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SOCIAL MEDIA EVIDENCE: PROCUREMENT & ADMISSION OF EVIDENCE

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Social Media Evidence: *Procuring and Admitting*

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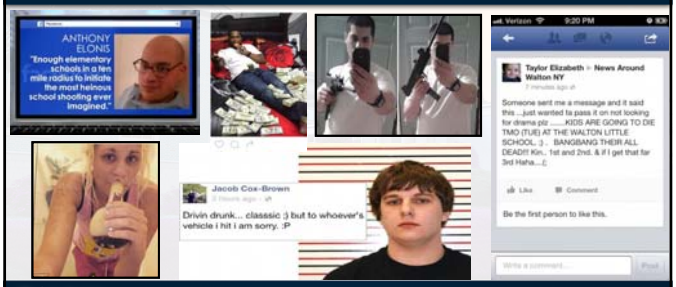
Strong Evidence



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Doesn't have to be complicated

How would you approach this evidence if wasn't digital?

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Vague Objection "or whatever…"

"…I don't know if there has been, um, what would need to be done to trace this back to a particular IP address or whatever at this time. So, I think authentication would certainly be an issue that we would raise…."

- ***State v. Ford*, 245 N.C. App. 510 (2016)**

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What the Defense Is *Trying* To Say

Authentication → Original Writing/ Best Evidence → Hearsay

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Hearsay

- **Common ways of avoiding hearsay bar**
  - Admission of a party opponent
  - Statement against interest
  - Statement of a co-conspirator
  - Hearsay exceptions
    - Business record
    - Excited utterance
    - Medical diagnosis
    - Many others
  - Non-hearsay purpose, not for the truth of the matter asserted

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Best Evidence Rule

Rule 1002: Need "original" to prove content of "writing, recording, photograph, or video" except as otherwise provided

- Rule 1001(e): "Original" includes any "printout or other output perceived by sight"
- Rule 1003: Duplicates are "admissible to the same extent as the original" unless a genuine question re: authenticity
- Rule 1004: Rule does not apply if all originals have been lost or destroyed without bad faith

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Helpful Cases

- ***Hackin v. Gaines*, 103 Ariz. 13 (1968)**
  "A carbon copy of a letter may be admitted into evidence. [...] The existence of a carbon requires the existence of the original, and proof that a carbon existed requires the inference that an original also existed."
- ***State v. Irving*, 165 Ariz. 219 (App. 1990)**
  "The statute, by its very terms, requires a custodian of records to certify that the computer printout is a "true reproduction of the information contained in the computer storage devices of the department of transportation, motor vehicle division...." The computer printout is an original of this record.
- ***State v. High*, 2018 WL 4628448 (Ariz. App. 2018) (memorandum)**
  "Because the photographs were taken using K.B.'s cell phone, they were 'electronically stored.' Ariz. R. Evid. 1001(d). High does not argue that the digital images and the hard-copy images differed in any way. Consequently, the "originals" of those photographs include "any printout," like the hard-copy images, and any "other output readable by sight," like the digital images projected on the screen in the courtroom. *Id.* Thus, the hard-copy images and the digital images were equally admissible.

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That reminds me…

Rule 111. Publication of Opinions of the Supreme Court and Court of Appeals

(a) Definitions.

2. A memorandum decision is a written disposition of a matter not intended for publication.

(c) Dispositions as Precedent.

(1) Memorandum decisions of Arizona state courts are not precedential and such a decision may be cited only:

(C) for persuasive value, but only if it was issued on or after January 1, 2015; no opinion adequately addresses the issue before the court; and the citation is not to a depublished opinion or a depublished portion of an opinion.

(2) A citation must indicate if a decision is a memorandum decision.
(3) A party citing a memorandum decision must provide either a copy of the decision or a hyperlink to the decision where it may be obtained without charge.

- **See generally *Whitmire v. Wal-Mart Stores, Inc.*, 359 F.Supp.3d 761 (D. Ariz. 2019)**

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Authentication Basics

- Authentication is identification
  - Rule 901(a) ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.")
- Authentication is "a special aspect of relevancy"
  - 32A C.J.S. Evidence § 1086 ("The rationale for requiring authentication is that, if a matter is not what its proponent claims, it has no relevance.")
- Authentication is a low hurdle
  - *State v. Lavers*, 168 Ariz. 376 (1991) ("The judge does not determine whether the evidence is authentic, but only whether evidence exists from which the jury *could reasonably conclude* that it is authentic.")

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How Do You Authenticate?

- Rule 901(b) gives ***examples***:

(1) Testimony of a witness with knowledge: *Testimony that an item is what it is claimed to be.*

(4) Distinctive characteristics and the like: *Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken together with all the circumstances.*

(9) Process or system: *evidence describing process/system and showing that it produces an accurate result.*

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How Did You Get It?

