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Evidence Issues in Domestic Court

Special Topic Seminar for District Court Judges

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Discussion Questions and Suggested Answers

1(a). Child custody case where child has lived primarily with mother: During the direct examination of mother, her lawyer asks if the 10 year-old child has told the mother where the child prefers to live. Father's attorney objects. Sustained or overruled?

Answer: Probably overruled. Mother can testify as to what child told her about where the child prefers to live, unless you find it should be excluded pursuant to Rule 403 as unduly prejudicial.

Relevance? Statement of child's preference is relevant if the child is of an age and capacity to form an intelligent and rational view on the matter. Hinkle v. Hinkle, 266 N.C. 189 (1966); In re Pearl, 305 N.C. 640 (1982)(nine year child old enough to form opinion). But compare Daniels v. Hatcher, 46 N.C . App. 481 (1980)(judge did not abuse his discretion in refusing to hear testimony from children ages 7, 8 and 12) with Kearnes v. Kearnes, 6 N.C. App. 319 (1969)(judge erred in refusing to hear testimony of children ages 7, 9, 11 and 12).

Hearsay? If child testifies, the statement of the child to the mother will be offered to corroborate the in-court statement of the child. The statement will not be hearsay because it is offered for a non-hearsay purpose. See Rule 801(c). See State v. Aycock, 310 N.C. 1 (1984); State v. Gilbert, 96 N.C. App. 363 (1989).

If child does not testify, statement is hearsay. Rule 801(c).

Exception? Probably can come in under Rule 803(3), which allows hearsay if it is a statement of the child's "then-existing state of mind …". See Griffin v. Griffin, 81 N.C. App. 665 (1986)(error for trial court to exclude testimony from two witnesses as to out-of-court statements made by the children about intimidation of the children by the father and the desire of the children to live with the mother). While Rule 803(3) allows hearsay statements to be introduced to prove state of

mind, the rule prohibits the introduction of "a statement of memory or belief to prove the fact remembered or believed…". See notes following question 1(b) below.

Rule 403? Relevant evidence can be excluded when the probative value is substantially outweighed by the danger of undue prejudice or confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

1(b). Also on direct, mother testifies that the child is often upset when she returns from staying at the father's house. Can the mother testify that the child told her that the child doesn't like being at her father's house because his girlfriend often spends the night while the child is present?

Answer: If child testifies, statement can be offered for the non-hearsay purpose of corroborating the child's testimony.

If child does not testify, the statement of child to the mother is admissible to show the child's state of mind when returning from the father's house.

Relevance? Child's opinion as to the custodial arrangement is relevant. See question 1(a) above. Fact that father has a girlfriend who spends the night when child is present is relevant when offered in connection with evidence that the child is affected by the condition in father's home. See Pulliam v. Smith, 348 N.C. 616 (1998) and Browning v. Helff, 136 N.C. App. 420(2000)(both cases indicating that evidence of sexual activity of parent is relevant to best interest determination to extent the activity impacts or affects the child). See also Green v. Green, 54 N.C. App. 571 (1981)(parent living with paramour not sufficient alone to determine custody, but relevant to the determination of best interest).

Hearsay? Yes, if the child does not testify as to these facts. Offered to prove that child is does not like father's girlfriend spending the night when the child is present.

Exception? Rule 803(3). A statement of the child's "then-existing state of mind …". Statement shows child's state-of-mind when she returns from her father's house. Generally, statements relating the reason or factual basis for the emotion also are admissible within this exception. See State v. Murillo, 349 N.C. 573 (1998); State v. Cummings, 326 N.C. 298 (1990); and Griffin v. Griffin, 81 N.C. App. 665 (1986).

But note: Rule 803(3) states that the exception does not include "statement[s] of memory or belief to prove the fact remembered or believed …". See State v. Hardy, 339 N.C. 207 (1994)(statements written in a diary of events but not of emotions were not admissible); In re Hayden, 96 N.C. App. 77 (1989)(1989)(trial

court properly refused to admit statement by child to mother that the child had been burned the day before where there was no evidence of child's emotion in the statement).

