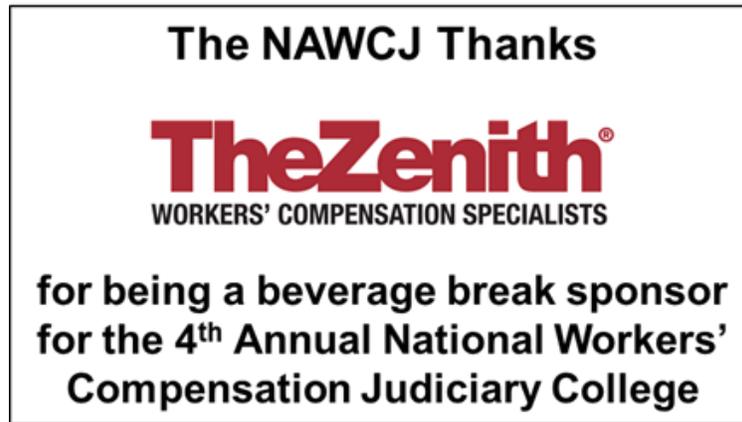


# Fourth Annual NAWCJ Judiciary College

August 20-23, 2012



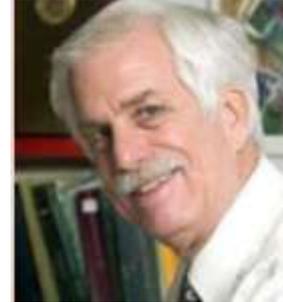
- I. Judicial Writing and Editing, Professor Terrel
- II. Comparative Law Panel
- III. Credibility of Medical Evidence, Professor McCluskey
- IV. Evidence
  - a. Electronic Evidence, Professor Ehrhardt
  - b. Evidence for Adjudicators, Ehrhardt
- V. Live Surgery, Biographies
- VI. To Tell the Truth, Ms. Constantine
- VII. Keeping the Case on Track, Judge Jones
- VIII. Social Networking, Rissman Wieland
- IX. Technology
  - a. Technology, Judge Rosen
  - b. Technology, I phone Article
- X. Appellate Roundtable
  - a. Appellate Roundtable, Alvey
  - b. Appellate Roundtable, Jones

## **EVIDENCE FOR ADJUDICATORS**

Professor Charles Ehrhardt

### **Professor Charles Ehrhardt – Florida State University**

Author of Florida Evidence (West 2011), the leading treatise on the topic, and Florida Trial Objections (West 4th ed. 2007), Professor Ehrhardt has been cited as an authority by appellate courts more than 500 times. He taught Torts, Evidence, Trial Practice and Trial Evidence Seminar, and was named Outstanding Professor seven times. After serving as the Ladd Professor of Evidence for 35 years, he earned emeritus status in 2007. He continues to teach Evidence at the law school. Professor Ehrhardt served as a commissioner to the National Conference of Commissioners on Uniform State Laws from 1996-2005. He was a member of the faculties of both the National Judicial College in Reno, Nevada, and the Federal Judicial Center in Washington, D.C. He has been a visiting professor at University of Georgia and Wake Forest. Professor Ehrhardt received the Selig I. Goldin Award from the Criminal Law Section of The Florida Bar and the President's Award from the Florida Board of Trial Advocates. He clerked for the Honorable M.D. Oosterhout of the U.S. Court of Appeals for the Eighth Circuit and joined Florida State University College of Law's faculty in 1967. For almost 20 years, he served as the university's representative to the NCAA and the ACC. In 2007, he was inducted into the Florida State Sports Hall of Fame. Education: J.D., University of Iowa, 1964; B.S., Iowa State University, 1962.



# ELECTRONIC EVIDENCE

## I. Hearsay

### Federal Rule 801

“(b) A "declarant" is a person who makes a statement.

(c) "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.”

Yisreal v. State, 993 So.2d 952 (Fla. 2008)(Print out of electronic record kept by Department of Corrections was not admissible under section 90.803(6) because no foundation had been laid for the hearsay exception.)

Means v. Cullen, 297 F.Supp. 1148, 1151 (WD Wisc. 2003)(Contents of email sent by defendant was inadmissible hearsay.).

US v. Ferber, 966 F.Supp. 90, 97 (D. Mass.1997)(Internal Merrill Lynch email message recounting conversation with defendant was inadmissible under FRE 803(6) because there was no business duty to make and maintain the record.).

Bowe v. State, 785 So.2d 531 (Fla. 4th DCA 2001)(Testimony concerning caller I.D. readout and the numbers appearing on the digital display of a pager was not hearsay. "[O]nly statements made by persons fall within the definition of hearsay.").

