



HOW TO AUTHENTICATE SOCIAL MEDIA, TEXT AND EMAIL TIPS ON CONDUCTING TRIAL

National Business Institute—South Carolina Litigation Start to Finish

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Social Media, Text and email Evidence New or Not?

- Definitely new in terms of volume, how stored, searchable without human eyes and who is generating
- Not new in terms of how to authenticate and get introduced at trial
- The search for credible evidence:
 - Is it relevant to the claims and defenses in the case? Who authored?
 - Who received?
 - Who read?
 - Has it been changed?
 - Where did it come from?

What is authentication?

- A subset of relevance—if it cannot be connected to the case, how can it show a relevant fact is more or less likely true?
- The party introducing the electronic writing or message must make a *prima facie* showing of the true author
- Up to the jury to decide if it is authentic once a judge says there is sufficient evidence for a reasonable jury to do so



The Basics

- Most writings CANNOT self authenticate
- In other words, an electronic signature, a typed name, a copyright notice or the like is not enough standing alone
- But strict technical proof establishing beyond doubt is not needed in S.C.
- Technical methods are strong authentication and required in some jurisdiction
- Tracking a party's Facebook, MySpace, Twitter(X) or similar page to an email address belonging to the party by internet protocol evidence
- Hash values—file fingerprints—file is processed through a cryptographic algorithm (usually MDS or SHA1) unique number lets it be found—you modify the file, the number changes
- Metadata--structured reference data that lets processor sort and identify attributes of the information it describes

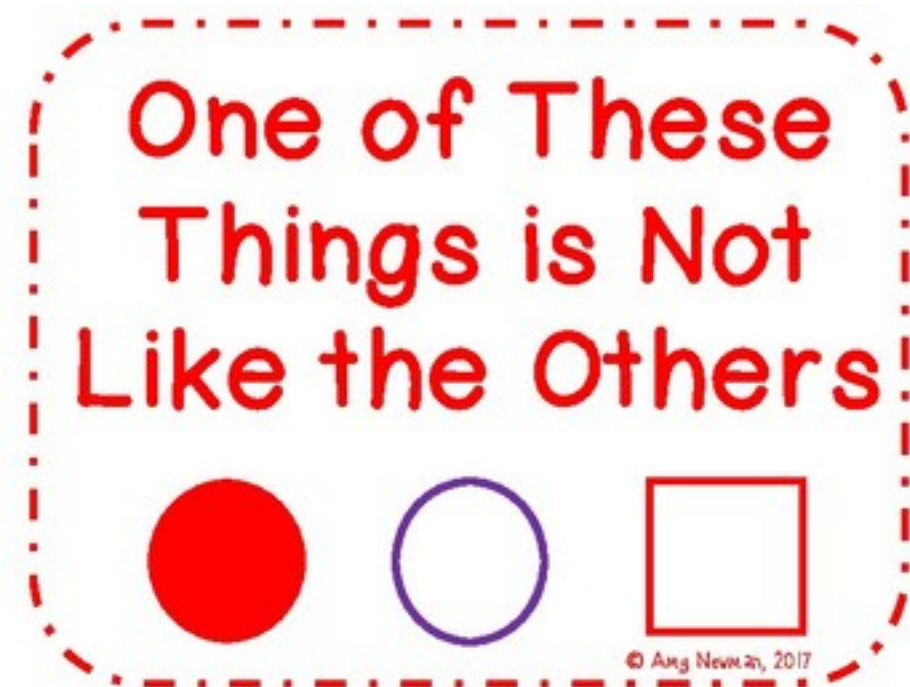
Common Methods

- Witness testifies they created the post, email, text
- Witness testifies they saw the person create the post, email, text
- The computer, tablet or cellphone that originated the material was cloned or seized and evidence shows who had possession of it at the relevant time
- TIP you are not going to become an expert on every social media platform out there—know the experts who can help



Differences Between Electronic Media Evidence

- Email, instant messaging, text messages more easily fit traditional authentication methods because it tracks from a person or group transmitting to another and so on. If and when it has been changed is usually easier to determine.
- Broadcast social media creates issues of how did the material travel and get changed before it arrived at the preservation point



EXAMPLES OF CIRCUMSTANTIAL AUTHENTICATION

- *U.S. v. Recio*, 884 F.3d 230 (4th Cir. 2018) (1) social networking website record containing post was made at or near time the information was transmitted by the user, (2) user name associated with account was defendant's name, (3) one of the four email addresses associated with account contained defendant's name, and (4) more than 100 photographs of defendant were posted to account
- It is very doubtful that 1 standing alone would suffice. But how many of 2-4 must be present to make the “strong enough circumstantial” hurdle?
- How much indirect evidence that does not, on its face, prove a fact in issue, is enough to give rise to a logical inference the fact exists?

Other Examples

- Remember our hearsay discussion
- Custodian of business records—the witness from Facebook, AT&T, Google etc. may be all you need
- Particularized content—search the email, text or post for things that are unique to the person or only a small group of people which he belongs to would know



Continued



- In the email, text and instant messaging world if a reply comes back from a different account it corroborates the sender's account address and can be sufficient to go to the jury on authenticity
- Look carefully at attachments, these can add sufficient corroboration

If you Love this Work—the Best Part



TRIAL PREPARATION BEGINS DAY 1

- If you want to succeed at trial, your preparation begins when you get the case
- Successful trial lawyers know how to simplify a message
- Trial themes should be discussed, documented and evolve through the early stages of the case and become firm in the later discovery phase
- Not every case can be reduced to 1-3 simple themes that if your proof supports you win, but even the most complex can be divided into simpler segments
- Jurors want to do what is “right” show them how to follow the law AND do the right thing by finding for your client

Opening Statement

- Live question voir dire extremely rare in SC civil cases
- This is your first impression on the jury as a result
- You are helping them navigate what will come, placing the evidence in an understandable story
- Make your client relatable to the jury



Opening Statement (Cont.)

