ADMISSIBILITY OF DIGITAL EVIDENCE

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3/09

I. WHAT IS "DIGITAL EVIDENCE" OR "E.S.I."?

A. PRE-EXISTING, COMPUTER STORED INFORMATION IN

1. BUSINESS RECORDS

2. EMAIL

3. WEB PAGES

4. CHAT ROOM DISCUSSIONS

5. TEXT MESSAGES

6. VIDEOS/PHOTOS

B. COMPUTER-GENERATED EVIDENCE

1. NOT A RECORD ENTERED BY A HUMAN: E.G.,

a) TIME/DATE STAMPS

b) INTERNET SERVICE PROVIDER (ISP) INFORMATION ON EMAILS

c) METADATA

C. EVIDENCE CREATED ON A COMPUTER FOR USE AT TRIAL

1. SIMULATIONS

2. ANIMATIONS

3. COMPUTATIONS

II. EVIDENCE RULES APPLICABLE TO DIGITAL EVIDENCE

A. AUTHENTICATION (R. 901, 902)

B. RELEVANCE (R. 401)

C. UNDUE PREJUDICE (R. 403)

D. HEARSAY (R. 801-804)

E. BEST EVIDENCE RULE (R. 1001-1009)

III. AUTHENTICATION OF DIGITAL EVIDENCE

A. AUTHENTICATION = PROOF "SUFFICIENT TO SUPPORT A FINDING THAT THE MATTER IS WHAT ITS PROPONENT CLAIMS" IT IS. (R. 901(A))

1. USUALLY PHRASED: EVIDENCE FROM WHICH A "REASONABLE JUROR COULD FIND" THAT THE EVIDENCE IS WHAT THE PROPONENT CLAIMS IT TO BE. SEE E.G., Page v. State, 125 S.W.3d 640 (Tex. App. Houston [1st Dist.] 2003, pet. ref'd).

2. = RULE 104(b) ISSUE – CONDITIONAL RELEVANCE - THE JUDGE MERELY DECIDES IF THE PROPONENT HAS ESTABLISHED A PRIMA FACIE CASE THAT THE EXHIBIT IS WHAT SHE CLAIM, NOT THE ACTUAL QUESTION ON GENUINENESS; THAT IS A JURY QUESTION. R. 1008.

3. THIS IS THE LOWEST THRESHOLD OF PROOF IN THE RULES. (I.E.: IF NO REASONABLE JUROR COULD FIND IT GENUINE W/O ENGAGING IN PURE SPECULATION OR UNSUPPORTED CONJECTURE, IT IS OUT.)

4. THIS CAN BE DONE THROUGH EXTRINSIC PROOF (R. 901) OR THROUGH INTRINSIC PROOF ("SELF-AUTHENTICATION" – R. 902).

5. THIS THRESHOLD CAN BE MET EVEN IF THE EVIDENCE CAN BE READILY CHANGED OR FABRICATED

a) MOST COURTS WILL NOT RECOGNIZE THIS OBJECTION UNLESS THERE IS SOME EVIDENCE THAT THE INFORMATION HAS BEEN ALTERED OR IS FABRICATED.

(1) Ly v. State, 908 S.W.2d 598 (Tex.App.-Houston [1st Dist.], 1995 no pet.)

(2) Kingsbury v. St., 14 SW3d 730 (Tex. App.-Waco, 2000, no pet.)

6. MINOR IRREGULARITIES IN THE EVIDENCE ALSO WILL NOT NECESSARILY MAKE THE EVIDENCE INADMISSIBLE

a) "GOES TO WEIGHT, NOT ADMISSIBILITY'

B. THE INTERTWINED AUTHENTICATION/RELEVANCE ISSUES

1. KEY TO UNDERSTANDING WHAT MUST BE SHOWN TO ESTABLISH AUTHENTICATION IS TO ASK:

a) "WHAT DOES THE PROPONENT CLAIM THE EVIDENCE IS?"

(1) E.G., AN EMAIL FROM "X", OR

(2) AN EMAIL FROM "X" TO "Y", OR

(3) AN EMAIL FROM "X" TO "Y" ON A CERTAIN DATE (OTHERWISE THE EMAIL IS IRRELEVANT)

C. RULE 901: AUTHENTICATING ESI WITH EXTRINSIC PROOF

1. PRE-EXISTING COMPUTER-STORED INFORMATION.

a) E.G., EMAIL, TEXT MESSAGES, PHOTOS, OR CHAT ROOM CONVERSATION:

b) HYPO: "X" IS ON DEFERRED DISPOSITION W/ CONDITION HE NOT USE ILLEGAL SUBSTANCES;

c) "X"'S SPURNED GIRLFRIEND, "G," DECIDES TO RETALIATE BY TELLING THE POLICE THAT HE USED "WEED" AFTER BEING PUT ON PROBATION

d) "G" THEN EMAILS/SHOWS THE POLICE THE FOLLOWING:

(1) A CELL PHONE PICTURE OF "X" TAKING A "BONG" HIT

(2) A COPY OF A TEXT MESSAGE FROM "X" TO "G" DESCRIBING HOW HE GOT "WASTED" ON "WEED" LAST WEEKEND

(3) A TIP TO CHECK OUT "X"'S "MYSPACE" PAGE WHERE HE DESCRIBES HIS "WASTED" WEEKEND

2. HOW CAN THE CITY ATTORNEY GET THESE INTO EVIDENCE AT "X"'S PROBATION REVOCATION HEARING?

a) CELL PHONE PICTURE:

(1) MUST SHOW IT IS A PICTURE OF "X" AND WHEN IT WAS TAKEN (TO BE RELEVANT)

(a) R. 901(1): TESTIMONY OF PERSON WITH FIRST-HAND KNOWLEDGE, SUCH AS,

(i) TAKER OF THE PICTURE

(ii) PERSON WHO SAW THE EVENT

(b) R. 901(4) "DISTINCTIVE CHARACTERISTICS" IN THE PICTURE

(i) E.G., ABSENCE OF FACIAL HAIR WORN 'TIL RECENTLY, OR

(ii) A NEW BODY PIERCING SHOWN

(iii) A RECENT INJURY SHOWN

b) TEXT MESSAGE OR EMAIL FROM "X" TO "G"

(1) R. 901(1): TESTIMONY BY A PERSON WITH KNOWLEDGE

(a) IDENTIFIED BY PERSON WHO WROTE OR SENT OR WHO RECEIVED IT.

(b) EMAIL CAME FROM A COMPUTER THE ALLEGED SENDER/RECEIVER HAD PRIMARY ACCESS TO

(2) HOW PROVE RELEVANCE; THE EMAIL CAME FROM THE RELEVANT PERSON?

(a) R. 901(4): "DISTINCTIVE CHARACTERISTICS" – E.G.,

(i) EMAIL ADDRESS KNOWN TO THE WITNESS

(ii) IDENTIFIABLE EMAIL ADDRESS (FMOSS@YAHOO.COM)

(a) Plus "judicial notice" that no two people can have the identical yahoo address

(iii) SUBSTANCE OF THE MESSAGE UNIQUELY KNOWN TO THE ALLEGED SENDER = "REPLY LETTER" DOCTRINE APPLIES TO EMAIL

(iv) SUBSEQUENT CONDUCT BY THE ALLEGED SENDER CONSISTENT WITH THE EMAIL.