Avilez v. State, 50 So.3d 1189 (Fla. 4th DCA 2010)(A computer generated report of electronic-key card swipes for a door lock was not hearsay).

## II. Authentication

People v. Beckley, 110 Cal Rptr.3d 362 (Cal. App. 2010)(“The issue, however, was not whether the computer's printer could be trusted to reliably print out what was on the computer's screen or stored on some site but whether the content of what was on the site was reliable.”).

A. Electronic Evidence is generally not self-authenticating.

Yisreal v. State , 993 So.2d 952 (Fla. 2008) (discussing the need to authenticate a computer print out which was offered under 90.803(8)).

Com. v. Williams, 456 Mass. 857, 926 N.E.2d 1162 (Mass.2010)(error to admit MySpace messages which were not authenticated).

People v. Givans, 845 N.Y.S.2d 665(App. Div.2007)(error to admit text messages which had not been authenticated).

Nationwide Mut. Fire Ins. Co. v. Darragh, --- So.3d ----, 2012 WL 2051075 (Fla.5th DCA 2012)(In action to recover uninsured motorist coverage, printout of United States government website which allows individual to estimate further military benefits was not admissible because it was not authenticated. Websites are not self-authenticating. The printout was also inadmissible hearsay.)

## B. Methods of Authentication

### 1. Personal Knowledge.

Griffin v. State, 19 A.3d 415 (Md. App. 2011)(Contents of MySpace page could be authenticated by testimony that the person authored by the person and that the contents were hers).

People v. Beckley, 110 Cal Rptr.3d 362 (Cal. App. 2010)(Photograph on social networking site could be authenticated by testimony of person who has present at the time the photograph was made and it was an accurate depiction.).

### 2. Circumstantial Evidence.

Tienda v. State, 358 SW3d 633 (Tex. 2012)(Evidence was sufficient to authenticate that social media webpage was authored by defendant. Opinion contains broad citations from other jurisdictions relating to the authentication of social media, text messages emails and other electronic evidence.)

State v. Eleck, 130 Conn.App. 632, 23 A.3d 818, 822-823 (2011)(“ An electronic document [eg., email, text messaging and networking sites like Facebook] may continue to be authenticated by traditional means such as the direct testimony of the purported author or circumstantial evidence of “distinctive characteristics” in the document that identify the author...The defendant does not argue that the Facebook messages were self-authenticating. Typically, electronic messages do have self-identifying features. For example, e-mail messages are marked with the sender's e-mail address, text messages are marked with the sender's cell phone number, and Facebook messages are marked with a user name and profile picture. Nonetheless, given that such messages could be generated by a third party under the guise of the named sender, opinions from other jurisdictions have not equated evidence of these account user names or numbers with self-authentication. Rather, user names have been treated as circumstantial evidence of authenticity that may be considered in conjunction with other circumstantial evidence. See, e.g., Commonwealth v. Purdy, 459 Mass. 442, 450, 945 N.E.2d 372 (2011) (evidence that electronic communication originates from e-mail or social networking website that bears purported author's name is not sufficient alone to authenticate it”).

United States v. Siddiqui, 235 F.3d 1318, 1322–23 (11th Cir.2000) (e-mails authenticated not only by defendant's e-mail address but also by inclusion of factual details known to defendant that were corroborated by telephone conversations);

United States v. Tank, 200 F.3d 627, 630–31 (9th Cir.2000) (author of chat room message identified when he showed up at arranged meeting).

3. The reliability of the process or the system that produced the evidence.

Authentication of a result by evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result. This method of authentication may be used when the accuracy of a result depends on a process or system which produces it.

Bryant v. State, 810 So. 2d 532, 536 (Fla. 1st DCA 2002); Wagner v. State, 707 So. 2d 827, 831 (Fla. 1st DCA 1998)(Silent witness rule)

Bryant v. State, 810 So. 2d 532 (Fla. 1st DCA 2002) (Testimony concerning process authenticated digitally enhanced images that reveal images not discernable to the human eye.)

U-Haul Int'l, Inc. v. Lumberman's Mut. Cas. Insu. Co., 576 F.3d 1040 (9th Cir. 2009)(Computer-generated summaries of payments were authenticated by testimony concerning the process that was used to generated the summaries and that it was accurate.)

CA, Inc. v Simple.com, Inc., 780 F.Supp.2d 196, 227-28 (EDNY 2009)(Time-stamps indicating when computer file was created or modified can be authenticated by testimony describing the process how the time stamps are produced and that they are accurate.)

Lorraine v. Markel American Ins. Co., 247 FRD 534 (D.Md. 2007)(discussing the use of FRE 901(b)(9) to authenticate electronically stored evidence)