

TENNESSEE JUDICIAL CONFERENCE
MARCH 16, 2011

What If . . .

NOVEL EVIDENCE ISSUES

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I. Application of new Tenn. R. Evid. 803(26)

A. Tenn. R. Evid. 803(26)

Tennessee has added a new exception to the list of hearsay exceptions found in Rule 803. The new exception provides for the admission of certain prior inconsistent statements of a testifying witness. The rule provides:

Rule 803 (26) Prior Inconsistent Statements of a Testifying Witness.

The following are not excluded by the hearsay rule:

A statement otherwise admissible under Rule 613(b) if all of the following conditions are satisfied:

(A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.

(B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.

(C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

The Advisory Commission Comments to Rule 803(26) articulate the reason for the new exception: “[m]any other jurisdictions have adopted this approach to address circumstances where witnesses suddenly claim a lack of memory in light of external threats of violence which cannot be directly attributed to a party, for example.” Additionally, the Comments suggest that the rule “incorporates several safeguards . . .” to address concerns related to reliability and authenticity. In addition, the Comments note

that “[o]ther rules address authenticity of documents and recordings which clearly apply here.”

B. Change in Existing Law on Use of Prior Inconsistent Statements

This rule substantially changes Tennessee law. Previously, prior inconsistent statements were admissible to impeach the testifying witness or the hearsay declarant. *See State v. Reece*, 637 S.W.2d 858, 861 (Tenn.1982) (stating that prior inconsistent statement may be considered only on the issue of credibility and not as substantive evidence). Under prior law, extrinsic evidence of a prior inconsistent statement is inadmissible if the witness unequivocally admits to having made the prior statement. *See State v. Grady*, 619 S.W.2d 141, 143 (Tenn. Crim. App. 1980)(noting general rule that extrinsic evidence of prior inconsistent statement “is inadmissible if the witness unequivocally admits [to] making [the prior statement]”).

C. Prerequisites to Admissibility Under Rule 803(26)

Rule 803(26) contains four prerequisites to admissibility. The first is set out in the rule’s opening phrase and the remaining three are set out in lettered phrases (A) – (C).

1. Statement must be “otherwise admissible under Rule 613(b)”

The new hearsay exception admits only particular kinds of statements. The rule is entitled, “prior inconsistent statements of a testifying witness,” but the requirement that the prior statement be inconsistent is not found within Rule 803(26), but rather is provided by its specific linkage to Rule 613(b). The rule provides first that the statement must be “otherwise admissible under Rule 613(b).” Thus, the admissibility of a statement under Rule 803(26) depends upon adherence to the requirements of Rule 613(b), which concerns the admissibility of extrinsic evidence of prior *inconsistent* statements for the limited purpose of impeachment.

a. Statement must be inconsistent

Under Rule 613(b), and therefore, under Rule 803(26), the statement must be inconsistent with the testimony given at the present trial or hearing. Rule 613 does not define “inconsistent,” but generally, an inconsistent statement is one that “has a reasonable tendency to discredit the testimony of the witness.” *Hunter v. Ura*, 163 S.W.3d 686, 699 (Tenn. 2005). A direct contradiction is not required. It is sufficient if the “proffered testimony, taken as a whole, either by what it says or by what it omits to say, affords some indication that the fact was different from the testimony of the witness whom it sought to contradict.” *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988).

Inconsistency may also be found in evasive answers, silence, or changes in positions; however, prior consistent statements are not admissible under either rule in Tennessee. Whether the prior statement is inconsistent is a preliminary question for the

trial judge. The trial judge's determination under Rule 104 will be overturned only for an abuse of discretion.

b. Extrinsic evidence of statement cannot be offered unless and until witness is given opportunity to explain or deny

Tennessee Rule of Evidence 613(b) incorporates the common-law confrontation requirement, which requires the cross-examiner to confront the witness with the prior inconsistent statement before extrinsic evidence of the statement is admissible. The rule does not apply to statements that are admissible as statements by party opponents under Rule 803(1.2).

Rule 613(b) is a fairness rule, although it is motivated additionally by efficiency concerns. The Tennessee rule is rigid in its terms and in its application. It provides that that "extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." As Tennessee case law makes clear, counsel may not introduce extrinsic evidence of the prior inconsistent statement until counsel has given the witness an opportunity to explain or deny the statement. *State v. Martin*, 964 S.W.2d 564 (Tenn. 1998). This requirement has been interpreted to require that the witness be asked about the statement during cross-examination. *See State v. Flood*, 219 S.W.3d 307 (Tenn. 2007). Thus, because Rule 803(26) incorporates the requirements of Rule 613(b), extrinsic evidence of a prior inconsistent statement is not admissible until and unless the witness is given an opportunity to explain or deny the statement.