(v) FOUND ON ALLEGED SENDER'S COMPUTER IN THE "SENT FILE" WITH THE SAME DATE/TIME ON IT

(vi) INFORMATION OBTAINED FROM THE ISP

(vii) "CHAIN OF CUSTODY" = FOLLOWING THE ROUTE OF THE MESSAGE BACK TO ORIGINAL SENDER, COUPLED WITH EVIDENCE CONNECTING THE ALLEGED SENDER WITH THE ADDRESS OR THE SOURCE COMPUTER

(viii) See, Massimo v. State, 144 SW3d 210 (Ft. Worth 2004, no pet.) - email authenticated when

(a) Victim recognized the def't's email address;

(b) Emails discussed matters on the def't and a few others knew;

(c) Messages written in the manner def't would communicate; and

(d) A witness had seen def't send similar messages.

(ix) See, Johnson v. State, 208 S.W.3d 478 (Tex.App.-Austin, 2006, pet. ref'd); Kupper v. State, 2004 WL 60768 (Tex.App.-Dallas 1/14/2004, writ ref'd.)

c) PRINTOUTS OF MATTERS ON A WEBSITE

(1) TO AUTHENTICATE, THERE ARE THREE QUESTIONS THAT MUST BE ANSWERED EXPLICITLY OR IMPLICITLY.

(A) WHAT WAS ACTUALLY ON THE WEBSITE?

(B) DOES THE EXHIBIT OR TESTIMONY ACCURATELY REFLECT IT?

(C) IF SO, IS IT ATTRIBUTABLE TO THE OWNER OF THE SITE? (= RELEVANCE)

(2) THE AUTHENTICATION RULES MOST LIKELY TO APPLY, SINGLY OR IN COMBINATION, ARE:

(A) 901(B)(1) (WITNESS WITH PERSONAL KNOWLEDGE)

(B) 901(B)(3) (EXPERT TESTIMONY)

(C) 901(B)(4) (DISTINCTIVE CHARACTERISTICS)

(D) 901(B)(7) (PUBLIC RECORDS),

(E) 901(B)(9) (SYSTEM OR PROCESS CAPABLE OF PRODUCING A RELIABLE RESULT), AND

(F) 902(5) (OFFICIAL PUBLICATIONS).

d) "X"'S MYSPACE PAGE TEXT AND/OR VIDEO

(1) SIMILAR CONSIDERATIONS AS FOR WEBPAGE CONTENT.

(2) HOWEVER, CONTENT CAN BE POSTED BY 3D PARTIES AND "SCREEN NAMES" ARE USED.

(3) THE FOLLOWING TYPES OF EVIDENCE CAN BE USE TO AUTHENTICATE CHAT ROOM EVIDENCE:

(A) EVIDENCE THAT THE INDIVIDUAL USED THE SCREEN NAME IN QUESTION WHEN PARTICIPATING IN CHAT ROOM CONVERSATIONS;

(B) EVIDENCE THAT, WHEN A MEETING WITH THE PERSON USING THE SCREEN NAME WAS ARRANGED, THE INDIVIDUAL SHOWED UP;

(C) EVIDENCE THAT THE PERSON USING THE SCREEN NAME IDENTIFIED HIMSELF AS THE PERSON IN THE CHAT ROOM CONVERSATION;

(D) EVIDENCE THAT THE INDIVIDUAL POSSESSED INFORMATION GIVEN TO THE PERSON USING THE SCREEN NAME;

(E) EVIDENCE FROM THE HARD DRIVE OF THE INDIVIDUAL'S COMPUTER SHOWING USE OF THE SAME SCREEN NAME.

e) E.G., DIGITALLY STORED BUSINESS RECORDS

(1) PER 901(9) EVIDENCE THAT THE "PROCESS OR SYSTEM" FOR DIGITIZING AND MAINTAINING THE INTEGRITY OF THE RECORDS IS ACCURATE.

(2) (1) USUALLY MET BY COMPLYING WITH R. 803(6): TESTIMONY BY CUSTODIAN OR OTHER PERSON WITH KNOWLEDGE WHO IS COMPETENT TO PROVIDE THE INFORMATION REQUIRED BY R. 803(6).

(3) HOWEVER, W/ DIGITAL EVIDENCE, THE FOUNDATION MUST INCLUDE PROOF OF THE RELIABILITY OF THE COMPUTER HARD- AND SOFTWARE. SEE VI.B.1.b, BELOW.

(4) MAY NOW BE DONE BY AFFIDAVIT. R. 902(10)

f) BUSINESS WEBSITE PRINTOUTS*:*

(1) 902(7) – TRADE INSCRIPTIONS SELF AUTHENTICATING

(2) 901(1) – WITNESS WITH FIRST-HAND KNOWLEDGE

(3) SEE Daimler-Benz Aktiengesellschaft v. Olson, 21 S.W.3d 707 (Tex.App.-Austin, 2000, rev. dism.).

g) E.G., GOVERNMENT RECORDS

(1) INTRINSICALLY BY SELF-AUTHENTICATION**:**

(a) 902(5) [OFFICIAL PUBLICATIONS - WEBSITES]

(i) SEE Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 434, 551 (D. Md. 2007)

(ii) Paralyzed Veterans of America v. McPherson, 2008 WL 4183981 (N.D.Cal. 9/9/08)(pages printed from Calif. Secretary of State's website self-authenticating.)

(b) 902(1) [UNDER SEAL], OR

(c) 902(2) [SIGNED BY ONE IN AN OFFICIAL CAPACITY WITH THE AGENCY]

(d) 902(4) [CERTIFIED COPIES OF PUBLIC RECORDS AUTHENTICATED PER 902 (1) AND (2)] (= A BEST EVIDENCE RULE)

(2) 901(7) - EVIDENCE MAY BE PROVIDED EXTRINSICALLY BY A WITNESS WITH KNOWLEDGE OF THE SOURCE OF THE RECORD, OR

h) E.G., PHOTOS FOUND ON A COMPUTER

(1) SEE, Page v. State, 125 S.W.3d 640 (Tex.App.-Houston [1st Dist.] 2003, pet. ref'd)(automotive surveillance video evidence properly authenticated)

3. COMPUTER-GENERATED EVIDENCE

a) E.G., AUTOMATED PHONE AND COMPUTER RECORDS AND IDENTIFIERS, ISP LOGS, AUTOMATED TELLER RECORDS, TIME STAMPS, VEHICLE OPERATION DATA.

b) IDENTITY OF THE AUTHOR IS IMMATERIAL

c) THE QUESTION IS THE ACCURACY OF THE INFORMATION GENERATED BY THE MACHINE

d) R. 901(9) APPLIES

(1) NO DIFFERENT THAN PROVING THAT THE POLICE INTOXILIZER WAS FUNCTIONING PROPERLY ON THE NIGHT IN QUESTION.

(2) See, Ly v. State, 908 S.W.2d 598 (Tex.App.-Houston [1st Dist.] 1995, no pet.)(automated computer monitoring printout properly authenticated).

(3) State v. Dunn, 7 S.W.3d 427, 432 (Mo.Ct.App.2000) (Admissibility of computer-generated records "should be determined on the basis of the reliability and accuracy of the process involved.").