1(c). Mother calls a psychologist to give an opinion about the impact moving child to the primary care of the father will have on the child. The psychologist will base her opinion on information she received during recent therapy sessions with the minor child. Father objects, arguing that the substance of the sessions between the child and the psychologist is privileged. Is it?

Answer: It is privileged. G.S. 8.53.3 provides that communications between a psychologist and a patient are privileged. However, a judge can compel disclosure at trial or prior thereto, "if in his or her opinion disclosure is necessary to a proper administration of justice." See Sims v. Insurance Company, 257 N.C. 32 (1962)("Judges should not hesitate to require disclosure when it appears to them necessary in order that the truth be known and justice be done."); State v. Adams, 103 N.C. App. 158 (1991)(trial court properly excluded medical records after concluding there was no good cause to violate the privilege). With regard to procedure for determining whether to compel disclosure, see In re Mental Health Center, 42 N.C. App. 292 (1979)(district attorney properly initiated a special proceeding pursuant to GS 1-3 and 1-394 to request that court compel disclosure of confidential information needed for investigation of homicide; trial court required to conduct in camera proceeding to determine whether administration of justice requires that information be disclosed).

Can one parent waive privilege on behalf of child? Answer is uncertain. Because both parents have equal access to all medical records of the child unless a court has ordered otherwise, see G.S. 50-13.2, and either parent can consent to treatment, see G.S. 90-21.1, it seems inconsistent to say one parent cannot call a treating physician to testify about that treatment. However, several courts in other states have held that parents do not have the right to waive their child's privilege – even if both parents consent. Rather, those courts hold that a trial judge must appoint a GAL to make a decision about waiver on the child's behalf before the psychologist can be called to testify in court. See Attorney as Litem for D.K. v. D.K., 780 So.2d 301(2001)(Florida custody case); Kovacs v. Kovacs, 633 A.2d 425 (Maryland custody case); Nagle v. Hook, 460 A.2d 49(1983)(Maryland custody case); In re Daniel C.H., 269 CA. Rptr. 624 (1990)(California dependency proceeding). [NC law does not indicate a need for a GAL if the judge determines that disclosure is or is not necessary].

If you compel disclosure, expert can testify as to the factual basis of his/her opinion. See Rule 703. However, evidence used to form opinion is not substantive evidence unless it is otherwise admissible – usually meaning there is a hearsay exception to support admission. See State v. Wade, 296 NC 454 (1979); State v. Hoyle, 49 NC App 98 (1980).

2. In an equitable distribution trial, defendant's attorney prepared computer-generated charts to summarize defendant's contentions as to the (significant) marital debt of the parties and defendant's payments on the debts after separation. When defendant's attorney offers the charts into evidence, plaintiff objects. Sustained?

Answer: The charts are admissible as long as the proponent lays the appropriate foundation.

There is no rule of evidence specifically addressing demonstrative evidence. However, if the information in the charts summarizes information that is within the defendant's knowledge and defendant testifies as to that information, then the charts are admissible as illustration of defendant's testimony. See Stickel v. Stickel, 58 N.C. App. 645 (1982)(no error for trial court to admit summaries of plaintiff's living expenses where expenses where within personal knowledge of plaintiff and summaries were offered to illustrate her testimony. No best evidence rule problem). Authentication satisfied by defendant's testimony that the charts are accurate illustrations. See Rule 901.

If charts are offered as evidence of the underlying financial records, then defendant may offer the charts as summaries of voluminous writings, pursuant to Rule 1006. Foundation must establish that the underlying financial records are so voluminous that it would be impractical to produce and examine them in court, and a witness would need to testify as to the examination and summary of the underlying documents. See Official Commentary to Rule 1006. However, if information from records is offered for truth of the contents of the records, then the information is hearsay. Exception for business records – Rule 803(6) – will allow introduction, but only with appropriate foundation by records custodian or other witness qualified to testify that records are kept in "course of regularly conducted business activity."

3. In a hearing to establish paternity, plaintiff seeks to introduce a certified copy of the results of a blood test performed as the result of an earlier court order. Defendant objects,

arguing that plaintiff failed to establish the chain of custody for the blood samples, and that plaintiff must produce the lab technician who actually performed the blood tests. Sustained?