Notably, the federal counterpart to Rule 613(b) is not so restrictive. Unlike the Tennessee rule, the federal rule does not contain the phrase "unless and until," but rather provides that extrinsic evidence is not available "unless the witness is afforded an opportunity to explain or deny." The federal rule is interpreted with an emphasis on the word "opportunity;" thus, the federal rule does not have the temporal requirement that the state rule has. Additionally, the federal rule has not been interpreted to require that the cross-examiner be the one to afford the witness the opportunity to explain or deny the prior statement. As a result, judges should be cautious in relying on federal cases in interpreting the requirements of Rule 613(b).

2. "[D]eclarant must testify at the trial or hearing and be subject to cross-examination concerning the statement"

The new hearsay exception applies only when the declarant, the maker of the statement, testifies and is subject to cross-examination concerning the statement. The rule does not allow the admission of statements made by non-witness declarants.

3. Statement must be in one of four specified forms

The statement must be recorded, either by (1) audio or (2) video; or (3) written and signed; or (4) given under oath. The reason for this particularization, according to the Advisory Commission Comments, is “so that the jury is assured that the statement contains the actual ‘words’ of the witness on a prior occasion.”

4. Statement must be “made under circumstances indicating trustworthiness” as determined by judge in a jury-out hearing

Finally, the statement must have been made under circumstances indicating trustworthiness. This determination is made by the judge. The standard is “by a preponderance of the evidence.” The purpose of this pre-admission determination is to “prevent fraud” The Advisory Commission Comments reference other evidence rules with similar gate-keeping requirements, notably the business record exception.

Although the rule does not specify whether the obligation to initiate the pre-admission hearing falls upon the judge or the lawyer, the Advisory Commission Comments specify that “[t]he rule requires that the party seeking to have the statement treated as substantive evidence request a hearing . . . [and] satisfy the judge ‘by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.’”

D. Application of Rule 803(26)

If each of the four elements prerequisites is satisfied, the statement is admissible as substantive evidence. In other words, when a statement is admitted under Rule 803(26), the statement is offered to prove the truth of the matter asserted in the statement. This may become important if an issue of sufficiency of the evidence is raised at the close of proof.

E. Interpretation of Rule 803(26)

The new rule, although relatively short, raises several questions, many of which pertain to the form of the statement. For example, with regard to recorded statements, the rule does not address whether the recordings must be made with consent. With regard, to the written and signed statements, the rule itself does not address whether electronic signatures are acceptable. With regard to statements given under oath, the rule does not discuss whether the statement must be given in a formal proceeding. These and other issues will arise as judges begin applying the new rule.

When interpreting a rule of evidence, courts look to the rules of construction, the plain language of the rule, the advisory commission comments, and decisions from other jurisdictions. *See e.g., State v. Crowe*, 168 S.W.3d 731 (Tenn. 2005). When the plain language of a rule does not afford a clear approach, courts look to the purpose of the rule in ascertaining the correct interpretation.

A good example of the relative importance of the rule's purpose as expressed in the advisory commission comments can be gleaned from the Tennessee Supreme Court's decision in *State v. Hatcher*, 310 S.W.3d 788 (Tenn. 2010). Despite common practice and case precedent, the Supreme Court adopted a strict interpretation of a procedural rule based on the underlying purpose of the rule expressed in the advisory comments. The court's holding mirrored the interpretation of the rule set forth in the comments.

Similarly, the Advisory Commission Comments to Rule 803(26) speak directly to the purpose of the new rule and note that the intent of the rule is to safeguard reliability and authenticity while providing the jury with the "actual 'words' of the witness." Thus, when interpreting the ambiguities in the rule, courts should bear in mind the premium placed on accuracy.

In addition to the general statement of purpose and intent, the Advisory Commission Comments offer some specific interpretive guidance. With regard to the written statements, the Advisory Commission Comments specify that the written statement may be "created by the witness or by another but then must be signed by the witness. The commission intends that the 'signed' requirement must be equated with an actual signature as opposed to some email document which happens to have the witness's name on the address."