IV. UNDUE PREJUDICE – RULES 403

V. HEARSAY AND DIGITAL EVIDENCE – RULES 801-804

A. AUTOMATICALLY GENERATED COMPUTER INFORMATION/DATA IS NOT HEARSAY

NOT A STATEMENT BY A "PERSON" – R. 801(b), (d)

B. "PERSON"-GENERATED, COMPUTER STORED EVIDENCE

1. WHEN NOT HEARSAY

a) A PARTY "ADMISSION" = AUTHORED BY THE OPPOSING PARTY OR HIS AGENT (R. 801(e)(2)(A)-(E))

b) PRIOR INCONSISTENT OR CONSISTENT STATEMENT – 801(e)(1)(A)-(B)

c) PRIOR IDENTIFICATION – R. 801(e)(1)(C)

d) NOT OFFERED FOR THE TRUTH OF THE MATTER

(1) E.G., TO SHOW EFFECT ON [STATE OF MIND OF] THE RECIPIENT/HEARER

(2) TO SHOW KNOWLEDGE POSSESSED BY RECIPIENT, OR WHEN THE INFORMATION WAS LEARNED

(3) PRIOR INCONSISTENT STATEMENT

2. WHEN IT IS HEARSAY BUT ADMISSIBLE VIA AN EXCEPTION

a) PRESENT SENSE IMPRESSION – R. 803(1)

b) EXCITED UTTERANCE (??) – R. 803(2)

c) STATE OF MIND OF THE DECLARANT – 803(3)

d) BUSINESS RECORDS – 803(6)

e) PUBLIC RECORDS – 803(8)

f) MARKET REPORTS, COMMERCIAL PUBLICATIONS – 803(17)

g) STATEMENT AGAINST INTEREST – 803(24)

VI. BEST EVIDENCE RULE – RULE 1001 ET SEQ.

A. REQUIRES THE PROPONENT OF EVIDENCE TO PRODUCE THE ORIGINAL

1. WRITING

2. RECORDING, OR

3. PHOTOGRAPHS\VIDEO RECORDINGS

B. R. 1001(a): "WRITINGS AND RECORDINGS CONSIST OF LETTERS, WORDS, OR NUMBERS OR THEIR EQUIVALENT, SET DOWN BY . . . ELECTRONIC RECORDING, OR OTHER FORM OF DATA COMPILATION."

C. "ORIGINAL" – R. 1001(c)

1. "IF DATA ARE STORED IN A COMPUTER OR SIMILAR DEVICE, ANY PRINTOUT OR OTHER OUTPUT READABLE BY SIGHT, SHOWN TO REFLECT THE DATA ACCURATELY, <u>IS AN ORIGINAL</u>"

a) "SIMILAR DEVICE" = CELL PHONES, IPODS, BLACKBERRIES, PAGERS

b) "SHOWN TO REFLECT THE DATA ACCURATELY"

(1) REQUIRES TESTIMONY ON RELIABILITY OF

(a) THE EQUIPMENT CAN PERFORM THE FUNCTIONS CLAIMED AND WAS WORKING PROPERLY,

(b) THE COMPUTER USED A RELIABLE PROGRAM THAT CAN DO WHAT IT IS PURPORTED TO HAVE DONE,

(c) QUALIFIED OPERATORS RAN THE EQUIPMENT,

(d) THEY FOLLOWED PROPER INPUT AND OUTPUT PROCEDURES

(e) PRESERVATION OF THE DATA UNTIL PRESENTED IN COURT

c) "OTHER OUTPUT READABLE BY SIGHT"

(1) INCLUDES COMPUTER DATA DOWNLOADED TO A DISK AND THEN PRINTED OUT OR DISPLAYED ON A COMPUTER SCREEN.

2. "AN 'ORIGINAL' OF A PHOTOGRAPH [& VIDEO RECORDING] "AN 'ORIGINAL' OF A PHOTOGRAPH [& VIDEO RECORDING] INCLUDES THE NEGATIVE OR ANY PRINT THEREFROM." (R. 901(c))

3. E.G.:

a) PHOTOS PRINTED FROM COMPUTER

b) PHOTOS DOWNLOADED TO DISK

4. COURTS TREAT PRINTED COPIES OF DIGITAL VIDEOS/PHOTOS FROM A COMPUTER TO BE "ORIGINALS" THOUGH NOT MADE FROM A "NEGATIVE." SEE 1001(1).

D. EXCEPTIONS TO THE ORIGINAL DOCUMENT REQUIREMENT

1. R. 1004(A): ORIGINAL LOST OR DESTROYED

a) SEE State v. Espiritu, 176 P.3d 885 (Hawai'i 2008) (original of a text message not required where receiver's phone lost).

2. R. 1005 – PUBLIC RECORDS

ADMISSIBILITY OF DIGITAL EVIDENCE RESEARCH

WEBSITE PRINTOUT

Paralyzed Veterans of America v. McPherson
2008 WL 4183981, N.D.Cal.,Sep 09, 2008

i. **Exhibit E :**

Exhibit E of the McDermott Declaration is two pages printed from Secretary of State Debra Bowen's **website** on October 8, 2007. See Docket No. 122, Ex. E. One is located at http://www.sos.ca.gov/elections/elections_vs.htm and the other at http://www.sos.ca.gov/elections/hava.htm. The first page describes voting systems and the requirement under California law that all DREs have paper audit trails. It further provides links to a number of Secretary of State directives and information about various voting machines. The second page describes the HAVA and announces new voting equipment is being purchased and deployed.

*7 Defendant Bowen objects that this exhibit "is offered without authentication and/or foundation and, should it be authentic, is irrelevant because it is an incomplete portion of the Secretary of State's website." Docket No. 137, at 2.

In response to the latter part of Bowen's objection, the plaintiffs have included a complete printout of these sections of the Secretary of State's website. See Docket No. 153, Ex. A. Thus, that portion of the objection based upon incompleteness is moot. See, e.g., United States ex rel. Fortier v. Winters, No. 00 C 7058, 2007 WL 118225, *5 n. 5 (N.D.Ill. Jan.9, 2007) (unreported) (objection to affidavit as incomplete mooted by supplemental affidavit).

The authentication and identification of evidence is governed by Federal Rule of Evidence 901. Rule 902 addresses documents said to be "self-authenticating." It states that "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: ... (5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority." Fed.R.Evid. 902(5). Federal courts consider records from government websites to be self-authenticating under Rule 902(5). See, e.g., Estate of Gonzales v. Hickman, No. ED CV 05-660 MMM (RCx), 2007 WL 3237727, *2 n. 3 (C.D.Cal. May 30, 2007) (unreported) (finding report issued by the Inspector General of the State of California on the Office of the Inspector General's website to be self-authentic); Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 551 (D.Md.2007) ("Given the frequency with which official publications from government agencies are relevant to litigation and the increasing tendency for such agencies to have their own websites, Rule 902(5) provides a very useful method for authenticating these publications. When combined with the public records exception to the hearsay rule, Rule 803(8), these official publications posted on government agency websites should be admitted into evidence easily"); United States ex rel. Parikh v. Premera Blue Cross, No. C01-0476P, slip op., 2006 WL 2841998, *4 (W.D.Wash. Sep.29, 2006) (determining documents found on government websites to be self-authenticating); Hispanic Broad. Corp. v. Educ. Media Found., No. CV027134CAS (AJWX), 2003 WL 22867633, *5 n. 5 (C.D.Cal.