- Do not overpromise
- Be ready to trace back and show the evidence in closing
- Demonstrative exhibits give breaks in the teaching and allow the visual brain to kick in
- **WARNING** Using demonstratives or unopposed exhibits in opening still is uncommon (it shouldn't be)—make sure you've cleared it all in advance you don't want to have objections and rulings (perhaps with you losing a key piece of your plan)
- Be prepared, flow easily, but don't memorize and seem mechanical

Witness Examination

- Forget everything we said about depositions. You want your witnesses now to tell a story in response to as few and as simple questions as you can ask. You want the witness to be the star.
- With hostile witnesses, you are not trying to learn how they will come at your case and box them in, now is when you don't ask a question you do not know the answer to—better yet, don't ask a question that you can't use a document, picture, testimony of several other witnesses, this witness's deposition or something else to bring credibility crashing down on the witness who gives you the wrong answer
- NEVER FORGET every rule is meant to be broken sometimes. If you are in a pinch and the case is slipping away, sometimes you take chances.

Objections

- I found this the most difficult area of trial to master
- You must be prompt
- If a case justifies the expense it is great to have a team member at table who is focused solely on objections
- Be polite—outrage rarely scores you points, I like the “May it please the court” intro when I have time
- Always have the rule number if it relates in anyway to Fed. or S.C.R. Evid.

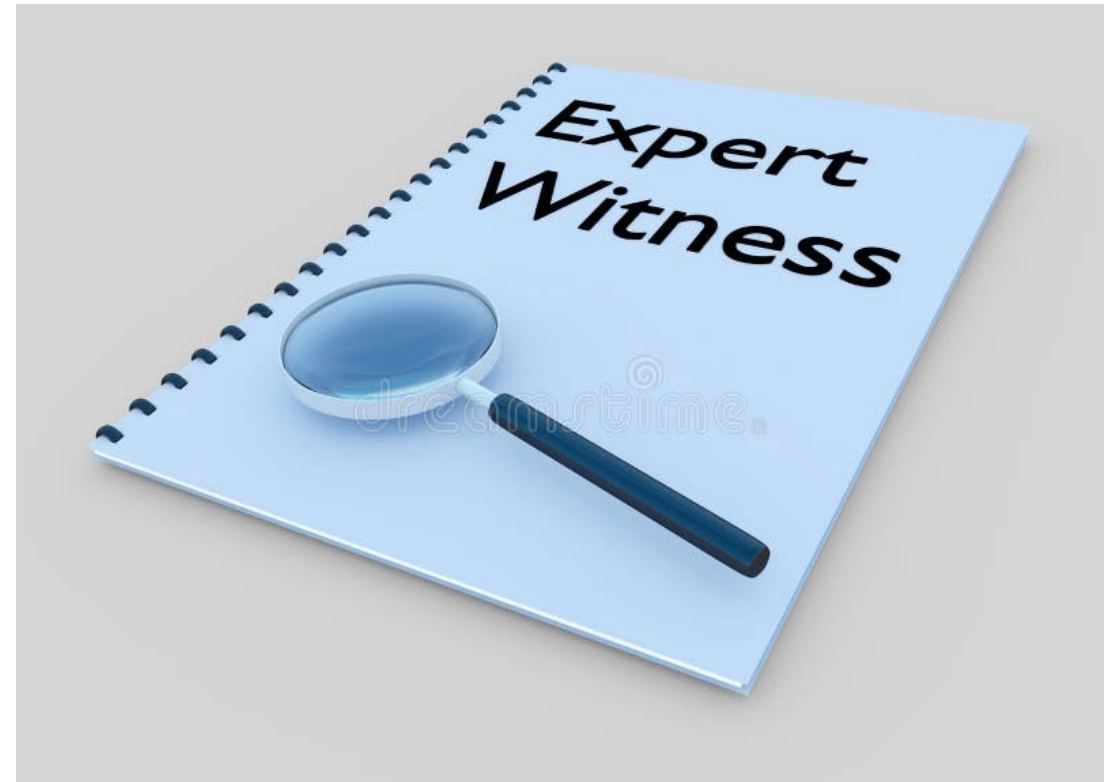


Exhibits

- Vital to your case because they go with the jury
- Intersperse them throughout testimony to give a break from Q A and to keep them from being overwhelming
- When you can use some videos and pictures
- Use demonstratives, but link them to evidence that will be in the jury room

Expert Witnesses

- Two types, those who support your case those who attach the other sides case—when you can split the jobs between different witnesses easier on the jury than prolonged single witness
- Look for someone who knows it all, but acts like your favorite high school teacher exuberant about the topic helping the jury learn, no arrogance or self importance
- Academic or professional, find someone who makes a substantial part of their living teaching or doing the expert field, not just testifying about it



Expert Witness (Cont.)



- Research their background carefully
- You don't want to be explaining to your client why the expert that cost \$\$\$\$ won't be testifying due to pretrial ruling
- Even worse, you don't want your opponent rolling out an article, academic paper or testimony from another case that take the opposite position

Closing

- Show the jury how to put all the evidence together and how when you follow the path your client wins
- If things went wrong fix as best you can
- Talk about the client and who they are and what they are
- Talk about justice
- Link it to your themes and your opening, make it as simple as you can
- This is the last moment on stage, be believable, professional, in control and passionate for your client



QUESTIONS?

COMMENTS?



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