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The Admissibility of Electronic Evidence

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I. Introduction[*]

A. Courts confronting the admissibility of evidence based on new technologies have reacted in a predictable pattern: first resistance, then grudging acceptance, then a loosening of foundation requirements.

- *Compare United States v. Scholle*, 553 F.2d 1109, 1125 (8th Cir. 1977) ("[T]he complex nature of computer storage calls for a more comprehensive foundation."), *with Garden State Bank v. Graef*, 775 A.2d 189, 192 (N.J. Super. Ct. App. Div. 2001) (quoting *Hahnemann Univ. Hosp. v. Dudnick*, 678 A.2d 266, 269 (N.J. Super. Ct. App. Div. 1996)) ("[C]omputers are universally used and accepted, have become part of everyday life and work and are presumed reliable.").

B. Focus on three major evidentiary issues: authentication, hearsay, and the best evidence rule.

C. Focus on the following types of electronic evidence: e-mails; material downloaded from websites; text and instant messages, including chat room conversations; digital photography; computer animations and simulations; and business records.

D. Despite concerns that parties will fraudulently create, tamper with, or manipulate electronic evidence, the existing rules of evidence are adequate to the task of addressing questions about the admissibility of such electronic evidence. Introducing special, and heightened, standards of admissibility for electronic evidence will prove counterproductive.

E. Concerns with manipulation are best investigated during the discovery stage.

- *See, e.g.,* Report of Digital Forensic Analysis at 27–35, Ceglia v. Zuckerberg, No. 1:10-cv-00569-RJA (W.D.N.Y. Mar. 26, 2012) (finding fabricated emails to be inconsistently formatted, with the wrong time zone stamps, and cut-and-pasted onto backdated Microsoft Word documents).

F. Valuable reference sources:

- **Books**: Paul R. Rice, Electronic Evidence: Law and Practice (2d ed. 2008); Deanne C. Siemer, Frank D. Rothschild, Anthony J. Bocchino & Donald H. Beskind, Nat'l

[*] This outline is adapted and updated from Steven Goode, *The Admissibility of Electronic Evidence*, 29 Rev. of Litig. 1 (2009), and is printed here with the permission of The Review of Litigation and University of Texas School of Law Publications.

Inst. for Trial Advocacy, Effective Use of Courtroom Technology: A Lawyer's Guide to Pretrial and Trial (2002).

- **Articles**: Randy Wilson, *Admissibility of Web-Based Data*, 52 The Advocate 31 (Fall 2010); Andrew M. Grossman, *No, Don't IM Me—Instant Messaging, Authentication, and the Best Evidence Rule*, 13 Geo. Mason L. Rev. 1309 (2006); Gregory P. Joseph, *A Simplified Approach to Computer-Generated Evidence and Animations*, 156 F.R.D. 327, 335–37 (1994); Anthony J. Dreyer, Note, *When the Postman Beeps Twice: The Admissibility of Electronic Mail under the Business Records Exception of the Federal Rules of Evidence*, 64 Fordham L. Rev. 2285 (1996); Deborah R. Eltgroth, Note, *Best Evidence and the Wayback Machine: Toward a Workable Authentication Standard for Archived Internet Evidence,"* 78 Fordham L. Rev. 181 (2009); J. Shane Givens, Comment, *The Admissibility of Electronic Evidence at Trial: Courtroom Admissibility Standards*, 34 Cumb. L. Rev. 95 (2003); Leah Voigt Romano, Comment, *Electronic Evidence and the Federal Rules*, 38 Loy. L.A. L. Rev. 1745 (2005); Elan E. Weinreb, Note, *"Counselor, Proceed With Caution": The Use of Integrated Evidence Presentation Systems and Computer-Generated Evidence in the Courtroom*, 23 Cardozo L. Rev. 393, 403–04 (2001); G. Ross Anderson, Jr., *Computer Animation: Admissibility and Uses*, S.C. Trial Law. Bull., Fall 1995, at 9; Linda L. Listrom, Eric R. Harlan, Elizabeth H. Ferguson & Robert M. Redis, *The Next Frontier: Admissibility of Electronic Evidence*, A.B.A., Summer 2007.

- **Survey cases**: *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) (invaluable survey of the cases and legal issues of all types of electronic evidence); *State v. Swinton*, 847 A.2d 921, 932–59 (Conn. 2004) (comprehensive discussion of issues relating to digital photographs as well as computer animations and simulations).

II. Authentication

A. General Principles

1. Rule 901(a): The proponent of an item must produce evidence sufficient to support a finding that the item is what its proponent claims it to be.

   - *See, e.g.*, Tienda v. State, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012) ("The preliminary question for the trial court to decide is simply whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic."); STEVEN GOODE & OLIN G. WELLBORN, COURTROOM HANDBOOK ON FEDERAL EVIDENCE 298 (2009)

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