ELECTRONIC EVIDENCE ISSUES

Presented & Updated* by:
RALPH GUERRERO
First Assistant
Hays County Criminal District Attorney’s Office
712 South Stagecoach Trial, Ste. 2057
San Marcos, TX 78666
Austin, TX 78711-2548
(512) 393-2820
ralph.guerrero@co.hays.tx.us

State Bar of Texas
41ST ANNUAL
ADVANCED CRIMINAL LAW COURSE
July 27-30, 2015
San Antonio

CHAPTER 18

*Ralph Guerrero updated Justice Ada Brown’s State Bar of Texas 2014 Advanced Criminal Law Seminar article entitled “Evidence in An Electronic Age” and borrowed extensively from Emily Miskel’s Texas Center for the Judiciary’s 2015 Family Justice Conference article entitled “Admissibility of Digital Evidence in a Family Case.” Mr. Guerrero thanks Justice Brown and Mrs. Miskel for their research and writing in this area. Any errors in this article should be attributed to Mr. Guerrero. Any helpful legal acumen should be attributed to Justice Brown and Mrs. Miskel.
Ralph Guerrero  
First Assistant  
Hays County Criminal District Attorney’s Office  
712 South Stagecoach Trail, Ste. 2057  
San Marcos, TX 78666  
Austin, TX 78711-2548  
(512) 393-2820  
ralph.guerrero@co.hays.tx.us

EDUCATION
Yale Law School,  
Juris Doctor (J.D.), June 2003
Princeton University, Woodrow Wilson School of Public and International Affairs,  
Master’s in Public Affairs (M.P.A.), Domestic Politics, May 2000
University of Texas at Austin,  
Bachelor of Arts (B.A.), Government and Sociology, December 1997, Highest Honors

EXPERIENCE
Hays County Criminal District Attorney’s Office, First Assistant, January 2015-Present
Texas Attorney General’s Office, Assistant Attorney General, Criminal Prosecutions Division-
Violent Crime & Major Offender Section, August 2003-December 2014

Board Certified in Criminal Law by the Texas Board of Legal Specialization, 2013-Present
## TABLE OF CONTENTS

I. INTRODUCTION. ........................................................................................................................................... 1

II. ELECTRONIC EVIDENCE UNDER EXISTING RULES. ........................................................................ 1

III. RELEVANCE ............................................................................................................................................... 1

IV. AUTHENTICATION ...................................................................................................................................... 1
   C. Email .............................................................................................................................................. 5
   D. Reply-Letter Doctrine ....................................................................................................................... 5
   E. Text Messages ................................................................................................................................. 5
   F. Internet Website Postings ............................................................................................................... 7
   G. Chat Room Content ......................................................................................................................... 9
   H. Stored versus Processed Data ....................................................................................................... 10
   I. Computer Stored Records and Data ............................................................................................... 10
   J. Digital Photographs and Videos .................................................................................................... 10
      1) Original Digital Photograph. ..................................................................................................... 11
      2) Digitally Converted Images ....................................................................................................... 12
      3) Digitally Enhanced Images ......................................................................................................... 12
   K. Voicemail or Other Audio Recordings .......................................................................................... 13

V. BEST EVIDENCE RULE .......................................................................................................................... 13

VI. HEARSAY ISSUES IN ELECTRONIC EVIDENCE .................................................................................. 14
   A. Unreflective Statements ................................................................................................................. 14
      1) Present Sense Impression ........................................................................................................ 14
      2) Excited Utterance .................................................................................................................... 15
      3) Then Existing Mental, Emotional, or Physical Condition ....................................................... 15
   B. Reliable Documents ...................................................................................................................... 15
      1) Recorded Recollection .......................................................................................................... 15
      2) Records of Regularly Conducted Activity .............................................................................. 16
      3) Market Reports, Commercial Publications ........................................................................ 16
   C. Statements That Are Not Hearsay ............................................................................................... 16
      1) Computer Generated “Statements.” ...................................................................................... 16
      2) Metadata .................................................................................................................................. 16
      3) Admissions by a Party-Opponent ......................................................................................... 16

VII. WITNESSES ................................................................................................................................................. 17
    A. Writing Used to Refresh Memory ............................................................................................... 17
    B. Impeachment ................................................................................................................................ 17
       1) Prior Inconsistent Statement ................................................................................................. 17
       2) Impeaching Hearsay Statements ......................................................................................... 18
    C. Character Evidence ..................................................................................................................... 18

VIII. DEMONSTRATIVE EVIDENCE .................................................................................................................. 18

IX. CONCLUSION ............................................................................................................................................... 19
ELECTRONIC EVIDENCE ISSUES.

I. INTRODUCTION.

Criminal activity, for the most part, involves some face to face human interaction. Perpetrators usually have personal contact with their co-criminals or their victims at some point during a crime. But most of our human interaction is not personal and rarely is it face to face. The vast majority of all human interaction these days is electronic, which means that the vast majority of the criminal evidence will also be electronic. In other words, before, during, or after every drug transaction, drunk driving, assault (sexual or otherwise), theft, robbery, or murder, the perpetrator accessed the internet, used his cell phone, made a debit or credit card transaction, or passed by surveillance video. There is no way to tell effectively a criminal story to humans used to electronic interaction without using electronic evidence.

II. ELECTRONIC EVIDENCE UNDER EXISTING RULES.

While electronic evidence feels foreign to many (older) practitioners, it is evaluated under the same familiar rules judges have always used. State and federal courts have rejected calls to abandon the practitioners, it is evaluated under the same rules judges have always used. State and federal courts have rejected calls to abandon the traditional relevance and authenticity lenses. Instead, the Courts have examined electronic evidence admissibility through the traditional relevance and authenticity lenses.

III. RELEVANCE

Relevance is a low hurdle to overcome. Under the Rules of Evidence, relevant evidence has a two-part definition. The evidence must be material, or of consequence to the determination of the case, and probative, or make the existence of the fact more or less probable than it would be without the evidence. Relevant evidence should be examined by the trial court through the eyes of a reasonable juror. “If the trial court believes that a reasonable juror would conclude that the proffered evidence alters the probabilities involved to any degree, relevancy is present.” The evidence in question is relevant even if it only provides a small nudge in proving or disproving a fact of consequence to the trial. Courts should also look at the purpose for which the evidence will be used to determine whether there is a connection between the proposition sought to be proved and the evidence being offered. “So long as there is any reasonable logical nexus, the evidence will pass the relevancy test.”

IV. AUTHENTICATION.

Authentication is a bit higher burden to overcome than relevance. But as with relevance, authenticating electronic evidence should, in theory, be no more difficult than authenticating traditional evidence.

Authentication is a condition precedent to admissibility. This requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims it to be. Unless the evidence sought to be admitted is self-authenticating under Tex. R. Evid. 902, extrinsic evidence must be adduced prior to its admission. Rule 901(b) contains a non-exclusive list of authentication methods that comply with the rule:

1) Testimony of a Witness with Knowledge
2) Nonexpert Opinion About Handwriting
3) Comparison by an Expert Witness or the Trier of Fact
4) Distinctive Characteristics and the Like
5) Opinion About a Voice
6) Evidence About a Telephone Conversation
7) Evidence About Public Records
8) Evidence About Ancient Documents or Data Compilations
9) Evidence About a Process or System
10) Methods Provided by a Statute or Rule.


The Texas Court of Criminal Appeals has recently published two opinions that deal extensively with electronic evidence admissibility. In Butler, the Court of Criminal Appeals reversed the Corpus Christi-Edinburg Court’s holding and found that the State had produced evidence sufficient to support a finding that that text messages were authored by the defendant. Butler was convicted of the aggravated kidnapping of his girlfriend, Ashley Salas.

