The Admissibility of Electronic Evidence

Professor Steven Goode

Prof. Steven Goode
University of Texas School of Law
Austin, TX
sgoose@law.utexas.edu
512-232-1331
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.


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.


F. Valuable reference sources:


* 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.
I. Explanation

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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