

Courtroom Technology: Where is the Ethical Line?

By Diane M. Coffey, Esquire and Sean P. Lugg, Esquire

Evidence Considerations

When dealing with any evidence, a Delaware lawyer should have a good understanding of the applicable rules of evidence. The Delaware Uniform Rules of Evidence are to be “construed to secure fairness in administration, elimination of unjustifiable expense and delay and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”¹ While digital evidence, like many other forms of evidence, is susceptible to alteration or falsification, “the existing Rules of Evidence provide an appropriate framework for determining admissibility.”² Proffered evidence must be relevant³ and its probative value must not be “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.”⁴

Of course, the Judge, as gatekeeper, must be satisfied that the evidence is, in fact, what its proponent claims it to be. “When a proponent seeks to admit [digital] evidence, he or she may use any form of verification available under Rule 901 – including witness testimony, corroborative circumstances, distinctive characteristics, or descriptions and explanations of the technical process or system that generated the evidence in question — to authenticate the [digital evidence].”⁵ Thus, while digital evidence may be admissible, the advocate must spend some time assessing the manner by which the evidence will be

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properly authenticated to the satisfaction of the Trial Judge.

Digital evidence presents a final, equally important, issue: when the “evidence” is something that was created by, and wholly maintained within, a computer, how is it thereafter admitted at trial? The drafters of the rules of evidence foresaw this conundrum and provided clear guidance. “‘Writings’ and ‘recordings’ consist of letters, words, sounds, or numbers or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.”⁶ Moreover, “[i]f 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.’”⁷

Real vs. Demonstrative Evidence

There are a variety of different software applications and hardware configurations that may be employed to present “digital evidence” at trial. While this article does not endorse any particular tools, the user — lawyer/advocate — must have an understanding of what it is he is presenting to the factfinder. To this end, it is important to distinguish real versus demonstrative evidence.

“There are three basic types of evidence that are admitted into court: (1) testimonial evidence; (2) documentary evidence;

and (3) demonstrative evidence.”⁸ Testimonial and documentary evidence may be considered “real” evidence as, by its very existence, it tends to prove or disprove a particular fact of consequence. Demonstrative evidence, however, is “tendered for the purpose of rendering other evidence more comprehensible to the trier of fact.”⁹ “[A] physical object that does not have a direct part in the incident at issue and is only being used to help explain or illustrate to the trier of fact the verbal testimony of a witness or other evidence is considered to be demonstrative evidence.”¹⁰

The use of demonstrative evidence is looked on favorably by the courts because it allows the trier of fact to have the best possible understanding of the matters before it. However, the same human factor that makes demonstrative evidence valuable — that people learn and understand better what they see, rather than what they hear — also makes it possible for parties to abuse the use of demonstrative evidence by giving a dramatic effect or undue or misleading emphasis to some issue, at the expense of others. Thus, in ruling upon the admissibility of demonstrative evidence, the trial court must be ever watchful to prevent or eliminate that abuse.¹¹

1. DRE 102.

2. *Parker v. State*, 85 A.3d 682, 687 (Del. 2014)

3. DRE 401.

4. DRE 403.

5. *Parker*, 85 A.3d at 687-688 (assessing the requisite foundation for admitting Facebook posts).

6. DRE 1001(1).

7. DRE 1001(3).

8. *Serge*, 896 A.2d at 1177.

9. *Id.* citing *Commonwealth v. Reid*, 811 A.2d 530, 552 (Pa. 2002).

10. *Sharbono v. Hilborn*, 2014 Il. App. 3d 120587, *8 (2014).

11. *Id.* (citations omitted)

Evidence must be made part of the record. If you are using presentation software to display evidence (documents, photographs, video, audio, etc.) remember that, once admitted, some physical version of the evidence must be admitted. While in the Courtroom and working in the artful medium of technology, remember the basics. Your analysis of any presentation must start and end with the rules of evidence and proceed in accordance with those rules. Ask yourself how and through which rule you will seek admission of the evidence. When in doubt, bring the issue to the Court, outside of the presence of the jury. Have your exhibit marked and admitted before you hit the “play” button. Conversely, know when you do not need to admit an item before you make reference to it (potentially during cross-examination, for example). Documents and photographs may be printed, but some thought should be given to the size and quality of the printed material; remember, the factfinder will be working from what is submitted as evidence, not your presentation. Video and audio evidence present a different set of challenges; you must make sure that the “version” you submit as evidence is in a format compatible with the player available to the factfinder.

Final Thoughts

Once you have committed to employing technology to enhance your courtroom presentation, you must be mindful of the more practical planning required. A well crafted and rehearsed presentation will have no value if you neglect to consider the need for a particular cable or adapter to link your equipment to the courtroom system. To this end, the following non-exclusive checklist is recommended:

- Spell Check: Eliminate any spelling and typographical errors.
- Have a backup plan: Have a plan to enable you to continue if a technical glitch is encountered.
- Equipment: Make sure you have all of the equipment to make the necessary connections between your devices and the courtroom resources.
- Meet with designated court personnel in advance: Schedule a time to meet

with technology specialists to determine the capabilities of the courtroom and whether any special equipment will be needed.

- Conduct a “dry run”: Schedule a time to run through your presentation(s) to ensure that the software and hardware work as planned.
- Trial Exhibits & Court Exhibits: Have all “real” evidence prepared to be submitted as a Trial Exhibit and a copy of any presentation available for the Court to be received as a Court Exhibit.¹²

Conclusion

“The CSI Effect” is here to stay. Embrace it. Channel a little bit of Hollywood and capture and hold your juries’ attention. Let’s face it, the Courtroom is a stage. Remember, though, you will not have the opportunity for any re-takes and your courtroom audience (the jury) can pan your presentation with an unfavorable verdict. Work within the rules of evidence and be mindful of your ethical obligations. Practice your lines and be prepared. Have a back-up plan if your technology will not cooperate. You just might find yourself having fun while working hard for your clients and giving your juries what they expect, or close enough to it to help you achieve your intended results.

This is Part 2 of the article published in the November 2014 Bar Journal.

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Questions?

Do you have questions regarding the use of technology and the practice of law? Please submit them on the Delaware Supreme Court’s Commission on Law and Technology helpdesk form. (<http://courts.delaware.gov/declt/helpdesk.stm>). 

12. Most presentation software allows for presenter notes to be associated with each slide. These notes are viewable by the presenter, but not by the audience. These notes should not be included with the version submitted as a Court Exhibit.

Diane M. Coffey is in private practice and may be reached at dcoffey@napolibern.com. She previously held the position of Chief Prosecutor for New Castle County, Delaware Department of Justice.

Sean P. Lugg is a Deputy Attorney General with the Delaware Department of Justice. He can be reached at sean.lugg@state.de.us.

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