The State introduced the text messages through Salas, who testified that she recognized Butler’s phone number displayed on the text messages, that the text messages were from Butler, and that Butler even called

---

1 Fed. R. Evid. 401-402; Tex. R. Evid. 401-402
2 Tennison v. State, 969 S.W.2d 578, 580 (Tex. App. – Texarkana 1998, pet. ref’d)
4 Id.
6 Id. at 276-77
7 Tex. R. Evid. 901.
8 Tex. R. Evid. 901 (b).
11 Id. at *1.
her from that phone number at some point during the course of their text messaging back and forth. More specifically, the State offered the text messages after laying the following predicate through Salas’s testimony:

Q. What is [Butler’s] phone number?

Q. Does that number appear on all the pages of the exhibit?
A. Yes.

Q. How do you know that that is [Butler’s] telephone number?
A. Because that’s where he called me from and that’s what’s on the same exhibit in front of me.

Q. You’ve read the text messages in the exhibit?
A. Yes.

Q. Who sen[t] you those text messages?
A. He did.

Q. How do you know that it was him?
A. Because he was the one texting me back and forth and he had even called in between the conversations talking mess.13

The Court’s analysis focused on authentication:

As with other types of evidence, text messages may be authenticated by “evidence sufficient to support a finding that the matter is what its proponent claims.” TEX.R. EVID. 901(a). This can be accomplished in myriad ways, depending upon the unique facts and circumstances of each case, including through the testimony of a witness with knowledge or through evidence showing distinctive characteristics. TEX.R. EVID. 901(b)(1) (testimony of a witness with knowledge); TEX.R. EVID. 901(b)(4) (distinctive characteristics and the like)…. 14

As with evidence in general, authenticating evidence may be direct or circumstantial. In cases where a sponsoring witness may testify to an association between a cell-phone number and a purported author, other evidence may be available that might bridge the logical gap and permit a proper inference that the purported author sent the message. The other evidence might include the message’s “appearance, contents, substance, internal patterns, or other distinctive characteristics,” which considered in conjunction with other circumstances support a conclusion that a message indeed emanated from the purported author. TEX.R. EVID. 901(b)(1).15

For example, a cellular-phone company may provide records to show that a text message originated from the purported sender’s phone “under circumstances in which it is reasonable to believe that only the purported sender would have had access to the ... cell phone.” In other cases, the purported sender of a message may respond in such a way as to indicate his or her authorship of the message, such as by calling the recipient to confirm receipt of the message. And in still other cases, the content and/or context of a particular exchange of messages may create an inference supporting the conclusion that it was in fact the purported author who sent them…. 16

The Court went on to explain its ruling in this case:

[T]he content and context of the text messages themselves constituted additional circumstantial evidence of the authenticity of the messages. See TEX.R. EVID. 901(b)(4) (distinctive characteristics and the like). When considering the admissibility of text messages, just as when considering the admissibility of letters, emails, instant messages, and other similar written forms of communications, courts must be especially cognizant that such matters may sometimes be authenticated by distinctive characteristics found within the writings themselves and by comparative reference from those characteristics to other circumstances shown to exist by the evidence presented at trial. Conversations and events that precede or follow the communications at issue, when identified or referred to within the written communication, can provide contextual evidence demonstrating the authenticity of such communications.17

---

12 Id. at *2,*3
13 Id. at *2
14 Id. at *3
15 Id. at *5 (internal citations omitted).
16 Id. at *5 (internal citations omitted).
17 Id. at *6 (internal citations omitted).
The Butler Court cited its Tienda decision and reasoning throughout. What distinguishes Butler from Tienda is that Salas, the sponsoring witness in Butler, had some credibility issues as she had implicated someone other than Butler as the person who had beaten and kidnapped her. Butler argued that given Salas’s credibility issues, the trial court erred by relying on Salas’s testimony to establish Butler’s authorship of the text messages.\(^{18}\) The Court disagreed and explained:

Nothing in Rule 901 suggests that a witness whose credibility has been questioned in some way is precluded by that fact from sponsoring evidence as a “witness with knowledge.” Even when a trial court judge personally harbors some doubt as to the general credibility of a sponsoring witness, a decision to admit particular evidence sponsored by that witness may not necessarily be outside the zone of reasonable disagreement. So long as the ultimate fact-finder could rationally choose to believe the sponsoring witness, and the witness’s testimony would establish that the item proffered “is what its proponent claims[,]” the trial court will not abuse its discretion to admit it…\(^{19}\)

In this case, the jury could have rationally chosen to believe Salas’s testimony about the text message exchange, despite her equivocation with respect to the offense itself. Salas explained her equivocation at trial, and a rational jury might readily have accepted her explanation as credible. The jury might also have found her testimony about the text-message exchange to be reliable and therefore concluded that Appellant was the one and only author who composed the messages and the threats contained therein. The trial court’s decision to admit the content of the text messages and leave the ultimate question of authenticity to the jury was well within the zone of reasonable disagreement.\(^{20}\)


In Tienda, the State introduced printouts of a MySpace profile allegedly belonging to the defendant and implicating him in a shooting. The issue of whether the MySpace pages were sufficiently authenticated by circumstantial evidence was appealed all the way to the Court of Criminal Appeals, which addressed the issue very specifically:

Rule 901(a) of the Rules of Evidence defines authentication as a "condition precedent" to admissibility of evidence that requires the proponent to make a threshold showing that would be "sufficient to support a finding that the matter in question is what its proponent claims." Whether the proponent has crossed this threshold as required by Rule 901 is one of the preliminary questions of admissibility contemplated by Rule 104(a). The trial court should admit proffered evidence "upon, or subject to the introduction of evidence sufficient to support a finding of" authenticity. The ultimate question whether an item of evidence is what its proponent claims then becomes a question for the fact-finder—the jury, in a jury trial. In performing its Rule 104 gate-keeping function, the trial court itself need not be persuaded that the proffered evidence is authentic. The preliminary question for the trial court to decide is simply whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic.\(^{21}\)

There is no specific procedure for authenticating each piece of electronic evidence; rather the means of authentication will depend on the facts of the case:

Evidence may be authenticated in a number of ways, including by direct testimony from a witness with personal knowledge, by comparison with other authenticated evidence, or by circumstantial evidence. Courts and legal commentators have reached a virtual consensus that, although rapidly developing electronic communications technology often presents new and protean issues with respect to the admissibility of electronically generated, transmitted and/or stored information, including information found on social networking web sites, the rules of evidence already in place for determining authenticity are at least generally "adequate to the task." Widely regarded as the watershed opinion with respect to the admissibility of various forms of electronically stored and/or transmitted

\(^{18}\) Id. at *7 (internal citations omitted).
\(^{19}\) Id. at *7 (internal citations omitted).
\(^{20}\) Id. at *8 (internal citations omitted).
information is *Lorraine v. Markel American Insurance Co*. There the federal magistrate judge observed that "any serious consideration of the requirement to authenticate electronic evidence needs to acknowledge that, given the wide diversity of such evidence, there is no single approach to authentication that will work in all instances." Rather, as with the authentication of any kind of proffered evidence, the best or most appropriate method for authenticating electronic evidence will often depend upon the nature of the evidence and the circumstances of the particular case.22

The *Tienda* court reviewed the caselaw from other jurisdictions to list some methods by which electronic evidence had been authenticated:

Like our own courts of appeals here in Texas, jurisdictions across the country have recognized that electronic evidence may be authenticated in a number of different ways consistent with Federal Rule 901 and its various state analogs. Printouts of emails, internet chat room dialogues, and cellular phone text messages have all been admitted into evidence when found to be sufficiently linked to the purported author so as to justify submission to the jury for its ultimate determination of authenticity. Such prima facie authentication has taken various forms. In some cases, the purported sender actually admitted to authorship, either in whole or in part, or was seen composing it. In others, the business records of an internet service provider or a cell phone company have shown that the message originated with the purported sender's personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have had access to the computer or cell phone. Sometimes the communication has contained information that only the purported sender could be expected to know. Sometimes the purported sender has responded to an exchange of electronic communications in such a way as to indicate circumstantially that he was in fact the author of the particular communication, the authentication of which is in issue. And sometimes other circumstances, peculiar to the facts of the particular case, have sufficed to establish at least a prima facie showing of authentication.23

