

# Electronic Evidence Issues in District Court

June 2009

# OPRAH = Admissibility

- ▶ **O**riginal Writing
- ▶ **P**rivilege
- ▶ **R**elevance
- ▶ **A**uthentication
- ▶ **H**earsay

- Donald Beskind,  
Raleigh Attorney



# 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!”**

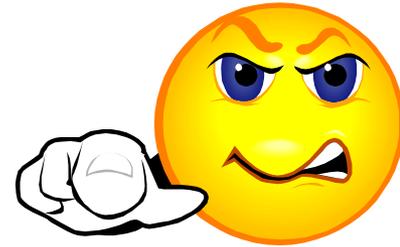
George testifies that his cell phone showed that the message came from a telephone number he recognized as belonging to Johnnie.

# First Objection .....

- Johnnie's lawyer objects to George relating the content of the message, arguing **hearsay**.

\_\_\_\_Sustained

\_\_\_\_ Overruled



# Your ruling is ...

1. Sustained
2. Overruled

# Hearsay

- ▶ “A statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.”
  - Rule 801(c)
- ▶ Not hearsay if offered to show the verbal act that is the crime.
  - *See State v. Weaver*, 160 NC App 61 (2003)(bribe)

# Cell Phone

- Johnnie's lawyer objects to George relating the *display of Johnnie's phone number*, arguing **hearsay**.

\_\_\_\_ Sustained

\_\_\_\_ Overruled



# And your decision is ...

1. Sustained
2. Overruled

# Hearsay

- ▶ “A ‘declarant’ is a *person* who makes a statement”
  - Rule 801(b)



- ▶ How is the phone number different from the text itself?

# Text Message

- Should the testimony be excluded on other grounds?

\_\_\_\_\_ Yes

\_\_\_\_\_ No

**Remember “OPRAH”**



# Other grounds to exclude?

1. Yes
  2. No
  3. Don't know
- 

# Original Writing (Best Evidence)

- ▶ “To prove the content of a writing, recording or photograph, the original writing, recording, or photograph is required.”
  - Rule 1002
- ▶ Original: “If data are stored in a computer or similar device, any printout, ..., shown to reflect the data accurately, is an ‘original’.”
  - Rule 1001(3)
- ▶ Doesn’t George need to produce the printout of the text?

.....**BACK TO JOHNNIE'S ADJUDICATION HEARING.**

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.



# Phone Records

- Johnnie’s lawyer objects, arguing **“lack of appropriate foundation”**

\_\_\_\_ Sustained

\_\_\_\_ Overruled



# And your decision is ...

1. Sustained
2. Overruled

# “Appropriate Foundation”

- ▶ Authentication
- ▶ Hearsay
- ▶ *See State v. Taylor*, 178 NC App 395
  - Records of text messages from cell phone company

# Authentication

- ▶ “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”
  - Rule 901(a)



# Ways to Authenticate (there are others)

- ▶ Testimony of witness with knowledge
  - Rule 901(b)(1)
  
- ▶ “Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances”
  - Rule 901(b)(4)



# Hearsay

- ▶ Are records offered for the truth of the matter asserted?
  - Yes – probably will use more than just the threat itself
  
- ▶ Hearsay exception?
  - Yes – Rule 803(6): Records regularly kept
  - Need person to provide foundation for exception

# *State v. Taylor*

- ▶ Testimony of 2 cell phone representatives
  - Phone store manager:
    - Phone numbers assigned to parties
    - Actually printed out the records
  - Strategic care specialist from Nextel
    - Electronic record keeping practices of Nextel
- ▶ Content of messages helped with weight
- ▶ No need to show who actually typed the message

# *MySpace*

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 he read the threat on his computer, and that Johnnie had 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.

# Objection

- Johnnie's lawyer objects to George's testimony as to the statement on the *MySpace* page, arguing inadmissible **hearsay**.

