EVIDENCE ARTICLE FOR SONOMA COUNTY BAR JOURNAL

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Overview and Introduction: On December 9, 2020, the Sonoma County Bar Association presented a webinar entitled "Hearsay And Other Pertinent Objections During The Time Of Covid." It was primarily an overview of specific objections and other key evidentiary points to keep in mind with respect to the use of evidence from social media prior to, during, and after trial, not all of which were specific to COVID, of course, but relate to the increased use of remote or distance trial practice. It also included some practical observations with respect to trial objections and appellate practice in general. Panelists included Sonoma County Superior Court Judge Andy Wick, Retired Justice of the California Court of Appeals Daniel "Mike" Hanlon, and attorneys Dawn Ross, Carle Mackie Power & Ross, and Andrew Martinez. The following is a compilation and overview of their overview, compiled and edited by Brian J. Purtill, who moderated the panel discussion in December.)

I. PRE-TRIAL EVIDENCE PRESERVATION

Today, Social Media is a virtual (pardon the pun) treasure trove of potentially admissible evidence. – Facebook, Twitter, What'sApp, YouTube, Instagram, to name a few, often contain priceless statements and/or photographs helpful to your client or harmful to your opponent.

Every new case intake should involve social media mining. And every new client should be asked about text messages or similar posts they know of which may be helpful or harmful to their case. Finding them is one thing; using them is another.

A. Assume You Will Have Authentication Issues

Try being direct; it often works: if you have texts and/or photographs with which you know the opponent to be familiar, you can demand authentication of them by use of Requests for Admission and/or Depositions.

Use your experts: If authenticity of evidence obtained on line must be established through circumstantial evidence because direct testimony is not available or authenticity is being challenged, you will need a third party (tech expert, Private Investigator, or paralegal, etc.) to identify how/where the evidence was located, how it was downloaded, etc. Utilize best practices to ensure its admissibility in court. See, Authentication, below.

B. Methods for Converting Electronic Communications Into Hard Copy

Even though you may be able to present evidence electronically at depositions and/or trial, you'll still want to convert it to paper form to preserve the evidence during litigation and for trial purposes in case your technology doesn't work. There are several ways to do this, remembering to use someone other than yourself to avoid having to testify to the conversion. Consider using a paralegal or tech expert who would make a good trial witness.

1. Save the information to the Cloud;
2. Print the relevant portions, making sure to include dates/times;
3. Send pictures of the evidence to an email, then print;
4. Take a screenshot of the information (i.e., from a smart phone; Facebook page, Instagram photos or text messages) and email it to your account then print.

II. ADMITTING SOCIAL MEDIA EVIDENCE AT TRIAL

The two primary evidentiary hurdles in seeking to admit social media evidence at trial are authentication and hearsay.

A. Authentication

1. Posts/writings: (See Evidence Code sections1413-1421). Authentication requires proof that a particular individual wrote the content, not just that it came from that person's social media account. Common ways to authenticate social media postings include:

    a. Testimony from a witness, including the sender, the receiver, or an expert to testify about what s/he observed. In this context, an expert can include a police officer with training and experience regarding the specific social media outlet used. (*In re K.B*. (2015) 238 Cal.App.4th 989.) Whatever is on the website or app at the time the witness views it and is the subject of the testimony should be preserved in a form that can be presented in court.

    b. Evidence of social media postings obtained from a phone, tablet or computer taken directly from the sender/receiver or found in the sender/receiver's possession.

    c. Proof of chain of custody following the route of the message or post, coupled with testimony that the alleged sender had primary access to the computer where the message originated.

    d. The content of the post refers to matters only the writer would know about.

    e. Evidence that after the post was placed on social media, the writer took action consistent with the content of the post.

    f. The content of the post displays an image of the writer. (*People v. Valdez* (2011) 201 Cal.App.4th 1429.)

    g. Other circumstantial evidence including that the observed posted images were later recovered from the suspect's cell phone and the suspect was wearing the same clothes and was in the same location that was depicted in the images. (*In re K.B.* (2015) 238 Cal.App.4th 989.)

    h. Evidence that the security measures for the social media site such as passwords-protections for posting and deleting content suggest the owner of the page controls the posted material. (*People v. Valdez* (2011) 201 Cal.App.4th 1429.) In the majority of cases a variety of circumstantial evidence provides the key to establishing the authorship and authenticity of a computer.