In *Tienda*, the Court found that the State presented sufficient circumstantial evidence to authenticate the MySpace pages and postings as those of the defendant:

This combination of facts—(1) the numerous photographs of the appellant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring; (2) the reference to [the victim’s] death and the music from his funeral; (3) the references to the appellant's [gang]; and (4) the messages referring to … the [MySpace] user having been on a monitor for a year (coupled with the photograph of the appellant lounging in a chair displaying an ankle monitor) sent from the MySpace pages … is sufficient to support a finding by a rational jury that the MySpace pages that the State offered into evidence were created by the appellant. This is ample circumstantial evidence—taken as a whole with all of the individual, particular details considered in combination—to support a finding that the MySpace pages belonged to the appellant and that he created and maintained them.24

The Court acknowledged the possibility that someone could have forged the pages to set up the defendant, but held that that issue was one for the fact-finder, not for the court as an authentication prerequisite:

It is, of course, within the realm of possibility that the appellant was the victim of some elaborate and ongoing conspiracy. Conceivably some unknown malefactors somehow stole the appellant's numerous self-portrait photographs, concocted boastful messages about [the victim’s] murder and the circumstances of that shooting, was aware of the music played at [the victim’s] funeral, knew when the appellant was released on pretrial bond with electronic monitoring and referred to that year-long event along with stealing the photograph of the grinning appellant lounging in his chair while wearing his ankle monitor. But that is an alternate scenario whose likelihood and weight the jury was entitled to assess once the State had produced a prima facie showing that it was the appellant, not some unidentified

\[22\] *Id.*

\[23\] *Id.*

\[24\] *Id.*
conspirators or fraud artists, who created and maintained these MySpace pages.

C. Email

Before and after *Tienda* and *Butler*, lower Texas appellate courts have provided guidance in published and unpublished opinions on how to authenticate electronic evidence, including emails. There are many ways in which e-mail evidence may be authenticated. An e-mail is properly authenticated if its appearance, contents, substance, or other distinctive characteristics, taken in conjunction with circumstances, support a finding that the document is what its proponent claims. One well respected commentator has observed:

[E]-mail messages may be authenticated by direct or circumstantial evidence. An e-mail message’s distinctive characteristics, including its ‘contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances’ may be sufficient for authentication. Printouts of e-mail messages ordinarily bear the sender’s e-mail address, providing circumstantial evidence that the message was transmitted by the person identified in the e-mail address. In responding to an email message, the person receiving the message may transmit the reply using the computer’s reply function, which automatically routes the message to the address from which the original message came. Use of the reply function indicates that the reply message was sent to the sender’s listed e-mail address. The contents of the e-mail may help show authentication by revealing details known only to the sender and the person receiving the message. However, the sending address in an e-mail message is not conclusive, since e-mail messages can be sent by persons other than the named sender. For example, a person with unauthorized access to a computer can transmit e-mail messages under the computer owner’s name. Because of the potential for unauthorized transmission of e-mail messages, authentication requires testimony from a person with personal knowledge of the transmission or receipt to ensure its trustworthiness.

The most frequent ways to authenticate email evidence are through the following Texas Rules of Evidence:

- 901(b)(1) (person with personal knowledge),
- 901(b)(3) (expert testimony or comparison with authenticated exemplar),
- 901(b)(4) (distinctive characteristics, including circumstantial evidence),
- 902(7) (trade inscriptions), and
- 902(11) (certified copies of business record).

An email can be authenticated by testimony that the witness was familiar with the sender’s e-mail address and that she had received the e-mails in question from him. Another court enumerated several characteristics to consider when determining whether an e-mail has been properly authenticated, including:

1. consistency with the e-mail address on another e-mail sent by the defendant;
2. the author’s awareness through the e-mail of the details of defendant’s conduct;
3. the e-mail’s inclusion of similar requests that the defendant had made by phone during the time period; and
4. the e-mail’s reference to the author by the defendant’s nickname.

D. Reply-Letter Doctrine

Several Texas cases have held that the reply-letter doctrine for authenticating letters applies to email and other messages. Under this traditional doctrine, a letter received in the due course of mail purportedly in answer to another letter is prima facie genuine and admissible without further proof of authenticity. A reply letter needs no further authentication because it is unlikely that anyone other than the purported writer would know of and respond to the contents of the earlier letter addressed to him. An e-mail is sufficiently authenticated when a person responds to an e-mail that was sent to the person’s e-mail address.

E. Text Messages.

Text messages can be authenticated by applying the same factors as emails.

---


30 *Id*.

31 *Manuel v. State*, 357 S.W.3d at 75-76.

32 *Id*. 
Recent Case: In an aggravated sexual assault of a child case, the defendant argued a witness [M.N.] should not have been allowed to authenticate text messages that she saw on the phone that the defendant had given the child victim [C.G.J.]. Citing Tienda, the Court concluded that the witness’s testimony was sufficient to support a reasonable jury’s determination that the text messages were what the State claimed them to be. The Court explained that the following evidence provided sufficient authentication:

Outside the presence of the jury, M.N. testified that, while he lived with her, C.G.J. had a cell phone that he received as a gift from the appellant. She testified that C.G.J. referred to appellant as “Godfather,” that C.G.J.’s cell phone had the name “Godfather” associated with appellant, and that the phone would state “Godfather” when C.G.J. received text messages from appellant. M.N. stated that C.G.J. did not refer to anyone else as “Godfather.” She also testified that she saw several text messages on C.G.J.’s phone from “Godfather” that said “Why haven’t you called me?,” “I miss you,” “I can’t live without you,” and “Why are you doing this to me?” M.N. testified that she then confronted appellant about the text messages and that he did not deny sending them. Later that night, she asked C.G.J. for his phone, but he had already deleted the text messages at appellant’s direction.

Recent Case: In a possession with intent to deliver or manufacture a controlled substance case, the defendant argued that the State failed to authenticate the text messages attributed to him. The Court disagreed. Citing Tienda, the Court explained:

Here the State offered the evidence from the phone as information and content that was within Jones’s control. In support of that, the State relied on circumstantial evidence connecting Jones to the phone at the time of his arrest. This included Jones’s possession and use of the phone when stopped by Deputy Martin, the identification of phone numbers in the phone suggesting that it was used to communicate with “Baby” and with James but not with him, photographs showing a shipping label addressed to him at the restaurant where he worked, and text messages regarding bank transactions consistent with bank receipts found in the car he was driving. Though individual pieces of the circumstantial evidence, standing alone, could have led to a different inference, taken together, we conclude that the evidence supported a prima facie case that the phone and its contents belonged to Jones.

Recent Case: In a stalking case, the defendant argued that the State failed to authenticate a text message because the witness did not see the text message arrive from the defendant’s phone, nor could the witness testify the texts were sent by the defendant’s recognizable telephone number. The court held that the witness did testify he knew when his mother received text messages from the defendant. Because he was better with technology, he saved the texts on the phone. The witness then pulled out his mother’s phone and pulled up the text message for the attorneys to review. The court held that “Given the low threshold for authentication under Rule 901(b)(1), we conclude [the witness’s] testimony was sufficient that a reasonable fact finder could properly determine that the text message was what it claimed to be—a text message from [the defendant].”

Recent Case: In a capital murder case, a witness was permitted to testify about the contents of text messages the victim received from the accused and the emotional effect the texts had on the victim.

Recent Case: In a possession of a controlled substance case, a defendant raised an authenticity objection claiming that just because text messages were found on a phone in his possession did not mean he sent or received them. The court overruled the authenticity objection (but upheld a hearsay objection), stating in part:

This court is sympathetic with Appellant’s position in trying to find law directly on point, given the speed with which technology

34 Id. at *16
35 Id.
37 Id. at *7.
39 Id. at *2-*3
40 Id.
41 Id.
42 Id.
has changed. To guide parties in raising and preserving such issues, courts are going to have to determine at some point whether a cell phone is akin to a computer, a file cabinet, a personal notebook or diary, or something else, and the rules of evidence should be modernized. But Appellant does not challenge the technology. Nor does he challenge the rule 901 predicate required for the authentication or identification of most electronic devices.\footnote{Id. at 831.}

**F. Internet Website Postings.**

When determining the admissibility website postings, the issues that have concerned courts include the possibility that third persons other than the sponsor of the website were responsible for the content of the postings, leading many to require proof by the proponent that the organization hosting the website actually posted the statements or authorized their posting.\footnote{Lorraine, 241 F.R.D. at 555-56.}

One commentator has observed “[i]n applying [the authentication standard] to website evidence, there are three questions that must be answered explicitly or implicitly.