- **On a Server**
  - *Phone records, service provider logs, account info*
- **In your Hands**
  - *Hard drive from house, messages saved on phone*
- **In the Wild**
  - *Social media posts, instant messages*

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Method #1 - On a Server

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Example: Service Provider Records

- Authentication?
  - Testimony from records custodian/service provider
  - With an affidavit from the provider [Rule 803(6)]
  - Author/content based on characteristics
- Original Writing?
  - Printout is an original [Rule 1001(e)]
  - Duplicate, no reason to doubt accuracy [Rule 1003]
- Hearsay?
  - Exception for business records
  - Admission of party opponent

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Helpful Cases

- ***State v. Griffith*, 247 Ariz. 361 (App. 2019)**
  - Facebook *messages* not admissible as business records
  - But records *themselves* still authenticated/admissible
  - Messages admissible on other grounds
- ***State v. Hatcher*, 2018 WL 1281597 (Ariz. App. 2018) (memorandum)**
  - Certified records from Verizon, included incriminating texts
  - Testimony/evidence established authorship, control
  - "there was sufficient basis from which the jury could have reasonably concluded the messages contained in the exhibit were authentic, and were sent by [defendants]."

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Method #2 – In your hand

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Example: Messages on Cell Phone

- Authentication?
  - Testimony/evidence showing it is his phone
  - Testimony/evidence confirming the messages came from that phone
  - Witness who can confirm/corroborate the messages
- Original Writing?
  - Printout is an original [Rule 1001(e)]
  - Duplicate, no reason to doubt accuracy [Rule 1003]
- Hearsay?
  - Statement of party opponent
  - Coconspirator's statement
  - Adopted statements

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Helpful Cases

- ***State v. Forde*, 233 Ariz. 543 (2014)**
  - Phone taken from defendant, messages on it
  - Matching contacts, registered subscriber
- ***State v. Damper*, 223 Ariz. 572 (App. 2010)**
  - Phone found on bed, next to victim
  - History of communicating only with defendant
- ***State v. Jacobs*, 2019 WL 1076558 (Ariz. App. 2019) (memorandum)**
  - Account moved to new phone, sees messages
  - Authenticated by contacts, substance, circumstances

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Method #3 – In the Wild

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How Do You Authenticate It?

"[T]he novel question regarding the admissibility of web-based evidence . . . is going to be authentication. . . . [M]ost of the rest of the evidentiary problems are the common problems lawyers face all the time."

- G. Michael Fenner, The Admissibility of Web-Based Evidence, 47 Creighton L. Rev. 63 (2013)

"[B]ecause anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password," authenticating social media postings presents "significant challenges" and requires "greater scrutiny."

- Griffin v. State, 19 A.3d 415 (Md. Ct. App. 2011)

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The Old "Social Media" (i.e., Letters)

Means not available with social media evidence

- Witness identifies handwriting as the author's
- Witness identifies signature as the author's

Means still available with social media evidence

- Author admits writing it
- Witness saw author write it
- Evidence about contents, terms and nicknames used, and originating/return address
- Evidence that it was in reply to a communication from witness

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Many Ways to Authenticate!

- Purported author acknowledges authorship of communication
- Witness testifies that purported author is the author of the communication
- Purported author acknowledges ownership of originating account
- Account name contains purported author's name
- Account profile contains picture of purported author
- Account profile contains identifying data associated with purported author (DOB, physical address, etc.)
- Account has been used by purported author in the past
- Purported author has had exclusive control of account in the past
- Account was created on purported author's device or from purported author's home
- Account has been accessed on purported author's device or from purported author's home
- When the communication was sent, account was accessed on purported author's device or from purported author's home
- Communication contains words, phrases, or signature characteristic of purported author
- Communication concerns events only known to, or of special interest to, purported author
- Communication is connected in time or content to other communications clearly written by purported author
- Timing of communication connects to events in life of purported author

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Top Methods for Social Media

- Testimony of a witness with knowledge [901(b)(1)]
  - Author testifies and admits writing the communication
  - Witness testifies to seeing the author write the communication
- Distinctive characteristics [901(b)(4)]
  - Name or "signature" alone normally is not enough to authenticate
  - Ownership of originating account is significant support for authentication
  - Combining account/phone number ownership with circumstantial evidence drawn from the case

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Example: Threat Posted on Facebook

- Authentication?
  - Name on account
  - Content of pictures and updates on account
  - Timing and content of post in relation to events
- Original Writing?
  - Printout is an original [Rule 1001(e)]
  - Duplicate, no reason to doubt [Rule 1003]
- Hearsay?
  - Statement of party opponent
  - Other exceptions

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Helpful Cases

***Griffith* and…**

- ***State v. Durr*, 2020 WL 587028 (Ariz. App. 2020) (memorandum)**
  - Social media accounts: matching nickname, photos, messages to associates
  - Properly authenticated, admitted as statement of party opponent
- ***State v. Smith*, 2019 WL 6998888 (Ariz. App. 2019) (memorandum)**
  - Allowing witness testimony about seeing incriminating Snapchat videos
  - Videos no longer available, witness testimony was admissible, jury decides credibility
- ***State v. Hoover*, 2016 WL 314315 (Ariz. App. 2016) (memorandum)**
  - Facebook messages admitted – defense admits account, but disputes authorship
  - Authenticated by content/terminology, witness saw defendant on Facebook at the time
- ***Price v. Clingempeel*, 2020 WL 853549 (Ariz. App. 2020) (memorandum)**
  - Facebook and text messages authenticated based on account, number, appearance
  - "Because [defendant] failed to provide any evidence to show that the messages were inaccurate, doctored, or mislabeled, we find no abuse of discretion."

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Point to Remember:

The main challenge is authentication… which doesn't have to be challenging.

On a Server?	Show Source
In your Hands?	Show How
In the Wild?	Show Who

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Questions/Discussion?

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