Oct.30, 2003) (unreported) (holding, "exhibits which consist of records from government websites, such as the FCC website are self- authenticating").
The web page printouts purport to be, and Bowen does not dispute they are, reports issued by the Office of the California Secretary of State, a public authority. They are then "official records" for purposes of Rule 902(5), and are therefore "self-authenticating."
Moreover, "[a] trial court may presume that public records are authentic and trustworthy. The burden of establishing otherwise falls on the opponent of the evidence, who must come 'forward with enough negative factors to persuade a court that a report should not be admitted.' " Gilbrook v. City of Westminster, 177 F.3d 839, 858 (9th Cir.1999) (quoting Johnson v. City of Pleasanton, 982 F.2d 350, 352 (9th Cir.1992)). Bowen points to nothing in particular in challenging the authenticity or trustworthiness of what are printouts of her official state website. Defendant Bowen's objection to the printouts is accordingly OVERRULED.

WEBSITE PRINTOUT

Estate of Gonzales v. Hickman, Not Reported, 2007 WL 3237727 C.D.Cal.,May 30, 2007

Second, the Report is self-authenticating under Rule 902. See Fed.R.Evid. 902(5) ("Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to ... [b]ooks, pamphlets, or other publications purporting to be issued by public authority"). The OIG Report "purports" to be authored by Matthew L. Cate, Inspector General of the State of California, and issued by his Office. Indeed, the OIG Report submitted by plaintiffs in opposition to defendants' motions for summary judgment is accessible to the public on the **website** of the Office of the Inspector General. See http:// www.oig.ca.gov/reports/pdf/Review_03-17-05.pdf (last visited May 19, 2007). This is sufficient to authenticate the OIG Report under the Federal Rules of Evidence. See, e.g., Lorraine v. Market American Ins. Co., 241 F.R.D. 534, 2007 WL 1300739, *19 (D.Md. May 4, 2007) ("Given the frequency with which official publications from government agencies are relevant to litigation and the increasing tendency for such agencies to have their own websites, Rule 902(5) provides a very useful method of authenticating these publications. When combined with the public records exception to the hearsay rule, Rule 803(8), these official publications posted on government agency websites should be admitted into evidence easily").

TEXT MESSAGES; BER

State v. Espiritu, 117 Hawai'i 127, 176 P.3d 885 Hawai'i,2008.

Petitioner also argues that the court committed error in allowing the Complainant to testify "because her testimony neither constituted the original nor a duplicate of the text message" as required by HRE Rule 1002 (1993). Petitioner contends that the original text messages for purposes of HRE Rule 1002 "would have consisted of the cell phone itself with the saved messages or a printout of the messages." Respondent counters that (1) HRE 1002 is inapplicable

in this case because a text message does not qualify as a writing, recording, or photograph; (2) there was no evidence that it was possible to obtain a printout of the messages; (3) that no photographs were taken of the messages does not preclude the admission of the Complainant's testimony about the messages; (4) even if HRE Rule 1002 is applicable here, HRE Rule 1004 (1993) allows the admission of other evidence in place of the original where the original is lost or destroyed; and (5) Petitioner failed to raise an objection to the Complainant's testimony based on HRE Rule 1002 and, thus, waived the right to raise an argument based on HRE Rule 1002. HRE Rule 1002 provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise *134 **892 provided in these rules or by statute." [FN6] A writing or recording is defined in HRE 1001 (1993) as "consist[ing] 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." This definition is identical to FRE Rule 1001.

> FN6. HRE Rule 1002 is identical to Federal Rules of Evidence (FRE) Rule 1002 except that the word "statute" in HRE Rule 1002 is substituted for the phrase "Act of Congress" found in FRE Rule 1002.

[5] Contrary to Respondent's assertion, a text message is a writing because it consists of letters, words, or numbers set down by mechanical or electronic recording, or other form of data compilation. Although neither party makes this assertion, text messages received on cell phones appear akin to messages received on computers and email for purposes of HRE Rule 1002. See Laughner v. State, 769 N.E.2d 1147, 1159 (Ind.Ct.App.2002) (holding that text messages sent between computers through an internet chat room were subject to the original writing rule and a printout of the messages was an original for purposes of the rule), cert. denied, 538 U.S. 1013, 123 S.Ct. 1929, 155 L.Ed.2d 849 (2003), abrogated on other grounds by Fajardo v. State, 859 N.E.2d 1201 (Ind.2007). Thus, HRE Rule 1002 which requires an original in order to prove the content of a writing is applicable unless an exception under the HRE or a statute provides otherwise.

2.

[6] Although HRE Rule 1002 would ordinarily preclude the admission of testimony about the text messages because such testimony is not an original, the testimony here is admissible because HRE Rule 1004 applies to the text messages such that other evidence may be admitted to prove the content of the text messages. HRE Rule 1004 provides an exception to the original writings requirement of HRE Rule 1002 inasmuch as HRE Rule 1004 provides that:

The original or a duplicate is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]

(Emphasis added.)

This Rule is identical to FRE Rule 1004 except that HRE Rule 1004 eliminates the need for a duplicate as well if the aforementioned condition is met.

The Complainant no longer had the actual text messages because the Complainant no longer had

the cell phone or the cell phone service from Verizon through which she received the messages. No other original version of the text messages appear to have existed because there is no indication from the record that the text messages were ever printed out, nor is it clear that it was possible for the messages to be printed from the phone. Thus, for purposes of HRE Rule 1004, the original text messages were "lost or destroyed."

[7] Petitioner argues that "the original writing was lost or destroyed due to the bad faith of the State of Hawai'i." However, there is no evidence that Respondent exercised bad faith that led to the loss of the cell phone, which Petitioner contends was the "original" for purposes of HRE Rule 1002. Bad faith cannot reasonably be inferred because the Complainant failed to preserve text messages for over two years on a cell phone for which she discontinued service. Similarly, bad faith cannot be inferred because the text messages were not printed out when there is no indication that such a printout was even possible.

Indeed, courts agree that HRE Rule 1004(1) is "particularly suited" to electronic evidence "[g]iven the myriad ways that electronic records may be deleted, lost as a result of system malfunctions, purged as a result of routine electronic records management software (such as the automatic deletion of e-mail after a set time period) or otherwise unavailable...." *135 **893 Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 580 (D.Md.2007). See also King v. Kirkland's Stores, Inc., No. 2:04-cv-1055-MEF, 2006 WL 2239203, at *5 (D.Ala. Aug. 4, 2006) (unpublished decision) (holding that plaintiff's testimony regarding the content of an e-mail from defendant was admissible although plaintiff argued only that a copy of the e-mail, as opposed to the original or sole copy, was in the possession of the defendant); Bidbay.com, Inc. v. Spry, No. B160126, 2003 WL 723297, at *7 (Cal.App. Mar. 4, 2003) (unpublished opinion) (stating that the exception to the original writing rule permitting the substitution of secondary evidence would apply in light of the "tenuous and ethereal nature of writings posted in Internet chat rooms and message boards").

Petitioner argues that Respondent "should not be excused from producing the original or a duplicate of the text messages, which are otherwise inadmissible under the best evidence rule," because Respondent "has not shown that it would have been impossible or even difficult to download, photograph, or print out the data from [the Complainant's] cell phone." In support of this argument, Petitioner cites United States v. Bennett, 363 F.3d 947, 953-54 (9th Cir.2004), wherein the Court of Appeals for the Ninth Circuit held that in accordance with the best evidence rule, the court could not admit secondary evidence pertaining to a global positioning system (GPS) reading as the government failed to show that it would have been difficult or impossible to download or print out the GPS data. That case is distinguishable in that there was no evidence that the GPS data had been lost or destroyed. Id. at 954. Rather, the witness testifying about the data stated that he was not the GPS custodian and it was not necessary to videotape or photograph the GPS contents. Id.

