

## Authentication of Cell Phone Text Messages

By Pierre Grosdidier

Parties seeking to admit cell phone text messages at trial face two authentication challenges. They must show that the documents they seek to admit into evidence are accurate copies of the original text messages, and they must show that the persons to whom they seek to ascribe the messages actually wrote them.<sup>1</sup> These issues are not just of interest to criminal defendants' counsel, as the largely-penal available case law suggests. Civil litigants may also seek to introduce text messages, or challenge their authenticity, in divorce or custody proceedings or in other civil litigation.<sup>2</sup>

Courts have uniformly held that existing rules of evidence are “generally ‘adequate to the task’” of authenticating electronic information, despite its unique characteristics, and have declined to create new and special rules.<sup>3</sup> Under Texas Rule of Evidence 901(a), evidence authentication, *i.e.*, establishing that evidence is what its proponent claims it is, is a “condition precedent” to admissibility. Evidence that cannot be authenticated is not relevant and is inadmissible.<sup>4</sup>

Rule 901(a)'s authentication threshold is met “by evidence sufficient to support a finding that the matter in question is what its proponent claims.”<sup>5</sup> This issue is a preliminary question of law for the judge under Texas Rule of Evidence 104(a). Only a threshold showing is necessary, the judge need not be personally convinced of the evidence's authenticity, and the rules of evidence do not apply to Rule 104 determinations. The trial court must simply decide “whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable

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<sup>1</sup> There may be other evidentiary hurdles to admissibility, such as hearsay, but this article focuses on authentication. As to parties, text messages are not hearsay when they are the statements of a party against whom the messages are offered into evidence. *Aekins v. State*, No. 04-13-00064-CR, 2013 WL 5948188, at \*6 (Tex. App.—San Antonio Nov. 6, 2013) (mem. op.), *aff'd*, 447 S.W.3d 270 (Tex. Crim. App. 2014). As to parties, then, they are admissible under the admission by party-opponent exception to the hearsay rule.

<sup>2</sup> *See, e.g., In re A.V.*, No. 04-15-00011-CV, 2015 WL 6535471 (Tex. App.—San Antonio Oct. 28, 2015, no pet. h.) (mem. op.) (child custody); *Howell v. Howell*, No. 13-10-00687, 2013 WL 784542 (Tex. App.—Corpus Christi Feb. 28, 2013, no pet.) (mem. op.) (divorce). Neither of these two cases challenged the authenticity of the text messages at issue.

<sup>3</sup> *Tienda v. State*, 358 S.W.3d 633, 638-39 (Tex. Crim. App. 2012).

<sup>4</sup> Tex. R. Evid. 402; *Tienda*, 358 S.W.3d at 638.

<sup>5</sup> Tex. R. Evid. 901(a).

jury determination that the” proffered evidence is authentic.<sup>6</sup> The jury ultimately decides the weight to give the admitted evidence.

The standard of admissibility under Rule 901(a) is rather liberal and can be met in a large number of ways, several of which are listed under Rule 901(b). Personal testimony of a knowledgeable witness is the most common and time-honored way of authenticating evidence.<sup>7</sup> Evidence can also be authenticated by “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.”<sup>8</sup> As the cases discussed in this article show, electronic evidence, including cell phone text messages, is most often authenticated through witness testimony and circumstantial evidence.<sup>9</sup>

### **A witness can authenticate photographs of cell phone text messages.**

As noted, the first authentication hurdle is that of the text messages themselves, which reside on cell phones or other hand-held devices, from which they are not easily extracted and transcribed into print. One commentator has described this authentication issue as “the lesser one.”<sup>10</sup> The messages can always be read into the record if they are not too long or too numerous. In *Montoya v. State*, an incriminating text message was read into the record, the cell phone was admitted into evidence, and the witness “pulled out [the] phone and pulled up the . . . text message for the attorneys to review.”<sup>11</sup> In other cases, parties successfully introduced photographs of text messages. In *Butler v. State*, for example, the court allowed photographs of text messages taken on the victim’s BlackBerry.<sup>12</sup> Two other courts did likewise in *Aekins* and in *Manuel v. State* with photographs taken on the victims’ cell phones.<sup>13</sup> Photographs of text messages satisfy Rule 901’s admissibility threshold provided that a witness can testify as to the photographs’ authenticity.<sup>14</sup>

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<sup>6</sup> See generally, *Tienda*, 358 S.W.3d at 637–38.

<sup>7</sup> Tex. R. Evid. 901(b)(1).

<sup>8</sup> *Id.* 901(b)(4).

<sup>9</sup> See also, Steven Goode, *The Admissibility of Electronic Evidence*, 29 Rev. Litig. 1, 9 (2009).

<sup>10</sup> *Id.* at 17.

<sup>11</sup> No. 05–10–01468–CR, 2012 WL 1059699, at \*3 (Tex. App.—Dallas Mar. 30, 2012, no. pet.) (mem. op.).

<sup>12</sup> 459 S.W.3d 595, 599 (Tex. Crim. App. 2015).

<sup>13</sup> *Aekins*, No. 04–13–00064–CR, 2013 WL 5948188, at \*\*5□6; 357 S.W.3d 66, 76 (Tex. App.—Tyler 2011, no pet.).

<sup>14</sup> In *Butler* and *Manuel*, the testifying witnesses (the victims) owned the photographed devices. In *Butler*, the State introduced the text messages via the victim’s testimony. Likewise, in *Chavezcasarrubias v. State*, “the State elicited testimony from [the victim] that the text messages were a true and accurate

Of course, text messages can be also be extracted forensically from cell phones or can be requested from cell phone companies. Forensic extraction is costly, which is often not an insignificant consideration in family law cases. Cell phone companies will produce text messages to the cell phone's owner, but the process usually takes time. "Apps" now exist to export text messages on smart devices to computers, from where they can be conveniently printed.<sup>15</sup> In all these scenarios, the text message recipient must still testify as to authenticity. Unless the messages are numerous or lengthy, authenticated photographs seem like the simplest way to admit them into evidence.