This Advisory Commission Comments do not clarify what is meant by "actual signature." It remains unclear whether a signature must be handwritten to be an "actual signature" or whether the increasingly common typed name or electronic signature would satisfy the "signed" requirement? Clearly, a distinction can be drawn between "some email document which happens to have the witness's name on the address" and an email document on which the witness has typed his or her name at the bottom or attached an electronic signature, intending to do so as a verification that the writing was his or her own. A name typed as a signature at the closure of an email is more akin to an "actual signature" than a document which happens to have a name in the email address.

The Advisory Commission Comments also include a more indirect reference that may be used as an interpretive guide. While referencing the additional authenticity requirements that apply, the Comments oddly cite to Rule 1001, rather than Rule 901. Whether this reference is intended to incorporate Rule 1001's broad definition of writing as applicable to the requirement of a written signature under Rule 803(26) is unclear, but the text of Rule 1001 makes that argument defensible. *See* Tenn. R. Evid. 1001(1) (defining 'writings' to "consist of letters, words, numbers, sounds, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation"); Advisory Commission Comments to Rule 1001 (providing that "the language in subsection (1) defining "writings and recordings "is sufficiently broad to cover electronic imaging, a process by which documents are read into a computer by a scanner for electronic storage.").

In addition to Rule 1001's broad definition of writing, the UCC and the Uniform Electronic Transactions Act also indicate that electronic writings and signatures satisfy statutory requirements. These statutes and court rules, as adopted in Tennessee, indicate a preference for allowing the use of electronic documents and signatures. The Uniform Electronic Transactions Act, in particular, is clear: "[i]f a law requires a signature, an electronic signature satisfies the law."

In deciding whether an electronic signature satisfies the requirements of a rule or statute, many courts look to the purpose of the underlying rule or statute. *See Anderson v. Bell*, 234 P.2d 1147 (Utah 2010)(holding that electronic signatures are valid signatures for purposes of a qualifying petition, but noting that particular statute required liberal construction). Other courts have stressed the importance of the party's intent. *See Rosenfeld v. Zerneck*, 776 N.Y.S.2d 458 (N.Y. 2004)(distinguishing between the automatic imprinting of a sender's name and a typewritten name at the bottom of an email acknowledged to be from the sender); *International Catings Group, Inc. v. Premium Standard Farms, Inc.*, 358 F.Supp.2d 863 (W.D. Mo. 2005)(holding that by sending an email, sender evidenced an intent to authenticate and adopt the writing's content); *Cloud Corp v. Hasbro, Inc.*, 314 F.3d 289 (7th Cir. 2002)(holding that "sender's name on an email satisfies the signature requirement of the statute of frauds").

F. Procedural Issues Raised By Rule 803(26)

1. Introduction of Extrinsic Evidence as Exhibit

Rule 803(26) does not detail the procedure to be used when admitting a prior inconsistent statement as substantive proof except for its reference to Rule 613(b), which preserves the common-law confrontation requirement. Counsel must first ask the witness about the prior inconsistent statement. The witness must be afforded an opportunity to explain or deny the statement. Once counsel has complied with those aspects of Rule 613(b), extrinsic evidence of the statement is "admissible" if the other prerequisites of Rule 803(26) are satisfied.

Neither Rule 803(26) nor the corresponding comments directly address the situation faced by counsel when a witness admits the content of the prior inconsistent statement. When counsel is impeaching the witness with a prior inconsistent statement, the general rule in Tennessee is that extrinsic evidence of the prior inconsistent statement is not admissible if the witness admits making the prior inconsistent statement. But, if the witness denies making the statement (or does not recollect making the statement, perhaps), extrinsic evidence of the statement is admissible, but is generally accompanied with a limiting instruction advising the jury to consider the statement only as it impacts the credibility of the witness.

But the underlying reasoning behind these procedural rules arguably does not apply to the introduction of the prior inconsistent statement for purposes of proving the truth of the content of the statement under Rule 803(26). If the rule is applied as written, then the extrinsic evidence would be admissible. Some argue that admitting the extrinsic

evidence of an out-of-court statement will tend to overemphasize the statement. This concern is reflected in Rule 805(5), for example, which provides that “[i]f admitted, the [recorded recollection] may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.” No similar caveat is include in Rule 803(26).

Clearly, if extrinsic evidence is allowed, the extrinsic evidence should be limited to the statements that fall within the Rule 803(26) hearsay exception or are otherwise admissible. Opposing counsel may urge the court to admit additional statements under Rule 106’s rule of completeness, but only otherwise admissible statements should be allowed.