1. What was actually on the website?
2. Does the exhibit or testimony accurately reflect it?
3. If so, is it attributable to the owner of the site?”

The same author suggests that the following factors will influence courts in ruling whether to admit evidence of internet postings:

- the length of time the data was posted on the site;
- whether others report having seen it;
- whether it remains on the website for the court to verify;
- whether the data is of a type ordinarily posted on that website or websites of similar entities (e.g. financial information from corporations);
- whether the owner of the site has elsewhere published the same data, in whole or in part;
- whether others have published the same data, in whole or in part;
- whether the data has been republished by others who identify the source of the data as the website in question?”

Counsel attempting to authenticate exhibits containing information from internet websites need to address these concerns in deciding what method of authentication to use, and the facts to include in the foundation.

The authentication rules most likely to apply, singly or in combination, are the following Texas Rules of Evidence:

- 901(b)(1) (witness with personal knowledge)
- 901(b)(3) (expert testimony)
- 901(b)(4) (distinctive characteristics),
- 901(b)(7) (public records),
- 901(b)(9) (system or process capable of producing a reliable result), and
- 902(5) (official publications).

**Recent Case:** In a sexual assault of a child case, the Court held that any error in the admission of social networking printout pages indicating the defendant’s gang affiliation was harmless.\footnote{Id. at 831.} The Court conceded that the evidence linking the defendant to the MySpace profile in this case was not as strong as the evidence presented in Tienda.\footnote{Rene v. State, 376 S.W.3d 302 (Tex. App. – Houston [14th. Dist.], pet. ref’d).}

The Court explained that the evidence was nonetheless sufficient to authenticate the pages:

Here, there is less circumstantial evidence than was present in Tienda. There is no evidence concerning the profile user’s stated email address, gender, age, date of birth, or location. There also is no evidence that the profile contained references to the complainant, to the charged offense, to any witnesses who testified at trial, or to the conditions of appellant’s release pending trial. None of the photographs appears to be a self-portrait.

There is, however, some circumstantial evidence that is similar to the evidence described in Tienda. [Officer] Wolfford testified that he discovered this MySpace profile when he searched social-networking websites for appellant’s name; thus, there is some evidence that the person who created the profile identified himself by appellant’s name or nickname. Headings at the top of some of the pages printed from the profile indicate that it belongs to “137’s Don Lo,” and although there is no evidence that appellant used the nickname “Don” or “Don Lo,” several witnesses testified that appellant uses the nickname “Lo.” Appellant appears
in nearly every photograph posted on this profile, and in many of the photographs, appellant is shown displaying some of his distinctive tattoos. The tattoos shown in the printouts from the MySpace profile match those shown in the photographs of appellant that were taken and authenticated by law-enforcement personnel. In some of the MySpace photos, appellant is making gang signs with his hands, including a sign for the Bloods and a sign typically made for “east” or “east side”; appellant has tattoos of similar symbols and handsigns on his body. In one of the MySpace photos, appellant is displaying the tattoos on his forearms; the tattoo on one arm shows the face of a small boy, and the tattoo on the other arm shows the face of a little girl. The caption to this photo is “THE HEIR TO MY THRONE.” In the same MySpace photo album are a number of pictures of a little boy and a little girl, and during the punishment phase of trial, appellant’s aunt authenticated recent photographs of appellant’s son and daughter. Based on a comparison of the photographs, a reasonable jury could have concluded that the tattoos on appellant’s arms and the photographs of a small boy and girl on the MySpace profile depict appellant’s two children.

Recent Case: In an aggravated assault with a deadly weapon case, the Court held, despite the defendant’s authenticity objection, that the three Facebook messages the defendant [Campbell] sent the complainant [Ana] were admissible. Citing Tienda, the Court found the State’s evidence was sufficient to link the defendant to the Facebook messages. The Court explained:

In analyzing whether the evidence is sufficient to support the trial court’s ruling, we start by noting that the content of the messages themselves purport to be messages sent from a Facebook account bearing Campbell’s name to an account bearing Ana’s name. While this fact alone is insufficient to authenticate Campbell as the author, when combined with other circumstantial evidence, the record may support a finding by a rational jury that the messages were authored and sent by Campbell.

Turning to the Facebook messages themselves, we find that the messages contain internal characteristics that tend to connect Campbell as the author. First, the unique speech pattern presented in the messages is consistent with the speech pattern that Campbell, a native of Jamaica, used in testifying at trial. Second, the messages reference the incident and potential charges, which at the time the messages were sent, few people would have known about. Thus, the contents of the messages provide circumstantial evidence supporting the trial court’s ruling.

Further, the undisputed testimony provides circumstantial evidence tending to connect Campbell to the messages. The undisputed testimony yields the following: (1) Campbell had a Facebook account; (2) only he and Ana ever had access to his Facebook account; and (3) Ana received the messages bearing Campbell’s name. This evidence suggests that only Campbell or Ana could have authored the messages received in Ana’s Facebook account. In addition, Ana told the jury that she could not access Campbell’s account, and therefore, she did not send the messages to herself. While this evidence certainly does not conclusively establish that Campbell authored the messages—in fact, Campbell insisted that he did not—the State was not required to “‘rule out all possibilities inconsistent with authenticity or prove beyond any doubt that the evidence is what it purports to be.’” So long as the authenticity of the proffered evidence was at least “within the zone of reasonable disagreement,” the jury was entitled to weigh the credibility of these witnesses and decide who was telling the truth.

Recent Case: In an aggravated sexual assault of an elderly person case, the Court ruled that any error in excluding social media posting from unavailable third parties that could not be authenticated did not harm Appellant. Citing Tienda and other cases, the Court distinguished the insufficient authenticating evidence in this case with the evidence presented in other cases. The Court explained:

---

49 Id. at 307 (internal citations omitted).
50 Campbell v. State, 382 S.W.3d 545 (Tex. App. – Austin, 2012)
51 Id. at 551-552 (internal citations omitted.)
53 Id. at *3
These cases are distinguishable from our facts. Here, the Facebook posts were not made by Appellant or sent by Appellant to anyone. In fact, Appellant had nothing to do with the creation or the content of the Facebook posts other than serve as the subject of the posts. The original post was created by a third party who did not testify during any of the proceedings. The sponsoring witness recognized the account owner’s name and some, but not all, of the posters’ names. The witness had talked to some of the posters in person but did not say that they specifically talked about what they posted on Facebook. There was no evidence of the authenticity of who the purported author was of any of the Facebook posts. All that Appellant offered in terms of authenticity were the names and photos as shown on the accounts of the owner and posters. Without more, this evidence is insufficient to support a finding of authenticity.54

Recent Case: A felony DWI case addressed an online personal ad. The Court found that it was not necessary for authentication to show that the person placed the ad, only that the exhibit was an authentic copy of the actual online ad.55 Whether the party placed the ad did not go to the authenticity of the exhibit, but rather to the underlying issues in the case.56

Recent Case: A Mother objected to the admission of provocative photographs of her, allegedly posted to an adult website. The Court held that the objection had not been preserved because, although she objected at trial that the photos were not of her, she failed to object to their authentication as pictures that were posted on an adult website.57

G. Chat Room Content.

Many of the same foundational issues encountered when authenticating website evidence apply equally to internet chat room content. However, the fact that chat room messages are posted by third parties, often using “screen names,” means that it cannot be assumed that the content found in chat rooms was posted with the knowledge or authority of the website host.58

One commentator has suggested that the following foundational requirements must be met to authenticate chat room evidence:

1. evidence that the individual used the screen name in question when participating in chat room conversations (either generally or at the site in question);
2. evidence that, when a meeting with the person using the screen name was arranged, the individual showed up;
3. evidence that the person using the screen name identified himself as the person in the chat room conversation;
4. evidence that the individual had in his possession information given to the person using the screen name; or
5. evidence from the hard drive of the individual’s computer showing use of the same screen name.

