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Electronic Evidence Issues

I. Remember “Oprah”

Original writing (best evidence): Rule 1001

Privilege: Rule 501

Relevance: Rule 401

Authentication: Rule 901

Hearsay: Rule 801

*** (Wish I made it up but I did not. Created by Donald Beskin, attorney in Raleigh)
Good analysis for all evidentiary issues – electronic or otherwise.

II. Good general resources. *See Lorraine v. Markel American*, 241 F.R.D. 534 (D.

Maryland 2007)(court decision that is a treatise on admissibility issues relating to ESI – electronically stored information - including email, web pages, text messages, digital photographs, etc). *See also* AUTHENTICATION OF ELECTRONICALLY STORED EVIDENCE, 34 ALR3rd 253 (2008)(also very lengthy and detailed).

III. Original Writing

- a. Rule 1002
 - i. Need original to prove content of writing, recording or photo. *See State v. Winder*, unpublished, 189 P.3rd 580 (Kansas 2008)(text message on cell phone is a writing).
 - ii. *State v. Springer*, 283 NC 627 (1973)(investigator could not testify as to contents of computer printout).
- b. Rule 1001(3)
 - i. If data are stored in a computer, any printout, shown to reflect the data accurately, is an original.
 - ii. *State v. Springer*, 283 NC 627 (1973)(printout needed to satisfy best evidence rule for computer stored information); *State v. Taylor*, 178 N.C. App. 395 (2006)(transcripts from phone company of text messages properly authenticated; no objection as to best evidence rule)
- c. Is a phone (for a text message) or a computer screen also an 'original'?
 - i. Probably. *See Dickens v. State*, 927 A.2d 32 (Maryland 2007)(introduced phone and photographs of phone screen to prove content of text message); *State v. Winder*, unpublished, 189 P.3d 580 (Kansas 2008)(opinion assumes lost cell phone was the 'original writing' for purposes of best evidence rule).
 - ii. *See also State v. Espiritu*, 176 P.2d 885 (Hawaii 2008)(where cell phone was lost, proponent could testify about content of text messages because of exception to best evidence rule for situations where original is lost or destroyed without bad faith on part of proponent); *State v. Winder* (same).

IV. Authentication

- a. Rule 901(a): **need evidence sufficient to support a finding that the matter in question is what the proponent claims it to be.** Low threshold; proponent does not need to rule out all possibilities inconsistent with authenticity, or to prove beyond a reasonable doubt that the evidence is what it purports to be. *See Horne v. Massey*, 157 N.C. App. 681 (2003)("Authentication does not require strict, mathematical accuracy, and a lack of accuracy will generally go to the weight and not the admissibility of the exhibit."); *see also Dickens v. State*, 927 A.2d 32 (Maryland 2007)(burden for authentication is 'slight').

- b. Proponent of electronically stored information does not need to prove who actually put data into computer or electronic device. *State v. Springer*, 283 NC 627 (1973) (no need to produce person who typed data into computer); *In re West*, 60 NC App 388 (1983)(same); *State v. Williams*, unpublished, 662 SE2d 577 (NC App 2008)(instant messages authenticated without direct evidence that defendant typed the message into his phone); *State v. Taylor*, 178 NC App 395 (2006) (same with text messages); *State v. Bell*, 882 NE2d 502 (Ohio Misc. 2d. 2008)(fact that MySpace postings could have been made by someone other than defendant or could have been altered after he put them on the page, go to weight of evidence rather than authenticity).

- c. Rule 901(b): lists ways authentication can be established. **Most reported cases to date upholding authentication of electronic evidence have done so based on circumstantial evidence of authenticity – using combination of 901(b)(1) and 901(b)(4).**
 - i. 901(b)(1): testimony of witness with knowledge
 - ii. 901(b)(4): appearance, content, substance, distinctive characteristics, “taken in conjunction with the circumstances”
 1. *See State v. Taylor*, 178 NC App 395 (2006)(text messages); *Dickens v. State*, 927 A.2d 32 (Maryland 2007)(text messages); *Ford v. State*, 274 Ga. App. 695 (2005)(printout of on-line chat); *Jarritos Inc., v. Jarritos* (N.D. Cal. 2007)(web page); *Simon v. State*, 279 Ga. App. 844 (2006)(emails); *State v. Bell*, 882 NE2d 502 (Ohio Misc. 2d. 2008)(MySpace).
 2. *But compare, Nightlight Systems Inc. v. Nitelites Franchise Systems*, (N.D. Ga., 2007)(for webpage, need witness who can testify content was actually posted by company which maintains site).

- d. Rule 902: Self-authentication (especially useful for web pages).
 - i. 902(5): publications purporting to be issued by public authority
 - ii. 902(6): newspapers and periodicals
 - iii. 902(7): inscriptions, tags, signs “purporting to have been affixed in the course of business and indicating ownership, control or origin.”

V. Hearsay

- a. Rule 801: out of court statement, offered for truth of matter asserted
- b. Not admissible unless falls within an exception. Frequently used with electronic evidence:
 - i. Admission of party-opponent. Rule 801(d)
 - ii. Business record. Rule 803(6). *State v. Springer*, 283 NC 627 (1973)(computerized credit card records); *State v. Taylor*, 178 NC App 395 (2006)(text messages).
 - iii. Commercial publications “generally used or relied upon by the public or persons in particular occupations.” *Jianniney v. State*, 962 Ad 229 (Delaware 2008)(Mapquest page printout)