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The Admissibility of Electronic Evidence

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Article

***1 THE ADMISSIBILITY OF ELECTRONIC EVIDENCE**[Steven Goode \[FNa1\]](#)

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*2 Abstract

The digital revolution has forever altered the way in which information is stored and communicated. Although oral testimony is offered in much the same form it has been for centuries, trial lawyers now have to deal with an array of evidence of a type that was almost unimaginable fifty years ago. Not only are most documents now stored on or generated by computers, but a variety of electronic data has found its way into the courtroom. This includes material downloaded from websites, e-mails, text messages, instant messages, data from GPS devices, computer animations and simulations, digital photos, and enhanced images. Some courts and commentators have cast a skeptical eye on electronic evidence, with some even urging that new standards need to be devised. By reviewing how courts have and should address the objections most commonly raised to electronic evidence--authentication, hearsay, and best evidence--this article demonstrates that the current framework provided by the rules of evidence is adequate to the task.

I. Introduction

Most of the drafting of the Federal Rules of Evidence [FN1] occurred in the 1960s, well before computers, e-mail, the internet, and digital cameras became commonplace in American life. [FN2] Not surprisingly, the admissibility of electronic evidence was not high on the minds of the drafters. Indeed, it is perhaps surprising that the *3 rules make any reference to computers or the electronic recording of information. But they do. [FN3] Perhaps even more surprising is that the rules provide a fairly good evidentiary framework for addressing the admissibility issues raised by the proliferation of new technologies. The framework operates, however, at a relatively general level, and, as we all know, the devil is in the details. This article addresses those details. [FN4]

*4 Our jurisprudence is littered with examples of courts confronting the admissibility of evidence based on new technologies, and courts have reacted in a predictable pattern. At first, new technologies meet with judicial resistance. More than a century ago, courts balked at admitting photographs on the ground that “either through want of skill on the part of the artist, or inadequate instruments or materials, or through intentional and skillful manipulation, a photograph may be not only inaccurate, but dangerously misleading.” [FN5] Audio recordings provoked similar skepticism. As late as 1934--seven years after *The Jazz Singer* [FN6]--one court refused to admit a recorded conversation, stating, “[w]e know of no case, and counsel cite none, in which a phonograph record of an alleged conversation was admitted in a court of

law as evidence thereof.” [FN7] Motion pictures received similar treatment. [FN8] With each of these technologies, initial judicial intransigence eventually yielded to grudging acceptance, but proponents still had to meet high thresholds for admissibility. [FN9] Then, over time, as courts grew more comfortable with the technologies, foundation requirements loosened.

Early attempts to offer business records generated by computers met with similar resistance. In the late 1970s, the Eighth Circuit declared that “the complex nature of computer storage calls *5 for a more comprehensive foundation.” [FN10] Beyond the foundation ordinarily required for business records, the proponent had to delineate “the original source of the computer program . . . and the procedures for input control including tests used to assure accuracy and reliability.” [FN11] But as computer-generated and computer-stored [FN12] business records became ubiquitous, admissibility standards relaxed. As one New Jersey court recently stated, “computers are universally used and accepted, have become part of everyday life and work and are presumed reliable.” [FN13]

More recently, the Internet has provoked judicial recalcitrance. Perhaps the grumpiest reaction to an offer of evidence gathered from the Internet appears in *St. Clair v. Johnny's Oyster & Shrimp, Inc.*:

While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. . . . Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on any web-site from any location at any time. For these reasons, any evidence procured off the Internet is adequate for almost nothing

*6 Instead of relying on the voodoo information taken from the Internet, Plaintiff must hunt for hard copy back-up documentation in admissible form [FN14]

As we will see, other courts are less antagonistic to Internet-generated evidence, and we can expect to find that admissibility decisions concerning this type of evidence will follow the same trajectory as have decisions regarding photographs, movies, audio recordings, and the like.

While electronic evidence does not present any particularly difficult analytical problems in terms of the law of evidence, [FN15] it does pose some very real practical problems. These flow primarily from the ease with which electronic data can be manipulated and the difficulty and expense that may be incurred in detecting such manipulation. [FN16] The Manual for Complex Litigation, Fourth [FN17] reflects this concern, as do many cases. It is clear that different judges view different types of electronic evidence with varying degrees of skepticism, and it is equally clear that a single judge will view different types of electronic evidence with varying degrees of skepticism. Given the general terms in which rules of evidence articulate the standards for admissibility, it is sometimes hard to *7 predict just how much proof a particular judge will require to admit a particular piece of electronic evidence. [FN18]

This paper will focus on the three major evidentiary issues that may arise when a party offers what I will loosely call electronic evidence: authentication, hearsay, and the best evidence rule. [FN19] Although there are numerous types of electronic evidence, this article will focus on the following: e-mails; material downloaded from websites; text and instant messages, including chat room conversations; digital photography; computer animations and simulations; and business records.

What should emerge from the ensuing discussion is an understanding that the existing rules of evidence are adequate to the task of addressing questions about the admissibility of such electronic evidence. To be sure, the danger that a party may fraudulently create, tamper, or manipulate electronic evidence certainly exists. But introducing special, and

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