The Texas evidentiary rules most likely to be used to authenticate chat room and text messages, alone or in combination, appear to be:

- 901(b)(1) (witness with personal knowledge) and
- 901(b)(4) (circumstantial evidence of distinctive characteristics).

Recent Case: In an online solicitation case, the Court held that the chat logs between the defendant and the police sergeant posing as a fourteen year old girl were properly authenticated.59 The Court explained:

The State was required only to show the chat logs were what they purported to be—a record of the conversations between DWB1148 and Ashleygyrl13. Meehan testified the chats he conducted while posing as Ashleygyrl13 appeared on his computer terminal during the chat and the chat logs contained the content of those chats. Meehan’s investigation traced the IP address used by DWB1148 to Bailey’s apartment. In the chat logs, DWB1148 said his first name was “David” and he worked in construction at the new administration building in Allen. Bailey admitted during the interview with Meehan that he “used to” have the screen name DWB1148 and that he worked in construction in the new administration building in Allen. Further, in response to Meehan’s question that he could “safely assume” that Bailey participated in the chats,

54 Id. (internal citations omitted.)
56 Id. at *2
57 In Re J.A.S., No. 11-09-00176-CV (Tex. App.—Eastland January 13, 2011) (memo. op.).
58 Lorraine, 241 F.R.D. at 556.
Bailey answered, “Yes, sir.” The evidence was sufficient to establish the chat logs were copies of the chats between Bailey and Ashleygyrl13. See *Cook v. State*, 256 S.W.3d 846, 849 (Tex.App.-Texarkana 2008, no pet.) (chat logs “were authenticated and confirmed by witness testimony”); *Shea v. State*, 167 S.W.3d 98, 105 (Tex.App.-Waco 2005, pet. ref’d) (e-mails authenticated by witness’s testimony she was familiar with defendant’s e-mail address and had received e-mails from defendant); see also *United States v. Barlow*, 568 F.3d 215, 220 (5th Cir.2009) (applying identical federal rule of evidence 901(a) and concluding testimony of officer that transcripts fully and fairly reproduced chats between her and defendant sufficiently authenticated chat log presented at trial). We conclude the chat logs were properly authenticated under rule of evidence 901.

**H. Stored versus Processed Data**

In general, electronic documents or records that are merely stored in a computer raise no computer-specific authentication issues. If a computer processes data rather than merely storing it, authentication issues may arise. The need for authentication and an explanation of the computer’s processing will depend on the complexity and novelty of the computer processing. There are many stages in the development of computer data where error can be introduced, which can adversely affect the accuracy and reliability of the output. Inaccurate results occur most often because of bad or incomplete data inputting, but can also happen when defective software programs are used or stored-data media become corrupted or damaged.

**I. Computer Stored Records and Data.**

Given the widespread use of computers, there is an almost limitless variety of records that are stored in or generated by computers. As one commentator has observed “many kinds of computer records and computer-generated information are introduced as real evidence or used as litigation aids at trials. They range from computer printouts of stored digital data to complex computer-generated models performing complicated computations. Each may raise different admissibility issues concerning authentication and other foundational requirements.”

The least complex admissibility issues are associated with electronically stored records. In general, electronic documents or records that are merely stored in a computer raise no computer-specific authentication issues. That said, although computer records are the easiest to authenticate, there is growing recognition that more care is required to authenticate these electronic records than traditional “hard copy” records.

The Texas Rules of Evidence most likely to be appropriate for computerized records are:

- 901(b)(1) (witness with personal knowledge),
- 901(b)(3) (expert testimony),
- 901(b)(4) (distinctive characteristics), and
- 901(b)(9) (system or process capable of producing a reliable result).

**J. Digital Photographs and Videos.**

Photographs have been authenticated for decades under Rule 901(b)(1) by the testimony of a witness familiar with the scene depicted in the photograph who testifies that the photograph fairly and accurately represents the scene. Calling the photographer or offering expert testimony about how a camera works almost never has been required for traditional film photographs. Today, however, the vast majority of photographs taken, and offered as exhibits at trial, are digital photographs, which are not made from film, but rather from images captured by a digital camera and loaded into a computer. Digital photographs present unique authentication problems because they are a form of electronically produced evidence that may be manipulated and altered. Indeed, unlike photographs made from film, digital photographs may be “enhanced.” Digital image enhancement consists of removing, inserting, or highlighting an aspect of the photograph that the technician wants to change.

Some examples graphically illustrate the authentication issues associated with digital enhancement of photographs: Suppose that in a civil case, a shadow on a 35 mm photograph obscures the name of the manufacturer of an offending product. The plaintiff might offer an enhanced image, magically stripping the shadow to reveal the defendant’s name. Or suppose that a critical issue is the visibility of a highway hazard. A civil defendant might offer an enhanced image of the stretch of highway to persuade the jury that the plaintiff should have perceived the danger ahead before reaching it. In many criminal trials, the prosecutor offers an ‘improved’, digitally enhanced image of fingerprints discovered at the crime scene. The digital image reveals incriminating points of similarity that the jury otherwise would never would have seen.

There are three distinct types of digital photographs that should be considered with respect to

---

60 *Id.* at *5 (Some internal citations omitted.)
authentication analysis: original digital images, digitally converted images, and digitally enhanced images.

1) **Original Digital Photograph.**

An original digital photograph may be authenticated the same way as a film photo, by a witness with personal knowledge of the scene depicted who can testify that the photo fairly and accurately depicts it. If a question is raised about the reliability of digital photography in general, the court likely could take judicial notice of it under Rule 201.

Further, even if no witness can testify from personal knowledge that the photo or video accurately depicts the scene, the “silent witness” analysis allows a photo or video to be authenticated by showing a process or system that produces an accurate result. Testimony that showed how the tape was put in the camera, how the camera was activated, the removal of the tape immediately after the offense, the chain of custody, and how the film was developed was sufficient to support the trial court’s decision to admit the evidence. Photos taken by an ATM were properly authenticated on even less evidence–mere testimony of a bank employee familiar with the operation of the camera and the fact that the time and date were indicated on the evidence were sufficient to authenticate the photos.

**Recent Case:** In an aggravated sexual assault and indecency with a child case, the Court held that the State adequately authenticated a picture of the defendant on complainant’s cell phone. Citing *Tienda*, the Court explained:

Peña contends the State failed to adequately demonstrate (1) the messages received by Tanya were messages from Peña himself and (2) the messages were received from a phone number the witness believed was associated with Peña. He claims the evidence was insufficient to show the messages were authored by him. The admission of State’s Exhibit # 3 was conditioned on a witness with knowledge identifying the photograph as an accurate representation of what the photograph purported to portray. The individual identified himself to Tanya as Alejandro Peña and the identification matched an individual with the same name and same appearance on Facebook.

Tanya testified she was familiar with the event the photograph purported, an exchange between herself and an individual she knew as Alejandro Peña. Tanya identified the exhibit as fair and accurate depiction of a photograph she received. Tanya stated she sent messages and photographs of herself, and the responder sent her messages and photographs of himself. Tanya identified the exhibit as a picture of her cell phone with a picture she received, and identified Peña as the individual in the photographs she received. Whether Tanya was present when the photograph was taken, and whether she knew Peña outside the exchange of text messages, only affects the weight to be given the exhibit, not its admissibility.

We conclude the photograph proffered with the testimony regarding the exchange of messages and photographs circumstantially support the messages were sent by Peña, and sufficient for the trial court to find the State provided sufficient evidence to allow the jury to draw a proper conclusion of genuineness.