2. Use of Jury Instruction

After the adoption of Rule 803(26), Tennessee Pattern Jury Instruction 42.06 and 42.04(b) were revised to provide:

A witness may be impeached by proving that he or she has made some material statements out of court which are at variance with his or her evidence on the witness stand. However, [unless entered as a numbered exhibit by the court and allowed to be taken by you back to the jury room when you deliberate,]¹ proof of such prior inconsistent statements may be considered by you only for the purpose of testing the witness’ credibility and not as substantive evidence of the truth of the mater asserted in such out-of-court statements. Further, a witness may be impeached by a careful cross-examination involving the witness in contradictory, unreasonable and improbably statements. However, immaterial discrepancies or differences in the statements of witnesses do not affect their credibility unless it should plainly appear that some witness has willfully testified falsely.

[Another factor for you to consider in evaluating a witness’ testimony is whether the witness has made material statements at some point before he or she testified which are different from his or her testimony at trial. However, [unless entered as a numbered exhibit by the court and allowed to be taken by you back to the jury room when you deliberate,] proof of any prior different statement may be considered by you only for the purpose of determining if the witness is telling the truth at trial. The contents of the prior inconsistent statement [unless the statement is entered as an exhibit] are not to be considered as proof in the trial.

¹ “The bracketed text at footnote 1 should always be included when a prior inconsistent statement has been admitted as substantive evidence during trial pursuant to Tenn. R. Evid 803 (26) The trial judge may wish to consult the Advisory Commission Comments accompanying that hearsay exception for examples of admissible and inadmissible prior inconsistent statements.

G. What If . . . (assume objections by opposing counsel in each situation)

1. During counsel's case in chief, counsel calls the court reporter from the deposition and asks the reporter to read the witness' prior inconsistent statement after the witness has testified, but without asking the witness about the statement on cross-examination?
2. Counsel offers as an exhibit the signed written prior inconsistent statement of a witness whose deposition testimony has been admitted, but who died before trial?
3. During cross, counsel confronts the witness about a prior written inconsistent statement made under oath and the witness admits making the statement, but says s/he was not telling the truth at the time?
4. Counsel confronts the witness about a prior handwritten inconsistent statement that is unsigned. Witness authenticates the handwriting but denies making the statement? Counsel offers the handwritten statement as an exhibit.
5. Counsel confronts the witness about a prior recorded inconsistent statement but the witness does not remember making the statement? Counsel offers the recorded statement as an exhibit.
6. Counsel confronts the witness about a prior inconsistent statement which the witness denies. Counsel offers into evidence a tape recording containing the witness' statement which was surreptitiously recorded by an investigator?
7. Counsel confronts the witness about a prior inconsistent statement which the witness denies. Counsel offers as an exhibit a copy of an email which includes an email address identifying the witness and the witness' name typed at the bottom of the email?
8. Counsel confronts the witness about a prior inconsistent statement which the witness denies. Counsel offers as an exhibit a letter which is attached to an email and which bears the witness' electronic signature?
9. Counsel confronts the witness about a signed, written prior inconsistent statement, but the witness claims that the signature is a forgery. Counsel seeks to introduce the signed written statement?

10. After introducing a signed, written prior inconsistent statement, counsel asks the court to instruct the jury that the statement is being offered for its truth?
11. After allowing the admission of a signed, written prior inconsistent statement, opposing counsel asks permission, pursuant to Rule 106, to read other portions of the statement?

II. Application of Evidence Rules to Electronic Evidence

Just as is true of other tangible or documentary evidence, the proponent of electronic evidence must scale several hurdles in order to admit the evidence. Reduced to its simplest form, electronic evidence must be both authenticated and admissible. The authentication methods are set out in Rules 901 through 903. Because most electronic evidence is written (or photographic), admissibility is affected by the rules that pertain to out of court statements and writings. The admissibility rules with regard to out of court statements, i.e., hearsay, are set out in Rules 801 – 806 and, for criminal cases, in the Sixth Amendment; and the admissibility rules concerning original writings (recordings, and photographs) when offered to prove content are set out in Rules 1001- 1007. Additionally, the evidence must satisfy the relevance standards set out in Rules 401 – 403.

A. Five Steps: Relevance, Authentication, Admissibility, Fairness

Thus, admitting electronic evidence involves consideration of the (1) relevance rules, (2) the authentication rules, (3) the hearsay rules, (4) the original writing rules, and (5) the scales of justice rule. The content of the electronic evidence may implicate other rules such as the opinion rules and the personal knowledge rule. Most scholars and courts agree that, if applied correctly, the existing evidence rules address the issues related to the authentication and admissibility of electronic evidence. Although technical challenges may arise, the Rules are flexible enough in their approach to address this new kind of evidence.

