its electronic handling. *See, e.g.,* ROBERT P. MOSTELLER ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS § 5-3(D)(1), at 5-28 (2d ed. 2006) ("The proponent can use the business records of all the systems that transmitted the message to trace the message back to the source computer."). That topic is not covered here.

That the proponent has met the authentication requirement for the writing does not necessarily establish authorship of the writing beyond a reasonable doubt. *See generally State v. McCaleb,* 2006 WL 2578837 (Ohio App. 2006) (unpublished) (recognizing distinction between authentication and proof beyond a reasonable doubt and finding sufficient proof that the defendant violated a no-contact civil protective order by repeatedly texting the victim).

7. Is the defendant's email address, telephone number displayed on caller ID, screen name, or like identifier sufficient to satisfy the requirement of authentication?

The courts have not adopted a hard-and-fast rule, but they generally have supported their finding of authentication by looking at the characteristics and circumstances of the electronic writing in addition to the identifying email address, screen name, etc. As one court stated,

> Evidence that the defendant's name is written as the author of an e-mail or that the electronic communication originates from an e-mail or a social networking Web site such as Facebook or MySpace that bears the defendant's name is not sufficient alone to authenticate the electronic communication as having been authored or sent by the defendant. There must be some "confirming circumstances" sufficient for a reasonable jury to find by a preponderance of the evidence that the defendant authored the e-mails.

Commonwealth v. Purdy, 945 N.E.2d 372, 379 (Mass. 2011) (citations omitted) (finding sufficient confirming circumstances to authenticate series of e-mails); *see also, e.g., Griffin v. State,* ___ A.3d ___, 2011 WL 1586683 (Md. 2011) (holding that the trial judge abused his discretion in allowing the State to introduce a printout from a MySpace page allegedly created by the defendant's girlfriend; the girlfriend's birth date and photo on the page were not sufficiently distinctive characteristics to authenticate the page as created by the girlfriend); *Hollie v. State,* 679 S.E.2d 47 (Ga. App. 2009) ("Though the e-mail transmission in question appears to have come from P.M.'s [the victim's] e-mail address, this alone does not prove its genuineness."); *Dickens v. State,* 927 A.2d 32 (Md. App. 2007) (discussing the characteristics and circumstances of five different text messages and finding authentication requirements satisfied)*; State v. Williams,* 191 N.C. App. 254 (2008) (unpublished) (finding sufficient circumstantial evidence to support a finding that the defendant was the person who exchanged the instant messages with Jennie; she testified that she and the defendant sent emails and instant messages to each other often, that his email address was the one on the messages, and that the details in the exchanges were details only the two of them knew about, such as having sex together and her going on birth control); 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 221, at 57 (6th ed. 2006) (noting in connection with traditional writings that "the purported signature or recital of authorship on the face of a writing will *not* be accepted, without more, as sufficient proof of authenticity to secure the admission of the writing in evidence") (emphasis in original); 2 MCCORMICK § 227, at 73 n.2 ("For purposes of authentication, self-identification of an e-mail is insufficient, just as are the traditional signature and telephonic self-identification.").

Some commentators have noted that the sender's email address is particularly easy to change; therefore, the address does not provide sufficient authentication without more. The courts may not make fine distinctions among different electronic media, however. Thus, regardless of the type of electronic media, the courts may still look to the characteristics and circumstances of the writing in addition to the electronic address, name, or other identifier. *See, e.g., People v. Cannedy,* ___ Cal. Rptr. 3d ___, 2009 WL 477299 (Cal. App. 2009) (unpublished) (finding that "away" message on victim's website was not adequately authenticated by the defendant even though it had password-protected access; there were no external or internal indicators that the victim posted the message).

Original Writing

8. How does the "original writing" requirement apply to electronic writings such as an email, text, or web posting?

If the matter is a "writing" and the proponent seeks to prove its contents, Evidence Rule 1002 requires the original of the writing unless production of the original is not required by other evidence rules.

Electronic writings such as e-mail, text messages, and web postings are "writings" within the meaning of the original writing requirement. Evidence Rule 1001(1) states that "writings" consist of "letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation." Courts have recognized that electronic writings of various forms meet this definition. *See, e.g., State v. Espiritu,* 176 P.3d 885 (Haw. 2008) (finding text messages to be a writing).