2. Chat Room or Other Posts: Common ways to authenticate chat room or Internet relay chat (IRC) communications include:

    a. Evidence that the sender used the screen name when participating in a chat room discussion. For example, evidence obtained from the Internet Service Provider that the screen name, and/or associated internet protocol (IP address) is assigned to the party or evidence circumstantially tying the party to a screen name or IP address.

    b. Security measures such as password-protections for showing control of the account of the sender and excluding others from being able to use the account. (See generally, *People v. Valdez* (2011) 201 Cal.App.4th 1429.)

    c. The sender takes action consistent with the content of the communication.

d. The content of the communication identifies the sender or refers to matters that only the writer would know about.

e. The alleged sender possesses information given to the user of the screen name (contact information or other communications given to the user of the screen name).

f. Evidence discovered on the alleged sender's computer reflects that the user of the computer used the screen name. (See, *U.S. v. Tank* (9th Cir. 2000) 200 F.3d 627.)

g. Party testified that he owned account on which search warrant had been executed, that he had conversed with several victims online, and that he owned cellphone containing photographs of victims, personal information that defendant confirmed on stand was consistent with personal details interspersed throughout online conversations, and third-party service provider (Facebook) provided certificate attesting to chat logs' maintenance by its automated system. (*U.S. v. Browne* (3d Cir. Aug.25, 2016) 2016 WL 4473226, at 6.)

3. Photos: While photos can be amazing evidence, you need to be able to prove not just when the photo was *posted*, but when it was *taken.* Consider other circumstantial evidence as well, including that the observed posted images were later recovered from the suspect's cell phone and the suspect was wearing the same clothes and was in the same location that was depicted in the images. (*In re K.B*. (2015) 238 Cal.App.4th 989.)

Consider: What if you want to oppose the introduction into evidence of a photo of a car running a red light from a traffic camera? See, *People v. Goldsmith,* (2014) 59 Cal.4th 258, 259 (holding that in the absence of contrary evidence, automatically generated red light camera images are presumed to be authentic).

4. Authenticating The Data Inside the Data: Metadata: If the digital evidence contains "metadata" (data about the data such as when the document was created or last accessed, or when and where a photo was taken) proponents will need to address the metadata separately and prepare an additional foundation for it. Here's where your expert earns their keep.

B. Hearsay and Its Exceptions: Examples Found on Social Media

Hearsay is defined in Evidence Code section 1200 as follows:

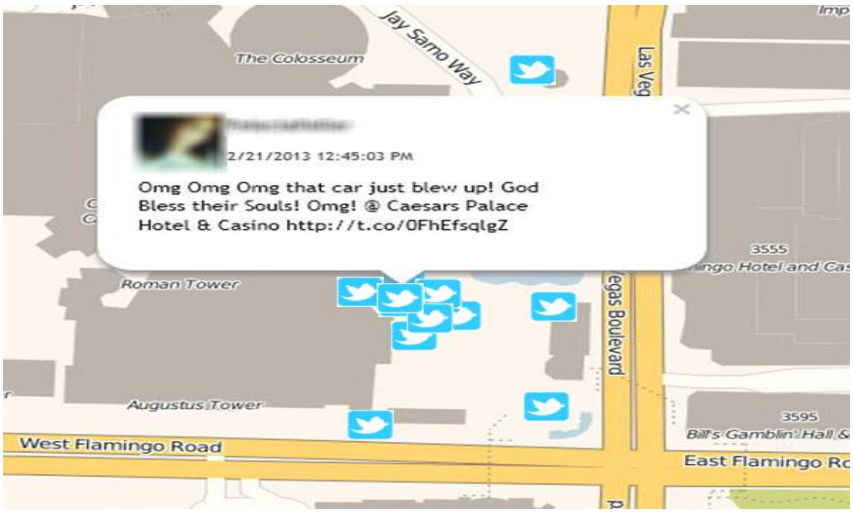
(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.
(b) Except as provided by law, hearsay evidence is inadmissible.
(c) This section shall be known and may be cited as the hearsay rule.

It's been said that the hearsay exceptions often swallow the rule, but the following are some examples of exceptions which may apply to evidence from social media sites.