\_\_\_\_ Sustained      \_\_\_\_ Overruled



# Inadmissible hearsay????

1. Sustained
2. Overruled

# Hearsay

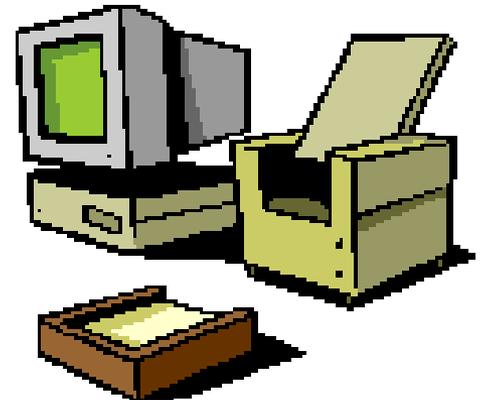
- ▶ “A statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.”
  - Rule 801(c)
- ▶ Not hearsay if offered to show the verbal act that is the crime.
  - *See State v. Weaver*, 160 NC App 61 (2003)(bribe)

# Original Writing

- The lawyer also objects to the testimony of the content of the statement, arguing a violation of the *best evidence* rule.

\_\_\_\_\_ Sustained

\_\_\_\_\_ Overruled



# Best evidence problem?

1. Sustained
2. Overruled

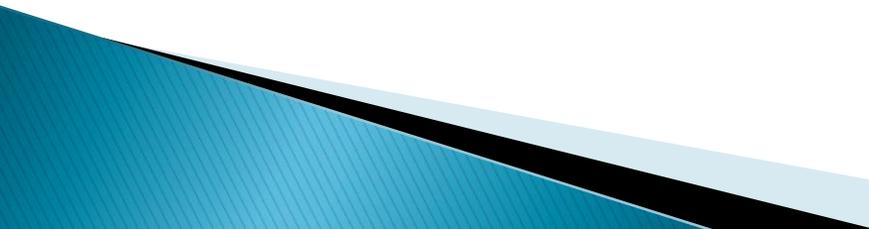
# Original Writing (Best Evidence)

- ▶ “To prove the content of a writing, recording or photograph, the original writing, recording, or photograph is required.”
  - Rule 1002
- ▶ Original: “If data are stored in a computer or similar device, any printout, ..., shown to reflect the data accurately, is an ‘original’.”
  - Rule 1001(3)
- ▶ Doesn’t George need to produce the printout of the *MySpace* page?

# But the lawyer is prepared ...

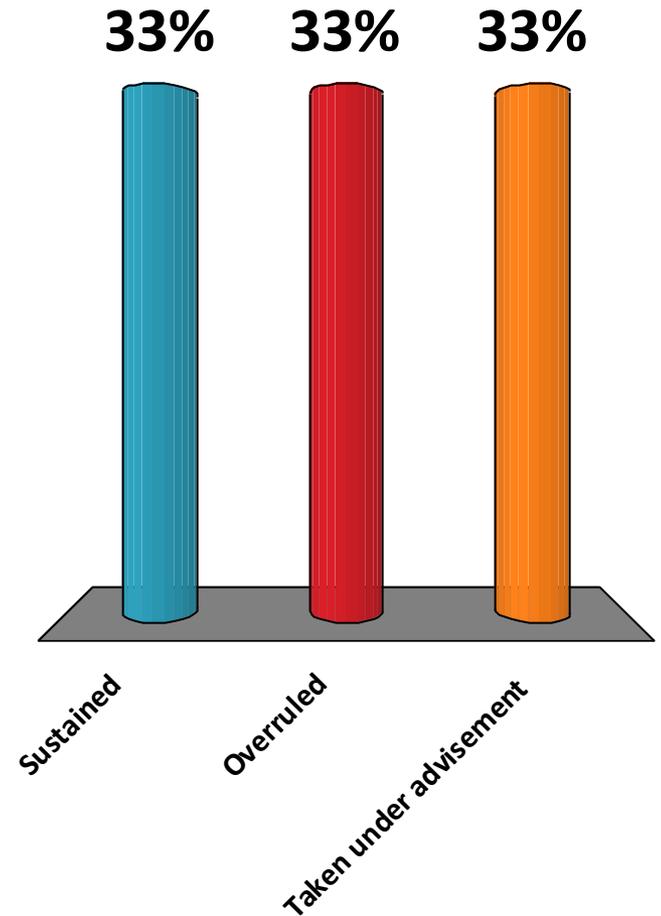
The prosecutor hands George a paper, and George identifies the paper as a print out from his home computer of the *MySpace* page containing the threat and Johnnie's photograph. When the prosecutor asks to admit the print out into evidence, Johnnie's lawyer objects.