**Recent Case:** In a capital murder case, the Court upheld the admission of a surveillance video. Citing *Tienda*, the Court explained its ruling:

In this case, the trial court heard testimony from two witnesses familiar with the video surveillance system regarding the video evidence. Ernest Turner, who bought and installed the surveillance system, testified that the system included four video surveillance cameras that were installed in his office, the dispatcher’s office, the driver’s lounge, and the garage area. He explained that the cameras fed into a monitor located in his office that allowed for split screen viewing so he could monitor all four locations at the same time. The system also included a digital recorder so that in addition to watching live events, any events captured by the cameras would be recorded. Turner testified that the system and recorder were operating properly on the day of the murder, that the recorder made an accurate recording,

---

64 See Tex.R. Evid. 901(b)(9).
68 Id. at *4 (internal citations omitted.)
69 *Turnbull v. State*, No. 03-11-00118-CR, 2013 WL 5925543 (Tex. App. – Austin, October 24, 2013, pet ref’d)(memo op. not designated for publication.)
and that the recording was a fair and accurate recording of what was recorded that day. While he conceded that he had no personal knowledge of what happened in the cab company that morning, he expressed that he did not see how the system could have recorded anything but what actually happened. Turner disconnected the entire system and gave the digital video recorder and monitor to the sheriff’s deputies at the murder scene that morning. He followed them to the sheriff’s office to view the recording. He watched the video, except the portion depicting the actual shooting, and identified Turnbull as the individual on the recording. In preparation for trial, Turner reviewed the recording, again exclusive of the actual shooting. He testified that, to his knowledge, the recording had not changed or been tampered with in any way.

In addition, prior to Turner’s testimony, Mike Ferrell, the cab driver who discovered Manning, testified about the surveillance video recording. He was familiar with the security system and testified that the system was capable of recording events that occurred at the cab company, was properly working the day of the murder, and did in fact make an accurate recording on that day. He was present when the sheriff’s deputies removed the whole system to take to the sheriff’s office. At the sheriff’s office, he watched the entirety of the recording from that morning, up to the point that showed his arrival and discovery of Manning. He testified that he reviewed the recording in preparation for trial and that the recording and still photographs taken from the system fairly and accurately represented what he had previously seen when he watched the recording at the sheriff’s office on the day of the murder.

We conclude that this evidence was sufficient for the trial court to determine that the testimony concerning the surveillance video recording was sufficient for a reasonable jury to determine that the recording was authentic—that is, that the recording was in fact an accurate video recording of the events that occurred that morning at the cab company. Thus, we discern no abuse of discretion on the part of the trial court in admitting the surveillance video recording.  

Recent Case: In a fraudulent use or possession of identifying information case, the Court found the following testimony sufficient to authenticate a video: a witness, who was not present at the time of the incident, described the store’s multiplex recording system and its computer systems; he detailed how he was able to link the encoding on the receipts to the time and date that the account was opened, to the transactions in question, to the cashier, to the terminal, and finally to the video camera that recorded the transactions; and he testified that he had personally copied the relevant recordings from the multiplex to the videotape. He further testified that he had viewed the video on the multiplex system, viewed it on the tape on the day that he made the tape, and then viewed it again on the day prior to his testimony and that it fairly and accurately represented what it purported to show. The witness testified that no alterations or deletions were made to the videotape.

Recent Case: In an aggravated sexual assault, aggravated kidnaping, and unlawful possession of a firearm case, a witness authenticated a photograph without knowing where it was taken, when it was taken, or by whom it was taken, because the witness could testify that the photograph accurately represented what it purported to represent. This logic holds true for any photograph, not just digital photographs.

2) Digitally Converted Images.
   For digitally converted images, authentication requires an explanation of the process by which a film photograph was converted to digital format. This would require testimony about the process used to do the conversion, requiring a witness with personal knowledge that the conversion process produces accurate and reliable images, Rules 901(b)(1) and 901(b)(9)-the latter rule implicating expert testimony under Rule 702. Alternatively, if there is a witness familiar with the scene depicted who can testify to the photo produced from the film when it was digitally converted, no testimony would be needed regarding the process of digital conversion.

3) Digitally Enhanced Images.
   For digitally enhanced images, it is unlikely that there will be a witness who can testify how the original scene looked if, for example, a shadow was removed, or the colors were intensified. In such a case, there will

70 Id. at *3-*4.
72 Id.
73 Id.
need to be proof, permissible under Rule 901(b)(9), that the digital enhancement process produces reliable and accurate results, which gets into the realm of scientific or technical evidence under Rule 702. Recently, one state court has given particular scrutiny to how this should be done.

Because the process of computer enhancement involves a scientific or technical process, one commentator has suggested the following foundation as a means to authenticate digitally enhanced photographs under Rule 901(b)(9):

(1) The witness is an expert in digital photography;
(2) the witness testifies as to image enhancement technology, including the creation of the digital image consisting of pixels and the process by which the computer manipulates them;
(3) the witness testifies that the processes used are valid;
(4) the witness testifies that there has been adequate research into the specific application of image enhancement technology involved in the case;
(5) the witness testifies that the software used was developed from the research;
(6) the witness received a film photograph;
(7) the witness digitized the film photograph using the proper procedure, then used the proper procedure to enhance the film photograph in the computer;
(8) the witness can identify the trial exhibit as the product of the enhancement process he or she performed.

The author recognized that this is an extensive foundation, and whether it will be adopted by courts in the future remains to be seen. However, it is probable that courts will require authentication of digitally-enhanced photographs by adequate testimony that a photograph is the product of a system or process that produces accurate and reliable results under Rule 901(b)(9).

K. Voicemail or Other Audio Recordings.

Rule 901(b)(5) provides that a voice recording may be identified by opinion based upon hearing the voice at anytime under circumstances connecting it with the alleged speaker. One Texas court has found that a voicemail was not properly authenticated when a witness testified that she recognized the voice as a party’s but did not identify the recording or explain the circumstances in which it was made.75 However, a recording can be properly authenticated even when the witness cannot identify every voice in the recording.76

Recent Texas Case: One recent case lists three methods that can be used to authenticate a voicemail: (1) through the testimony of a witness with knowledge that a matter is what it is claimed to be; (2) by opinion based upon hearing the voice at anytime under circumstances connecting it with the alleged speaker; or (3) the identity of a caller can be demonstrated by self-identification coupled with additional circumstances, such as the context and timing of the call, the contents of the statement, and disclosure of knowledge of facts known peculiarly to the speaker.77

V. BEST EVIDENCE RULE.

The Best Evidence Rule states that, to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required except as otherwise provided.78 The purpose of the best evidence rule is to produce the best obtainable evidence, and if a document cannot as a practical matter be produced because of its loss or destruction, then the production of the original is excused.79

Under Tex. R. Evid. 1001(c), if data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original. An Indiana court, for example, found that internet chat room communications that a party cut and pasted into a word processing document were still originals.80 In the predicate for introducing a computer printout, asking whether the exhibit reflects the data accurately may help to overcome an objection under the Best Evidence Rule.

Recent Case: In a case where the trial court was not equipped to play minicassettes, the State transferred a recording to a CD, and offered the duplicate into evidence instead.81 The defendant objected, citing the Best Evidence Rule. The Court stated that a duplicate is admissible to the same extent as an original unless a question is raised as to the authenticity of the original. Stated another way, a duplicate is inadmissible if reasonable jurors might differ as to whether the

77 Tex. R. Evid. 1002 (emphasis added).
original is what it is claimed to be. In this case, the defendant primarily challenged the authenticity of the duplicate CD, rather than the original. He also objected that the chain of custody was never documented between the officer’s possession of the minicassette to its transfer onto a CD. The officer testified the copy was an exact duplicate, and the defendant never questioned the authenticity of the original, so the best evidence rule objection was overruled.