Five-point Checklist:

1. Is the electronic evidence relevant? Rule 401
Does it make a fact that is of consequence to the action more or less probably than it would be without the evidence?
2. Is the electronic evidence authentic? Rule 901
Can the proponent produce “evidence sufficient to support a finding that the electronic evidence is what the proponent claims?”
3. Is the electronic evidence hearsay? Rules 801- 807
**Is the electronic evidence offered to prove the truth of what it asserts?
If so, does it satisfy a hearsay exception?**

4. Is the electronic evidence an original or duplicate sufficient to satisfy the requirements of the original writing rule? Rules 1001- 1004
**Is the writing offered to prove the content?
If so, is it either the original or a duplicate (counterpart produced by the same impression as the original, or from same matrix, etc.) unless genuine questions of authenticity or fairness exist?**
5. Is the probative value of the electronic evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? Rule 403

B. Challenges Related to Authentication

While many of the evidentiary challenges that pertain to other documentary evidence also apply to electronic evidence, some greater challenges exist in authenticating electronic evidence. Some courts “demand that proponents of evidence obtained from electronically stored information pay more attention to the foundational requirements than has been customary for introducing evidence not produced from electronic sources.” *Lorraine et al. v. Mackel American Insurance Company*, 241 F.R.D. 534 (D. Md. 2007).

As noted in Weinstein’s text on evidence rules,

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 states 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.

The authentication requirements of Rule 901 are designed to set up a threshold preliminary standard to test the reliability of evidence, subject to later review by an opponent's cross-examination. Factors that should be considered in evaluating the reliability of computer-based evidence include the error rate in data inputting and the security of the systems. The degree of foundation required to authenticate computer-based evidence depends on the quality and completeness of the data input, the complexity of the computer processing, the routineness of the computer operation, and the ability to test and verify results of the computer processing.

Determining what degree of foundation is appropriate in any given case is in the judgment of the court. The required foundation will vary not only with the particular circumstances but also with the individual judge.

The basic threshold standard for the authentication of any evidence is **evidence sufficient to support a finding that the matter in question is what its proponent claims. It is not necessary that the court find that the evidence is what the proponent claims, only that there is sufficient evidence from which the jury might ultimately do so.** This is obviously a fairly low standard. The rules set forth the general standard, then illustrations, then a list of several self-authenticated documents.

C. Some Examples of Authentication of Electronic Evidence

1. Faxed Materials –

(a) To prove receipt of faxed materials – witness with knowledge testifies that fax was produced on recipient’s facsimile machine;

(b) To prove that a fax transmitted by a sender was received – witness with knowledge testifies that fax machine was operating properly and capable of transmitting and receiving fax, witness looked up recipient’s fax number in a reliable directory or obtained fax number from reliable source, dialed number into fax machine, paper containing the facts passed through machine, machine generated transmission report listing dialed number and indicating that transmission occurred.

(c) To prove that fax received was sent by particular sender – witness with knowledge testifies that fax was produced on recipient’s fax machine, faxed paper disclosed information known by sender or was in response to previous contact by analogy to reply letter doctrine, or faxed paper has sender’s fax number and identifying information imprinted on it, and imprinted numbers are sufficiently established to be sender’s fax number

2. Email Message –

To prove email from specific sender – (1) email is signed by specific person; (2) email address identifies specific person either as established by admission or by email company records; (3) proponent may also use reply letter doctrine by offering evidence that address was obtained from reliable source, email was sent to address, reply was received responsive to the terms of the earlier message or (2) proponent shows that only the purported sender was likely to know the information stated in the message or (3) proponent shows purported sender took action consistent with email content

3. Tape or Video Recording –

To prove that tape recording is authentic, witness testifies that he heard the conversation, listened to tape, and tape accurately reproduces the conversation; or witness is familiar with and capable of identifying voice of speaker, under Rule 901(b)(5); to prove video recording, witness testifies that she participated in or watched the event being recorded, viewed the video recording, and video recording accurately depicts what she saw

4. Transcript of Tape or Video Recording –

At a minimum, before a jury should be allowed to review transcript while listening or viewing, witness should testify that a comparison has been made and that the transcript is accurate