In contrast, here, it appears that the cell phone containing the text messages is unavailable. The Complainant testified that she changed cell phone service providers since the time of the

accident. Furthermore, Petitioner concedes that "the original cell phone is no longer available and there is no indication that any photographs exist of the text messages" therefore, "neither the original nor any duplicates exist."

In addition, this court is not bound by the holding in Bennett. The plain language of HRE Rule 1004 states that an original or duplicate is not required to prove the contents of a writing or recording so long as the originals are lost or destroyed and such loss or destruction was not due to the bad faith of the proponent of the evidence. There is no requirement that the proponent must show that it was impossible or difficult to download or print out the writing at the time that it existed.

TEXT MESSAGES: AUTHENTICATION; BER; HEARSAY

Adams v. Disbennett, 2008 WL 4615623, Ohio App. 3 Dist., Oct 20, 2008

The trial [c]ourt erred in allowing the Plaintiff-Appellee to admit as evidence his exhibits D & E which were copies of instant messaging allegedly between the parties.

{¶ 5} For ease of analysis, we elect to address the assignments of error out of order, beginning with the fifth assignment of error, in which Disbennett argues the IM records were not authenticated pursuant to Evid.R. 901(A) nor corroborated by originals under Evid.R. 1001. In response, Adams claims the trial court did not abuse its discretion by admitting the exhibits. Adams contends the IM records were relevant to prove a loan; the probative value of the evidence "clearly outweighed" any unfair prejudice; the printouts should be considered originals pursuant to Evid.R. 1001(3); and the records were authenticated.

{¶ 6} A trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. State v. McCullough, 3d Dist. No. 12-07-09, 2008-Ohio-3055, at ¶ 25, citing Deskins v. Cunningham, 3d Dist. No. 14-05- 29, 2006-Ohio-2003, at ¶ 53, citing Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio St.3d 83, 482 N.E.2d 1248. An " 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting State v. Adams (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144, internal citations omitted.

{¶ 7} Evid.R. 901(A) provides: "[t]he requirement of an 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." Evid.R. 902(B)(1) provides in pertinent part: "[b]y way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: * * * Testimony that a matter is what it is claimed to be."

*3 {¶ 8} The trial court permitted Adams to authenticate the documents through his own testimony. See Johnson-Wooldridge v. Wooldridge (Jul. 26, 2001), 10th Dist. No. 00AP-1073, citing Kassouf v. White (Mar. 2, 2000), 8th Dist. No. 75446. During the hearing on the motion in limine, Adams testified that "Bob99HD" was his IM screenname, or his online identity; that "Diane Disbennett" was how her name came up on his computer even though her screennames were "sexybitch43302" and "mzz_dakota43302;" that he had not changed any of the messages;

that Exhibit D was a print out of what he observed on his computer screen; and that Exhibit E was a compilation of messages from various dates, with each page representing a different day's conversation. (Trial Tr., May 23, 2008, at 13; 15; 33-35; 44). Adams also testified that the messages contained information that would have been private between himself and Disbennett. (Id. at 49). During Disbennett's testimony, she stated only that she could not recall typing the messages Adams attributed to her, and that her computer was disposed of prior to the commencement of litigation. (Id. at 61; 64-65).

{¶ 9} Although the following case from the Tenth Appellate District is not directly on point in that it concerns authentication of telephone calls rather than computer messages, it contains some useful general information concerning authentication under Evid.R. 901.

"Thus, '[i]t is clear that the connection between a message (either oral or written) and its source may be established by circumstantial evidence.' * * * Moreover, '[a]ny combination of items of evidence illustrated by Rule 901(b) * * * will suffice so long as Rule 901(a) is satisfied.' * * * Finally, '[t]he burden of proof for authentication is slight.' * * * We have explained that[:]

" 'the showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility. Rather, there need be only a prima facie showing, to the court, of authenticity, not a full argument on admissibility. Once a prima facie case is made, the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence, not the court. The only requirement is that there has been substantial evidence from which they could infer that the document was authentic.' " United States v. Reilly (C.A.3, 1994), 33 F.3d 1396, 1404, [internal quotations omitted]. State ex rel. Montgomery v. Villa (1995), 101 Ohio App.3d 478, 484-485, 655 N.E.2d 1342. In alleging that the IM records introduced by Adams were not properly authenticated, Disbennett cites the following:

"There are many states in the development of computer data where error can be introduced, which can adversely affect the accuracy and reliability of the out put * * * Determining what degree of foundation is appropriate in any given case is in the judgment of the court. The required foundation will vary not only with particular circumstances but also with the individual judge."

*4 Lorraine v. Markel Amer. Ins. Co. (D.Md.2007), 241 F.R.D. 534, 543, quoting Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 900.06[3] (Joseph M. McLaughlin ed., Matthew Bender 2d ed.1997). Disbennett then provides a litany of possibilities as to why Exhibits D and E were not authenticated; however, the majority of those reasons are either unsupported by the record or simply contradicted by the testimony. The trial court was in the best position to observe the witnesses and assess credibility. Seasons Coal Co., Inc. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. On this record, we cannot find the trial court abused its discretion when it authenticated Plaintiff's Exhibits D and E.

{¶ 10} Disbennett also contends that Exhibits D and E were improperly admitted because they were not the "originals." Disbennett contends that Adams could have brought his computer's hard drive into court and retrieved the messages in open court. The Rules of Evidence do not impose such a burden upon a plaintiff. Evid.R. 1001(3) defines "original" as, "[a]n 'original' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. * * * If data are stored in a computer or similar device, any

printout or other output readable by sight, shown to reflect the data accurately, is an 'original.' " At the hearing, Adams testified that his hard drive was in his car and was accessible. However, Adams hoped to prove his case by use of his exhibits, which were print-outs of information stored in the computer. Disbennett has cited no authority to support her proposition that Adams was required to produce the computer in court, and she has cited no authority to show that the print outs of information stored on Adams computer were not to be considered the "originals." On this record, we cannot hold that the trial court abused its discretion when it admitted Plaintiffs Exhibits D and E into evidence. The fifth assignment of error is overruled.
{¶ 11} In the fourth assignment of error, Disbennett contends that the trial court erred by allowing inadmissible hearsay into evidence. At trial, Adams' sister, Martha Osbourne, testified that Adams asked her to loan him $10,000. Osbourne testified that she asked Adams why he needed the money, and she stated, "I understood that there was a house that was to be sold or bought by Diane--anyway, and that she was to--she was going to get a loan, but she needed money--he needed money until she could get the loan in her name." (Trial Tr., at 120:10-13).
{¶ 12} Generally, "a written or oral out-of-court statement, offered into evidence to prove the truth of the matter asserted is considered inadmissible hearsay, unless the statement falls within a hearsay exception." McDermott v. McDermott, 6th Dist. No. F-02-023, 2003-Ohio-2361, at ¶ 19, citing Evid.R. 801, 802. "Evid.R. 803(3) provides that the following is excluded from the hearsay rule: 'A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will.' " Id. at ¶ 20.
*5 {¶ 13} As in McDermott, Osbourne's testimony merely indicates Adams' motive for seeking a loan from her. See Unifirst Corp. v. Yusa Corp., 12th Dist. No. 08-25-2003, 2003-Ohio-4463, at ¶ 20. Furthermore, even if the trial court did err in allowing the testimony under Evid.R. 803(3), the error was non-prejudicial since the evidence was cumulative. Unifirst, at ¶ 21, citing McDermott, at ¶ 22, citing State v. Tomlinson (1986), 33 Ohio App.3d 278, 281, 515 N.E.2d 963. Adams testified that he and Disbennett agreed that she would repay him the $10,000 she used to purchase her home. Adams also testified that Disbennett specifically told him she would repay the money. (Trial Tr., at 127). On this record, we cannot find an abuse of discretion in the trial court's admission of Osbourne's statement. The fourth assignment of error is overruled.