VI. HEARSAY ISSUES IN ELECTRONIC EVIDENCE.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.82 (See “Non-Assertive Statement,” below, for a discussion of whether testimony is even a “statement” at all.) The “matter asserted” includes any matter explicitly asserted, and any matter implied by a statement, if the probative value of the statement as offered flows from declarant’s belief as to the matter.83 Hearsay is inadmissible unless otherwise permitted by the rules or by statute.84

Put more simply, any out-of-court statement, whether by the witness or another person, is hearsay and is inadmissible to support the truth of a claim, unless permitted by another rule. However, otherwise inadmissible hearsay admitted without objection should not be denied probative value merely because it is hearsay.85 If it can be shown that a statement is non-hearsay or that it falls within a hearsay exception, the statement can be admissible as probative evidence.86

The twenty-four hearsay exceptions listed in Tex. R. Evid. 803 may be roughly categorized into three categories: unreflective statements, reliable documents, and reputation evidence. The rationale for all of the exceptions is that, over time, experience has shown that these types of statements are generally reliable and trustworthy.87 However, all hearsay exceptions require a showing of trustworthiness.88

A. Unreflective Statements.

Evidence obtained from email, text messaging, or social networking sites, such as Facebook, MySpace, or Twitter, is especially relevant in criminal cases. The evidence may be non-hearsay to the extent that it is an admission by a party-opponent, but there may be times where statements by others are relevant. Of the hearsay exceptions, Tex R. Evid. 803(1)-(3) can be especially useful in admitting these types of evidence. Those are the exceptions for present sense impression, excited utterance, and then-existing condition. Electronic communication is particularly prone to candid statements of the declarant’s state of mind, feelings, emotions, and motives.89 Further, such messages are often sent while events are unfolding. The logic of the existing exceptions can be applied to admit even new forms of communication.

1) Present Sense Impression.

A statement describing or explaining an event made while the declarant was perceiving the event or immediately thereafter.90 Unlike the excited-utterance exception, the rationale for this exception stems from the statement’s contemporaneity, not its spontaneity.91 The present sense impression exception to the hearsay rule is based upon the premise that the contemporaneity of the event and the declaration ensures reliability of the statement. The rationale underlying the present sense impression is that: (1) the statement is safe from any error of the defect of memory of the declarant because of its contemporaneous nature, (2) there is little or no time for a calculated misstatement, and (3) the statement will usually be made to another (the witness who reports it) who would have an equal opportunity to observe and therefore check a misstatement.92 The Fischer93 case states the following: The rule is predicated on the notion that the utterance is a reflex product of immediate sensual impressions, unaided by retrospective mental processes. It is instinctive, rather than deliberate. If the declarant has had time to reflect upon the event and the conditions he observed, this lack of contemporaneity diminishes the reliability of the statements and renders them inadmissible under the rule. Once reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious thinking-it-through statements enter the picture, the present sense impression exception no longer allows their admission. Thinking about it destroys the unreflective nature required of a present sense impression.

82 Tex. R. Evid. 801(d).
83 Tex. R. Evid. 801(c).
84 Tex. R. Evid. 802; see also Tex. R. Evid. 801(e), 803, 804.
85 Tex. R. Evid. 802.
90 Tex. R. Evid. 803(1) (emphasis added).
92 Id.
2) Excited Utterance.
A statement relating to a startling event or condition made while the declarant was under stress or excitement caused by event or condition. The excited-utterance exception is broader than the present-sense-impression exception. While a present-sense-impression statement must be made while the declarant was perceiving the event or condition, or immediately thereafter, under the excited-utterance exception, the startling event may trigger a spontaneous statement that relates to a much earlier incident. The Goodman case states the following: For the excited-utterance exception to apply, three conditions must be met: (1) the statement must be a product of a startling occurrence that produces a state of nervous excitement in the declarant and renders the utterance spontaneous and unreflecting, (2) the state of excitement must still so dominate the declarant’s mind that there is no time or opportunity to contrive or misrepresent, and (3) the statement must relate to the circumstances of the occurrence preceding it. The critical factor in determining when a statement is an excited utterance under Rule 803(2) is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event. The time elapsed between the occurrence of the event and the utterance is only one factor considered in determining the admissibility of the hearsay statement.

3) Then Existing Mental, Emotional, or Physical Condition.
A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.

Texas courts have held that the type of statement contemplated by this rule includes a statement that on its face expresses or exemplifies the declarant’s state of mind—such as fear, hate, love, and pain. For example, a person’s statement regarding her emotional response to a particular person qualifies as a statement of then-existing state of emotion under Rule 803(3). However, a statement is inadmissible if it is a statement of memory or belief offered to prove the fact remembered or believed. One federal court offers the following explanation of Rule 803(3)’s “exception to the exception”: Case law makes it clear that a witness may testify to a declarant saying “I am scared,” but not “I am scared because the defendant threatened me.” The first statement indicates an actual state of mind or condition, while the second statement expresses belief about why the declarant is frightened. The phrase “because the defendant threatened me” is expressly outside the state-of-mind exception because the explanation for the fear expresses a belief different from the state of mind of being afraid.

B. Reliable Documents.
The second category of hearsay exceptions, reliable documents, can also include a variety of computer- or internet-stored data. Anything from online flight schedules, to personal financial records, to emails could potentially be admitted under these existing hearsay exceptions.

1) Recorded Recollection.
A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’ memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document’s trustworthiness. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. For a statement to be admissible under Rule 803(5): (1) the witness must have had firsthand knowledge of the event, (2) the statement must be an original memorandum made at or near the time of the event while the witness had a clear and accurate memory of it, (3) the witness must lack a present recollection of the event, and (4) the witness must vouch for the accuracy of the written memorandum. To meet the fourth element, the witness may testify that she presently remembers recording the fact correctly or remembers recognizing the writing as accurate when she read it at an earlier time. But if her present memory is less effective, it is sufficient if the witness testifies that she knows the memorandum is correct because of a habit or practice to record matters.

94 Tex. R. Evid. 803(2).
96 Id.
98 Tex. R. Evid. 803(3).
100 Id.
101 Tex. R. Evid. 803(3).
102 Delapaz v. State, 228 S.W.3d 183, 207 (Tex. App.—Dallas 2007, pet. ref’d) (citing United States v. Ledford, 443 F.3d 702, 709 (10th Cir. 2005)).
103 Tex. R. Evid. 803(5).
accurately or to check them for accuracy. At the extreme, it is even sufficient if the individual testifies to recognizing her signature on the statement and believes the statement is correct because she would not have signed it if she had not believed it true at the time.105

2) Records of Regularly Conducted Activity.
   A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. “Business” as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.106 For example, if a spouse keeps financial records as part of a regularly organized activity, the records can be admitted under this exception with the spouse as the sponsoring witness, without a business records affidavit. Courts have admitted check registers, medical bills and receipts, and cancelled checks in this way.107 The predicate for admissibility under the business records exception is established if the party offering the evidence establishes that the records were generated pursuant to a course of regularly conducted business activity and that the records were created by or from information transmitted by a person with knowledge, at or near the time of the event.108 Business records that have been created by one entity, but which have become another entity’s primary record of the underlying transaction may be admissible pursuant to Rule 803(6).109 Although Rule 803(6) does not require the predicate witness to be the record’s creator or have personal knowledge of the content of the record, the witness must have personal knowledge of the manner in which the records were prepared.110 In order for a compilation of records to be admitted, there must be a showing that the authenticating witness or another person compiling the records had personal knowledge of the accuracy of the statements in the documents.111

3) Market Reports, Commercial Publications.
   Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.112 Where it is proven that publications of market prices or statistical compilations are generally recognized as reliable and regularly used in a trade or specialized activity by persons so engaged, such publications are admissible for the truth of the matter published.113 A variety of potentially-relevant commercial data published online can be admissible under this exception.

C. Statements That Are Not Hearsay.
   Evidence constitutes hearsay only if it is (1) an assertive statement (2) by an out-of-court declarant (3) offered to prove the truth of the assertion.114

1) Computer Generated “Statements.”
   “Cases involving electronic evidence often raise the issue of whether electronic writings constitute ‘statements’ under Rule 801(a). Where the writings are non-assertive, or not made by a ‘person,’ courts have held that they do not constitute hearsay, as they are not ‘statements.’”115

2) Metadata
   Metadata is the computer-generated data about a file, including date, time, past saves, edit information, etc. It would likely be considered a non-statement under the above logic, and therefore non-hearsay. It remains important to properly satisfy authentication requirements. A higher authentication standard may apply, since it is computer-processed data, rather than merely computer-stored data.