5. Website Information –

Proponent must show that information was on the website at the time in question, which may be accomplished by producing a witness who can verify the contents on the date by personal knowledge or by webmaster; depending on the purpose of the evidence, testimony may be required from person with knowledge of procedures for accessing and posting on the webpage in order to establish source of posting

6. Electronic Information Stored in or Generated by Computers-

Authentication under Rule 901(b)(9) by “evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result”

7. Digitally-Enhanced Photographs

Proponent must show that the photo fairly and accurately depicts scene by witness with knowledge; if photo is digitally converted image, proponent may also have to introduce evidence from witness with knowledge explaining conversion process and verifying that it produces an accurate and reliable image

8. Text Messages

Proponent may authenticate by telephone company employees who describe logistics for text message storage, receipt, and production; messages may be authenticated by use of circumstantial evidence in which the content of text message or screen names indicates who sent or received the message

D. What If . . .

1. Counsel seeks to introduce an email message through a witness who claims to have received the email from a party?
2. Counsel seeks to introduce a text message through a witness who claims to have received the text message from a party?
3. Counsel seeks to introduce a text message which counsel alleges was sent by a witness through a telephone company representative?

4. Counsel seeks to introduce a photograph from a Facebook page. Opposing counsel requests permission to voir dire the witness and establishes that the photograph has been digitally altered?
5. Counsel seeks to introduce statements from a parties' blog?
6. Counsel seeks to introduce a list of "favorites" copied by a computer technician from a party's home computer?
7. Counsel seeks to introduce a list of "recent calls" which counsel alleges is from a party's cell phone through a telephone company's representative?
8. Counsel seeks to introduce computer printouts concerning calls made from a party's cell phone?

E. Some Illustrative Cases Involving Electronic Evidence

1. Chat room Discussion

United States v. Simpson, 152 F.3d 1241 (10th Cir. 1998); *United States v. Tank*, 200 F.3d 627 (9th Cir. 2000); *United States v. Burt*, 495 F.3d 733 (7th Cir. 2007).

2. Digital Photographs

State v. Swinton, 847 A.2d 921 (Conn. 2004); *State v. Arafat*, 2006 OhioApp. LEXIS 1592 (Apr. 6, 2006) (videotape); *Commonwealth v. Leneski*, 846 N.E.2d 1195 (Mass. App. Ct. 2006); *State v. Brown*, 2007 Ohio App. LEXIS 1782 (Apr. 26, 2007)

3. Enhanced or Altered Photographs

State v. Swinton, 847 A.2d 921 (Conn. 2004)(key case relied upon by other courts); *State v. Jackson*, 770 N.W.2d 470 (Minn. 2009); *State v. Bauer*, 598 N.W.2d 352 (Minn. 1999)

4. Electronically Stored Business Records

State v. Hall, 976 S.W.1d 121, 148 (Tenn. 1998); *State v. Meeks*, 867 S.W.2d 361 (Tenn. Crim. App. 1993); *In Re Vee Vinhnee*, 336 B.R. 437 (B.A.P. 9th 2005); *Rambus, Inc. v. Infineon Techs. A.G.*, 348 F. Supp.2d 698 (E.D. Va. 2004); *Wady v. Provident Life and Accident Ins. Co. of Am.*, 216 F. Supp.2d 1060 (C.D.Cal. 2002)

5. Electronically Stored Public Records

United States v. Kassimu, 188 Fed. Appx. 264 (5th Cir. 2006)

6. Text Messages

State v. Thompson, 777 N.W.2d 617 (N.D. 2010); *North Carolina v. Taylor*, 632 S.E.2d 218 (N.C. Ct. App. 2006); *Dickens v. State*, 927 A.2d 32 (Md. Ct. Spec. App. 2007); *State v. Taylor*, 632 S.E.2d 218 (N.C. Ct. App. 2006)

7. Website Information

United States v. Jackson, 208 F.3d 633 (7th Cir. 2000); *St. Luke's Cataract and Laser Institute PA v. Sanderson*, 2006 WL 1320242 (M.D. Fla. 2006); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146 (C.D. Cal. 2002); *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, 2004 U.S. Dist. LEXIS 20845 (N.D. Ill. 2004)(internet archives); *Nightlight Systems, Inc. v. Nitelite Franchise Systems, Inc.*, 2007 U.S. Dist. LEXIS 95538 (N.D. Ga. 2007)

8. Computer List of Favorites

United States v. Wilder, 526 F.3d 1 (1st Cir. 2008)