FAX OF TELEPHONE RECORDS; AUTHENTICATION

Tyson v. State, 873 S.W.2d 53 (Tex.App.-Tyler,1993, pet. ref'd)

During testimony of DPS Officer Don Sparks, the State elicited testimony from Officer Sparks that when he was present at the arrest of Catherine Dyke at the motel in Lufkin, that he observed by looking at hotel records, a phone number representing a long-distance call from room 141, the room that Catherine Dyke was using. To show who the subscriber was or to whom the number belongs, the prosecutor offered a facsimile from the telephone company that was received in response to an inquiry asking to whom the number was registered. Testimony was given reflecting that a subpoena had been faxed to Southwestern Bell Telephone Company asking for subscriber information on that phone number for the month of October, 1989. The facsimile from

the phone company showed the telephone number was issued to Betty Kean and her mailing address. It was not certified or exemplified. As we understand it, the issue before us is whether or not there is sufficient authentication or identification of this facsimile of the records of the telephone company as governed by Texas Rule of Criminal Evidence 901, which requires:

General Provision: 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.***

Tex.R.Crim.Evid. 901(a) (emphasis added). What the proponent (State) here was claiming, is that a certain telephone number was listed to a certain person (Kean). Rule 901(b)(4) sets forth examples as to how the requirement of authentication can be met:

(4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

Tex.R.Crim.Evid. 901(b)(4). The first page of the facsimile transmittal sheet with the heading from Southwestern Bell Telephone Company, and below that, the statement: *62 "This is: Southwestern Bell Telephone Company Risk Management-SECURITY LOCATED AT 208 SOUTH ACKARD, ROOM 655, DALLAS, TEXAS, 75202." We find that the court impliedly found that by examining the copy of the subpoena, the faxed documents themselves, and the circumstances surrounding its acquisition by Officer Sparks, the State had satisfied the authenticity requirement of Texas Rule of Criminal Evidence 901. We find merit in the State's argument that this is only the reverse of what is found in a telephone book. We further find that a fax transmission is a "telephone conversation" as set forth as an example of a manner of authenticating a probative fact. With this substitution in mind, we read Texas Rule of Criminal Evidence 901(b)(6), which states in pertinent part the following:

(6) *Telephone Conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, or ...

... the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

Here, the officer, by fax to the telephone company at their fax number, inquired about a matter that could reasonably be transacted over the telephone or by fax. It is questionable as to whether Appellant was harmed due to the fact Catherine Dyke had earlier testified that she had telephoned San Augustine and talked to Ray (Kenneth Ray Tyson) in regard to meeting at Arby's at which Betty Kean and Appellant showed up, supposedly unexpected, in the white Oldsmobile. There was also testimony this call was made the same day she left the motel room to go to Arby's in Nacogdoches. Since the officer did not see her leave the motel room before the trip to Arby's that day, the implication is that the call was made from the motel and this number which the officer testified was made from that room was already in evidence without objection. We find the

court did not abuse its discretion in allowing the facsimile into evidence. Point of error number five is overruled.

WEBSTIE PRINTOUT - AUTHENTICATION

Daimler-Benz Aktiengesellschaft v. Olson, 21 S.W.3d 707 (Tex.App.-Austin,2000, rev. dismd) **(**website printouts properly authenticated)

Einfalt's affidavit contains as attachments pleadings and discovery submitted in this case, Daimler-Benz's and DBNAC's annual shareholder reports from 1990 through 1995, information from the **web sites** of Daimler-Benz, DBNAC, and MBNA, and several commercial reports. Daimler-Benz argues that the attachments are not properly identified and authenticated. Einfalt averred that, within his personal knowledge, the attachments are accurate copies of the original documents; Einfalt then identified the attachments. This testimony properly authenticates the attachments. Tex.R. Evid. 901(b)(1). Daimler-Benz's argument that documents printed from web sites must be authenticated by testimony establishing the system from which the printouts were obtained and the accuracy of the printouts was not presented to the trial court, and we do not consider it. Tex.R.App. P. 33.1(a).

PRINTOUT OF LETTER STORED ON COMPUTER; AUTHENTICATION; HEARSAY

Johnson v. State
208 S.W.3d 478
Tex.App.-Austin,2006. Pet ref'd

State's exhibit 153A is a copy of an anonymous letter dated October 27, 1999, and addressed to Laylan Copelin, a newspaper reporter who was involved in the coverage of the Beard shooting. The letter purports to be written by a friend of appellant. It describes appellant as "one of the most giving people in the world" and her marriage to Beard as a "caring relationship with a husband that absolutely adores her." The letter contains an account of appellant's "difficult and traumatic life," including sexual abuse by her father, physical abuse by her first husband, and a number of diseases including ovarian cancer. The letter says that appellant befriended Tarlton because she had suffered "similar trauma issues," and that she had made it clear to Tarlton that "their friendship was nothing more than that." The letter laments that "[b]y the time we all started to see the signs of Tracey being obsessed with Celeste it was obviously too late." The letter concludes by saying that appellant "trusted someone who is crazy" and "feels tremendous guilt over the entire situation even though Steven has told her not to give it another thought." The letter pleads with Copelin to treat appellant fairly in his stories.

[21] Kristina's boyfriend testified that he found the letter in a file saved on the Beard family computer. In his own testimony, Copelin confirmed receiving the letter. In addition to asserting that the exhibit was inadmissible under rules 403 and 404(b), appellant urges that the letter was hearsay and not properly authenticated. *See* Tex.R. Evid. 802, 901.

[22] 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. Tex.R. Evid. 901(a). In addition to being found on the Beard computer, the

letter contained numerous intimate details of appellant's life, confirmed by other evidence, that collectively support an inference that she was the author: her previous marriages, the suicide of her second husband, meeting Tarlton while both were receiving psychiatric treatment, the upcoming trip to Europe. Given these circumstances, it was a reasonable exercise of the trial court's discretion to conclude that the letter was written by appellant. *Id.* rule 901(b)(4); *see United States v. McMahon,* 938 F.2d 1501, 1509 (1st Cir.1991) (applying Fed.R.Evid. 901(b)(4)); *United States v. Newton,* 891 F.2d 944, 947 (1st Cir.1989) (same). And because the letter was shown to be written by appellant, it was not hearsay when offered against her. Tex.R. Evid. 801(e)(2)(A) (admission by party-opponent).

