

Admissibility of Evidence: Emphasis on Electronic Evidence

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The Rules of Evidence apply "To all actions and proceedings in the courts of this State." R. 1101 (a)

HARPO = Admissibility

OPRAH = Admissibility

Hearsay

Original Writing

Authentication

Privilege

Relevance

Relevance

Privilege

Authentication

Original Writing

Hearsay

Role of the Judge

"Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b)."
Rule 104(a)

Evidentiary decisions are reviewed for abuse of discretion only. State v. Fearing (1985)

Data Stored in Computers

Since N.C. v. Springer, 283 N.C. 627 (1973) entries admissible if:

- (1) the computerized entries were made in the regular course of business,
- (2) at or near the time of the transaction involved, and
- (3) foundation laid by witness familiar with records and the methods under which they were made. Satisfies court that methods, sources of information, and time of preparation render such evidence trustworthy.

Computer Data Facts

Plaintiff sues for unpaid bill

Witness is the business's bookkeeper

Plaintiff wants to offer computer print out of ledger showing unpaid balance

Using HARPO

Q: Hearsay?

A: Business record R. 803(6)

Data compilation

Of events

Made at or near the time

Kept in the regular course of business

Testified to by qualified witness

Unless sources or circumstances untrustworthy

Q: Relevance?

A: Proves amount due

Q: Privilege?

A: None applicable

Q: Original Writing/Best Evidence?

A: R. 1001(3) "If data are stored in a computer... any printout ... shown to reflect the data accurately, is an "original."

Q: Authentication

A: Establish these facts

Business uses a computer

Computer is reliable and in good repair

Valid data entry procedure

Valid data retrieval procedure

Safeguards for accuracy/errors

Witness recognizes printout

Caller ID Facts

Woman getting harassing phone calls

Copies down the number from her caller ID

Defendant allegedly made the calls

Caller ID using Oprah

Q: Original Writing/Best Evidence

A: Not a writing

Q: Privilege

A: No applicable privilege

Q: Relevance

A: Tends to prove from where calls were made

Q: Authentication
(1) Judicially notice reliability 201(b)
(2) Has and uses caller ID
(3) This particular unit is reliable
(4) Unit displayed a particular number
(5) Number shown belongs to Defendant
Telephone directory 803(17) for hearsay; 902(7) for self-authentication

Q: Hearsay
A: Not an assertion by a person

Electronic Mail Facts

Divorce case
Issue is whether spouse had sex with another during marriage
Witness is person who snooped on computer of the person having affair
with spouse and printed out e-mail

E-mail using OPRAH

Q: Original Writing/Best Evidence
A: Print out of stored data is a duplicate original

Q: Privilege
A: No applicable privilege

Q: Relevance
A: Tends to prove spouse had sex with another at relevant time. No need to prove it was read.

Q: Authentication
A: Three Methods -

(1) Action taken consistent with message
Testimony that recipient went to motel
Checked in
Cheating spouse checked in....

(2) Knowledge known only to sender

(3) Process or system
Put on person who snooped
Establish they read message
Establish accuracy of print out being offered
Call someone from ISP of sender
Explain process of e-mail sending
Connect spouse with sender's e-mail address
Identify and offer log as routing information for message

Establish travel history of message
If necessary, call witness to prove recipient's e-mail address

Q: Hearsay?

A: Declaration against pecuniary interest

Web Site

Q: Original Writing?

A: Duplicate original

Q: Privilege?

A: None

Q: Relevance

A: _____

Q: Authentication

Q: Hearsay?