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Smartphones, Social Media, and Other Forms of Electronic Evidence: What Every Lawyer Needs to Know

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Introduction

In today's world, much of the information we process comes to us electronically. We receive and transmit emails and text messages over the internet. We take pictures and videos with our smart phones. We post text and photos to our social media sites. Motor vehicle black boxes record events of the moments leading up to a crash and surveillance and dash cam videos record events as well. This information/data is often referred to as "electronically stored information" ("ESI" for short).

As attorneys, we need to be aware of the types of ESI that exists, how to preserve and access it, and how to present this evidence in a courtroom or other legal setting. This memorandum seeks to provide a general outline of the evidentiary issues that will be a part of trying to use ESI in court in Maine. In conducting this analysis, we will assume that the attorney has properly obtained the ESI and is now at the point of wishing to admit the ESI into evidence.

The process will involve application of the following Rules of Evidence.

I. Relevance

Rule 401 of the Maine Rules of Evidence states "evidence is relevant if it makes a material fact 'more or less probable.'" *State v. Marquis*, 2017 ME 104, ¶ 14, 162 A.3d 818. Email or text messages, like other forms of ESI, need to be "relevant" in order to be admitted into evidence. In *Marquis*, Marquis was charged with intentionally and knowingly causing the victim's death. *Id.* The court held that the text messages suggesting Marquis was distraught or upset with the victim were relevant to proving Marquis's state of mind because they made it more probable than not that he acted intentionally or knowingly a few hours later. *Id.*

II. Foundation/Authentication

Once found "relevant," the attorney must establish the proper foundation to persuade the court that the ESI is "authentic." Rule 901(a) states "[t]o 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.” M.R. Evid. 901(a). It is important to remember that the standard for authenticity is not absolute certainty or even a preponderance of the evidence. The standard for authenticity simply requires the proponent to introduce enough evidence for the Court to conclude that the evidence of authenticity would be sufficient to support a finding by the factfinder (a judge or a jury) that the proposed evidence is authentic. As discussed in Rule 901(b), one way to authenticate evidence is to “present a witness who testifies that the ‘item is what it is claimed to be.’” *State v. Hussein*, 2019 ME 74, ¶ 11, 208 A.3d 752 (citing M.R. Evid. 901(b)(1)).

For photographs, foundation for admission into evidence “may properly be laid by any witness who knows that it fairly represents what it purports to represent.” *State v. Sargent*, 361 A.2d 248, 251 (Me. 1976) (citing *State v. Jordan*, 126 ME 115, 136 A. 483 (1927)). The same rule applies for laying foundation for video evidence, and the person who recorded the video is not required to be the one to authenticate it. *Hussein*, 2019 ME 74, ¶ 12, 208 A.3d 752. So, for example, a witness laying a foundation for a photo of video just needs to be able to testify that the photo or video fairly represents what it purports to represent.

In the *Hussein* case that was recently decided by Maine’s Law Court, an officer who was at the scene when the cell phone video was recorded testified that the video fairly and accurately represented what was shown in the video. *Hussein*, 2019 ME 74, ¶ 12, 208 A.3d 752. Because he was present at the scene, the officer had familiarity with what was shown in the video and was thus able to authenticate the video’s content. *Id.*

With text messages, the party offering the texts must “produce evidence sufficient to support a finding” that the proposed sender was the person who sent the texts. *Marquis*, 2017 ME 104 ¶ 15, 162 A.3d 818 (quoting M.R. Evid. 901(a)). Regarding the threshold foundation requirements of Rule 901(a), the Court held that the state met that requirement for the text messages by showing: (1) the phone containing the messages was identified as belonging to the victim; (2) the victim’s phone labeled the incoming message with Marquis’s first name and first initial of his last name; (3) Marquis’s ex-wife identified not the entire phone number of Marquis, but several digits that matched; and (4) “events described in the messages very closely corresponded to events testified to by witnesses.” *Marquis*, 2017 ME 104, ¶ 16, 162 A.3d 818. The court found that from that evidence, the jury could rationally conclude Marquis was the person who sent the texts found in the victim’s phone. *Id.* ¶ 17.

III. Best Evidence Rule

Rule 1002 states “[a]n original writing . . . is required in order to prove its content unless these rules or a statute provides otherwise.” M.R. Evid. 1002. Regarding ESI, an original means “any printout . . . if it accurately reflects the information.” M.R. Evid. 1001(d). For photographs, an “original” includes negatives or prints from it. *Id.* An original writing or recording includes “the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it.” *State v. Legassi*, 2017 ME 202, ¶ 25, 171 A.3d 589.

There are two requirements for the best evidence rule to apply: (1) “the evidence sought to be proved is a ‘writing’” and (2) “the contents of that writing are at issue.” *Id.* ¶ 26. The rule does not apply where the writing “is not closely related to a controlling issue.” *Id.* Content is at issue

when “the party seeking to prove a fact is trying to prove what a particular writing, recording or photograph says or shows.” *Id.* (citation omitted). Both text messages and Facebook messages fit under the definition of “writing.” *Id.* ¶ 30.