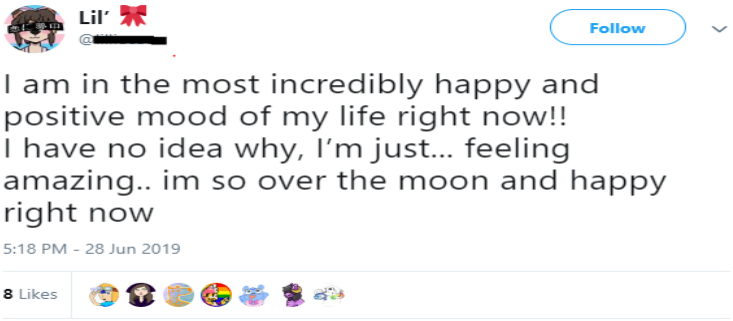
1. Excited Utterance/Spontaneous Declaration (Evid. Code 1240, FRE 803(2). A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." And . . .

2. "Contemporaneous Declaration/Present Sense Impression (Evid. Code 1241, FRE 803(1). A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."

The post with the four "OMGs" shown below is a good example of both.

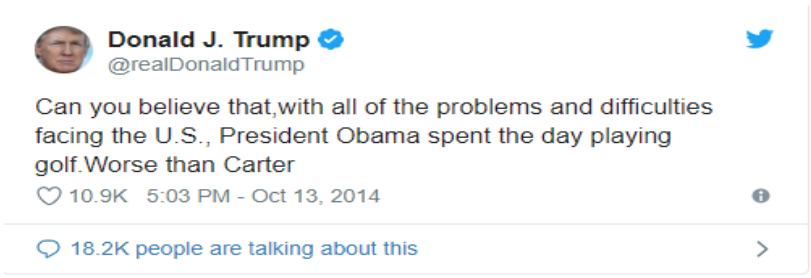


3. "*Then-Existing Mental, Emotional, or Physical Condition, or State of Mind (Evid Code 1250, 1252, FRE 803(3).* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)." The state of mind of a party or witness is a common issue in many legal matters. [See, *Gordon v. T.G.R. Logistics, Inc.* (D. Wy. May 10, 2017) (Court orders production of entire Facebook Account history as relevant to mental and emotional state of Plaintiff)]. Example:



Arguably the most compelling social media evidence stems from the propensity of folks to self-incriminate on Twitter or elsewhere, otherwise known as a . . .

4. *Statement Against Interest* (Evid Code 1230, FRE 804(b)(3) or a *Prior Inconsistent Statement* (Evid. Code 1235, FRE 801(d)(1)(A). This takes multiple forms, including flat out admissions of liability, or previous statements that contradict or otherwise impugn the integrity of a declarant. For instance:



C. Use of Expert Witnesses: What happens when expert witnesses rely on hearsay? The Supreme Court addressed this issue a few years ago in People v. Sanchez (2016) 63 Cal. 4th 665.

1. Experts cannot rely on hearsay to provide "case specific" facts.
2. The hearsay statements must first be independently proven by competent evidence or covered by a hearsay exception.
3. The key distinction is "between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception."
4. Query: can a doctor rely on the content of medical records authored by someone else? Can a real estate valuation expert rely on "comparable" sale information from MLS or similar sources?

D. Some Case Law.

In summary, social media provides a great source of evidence that now seems to play a part in every case. It also tends to fall under evidentiary hearsay exceptions, unlike many other forms of out of court statements.

- Social Media Cases:
  - *People* v. *Beckley* (2010) 185 Cal.App.4th 509, 510 (holding that a Myspace image should have been barred for lack of authenticating evidence).
  - *People* v. *Valdez* (2011) 201 Cal.App.4th 1429, 1438 (Defendant's social media page as circumstantial evidence of gang involvement; holding that a Myspace picture was sufficiently authenticated because of messages addressed to the defendant on the page and the page being password protected).
  - *Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854, 855 (ruling that the court can compel a juror to disclose Facebook posts made during jury service).
  - *Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1027–1028 (a text message is a writing within the meaning of Evidence Code section 250, which may not be admitted in evidence without being authenticated).

III. MAKING HEARSAY OBJECTIONS: PRACTICAL CONSIDERATIONS

Pre-trial examination of the potential issues that may arise in presenting hearsay evidence at trial, or preventing the admission of hearsay at trial, is necessary and extremely effective, but issues not anticipated can always arise at trial.