Objection: **Lack of appropriate authentication ??**



# Sufficient authentication?...

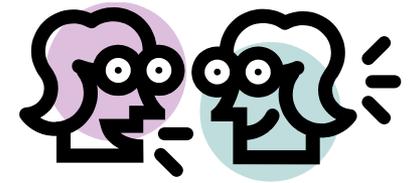
1. Sustained
2. Overruled
3. Taken under advisement



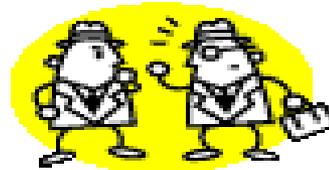
# Authentication of Webpages

- ▶ “There is no way Plaintiff can overcome the presumption that the information he discovered on the internet is inherently untrustworthy.”
  - *St. Clair v. Johnny’s Oyster and Shrimp, Inc.*, 76 F. Supp.2d 773 (Texas 1999)(“**voodoo information**”)
- ▶ “Schools, governments, and everybody else posts information on the internet,” so no reason to exclude printouts of pages.
  - *Watson v. Watson*, 196 SW2d3d 695 (Tenn. 2005)

# Authentication of “chats”



- ▶ Combine **Rule 901(b)(1)**(witness with personal knowledge) with **Rule 901(b)(4)**(circumstantial evidence and distinctive characteristics) to decide on case-by-case basis whether there is sufficient **“circumstantial indicia of authenticity”**.



- ▶ Authentication should be similar to that required for videotape or audiotape
  - *Ford v. State*, 274 Ga. App. 695 (2005)