If the best evidence rule applies, you must either offer the writing into evidence or show that the writing could not be obtained before you can offer secondary evidence in the form of witness testimony. *Id.* ¶ 37. There are multiple exceptions to the best evidence rule that relieve a party from being required to produce an original writing to prove its contents. The original is “not required if it (1) was lost or destroyed, absent bad faith; (2) is unobtainable; (3) is in the control of the party against whom the document is offered; or (4) relates to a collateral matter.” *Id.* ¶ 29 (quoting *LDC Gen. Contr. v. LeBlanc*, 2006 ME 106, ¶ 7, 907 A.2d 802).

The Law Court has held that “[d]epending on the content sought to be proved and the nature of the writing, multiple ‘originals’ can be at issue in a single case.” *Id.* ¶ 33-34. In *Legassie*, the Court held that Facebook messages received by the victim were “originals” because (1) each message sent by the author was “a ‘counterpart intended to have the same effect,’” and (2) each message was ESI and therefore any printout of the message was an original so long as its content accurately reflected the information. *Id.* ¶ 33.

The Law Court has further explained that two or more originals (depending on the number of recipients) are generated simultaneously when someone sends a Facebook message – “one retrievable from the sender’s Facebook account and one retrievable from the recipient’s account.” *Id.* ¶ 35. The Court concluded this because at the time the messages were sent and received, “they would have been electronically stored and accessible on any device . . .with access” to the sender or receiver’s accounts. *Id.*

IV. Probative Value

A court may exclude evidence if its probative value is substantially outweighed by a danger of unfair prejudice or misleading the jury. M.R. Evid. 403. “For purposes of Rule 403, prejudice means an undue tendency to move the fact finders to decide the issue on an improper basis.” *Hussein*, 2019 ME 74, ¶ 14, 208 A.3d 752 (quoting *State v. Michaud*, 2017 ME 170, ¶ 8, 168 A.3d 802).

With ESI, this rule comes into play often when videos or pictures are being offered into evidence. The Law Court has determined that photographs are admissible if (1) they are “accurate depictions”; (2) they are relevant; and (3) “their probative value is not outweighed by any tendency toward unfair prejudice.” *Marquis*, 2017 ME 104, ¶ 29, 162 A.3d 818. The unfair prejudice must be “more than simply damage to the opponent’s cause” and must have an “undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one.” *Id.* ¶ 29.

In *Marquis*, a full-body photograph of the deceased victim and other photographs depicting relevant evidence were not found to be substantially outweighed by the danger of unfair prejudice. *Id.* ¶ 32. The court found that the pictures were admissible because they were not overly or unnecessarily gruesome due to the nature of the case (a murder trial) and because the jury had already heard testimony from the medical examiner about the extensive injuries the

victim suffered and thus the pictures would not cause the jury to decide the case based on emotion or some other improper grounds. *Id.* ¶ 31.

V. Rule of Completeness

If only a portion of a written or recorded statement is offered into evidence, the court will not exclude it from evidence (for unfair prejudice or other reasons) solely because the complete statement was not offered. *Hussein*, 2019 ME 74, ¶ 14, 208 A.3d 752. Instead, at the time the portion of the evidence is offered, the adverse party may, under Rule 106, “seek to introduce the remaining portion in order to place the previously admitted portion into context.” *Id.* n.6.

VI. Is It Okay for the Factfinder to Consider ESI That Is Not Admitted in Another Form?

We hear stories of litigants (often appearing *pro se*) approaching the bench and showing the judge ESI such as text messages and photos directly from their smartphones. You may ask: is that proper? If we run down the analysis set forth above, we might come to the conclusion that it is admissible. The text or photo is relevant. A witness authenticates it as being what it purports to be. The witness shows the judge the original text or photo that comes right from the phone. With these three steps having been taken, it would seem the text or photos is admissible, but we have something different going on here as we do not (as of yet) have something tangible to be admitted into evidence. That could be a problem as “evidence” in Maine is generally thought to include witness testimony, exhibits received into evidence, and stipulations agreed-to by the parties. Alexander, *Maine Jury Instruction Manual* § 6-10 (2014 ed.).

Unless the person who is showing the judge the cell phone messages or photos introduces the actual phone and any accompanying password into evidence, an argument can be made that the text message or photo is not evidence and should not be considered by the court. Along those lines, you can imagine trying to argue on appeal that the evidence was not sufficient to sustain the verdict and the reviewing court does not have the text messages or photos in the record.

That said, the *pro se*, judge, or attorney on the other side could seek to correct any such deficiency by reading the text message into the record or describing for the record what is in the photo. It is unclear, at least to this author, whether that is sufficient. That said, if the judge is willing to proceed in that fashion, there is probably little that can be done other than to object for the record.