EMAIL AUTHENTICATION

Massimo v. State
144 S.W.3d 210
Tex.App.-Fort Worth,2004. No writ

Massimo and Taylor had a disagreement, leading to a physical altercation and a police complaint being filed by Taylor. Shortly thereafter, beginning October 22, 2002, Taylor began receiving threatening **e-mails,** which she believed were sent by Massimo, the first of which was identified at trial as State's Exhibit 1.[FN1] At one point in her testimony, Taylor did not recall Massimo's e-mail address although she recalled it later and, as she never saw her send the e-mail, could not say for certain who was sending the threatening e-mail. Taylor was fearful and felt threatened, and believed the e-mail came from Massimo because of the content. The language used was consistent with Massimo's and the account address, babycol20 @yahoo.com, was recognized by Taylor as Massimo's, although Taylor stated that Danielle Jones, and Kreshak besides Massimo, knew about the contents of the e-mail. Kreshak had previously witnessed Massimo sending Taylor a threatening e-mail which in part stated that “I will kill you and your two kids,” but it was not State's Exhibit 1.[FN2] The threatening e-mail witnessed by Kreshak was sent to rodeosweetheart12002@yahoo.com which was known by Kreshak to be Taylor's e-mail address.

Detective Sparby, who twice attempted to contact Massimo by phone on November 11 and left a business card on the door of her home the following day. Sparby received no immediate response to her phone calls and business card until she e-mailed Massimo at babycol20@yahoo.com, the address provided to her by Taylor.[FN3] The following series of e-mails, comprising State's Exhibit 6, were exchanged through November 16, 2002:

There is a paucity of case law applying the evidentiary rule to e-mails, but one federal court, applying identical Federal Rule of Evidence 901(a) and (b)(4), found that a district court had not abused its discretion in admitting e-mail evidence by applying Federal Rule 901(b)(4), utilizing characteristic evidence such as: (1) consistency with the e-mail address on another e-mail sent by the defendant; (2) the author's awareness through the e-mail of the details of defendant's conduct; (3) the e-mail's inclusion of similar requests that the defendant had made by phone during the time period; and (4) the e-mail's reference to the author by the defendant's nickname. *United States v. Siddiqui,* 235 F.3d 1318, 1322-23 (11th Cir.2000), *cert. denied,* *216 533 U.S. 940, 121 S.Ct. 2573, 150 L.Ed.2d 737 (2001).[FN5]

FN5. *See also* *Kupper v. State*, 05-03-00486-CR, 2004 WL 60768, at *3 (Tex.App.-Dallas Jan. 14, 2004, no pet.) (not designated for publication) (holding that admission of e-mails was not an abuse of discretion where the e-mails were recovered from defendant's work computer, contained the names of the defendant and the victim and the victim's e-mail address, and discussed similar fact scenarios).

Distinctive internal characteristics have also served to authenticate documents in other contexts. For example, typewritten documents found in a briefcase belonging to an alleged conspirator of a murder defendant were authenticated by their contents, which included specific details about the alarm code and gate code to the victim's house, an outline of the murder plot, and post-crime events and actions that tended to connect the defendant with the murder. *See* *Angleton v. State*, 955 S.W.2d 655, 658 (Tex.App.-Houston [14th Dist.] 1997), *rev'd on other grounds*, 971 S.W.2d 65 (Tex.Crim.App.1998).

A review of the characteristic evidence concerning Massimo's purported Exhibit 1 e-mail yields the following: (1) Exhibit 1 was sent to Taylor's e-mail address shortly after she and Massimo had a physical altercation, and the e-mail referenced that altercation; (2) Taylor recognized Massimo's e-mail account address since she had received e-mails from Massimo previously from this e-mail address; (3) Taylor testified that Massimo usually used the e-mail account babycol20@yahoo.com and that both she and Massimo utilized Yahoo personal accounts; (4) Taylor testified that only Massimo and a few other people knew about things discussed in State's Exhibit 1; (5) Taylor testified that the contents of the e-mails and the way the e-mails were written were the way in which Massimo would communicate; (6) Kreshak testified that she witnessed Massimo send a similar life-threatening e-mail to Taylor using the same vulgarities which appeared in State's Exhibit 1, albeit from a different e-mail address; and (7) Massimo told Kreshak that she was sending the threatening e-mail because she and Taylor did not like each other, which attitude is also reflected in State's Exhibit 1. Based on all of the foregoing and reviewing the requirements of Rule 901 of the Texas Rules of Evidence, we cannot say that the trial court's decision to admit State's Exhibit 1 over a lack-of-authentication objection was so unreasonable as to constitute an abuse of discretion.

[5] Likewise, the characteristic evidence concerning State's Exhibit 6, purported e-mails sent from Massimo to Sparby, yields the following: (1) the e-mails were signed “Amanda,” Massimo's given name, and were sent from an e-mail address Taylor recognized as belonging to Massimo, babycol20@yahoo.com; (2) the e-mails exchanged between Massimo and Sparby are consistent with Sparby's testimony that Massimo was not responding to her efforts to talk to her and was uncooperative; (3) the author of the e-mails knew the subject of the investigation, harassing e-mails, before Sparby revealed that to her; and (4) the November 16 e-mail threatened to report Sparby for harassment, and was sent the same day that Massimo appeared at the police station in person to file harassment charges against Sparby. While Massimo asserted defensively that someone was impersonating her *217 and sending the e-mails on her behalf, she introduced no evidence to support this assertion, and Taylor specifically denied such action. Again, in reviewing the admission of evidence under Texas Rules of Evidence 901, and under the abuse of discretion standard, we cannot say that the trial court abused its discretion in admitting State's Exhibit 6 over a lack-of-authentication objection.

EMAIL AUTHENTICATION

Kupper v. State
Not Reported in S.W.3d, 2004 WL 60768
Tex.App.-Dallas,2004. Writ ref'd

In April 2002, Kupper's former wife found child pornography on Kupper's home computer. She also suspected that Kupper was sexually involved with a middle school-aged girl. Kupper's former wife discussed her suspicions with Scott Stowers, a city of Wylie police detective. Then, she downloaded some files onto a disk and gave the disk to Stowers. She also gave Stowers a phone number which she retrieved from Kupper's cell telephone. Stowers determined it was K.B.'s telephone number. Kupper's home computer was forensically searched. Evidence was also retrieved from Kupper's work computer and from K.B.'s computer.

In his first argument, Kupper contends that the State did not show that Exhibits 1 and 2 came from a computer that Kupper actually used. The gist of Kupper's argument is that Kupper's work computer was one of many computers at his workplace, and because the computers may have been "commingled," the State did not show that the documents in the exhibits were actually retrieved from Kupper's computer. Kupper also argues that because computers were not given identifying marks, the copies made from the hard drives were improperly admitted.

The computers themselves were not offered as exhibits. Rather, Leonard testified that she "imaged" the computer Stowers pointed out to her as Kupper's work computer. There is no evidence that Leonard imaged a computer at the workplace that was not Kupper's. Leonard testified that she placed identifying marks on the documents copied from the hard drives and gave the copies to Stowers. She testified that the exhibits appeared to be the same as the documents she gave Stowers. Moreover, the text of documents in the exhibits contain the names "kyle" or kkupper." We reject Kupper's contention that the State did not show that Exhibits 1 and 2 were from Kupper's work computer.

Next, Kupper argues that the contents of Exhibit 1 were obtained from deleted files, and thus the hard drive had been altered or tampered with by the State. Leonard testified that the documents were downloaded or "recovered" as a deleted file from the hard drive. Kupper does not explain how retrieving a document from a "deleted" file on a hard drive by downloading or recovering it alters either the hard drive or the document itself. As evidence of tampering, Kupper also points to Leonard's testimony that she was not sure if the exhibits had been "changed, altered, or deleted" between Friday, when she compared the exhibit with the original copy, and Monday of trial. However, Leonard testified that the exhibits appeared to be the same, and she did not know if anything had been "deleted or added" to the exhibits. We cannot conclude that this testimony is a suggestion the evidence has been tampered with or changed in some manner. *See id.* Leonard's testimony merely establishes that the exhibits appeared to be the same as the documents Leonard gave Stowers, but she could not say so with absolute certainty. Importantly, Kupper offers no evidence of any alteration or deletion in the documents themselves or points to any evidence on the documents themselves of alteration or deletion.

