How to Outsmart a Smartphone: Practical Tips on How to Use Electronic Messaging Evidence in the Courtroom

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The availability of electronic evidence has grown exponentially in recent years, due in large part to the accessibility of hand held computers, i.e. smartphones. With this great benefit comes the unprecedented challenges in legal proceedings as the courts decide how to properly authenticate digital information under the current judicial rules and procedures.

Your client has a text message, e-mail, or message from social media that will help your case. Now what? This article will provide practical tips to consider in order to get a piece of electronic messaging evidence admitted in Virginia state courts under the Virginia Rules of Evidence.

You must first lay the proper foundation in order for electronic messaging evidence to be admitted. The Virginia Rules of Evidence require that for evidence to be admissible, it must be authenticated, relevant, and survive hearsay and best evidence rules.

Relevance: The evidence must be relevant to the claims asserted, legally speaking: it must have "any tendency" to prove or disprove a consequential fact.[1] All relevant evidence is admissible, unless otherwise barred by the US or Virginia Constitution, statute, Rules of Evidence, or other Virginia Supreme Court Rule.[2] Virginia law generally favors all relevant evidence, thus the rules calls for exclusion of relevant evidence only when its probative value is substantially outweighed by unfair prejudice.[3]

Authentication: In the simplest terms, authentication requires showing that the evidence offered is what the proponent claims it to be.[4] No single approach to authentication will work in all instances for electronic evidence.[5] Circumstantial authentication is necessary for electronic evidence, which involves a two-step process. First, is the printout an accurate depiction of the messages sent and received? Second, who is the author/sender of the message?

The standard is low in regard to the accurate depiction of the message. Have the witness authenticate the printout like a photograph, providing that it is a fair and accurate depiction of what they saw. Who can testify to the authentication? It is not necessary, and likely impracticable, to have a representative from the website/phone company. It is likely sufficient for the layperson who received the message to testify.

The second step, proving the identity of the author involves a more complex discussion. The statement, *"He sent me that message,"* alone is likely insufficient. There must be additional circumstantial evidence as to the identity of the sender.[6] Look for testimony that can describe distinctive characteristics such as: appearance, contents, substance, and internal patterns, taken in conjunction with circumstances. [7] Also, a witness-providing context to a writing can be sufficient to authenticate, especially when in response to another writing sent to a party, otherwise known as the "reply doctrine." [8] *"I know he sent me this message, because: he always communicates with me through this number, 'squishy' is the pet name that only he uses, this was right after he left the house, and only knows about x."* Unlike the previous assertion, this testimony provides distinctive characteristics.

Hearsay: Defined as an out-of-court statement offered for the truth of the matter asserted.[9] First, consider what you are offering the statement for? If the message is deemed hearsay, a majority of the time it will fall into the party admission or adoptive admission exception.[10] Other hearsay exceptions may be considered with respect to electronic messages, including business records, public records, and co-conspirator statements. Is it not being offered for the truth? Relevant non-hearsay statements include: offering for a purpose of circumstantial evidence of state of mind, effect on the listener, statements offered for impeachment, and legally operative facts.[11]

A significant distinction must be made when analyzing an electronic message: what is computer-generated compared to computer-stored. Likely, with an electronic message you will have a mix of both. The header, date, time, and received, portion of the message would fall under computer-generated, therefore, not a statement; whereas, the message that was typed by a person that was transmitted electronically is considered a "statement." There is precedent in Virginia with respect to electronic messages where a proponent could argue that the messages are not hearsay at all because the messages are computer-generated documents, thus there is no out of court asserter.[12]

Best Evidence: "Objection — the printout of the message is not the original

writing!" The Rule provides that where the contents of a writing are desired to be proved, the writing itself must be produced or its absence sufficiently accounted for before other evidence of its contents can be admitted.[13] The best evidence rule applies *only* to writings, it does *not* apply to digital images.[14] A recent Court of Appeals case held that text messages do constitute writings for purposes of the best evidence rule.[15] The court in *Dalton*, however, did not decide what constitutes an "original" because the phone in that case was no longer available, and the screenshot pictures of the text messages from the phone were admissible copies under the rule. [16]

An electronic message may make or break your case. Lay the proper foundation, have your witness testify to the authentication, and be prepared to respond to hearsay and best evidence objections. Don't lose heart, even if the electronic message is inadmissible, it may be useful in another way, such as for impeachment, refreshing memory, and corroboration. Be prepared so that you are able to outsmart the smartphone.

Endnotes:

1 Va. R. Evid. 2:401.
2 Va. R. Evid. 2:402.
3 Va. R. Evid 2:403.
4 Va. R. Evid. 2:901
5 *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (D. Md. May 4, 2007).
6 *Harlow v. Comm.*, 204 Va. 385 (1963).
7 *Whaley v. Comm.*, 214 Va. 353 (1973), *Bloom v. Comm.*, 34 Va. App. 364 (2001).
8 *Kitze v. Comm.*, 15 Va. App. 254 (1992).
9 Va. R. Evid. 2:801(c)
10 Va. R. Evid. 2:803(0).
11 *Mackall v. Comm.*, 236 Va. 240 (1988) (state of mind not hearsay); *Hamm v. Comm.* 16 Va. App. 150 (1993)(operative documents not hearsay); *Wood v. Bass Pro Shops*, 250 Va. 297 (1995) (effect on listener not hearsay); *Pugh v. Comm.*, 233 Va. 369 (1987)(statements for impeachment not hearsay).
12 *Chewning v. Comm.*, 2014 Va. App. LEXIS 82 (March 11, 2014). See also *Godoy v. Comm.*, 62 Va. App. 113 (2013).
13 Va. R. Evid. 2:1002.
14 *Midkiff v. Comm.*, 280 Va. 216 (2010).
15 *Dalton v. Comm.*, 64 Va. App. 512 (2015).
16 *Id.* See also *Cobb v. Comm.*, 2013 Va. App. LEXIS 301 (2013)(Verizon Wireless records considered original or duplicate original under best evidence rule).

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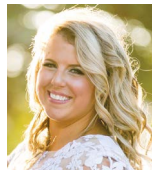

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