**Text message contents, context, and circumstances are key indicia of authenticity.**

Ascribing text messages to their putative senders is not as straightforward. The Texas Court of Criminal Appeals held in *Tienda* that showing that a "text message emanates from a cell phone number assigned to the purported author" is not, without more, sufficient to establish the message's authenticity.<sup>16</sup> As the *Tienda* Court noted, "cell phones can be purloined" and someone other than the cell phone owner might have sent the messages. Authenticating cell phone text message authorship requires something more than establishing originating cell phone ownership. But as the following cases show, that "something more" is not very demanding under Rule 901(b)(4)'s liberal standard.

In *Butler*, the Court of Criminal Appeals reversed the Corpus Court of Appeals, which had reversed the defendant's conviction because of allegedly inadequately authenticated text messages.<sup>17</sup> The trial court had found Butler guilty of aggravated kidnapping of his girlfriend. A week before trial, Butler sent his then ex-girlfriend a series of emails threatening her and her family should she testify against him. Butler's foul-language-laced messages contained death threats and accused the victim of snitching to the police and betraying him. The victim testified that the messages came from a phone number that belonged to Butler, and that Butler also called her from that number between text messages "talking mess."

The Court of Criminal Appeals reasserted that the victim's knowledge and testimony that the phone number from which the text messages originated was Butler's was insufficient to establish Butler's authorship. But other evidence "bridged the gap and supplied the necessary

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depiction of text messages between herself and Chavezcasarrubias." No. 02-14-00418-CR, 2015 WL 6081502, at \*2 (Tex. App.—Fort Worth Oct. 15, 2015, no pet.) (mem. op.).

<sup>15</sup> See, e.g., [www.imazing.com](http://www.imazing.com).

<sup>16</sup> *Tienda*, 358 S.W.3d at 642.

<sup>17</sup> *Butler*, 459 S.W.3d at 598.

predicate” for admissibility. In particular, the substance and context of the text messages accusing the victim of assisting authorities, and the threatening phone calls in-between text messages provided “additional circumstantial evidence” sufficient to authenticate the messages.

Similarly, in *Chavezcasarrubias*, the defendant was convicted of sexual crimes with an underage woman.<sup>18</sup> Chavezcasarrubias argued on appeal that text messages on the victim’s cell phone were not “‘sufficiently connected’ to him” and were, therefore, improperly admitted into evidence. Both the trial court and the Court of Appeals disagreed. The witness had testified that she knew the cell phone number was Chavezcasarrubias’ because she had previously communicated with him at that number by voice and via text messages, and the text messages contained information that only she and Chavezcasarrubias would have known. The Court of Appeals held that the victim’s testimony sufficiently authenticated the text messages as Chavezcasarrubias’.

The defendant in *Gardner v. State* was convicted for armed robbery based on evidence that included text messages on his cell phone.<sup>19</sup> A witness positively identified Gardner as one of the robbers. One text message on Gardner’s phone discussed practice-shooting a gun similar to the one used in the robbery. Another message sent an hour before the robbery stated that the sender was about to “hit a lick,” urban argot for robbing someone.<sup>20</sup> The court held that this circumstantial evidence was sufficient to authenticate the messages as Gardner’s.

Finally, in *Aekins*, the defendant challenged his sexual assault conviction based, in part, on an allegedly improperly authenticated text message.<sup>21</sup> The victim had received the message on her cell phone from an undisclosed phone number a few days before the assault. The message stated “Sorry if I offended u [sic]. Wil [sic] not do again,” and it was signed “Soul.” Three witnesses, including the victim and the defendant’s wife, testified that “Soul” was Aekins’s nickname. The victim also testified that she had received prior and similar messages from Aekins, and that this particular message appeared to have been sent in response to her complaining about Aekins’s inappropriate advances. The court concluded that “[t]he events

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<sup>18</sup> No. 02–14–00418–CR, 2015 WL 6081502, at \*1.

<sup>19</sup> No. 02–14–00459–CR, 2015 WL 4652718, at \*1 (Tex. App.—Fort Worth Aug. 6, 2015, pet. ref’d) (mem. op.).

<sup>20</sup> *Id.* (“ . . . hit a lick’ . . . meant the person sending the text was about to commit a robbery.”).

According to urbandictionary.com, to “hit a lick” is “[t]o gain a s[\*\*\*] load of mony [sic] in a short amount of time.”

<sup>21</sup> No. 04–13–00064–CR, 2013 WL 5948188, at \*6.

surrounding the message indicate circumstantially that [Aekins] was the author of the text message,” and held that the latter was properly admitted into evidence.

Taken together, these cases show the relative ease with which cell phone text messages can be authenticated provided that the substance and context of the messages can be linked to the facts of the case.

### **About the Author**

Pierre Grosdidier is an Attorney in Haynes and Boone, LLP’s Litigation Department in Houston, Texas. His practice focuses on complex commercial litigation, especially lawsuits and arbitrations with strong technical elements. He has litigated cases involving construction, oil and gas, software copyright, Computer Fraud and Abuse Act, Stored Communications Act, and trade secret claims. Prior to practicing law, Pierre worked in the process control industry. He holds a Ph.D. from Caltech and a J.D. from the University of Texas. He is a member of the State Bar of Texas and is a registered Texas P.E. (inactive).