

MCLE 1/11/17

Cyber Evidence in VRO Trials

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What is there?

How do you get it?

What do you do with it?

Relevance + Authentication

First Hurdle: Is the evidence relevant?

Second Hurdle: Is the evidence authentic?

Authenticity might be proven in different ways for different types of records.

Mass. G. Evid. § 901(b)(11) deals with authenticating electronic or digital communications.

Two main types of records

- 1. "Print Outs"
- 2. Records received that are not considered not to be hearsay

"Print Outs"

- Screen shots from computer/phone
 - Facebook
 - Mapquest
- Photographs of screens
- Printed out Emails
- Printed or Photographed Text Messages
- Printed out Logs from Computer
- Etc...

"Print Outs"

First question to ask for admissibility: Is there is hearsay contained within what you would like to introduce into evidence?

"Print Outs"

Example of Hearsay: Email Body

- Will Not be considered a business record.
- Can be authenticated by purported author, i.e. admission.
- Sometimes can be self-authenticating:
 - Purported author had (sole) access to the computer used to send the email (that we now have)
 - Purported author had unique knowledge of subject matter
 - Misspellings, nicknames, etc. like past writings of D's
 - Purported author took actions consistent w/ email content
 - Purported author response relied on the truth of 1st email

Commonwealth v. Siny Van Tran, 460 Mass. 535 (2011)

1. Can be proved via circumstantial evidence alone
2. Must be by a preponderance of evidence that item is what it purports to be.

Commonwealth v. Purdy, 459 Mass. 442 (2011)

You do not need to have either expert testimony or exclusive access to authenticate your evidence.

Commonwealth v. Oppenheim, 86 Mass. App. Ct. 359 (2014)

Should request that the Judge give the "Purdy Instruction"

Before you the jury can consider this evidence of the [text/email/etc. conversation], you must be satisfied by a preponderance of the evidence that it was the defendant who was on the other side of this conversation.

Commonwealth v. Gilman, 89 Mass.App.Ct. 752 (2016)

- 1. OK to admit printed spreadsheets of chat conversations as "best evidence" if website does not keep and no need to put in hard drive
- 2. The fact that the email bears the defendant's name is not sufficient alone to authenticate it, there must be some confirming circumstances sufficient for a reasonable jury to find by a preponderance of the evidence that the defendant authored the messages
- 3. While electronic mail messages and other forms of electronic communication present their own opportunities for false claims of authorship, the basic principles of authentication are the same as for telephone calls or written letters

"Print Outs"

But there can be Print Outs that are Non Hearsay: Logs, Receipts, "tack" on google map, ISP sign-in records, etc. Hearsay? No. Not assertion of declarant.

Authentic? Yes. Will need to establish they were produced by a computer.

- These records "represent the self-generated record of a computer's operations resulting from the computer's programming." Therefore there is no "statement."

Commonwealth v. Royal, 89 Mass.App.Ct. 168 (2016)

Other Good Cases to Know

- Facebook postings: *Commonwealth v. Foster*, 86 Mass. App. Ct. 734 (2014)
- E-Z pass records: *Commonwealth v. Fitzpatrick*, 463 Mass. 581 (2012)
- Internet searches of a defendant: *Commonwealth v. Vera*, 88 Mass.App.Ct. 313 (2015)
- GPS Records: *Commonwealth v. Thissell*, 457 Mass. 191 (2010)
- Myspace Records: *Commonwealth v. Salyer*, 84 Mass. App. Ct. (2013)

Business Records

- Not Hearsay: Business Record
- M.G.L chapter 233 § 78
 - Was made in good faith
 - Was made in the regular course of business
 - Was made before the beginning of the proceeding in which it was offered
- Mass. G. Evid. § 803(6)
 - Still needs to comply with Melendez-Diaz
 - Both the Judge and the Jury need to find those prongs by a preponderance of the evidence before the contents of the records can be considered.