# *MySpace*

- Printout is **inadmissible hearsay**

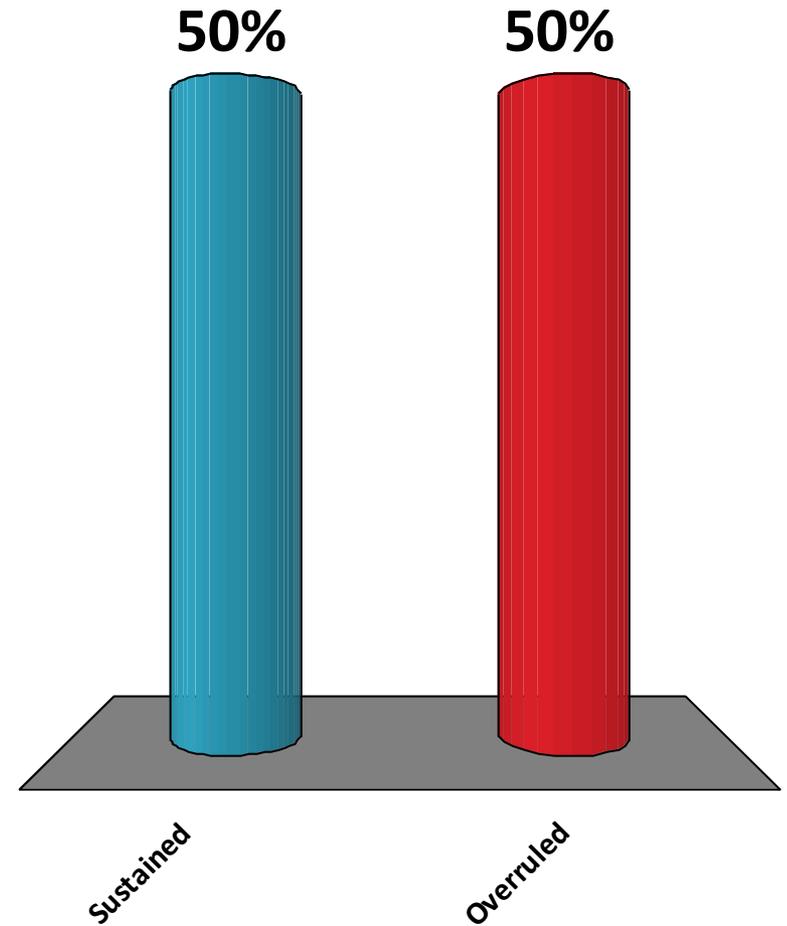
\_\_\_\_Sustained

\_\_\_\_ Overruled



# Inadmissible hearsay?...

1. Sustained
2. Overruled



# Hearsay

- ▶ “A statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.”
  - Rule 801(c)
- ▶ Not hearsay if offered to show the verbal act that is the crime.
  - *See State v. Weaver*, 160 NC App 61 (2003)(bribe)
- ▶ Exception: Admission of Party Opponent
  - Rule 801(d)

# *My Space* Printout

- Printout violates **best evidence rule?**

\_\_\_\_Sustained      \_\_\_\_Overruled



# Best evidence problem?

1. Sustained
2. Overruled

# Original Writing (Best Evidence)

- ▶ “To prove the content of a writing, recording or photograph, the original writing, recording, or photograph is required.”
  - Rule 1002
- ▶ Original: “If data are stored in a computer or similar device, any printout, ..., shown to reflect the data accurately, is an ‘original’.”
  - Rule 1001(3)

## 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”.



# Testimony



Dad testifies he was particularly influenced by information on a website located at [www.greatschools.net](http://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.

- Mom objects, arguing **best evidence**

\_\_\_\_Sustained      \_\_\_ Overruled

# Objection – Best Evidence ???

1. Sustained
  2. Overruled
  3. It Depends
- 

# Original Writing (Best Evidence)

- ▶ “To prove the content of a writing, recording or photograph, the original writing, recording, or photograph is required.”
  - Rule 1002
- ▶ Original: “If data are stored in a computer or similar device, any printout, ..., shown to reflect the data accurately, is an ‘original’.”
  - Rule 1001(3)
- ▶ Doesn't dad need to produce the printout of the web page?

# He really wants you to see .....

- ▶ Dad offers a document which he explains is a printout from his home computer of the information found on the website [www.greatschools.net](http://www.greatschools.net)
- Objection: Mom argues **lack of appropriate foundation**
  - \_\_\_\_\_ Sustained
  - \_\_\_\_\_ Overruled

# Appropriate foundation ??

1. Sustained
2. Overruled

# Authentication of Webpage

- ▶ Rule 901(b)(1): witness with personal knowledge
  - Does printout accurately reflect webpage?

## Together With....

- ▶ Rule 901(b)(4): appearance, content, substance, distinctive characteristics, other circumstantial evidence
  - URL, date of printing, content indicating page is what proponent says it is
  - Lack of evidence questioning authenticity of printout

# Self-authentication

## Rule 902

- ▶ Publications purporting to be issued by public authority
  - Example – Government sites
- ▶ Newspapers and periodicals
  - New York Times on-line
- ▶ Inscriptions, tags, signs “purporting to have been affixed in the course of business and indicating ownership, control or origin”



# Hearsay

- ▶ If offered to prove test scores, it is hearsay
- ▶ Exceptions:
  - Regularly conducted business activity – Rule 803(6)
    - Would need someone from owner of web page; webmaster or record custodian
  - Commercial Publication “generally used and relied upon by the public or persons in particular occupations” – Rule 803(17)
    - Need someone to testify about reliance
    - *See Jianniney v. State* (Deleware 2008)(Mapquest printout)

## Email

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.”

Email printout:

Dad objects, arguing **lack of appropriate foundation**

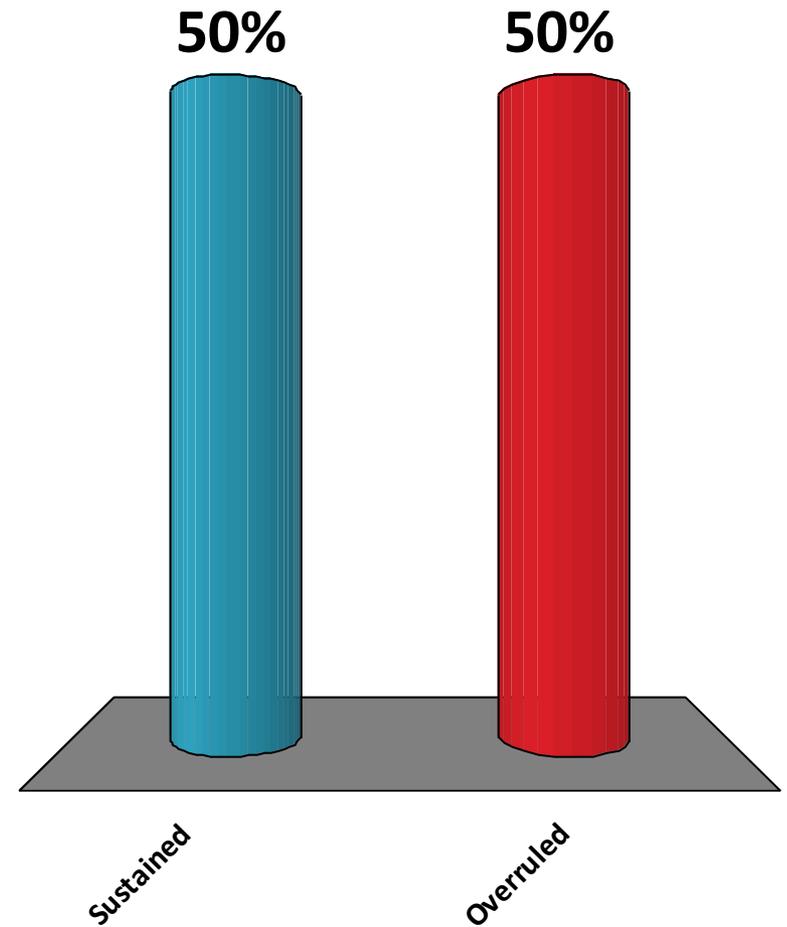
\_\_\_ Sustained

\_\_\_\_ Overruled



# Foundation for email???

1. Sustained
2. Overruled



# Email authentication



- ▶ Circumstantial evidence
  - Easier if sender or receiver testifies
  - Reply letter doctrine
  - Conduct consistent with message
  - Content of message
  - *See State v. Williams*, 662 SE2d 577 (NC App 2008)
  
- ▶ Chain of custody handling by email servers
  - Need employee of email service



## Recording

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.