In cases in which the contents of the electronic writing are at issue—for example, the writing conveys a threat or other relevant statement—the proponent is seeking to prove the content of the writing and must satisfy the original writing requirements. *See Lorraine,* 241 F.R.D. 534, 579 (discussing criminal cases in which the proponent sought to prove the content of electronic writings); *see also generally* Hon. Paul W. Grimm, Michael V. Ziccardi & Alexander W. Major, *Back to the Future:* Lorraine v. Markel American Insurance Co. *and New Findings on the Admissibility of Electronically Stored Information,* 42 AKRON L. REV. 357, 412 (2009) ("if there is no non-documentary proof of the occurrence, and the only evidence of what transpired is contained in a writing, then the original writing rule applies"); *compare*

State v. Branch, 288 N.C. 514, 533 (1975) (holding that witness could testify to a conversation he heard even though a recording of the conversation also existed; the conversation, not the content of the recording, was what was at issue).

Identifying information in the electronic writing, such as the sender's e-mail address, name, or telephone number, likewise would appear to constitute a "writing" whose "content" the proponent is seeking to prove and, therefore, would be subject to the original writing requirements. *Compare State v. Schuette,* 44 P.3d 459 (Kan. 2002) (holding that caller ID displayed during telephone call was not a writing because the results could not be printed out or saved in an electronic medium; the witness therefore could testify to the telephone number he observed when he received the telephone call). The proponent also may need to establish the reliability of the system that generated the identifying information but, for commonly used systems such as caller ID, a combination of judicial notice of how such systems work and the recipient's testimony may constitute a sufficient foundation. *Id.*

9. What constitutes an "original" electronic writing?

Various "originals" may exist. A printout of data stored on an electronic device is an "original." *See* N.C. R. EVID. 1001(3). The device itself (such as a cell phone displaying a text message) also may constitute an "original." *See generally State v. Winder,* 189 P. 3d 580 (Kan. App. 2008) (unpublished) (excusing production of cell phone containing text message, which the court assumed constituted an original).

In most instances, a duplicate is admissible to the same extent as an original. *See* N.C. R. EVID. 1003 (stating that a duplicate is admissible except when there is a genuine question about the authenticity of the original or it would be unfair to admit a duplicate in lieu of the original). A photograph of an electronic writing—for example, a photograph of a text message—may be admitted as a duplicate. *See generally State v. Thompson,* 777 N.W.2d 617 (N.D. 2010).

In authenticating an original or duplicate, including a printout, the proponent must offer sufficient evidence that it accurately reflects the matter in question (in addition to offering evidence sufficiently identifying the author). If the printout is a business record, the proponent also must lay a foundation for admission of the record under the business records hearsay exception, discussed below under Hearsay.

10. When is production of the original not required?

Neither an original nor a duplicate is required in the circumstances described in Evidence Rule 1004. Subsection (1) of Rule 1004 describes the most common ground that may arise in criminal cases. It provides that the original is not required, and a witness may testify to its contents, if *all* originals have been lost or destroyed, unless the proponent lost or destroyed the original in bad faith.

Hearsay

11. Are electronic writings subject to hearsay restrictions?

Yes, but electronic writings authenticated as having been written by the defendant will not violate the hearsay rule in most instances.

Generally, a statement by the defendant will constitute an admission of a party-opponent and therefore will be subject to the hearsay exception for such statements in Evidence Rule 801(d). If threatening, the statement also may be considered a declaration of state of mind within the hearsay exception in Evidence Rule 803(3) (state of mind) or non-hearsay evidence of a verbal act. *See State v. Weaver,* 160 N.C. App. 61, 64–66 (2003) (holding that a statement of a bribe was evidence of a verbal act and was not offered for the truth of the matter asserted but rather to show that the statement was made).

Electronically-generated identifiers, such as the telephone number from which a text message was sent, have been found *not* to constitute hearsay because such information is not a statement of a person. *See State v. Shuette,* 44 P.3d 459 (Kan. 2002); N.C. R. EVID. 801(a) (defining a statement as from "a person"). Such identifiers still must satisfy the original writing rules, discussed above.

12. Are printouts from businesses that keep records of electronic writings, such as internet service providers or cell phone carriers, subject to hearsay restrictions?

Yes. In addition to establishing that the records are authentic, the proponent must lay a foundation for admission of the printout under the business records exception in Evidence Rule 803(6). *See generally State v. Price,* 326 N.C. 56 (1990) (holding that the trial court erred in allowing a telephone bill to be introduced to show the record of calls without the testimony of a witness about the preparation of the records in accordance with Evidence Rule 803(6)); *State v. Taylor,* 178 N.C. App. 395 (2006) (noting that a telephone representative described how the records of text messages were created and maintained). Even though statements within the records may be admissible under a hearsay exception (such as the exception for an admission of a party-opponent), the business record itself is a form of hearsay and must be shown to satisfy the business records exception. The proponent may not avoid these requirements by having a witness read from a business record for which a proper foundation has not been established. *See State v. Springer,* 283 N.C. 627 (1973) (holding that allowing investigator to read from records violated the original writing rule).