

## Electronic Evidence Issues

### I. Remember “Oprah”

**O**riginal writing (best evidence): Rule 1001

**P**rivilege: Rule 501

**R**elevance: Rule 401

**A**uthentication: Rule 901

**H**earsay: Rule 801

II. *See Lorraine v. Markel American*, 241 F.R.D. 534 (D. Maryland 2007)(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).

### III. Original Writing

#### a. Rule 1002

- i. Need original to prove content of writing, recording or photo
- 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.

### IV. 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
- 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).

## V. 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.
- 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need to produce person who typed data into computer); *In re West*, 60 NC App 388 (1983)(same); *State v. Williams*, unpublished, 662 SE2d 577 (NC App 2008)(instant messages authenticated without direct evidence that defendant typed the message into his phone); *State v. Taylor*, 178 NC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* (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.”