# Federal Crime???

Mom objects, arguing the recording was made in  
**violation of federal law**

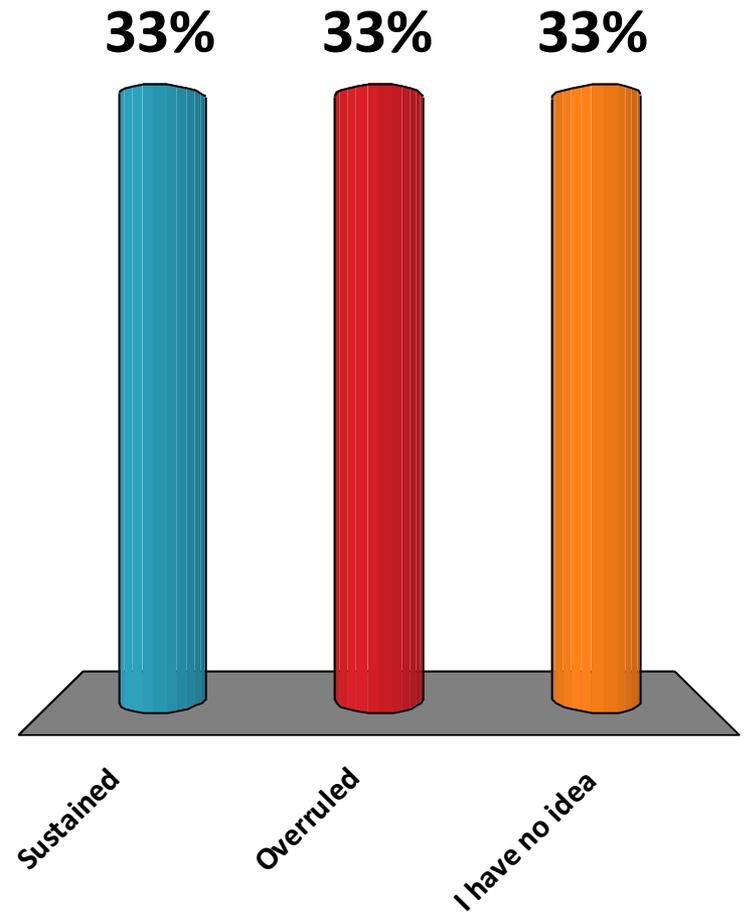
\_\_\_\_Sustained

\_\_\_\_Overruled



# Did dad commit crime??

1. Sustained
2. Overruled
3. I have no idea



# Illegal Wiretapping

- ▶ Electronic Surveillance Act
  - NC Gen Stat 15A-286 *et. seq.*
- ▶ Federal Omnibus Crime Control and Public Streets Act, 2000
  - 18 USCA sec. 2510 *et. seq.*
- ▶ Illegal to intercept communication, unless one participant consents
- ▶ Parent can consent for child
  - *Kroh v. Kroh*, 152 NC App 347 (2002)(if good faith belief interception is in best interest of child)



# And the last objection.....

- Mom objects to introduction of the tape, arguing **lack of appropriate foundation**

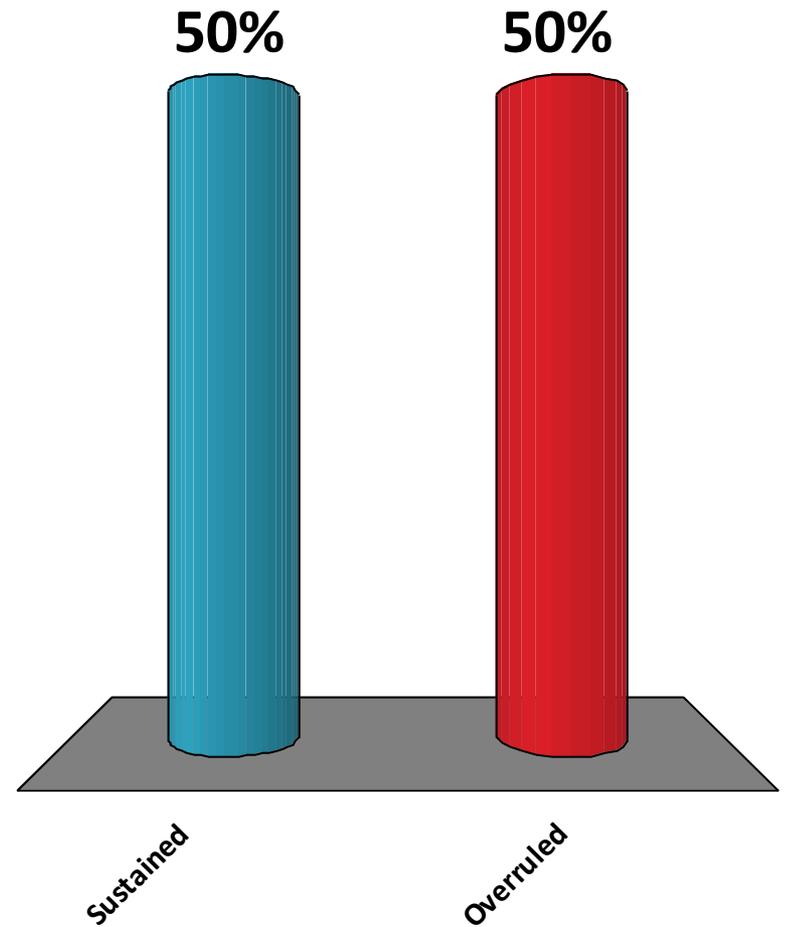
\_\_\_\_ Sustained      \_\_\_\_ Overruled

## Recording

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.

# Tape recording ...

1. Sustained
2. Overruled



# Tape recording

## ▶ Authentication

- Need witness who can identify voice on tape
- *See State v. Stager*, 329 NC 278 (1991)(no need for lengthy testimony about reliability of recorder)

## ▶ Hearsay

- Admission of party opponent
- Rule 801(b)