Answer: Overruled if the test was performed as the result of an order entered pursuant to G.S. 8-50.1(b1) and document contains information sufficient to establish chain of custody. That statute provides that verified documentary evidence of the chain of custody is competent evidence to establish the chain of custody, and provides that if no objection to the test is written, filed and served not less than 10 days prior to the hearing on paternity, the test results are admissible without the need for foundation testimony or other proof of authenticity or accuracy. See Rockingham County DSS ex. Rel. Shaffer v. Shaffer, 126 N.C. App. 197 (1997)(error to admit test results when there was no evidence that the chain of custody had been verified as required by the statute).

If test is not the result of an order entered pursuant to G.S. 8-50.1, the "relaxed evidentiary requirements" of that statute do not apply. Catawba County ex. Re. Kenworthy v. Khatod, 125 N.C. App. 131 (1997)(test not the result of a court order so trial court properly excluded results; needed witness to testify regarding proper administration of test and proper chain of possession, transportation, and safekeeping of blood sample, so as to establish likelihood that blood tested was in fact drawn from husband). When GS 8-50.1 does not apply, the case of Lambroia v. Peek, 107 N.C. App. 745 (1992) controls. In Lambroia, the court held that blood tests are not admissible without testimony from a competent witness sufficient to establish the proper administration of the test and the chain of custody necessary to prove that the blood taken from defendant was the blood used for the test. Lambroia explains that chain of custody information is to establish relevance of the test result and has nothing to do with hearsay.

4(a). In an alimony case, defendant has stipulated to marital misconduct. Plaintiff seeks to introduce a videotape showing defendant together with his paramour. Defendant objects, arguing that the tape is not relevant. Sustained?

Answer: Videotape is admissible only if you determine that it is relevant and that it should not be excluded pursuant to Rule 403.

Rule 401 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 or less probable than it would be without the evidence." Relevant evidence is presumed admissible. When facts are stipulated, there is no need to offer evidence to

prove the fact. But, does stipulation in case of marital misconduct mean evidence introduced to explain or describe the conduct is not "of consequence" to the judge determining alimony? See G.S. 50-16.3A(b)(marital misconduct is one factor court must consider in determining whether award of alimony is equitable and if so, the amount and duration of the award). Video is admissible if you think the information contained therein will be "of consequence" to your consideration of the required factors. See State v. French, 342 N.C. 863 (1996)(videos of crime scene allowed as substantive evidence even when defendant stipulates as to the cause of death of the victims because crime scene helped to prove premeditation and deliberation).

Even if you determine the video is relevant, Rule 403 allows you to exclude it if you find that the probative value is substantially outweighed by the danger of undue prejudice or confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. See Old Chief v. US, 519 U.S. 172, 117 S.Ct. 644 (1997)(court found that trial court had abused its discretion in admitting evidence of defendant's prior conviction. Defendant had tried to stipulate to fact of conviction, which was all that was relevant to case, but court had allowed prosecution to refuse stipulation and admit details of the conviction).

4(b). Assuming you allow plaintiff to show the video, what foundation must plaintiff provide before you view the tape?

Answer: The basic principles governing the admissibility of photographs also apply to motion pictures. Video recordings may be admitted into evidence for both substantive and illustrative purposes when they are relevant and have been appropriately authenticated. See G.S. 8-97; State v. Strickland, 276 N.C. 253 (1970); State v. Billings, 104 N.C. App. 362 (1991).

Foundation should establish 1) whether the camera and the taping system in question were properly maintained and were properly operating when the tape was made, 2) whether the video accurately presents the events depicted, and 3) whether there is an unbroken chain of custody of the tape from recording to introduction. State v. Mason, 144 N.C. App. 20 (2001)(trial court erred in admitting videotape of robbery where state failed to present appropriate evidence for each of the three foundation requirements). See also State v. Sibley, 140 N.C. App. 584 (2000)(error to admit tape without testimony that camera was operating properly or that the events accurately presented the events that were filmed). Both cases rely on authentication requirements set forth in State v. Cannon, 92 N.C. App. 246 (1988)(test met where

there was testimony from witness who had seen the events that were filmed, testimony concerning the maintenance of the video machine, and testimony from a police officer that he had maintained custody of the film since the night of the events). Videotapes can be authenticated even if no witness was present while video was being made. See State v. Prentice, 170 NC App 593 (2005)(videos made by defendant who did not testify at trial; officer testified to finding videos in defendant's bedroom, care and control of videos after officer took control of them, that area depicted in video was defendant's bedroom and that person in video was defendant; defendant's wife testified that video camera belonged to defendant and that it worked, and she identified other person in video).