3) Admissions by a Party-Opponent.
   The statement is offered against a party and is: (A) the party’s own statement in either an individual or representative capacity; (B) a statement of which the party has manifested an adoption or belief in its truth; (C) a statement by a person authorized by the party to make a statement concerning the subject; (D) a statement by the party’s agent or servant concerning a

---

105 Id.
106 Tex. R. Evid. 803(6).
109 Id.
110 Id.
111 In re EAK, 192 SW3d 133, 143 (Tex.App.—Houston [14th Dist.] 2006, no pet.).
112 Tex. R. Evid. 803(17).
matter within the scope of the agency or employment, made during the existence of the relationship; or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.  

The exemption for admissions by a party-opponent is extremely useful in overcoming a hearsay objection to texts, emails, Facebook wall posts, etc. The Massimo case has a description of the authentication of a party’s emails as well as a discussion of whether the emails meet the hearsay exemption for admission by party opponent or the hearsay exception for a statement against interest. A recent Texas family case held that statements by a party on his MySpace page were non-hearsay as admissions by a party-opponent.

VII. WITNESSES.

Online evidence can also be useful in managing a witness.

A. Writing Used to Refresh Memory.

Social networking or other electronic communications can be a useful record of events or a witness’ thoughts. If a witness’ memory fails, a writing, including an electronic communication, may be used to refresh the witness’ memory.

There is often confusion about the difference between a recorded recollection under the hearsay exception of Tex. R. Evid. 803(5) and a writing used to refresh memory under Tex. R. Evid. 613. The Welch case discusses the distinction: A witness testifies from present recollection what he remembers presently about the facts in the case. When that present recollection fails, the witness may refresh his memory by reviewing a memorandum made when his memory was fresh. After reviewing the memorandum, the witness must testify either his memory is refreshed or his memory is not refreshed. If his memory is refreshed, the witness continues to testify and the memorandum is not received as evidence. However, if the witness states that his memory is not refreshed, but has identified the memorandum and guarantees the correctness, then the memorandum is admitted as past recollection recorded. Where the memorandum, statement or writing is used to refresh the present recollection of the witness and it does, then the memorandum does not become part of the evidence, for it is not the paper that is evidence, but the recollection of the witness.

An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. Practice Note: Use of an otherwise privileged writing to refresh a party’s memory will constitute a waiver of that privilege.

B. Impeachment.

Electronic communications can be some of the most useful impeachment tools. Impeachment evidence is generally hearsay and does not have probative value. Prior inconsistent statements offered to impeach the witness’s credibility do not constitute hearsay because they are not offered for the truth of the matter asserted. If the impeachment evidence meets a hearsay exception or exemption, however, it may be admitted as probative evidence.

The Michael case gives an excellent summary of the means of impeachment: There are five major forms of impeachment: two are specific, and three are nonspecific. Specific impeachment is an attack on the accuracy of the specific testimony (i.e., the witness may normally be a truthteller, but she is wrong about X), while non-specific impeachment is an attack on the witness generally (the witness is a liar, therefore she is wrong about X). The two specific forms of impeachment are impeachment by prior inconsistent statements and impeachment by another witness. The three non-specific forms of impeachment are impeachment through bias or motive or interest, impeachment by highlighting testimonial defects, and impeachment by general credibility or lack of truthfulness. Electronic evidence can be useful for providing specific impeachment (previous statements by the witness) as well as non-specific impeachment (photos of the witness in situations that reflect poorly on the witness’s credibility).

1) Prior Inconsistent Statement.

In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of such statement.

---

116 Tex. R. Evid. 801(e)(2).
118 In re TT, 228 SW3d 312, 316-17 (Tex. App.— Houston [14th Dist.] 2007, pet. denied).
121 Tex. R. Evid. 613.
122 City of Denison v. Grisham, 716 S.W. 2d 121, 123 (Tex.App.— Dallas 1986, orig proceeding)
may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party-opponent as defined in Rule 801(c)(2).  

If a proper predicate is not laid, the inconsistent statement may be excluded and further cross-examination on the subject blocked. However, if the witness is the opposing party, no confrontation is required, and no opportunity to explain need be given.  

2) Impeaching Hearsay Statements

The credibility of hearsay statements can be impeached just as if the statements were uttered by a witness. If an opponent successfully uses online communications from a third party, an attorney can put on evidence to impeach the credibility of the out-of-court declarant. Tex. R. Evid. 806 provides that when a hearsay statement, or a non-hearsay statement defined by Rule 801(e), has been admitted in evidence, the credibility of the out-of-court declarant may be attacked. Evidence of a statement or conduct by the declarant at any time may be offered to impeach the out-of-court declarant. There is no requirement that the declarant be afforded an opportunity to deny or explain. If the credibility of the out-of-court declarant is attacked, it may be supported by any evidence which would be admissible if the declarant had testified as a witness. If the party against whom a hearsay statement has been admitted then calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

C. Character Evidence.

Social networking evidence can be especially useful for providing character evidence or evidence of a party’s prior conduct.

Evidence about prior instances of conduct used to show that a person acted in conformity on a particular occasion is generally inadmissible. However, under 404(b), such evidence may be admissible for other purposes, such as showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Further, evidence of a person’s habit or routine practice, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person on a particular occasion was in conformity with the habit or routine practice.

Although evidence of specific acts is limited, reputation or opinion character evidence is admissible. If reputation or opinion testimony is admitted, evidence of specific instances of conduct is permitted on cross-examination.

VIII. DEMONSTRATIVE EVIDENCE

There is often confusion about demonstrative evidence. Demonstrative evidence is used as an aid to the court in presenting information, but it is not admitted into evidence, and it cannot be taken back into the jury room along with the admitted evidence. Common examples of demonstrative evidence are transcripts, PowerPoint slide shows, lists or drawings on a tablet, or other visual aids. An attorney can use courtroom demonstratives without authenticating or admitting them into evidence. For example, demonstrative evidence may be used during voir dire.

Demonstrative evidence does not have to meet admissibility requirements under the rules of evidence. However, while a court has the discretion to permit counsel the use of visual aids, including charts, to assist in summarizing the evidence, the court also has the power to exclude such visual aids.

If a demonstrative does meet the requirements for admissibility, an attorney may offer it into evidence. One court allowed the admission into evidence of a golf club that was alleged to be similar to one used in a crime. Demonstrative evidence that summarizes or even emphasizes the testimony is admissible if the underlying testimony has been admitted, or is subsequently admitted into evidence. Admission of charts and diagrams which summarize a witness’ testimony is within the discretion of the court.

126 Tex. R. Evid. 613(a) (emphasis added).
129 Tex. R. Evid. 405(a).
130 See Garrett v. State, 658 S.W.2d 592 (Tex. Crim. App. 1983 ) and Moore v. State, 882 S.W.2d 844 (Tex. Crim. App. 1994 ) (Not error to allow State created audio or video transcripts as jury aids during the listening and/or viewing of recordings.)
131 See Hanson v. State, 269 S.W.3d 130 (Tex. App.—Amarillo Oct. 9, 2008, no pet.) (memo. op.).
Even if exhibits contain excerpts from witness’ testimony and are admitted, the trial court must permit them to be taken into the jury room.\textsuperscript{136}

\textbf{IX. CONCLUSION}

The vast majority of human interaction is electronic, which means that criminals will create evidence and jurors will expect to see (and will find more credible) evidence of an electronic nature. Prosecutors and defense attorneys will need to be ever more adept at finding and admitting this electronic evidence.

\textsuperscript{135} Speier v. Webster College, 616 S.W.2d 617, 618 (Tex. 1981); Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 342 (Tex. 1998).

\textsuperscript{136} Houston Lighting & Power Co. v. Klein I.S.D., 739 S.W.2d 508, 519 (Tex. App.—Houston [14th Dist.] 1987, no writ).