[2] In his final argument, Kupper argues that several of the documents in the exhibits appear to be e-mails, although there was testimony that they were never sent as e-mails. However, the issue is whether the documents are authenticated or identified as documents from Kupper's and K.B.'s computers, not whether any e-mail was sent or received by either party. The documents include Kupper's and K.B.'s names and K.B.'s e-mail address, and contain similar fact scenarios.

We reject Kupper's arguments and conclude that Leonard's testimony established that the appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances, authenticated Exhibits 1, 2, and 3. There is no evidence raising chain of custody issues. *See* Tex.R. Evid. 901; *Ennis*, 71 S.W.3d at 808; *see also United States v. Siddiqui*, 235 F.3d 1318, 1322-23 (11th Cir.2000) (applying identical federal rule of evidence 901(a) and considering e-mail addresses, facts, and names in authentication of e-mails). Accordingly, we conclude the trial court did not abuse its discretion in admitting these exhibits and resolve Kupper's first issue against him.

EMAIL AUTHENTICATION

Robinson v. State, 2000 WL 622945 (Tex. App. Amarillo 2000), pet.refused.

held that the trial court did not abuse its discretion by admitting certain computer-generated writings, apparently **e-mail** between the defendant and the victim, as they were sufficiently authenticated for purposes of Tex. R. Evid. 901(a). The court noted that Tex. R. Evid. 901(b) provided that evidence which could be identified by distinctive characteristics and the like, could be authenticated by "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in connection with circumstances." The prosecution relied upon various references in the letters in attempting to show that there were "distinctive characteristics" so as to show that the defendant authored the letters. These included the victim's recent trip with his mother, his favorite movies, the defendant's computer user name, "Ran Man," the defendant and victim's prior disagreements, and the victim's recent medical condition. The court acknowledged that the defendant argued, and the victim testified, that any of these items could possibly have been known by others. However, the court pointed out that the victim also testified that one of the letters addressed a concern that he only confessed to the defendant, namely that sometimes he felt that he acted like a snob. In addition, the court observed, although others might have known about his medical condition, the victim testified that he only mentioned it to his father and the defendant. Finally, the court concluded that the fact that the letters signed off with the defendant's user name was a factor that the trial court could consider as indicating it was more likely than not that he sent the letters.

EMAIL AUTHENTICATION

Shea v. State, 167 S.W.3d 98 (Tex. App. Waco 2005), pet. Refused.

held that the trial court did not abuse its discretion when it admitted printed copies of a series of **e-mails** purportedly from the defendant to the victim, despite a claim that their authenticity was not established. Noting that authentication could be established by testimony from a witness with knowledge that the document was what it was claimed to be, as per Tex. R. Evid. 901(b)(1), and

could also be established by appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances (Tex. R. Evid. 901(b)(4)), the court pointed out that the victim testified that she was familiar with the defendant's e-mail address and that she had received the six e-mails in question from the defendant. Thus, the court concluded, her testimony authenticated the e-mails. Relying on Massimo v. State, 144 S.W.3d 210 (Tex. App. Fort Worth 2004), this section, the court explained that when determining whether an e-mail has been properly authenticated, the court should consider consistency with the e-mail address on another e-mail sent by the defendant, the author's awareness through the e-mail of the details of defendant's conduct, the e-mail's inclusion of similar requests that the defendant had made by phone during the time period, and the e-mail's reference to the author by the defendant's nickname. The court pointed out that the six e-mails in question had several of these characteristics, as they were sent to the victim from two different e-mail addresses. The victim testified that she came to know the defendant's e-mail address because he would call to confirm that she had received an e-mail from him. The first three e-mails bore this address. In the fourth e-mail, the defendant asked the victim to no longer use the former address but to use the new address from which he had sent the fourth e-mail. The latter three e-mails bore this new address. In addition, the defendant himself offered in evidence eight e-mails from the victim to him at this new address. The court further noted that two of the e-mails offered by the State made reference to the defendant's occupation as a furniture maker. In one of the e-mails, the defendant commented that he liked the victim's locker number. She explained in her testimony that this comment was significant because her locker number had the numerals "22" in it and the defendant was 22 years older than she. The court also noted that the victim testified that the content of the e-mails was similar to conversations she had had with the defendant over the telephone, and that four of the e-mails were signed with the nickname "Kev."

EMAIL AUTHENTICATION

Ussery v. State, 2008 WL 269439 (Tex. App. Austin 2008) pet. Ref'd

held that **e-mail** communications between the defendant and the victim were properly admitted despite the defense's objection that the State had failed to authenticate the electronic recording evidence as required by Tex. R. Evid. 901(a). The victim's grandfather had installed "spyware" on the computer when he became suspicious of the victim's activities, which disclosed the e-mails. The defendant asserted that the State failed to call as a witness the person who actually installed the "spyware" on the computer and printed out the e-mails because the grandfather acknowledged that he knew little about computers. The court pointed out that the victim authenticated the evidence when she testified, identifying the e-mail communications as fair and accurate copies of actual e-mails she exchanged with the defendant.

DIGITAL VIDEO RECORDINGS; AUTHENTICATION

Page v. State, 125 S.W.3d 640 (Tex. App. Houston [1st Dist.] 2003, pet. ref'd)

held that where the store's digital recording system **recorded images** from 16 video cameras and automatically saved those images onto a computer hard drive, the trial court did not abuse its discretion in admitting a videotape of the robbery printed off the hard drive, as the evidence was

properly authenticated under Tex. R. Evid. 901. The stores' loss prevention investigator testified that he arrived at the store shortly after police. Once there, he accessed the digital recording system, replayed the recording of the robbery for the officers, produced a still photograph of the defendant from the digital recording system, copied the recording of the robbery onto a videotape, and gave the still photograph and the videotape to the officers. The defendant asserted that the investigator could not testify as to the accuracy of the contents of the videotape because he was not present in the store at the time of the robbery. The court reasoned that the investigator's testimony was sufficient evidence to enable a reasonable juror to conclude the videotape was what the State claimed it to be. The court added that the investigator reviewed the videotape before trial and testified that it had not been altered in any way.

COMPUTER-GENERATED INFO; AUTHENTICATION

Ly v. State, 908 S.W.2d 598 (Tex.App.-Houston [1st Dist.], 1995 no pet.)

held that the trial court did not err in admitting a **printout generated by the computer used for electronic monitoring** even though the State assertedly did not prove the reliability of the electronic monitoring system. The court noted precedent upholding a trial court finding that the printout process was reliable where the State presented testimonial evidence showing the accuracy and proper operation of the computer. The court noted that during trial, the county employee responsible for the monitoring testified to the reliability and accuracy of the electronic monitoring system, and she further testified that the vendor and manufacturer of the electronic monitoring equipment was also contacted to verify that the electronic equipment was operating properly. The court reasoned that her testimony established that the monitor was trustworthy with respect to the information which appeared on the computer printout and that the computer was working properly when the printout was generated. Moreover, the court said that no controverting evidence was offered by the defendant to indicate that the computer was not reliable or was not operating properly when the printout was generated.