4(c). Assume there is no stipulation as to marital misconduct and plaintiff is trying to prove that defendant was extremely verbally and emotionally abusive during the marriage. Plaintiff calls defendant's first wife to testify about defendant's similar conduct during their marriage. Defendant objects. Sustained?

Answer: Testimony will be admissible only if you find it is offered for a 404(b) purpose – motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake, entrapment or accident.

Rule 404 provides that evidence of a person's character (generally meaning a person's propensity to act in a certain way) is not admissible for the purpose of proving he acted in conformity therewith on a particular occasion. The only exception applicable to civil cases is 404(a)(3) allowing evidence of the character of a witness as provided in Rules 607 (impeachment of witness) and 608 (reputation and opinion as to truthfulness of witness). See outline by John Rubin, included in class materials.

The testimony of former wife in this case seems to be nothing more than plaintiff's attempt to show defendant's character by establishing his propensity for verbal and emotional abuse of his partners. However, the testimony can be allowed if plaintiff convinces you that that the testimony of the first wife is offered for one of the non-character purposes allowed by Rule 404(b)(proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident). Case law in criminal cases in North Carolina has been fairly lenient in finding that conduct that is very similar to the conduct alleged in the present case is admissible to establish a common plan or scheme, motive, etc. See e.g. State v. Penland, 343 N.C. 634 (1996)(defendant's actions against his former girlfriend and those against the victim were sufficiently similar to show a common plan or scheme, and fact that acts occurred ten years apart did not render them too remote. Court stated that the 10-year gap between incidents "did not negate the plausibility of the

existence of an on-going and continuous plan to engage in such activities."). The list of other purposes in 404(b) is not intended to be exclusive. See Rule 404(b) Official Comment. If you find the evidence of defendant's conduct during his first marriage is being offered for a 404(b) purpose, it can be introduced during plaintiff's case, or defendant can be asked about it during his testimony.

If you find it is not offered for a 404(b) purpose, can plaintiff ask defendant about his treatment of his first wife when husband presents his testimony? No, because his treatment of his first wife is not relevant to this alimony case and is being offered to prove character only. See Rules 608(b)(use of specific instances of misconduct allowed to impeach only if court, in its discretion, finds that the specific instances of conduct are probative of truthfulness or untruthfulness); State v. Call, 349 N.C. 382 (1998)(witness's history of domestic violence for which he had not been convicted had no bearing on his truthfulness or untruthfulness and was not proper impeachment evidence under Rule 608(b)).

However, if defendant testifies "I have never been abusive to anyone," then defendant can be cross-examined about his treatment of his first wife to contradict that testimony. Probably cannot offer extrinsic evidence (i.e. the ex-wife herself) unless you conclude that the issue of defendant's treatment of his first wife is material to the present alimony claim. See Brandis and Broun on N.C. Evidence, section 161.

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". Mom objects, arguing dad has no personal knowledge of the quality of the schools in the new town. Sustained or 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. See Duncan v. Cuna Mut. Ins. Society, 171 NC App 403 (2005)(testimony by licensed social worker based on "two articles, one a „recent study' by the American Medical Association, the other a press release from the NC Department of Health and Human Resources" was not based on personal knowledge). See also Fault v. Dellinger, 44 NC App 39 (1979)("What an

affiant thinks are facts, unless it is a situation proper for opinion evidence, is not information made on personal knowledge."). In addition, Rule 701 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 or 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 or 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.
   Mom objects, arguing lack of appropriate foundation. Sustained or 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."
Dad objects, arguing lack of appropriate foundation. Sustained or overruled?

Notes: Probably no hearsay problem. Even if offered for truth of matter asserted, statement would be admissible as admission of party opponent. See Rule 801. However, mom will 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 or 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 or 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).