(A) Recognizing what is hearsay, and is it relevant or admissible?

Hearsay defined (a review): Evidence Code§ 1200(a)

(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. Except as provided by law, hearsay evidence is inadmissible. EC§ 1200(b)

(b) Except as provided by law, hearsay evidence is inadmissible.

(B) How to challenge hearsay evidence? For the rule on cross-examination of a hearsay declarant, see EC§ 1203:

(a) The declarant of a statement that is admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement.

(b) This section is not applicable if the declarant is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776 , or (3) a witness who has testified in the action concerning the subject matter of the statement.

(c) This section is not applicable if the statement is one described in Article 1 (commencing with Section 1220), Article 3 (commencing with Section 1235), or Article 10 (commencing with Section 1300) of Chapter 2 of this division.

(d) A statement that is otherwise admissible as hearsay evidence is not made inadmissible by this section because the declarant who made the statement is unavailable for examination pursuant to this section.

(C) To object or not to object, that is the question! And you must have an answer, usually on very short notice. Consider whether it's more important to be correct on the law, or to appear unmoved by the evidence, especially if you think your objection will be overruled. (See section (F) below.)

Once you decide to object, don't delay. The timeliness of the objection is crucial to the Court's ruling on the objection and preservation of issues for a possible appeal. Failure to object is a waiver of the issue for motions for new trial and appeal (except for possible issues of Inadequate Assistance of Counsel).

(D) Planning ahead: What is the proper objection, and what should your response be to the Court to provide a basis for your objection? And you should have more than one answer ready to go if the judge doesn't like your first one (that's advice from Judge Andy Wick)!

(E) Sources for Hearsay Rules and Guidance:

CEB is your friend: Every trial attorney should have in their library, and read, the California Evidence Code and the CEB publication California Trial Objections. These two sources should be consulted whenever questions regarding evidentiary questions arise. The CEB book is great for specific objections, citing case law and giving guidance and practice tips. Sections 1940-1945 give great insight into misconceptions about the hearsay rule, a checklist for hearsay problems, alternatives to objecting and hints on "stating the objection".

Hearsay evidence is covered in California Evidence Code in Sections 1200-1390. Especially helpful are sections 1220-1390, defining the exceptions to the hearsay rule.

(F) Consider the effect of your objections on the trier of fact and the effectiveness of your objections.

Ask yourself: Will jurors perceive that you are trying to prevent information they might want to hear? How will they view your attempt if your objection is overruled and the jury hears the evidence anyway?

Consider how to perfect your objection, once you decide to make one. Stay with it; there may be times when a number of objections must be made, after the Court overrules your objection and the question is re-phrased. If you object to a certain question, the objection is overruled and the question is restated differently, it is a new question and must be objected to preserve the issue for appeal.

IV. GENERAL EVIDENTIARY AND OTHER CONSIDERATIONS FOR APPEAL

Keep in mind here that the three basic functions of an Appellate Court are: a. Error Correction; b. Law Development; and c. Doing Justice. Your appeal should address at least one of these.

1. When to consider the issues which may present the need for an appeal.
   a. From the very outset of your case, you should be identifying potential evidentiary issues and be sure to know the proper ways to preserve them for appeal, should the court rule against you at trial.
   b. Be keenly aware of the impact of discovery orders you receive along the way and when and how they may be part of your appeal or should be addressed through a writ (see discussion below on writs).
   c. Consider a potential appeal from an order resulting from a terminating motion; be sure to obtain a ruling on the objections you made to evidence. REMEMBER: The **order** granting summary judgement is not appealable and is not final until a final judgment is entered. Appeal from the judgment.
   d. Ruling on a motion in limine; beware of trial court denying the motion in a non-final way. Rulings must be final to be appealable.
   e. Consideration the following in creating an appellate strategy:

      Fundamentally, be sure you'll be able to raise the issue at trial: There are both substantive and procedural reasons for recognizing the possibility of appeal as part of the litigation strategy from the inception of the lawsuit. One of the most important steps for an attorney to take is to ensure that those issues which he or she thinks may be significant on appeal are raised in the trial court. Appellate courts will generally not consider issues not raised in the trial court.

      What is your goal in filing the appeal? Your objective should be looked at from both the broader standpoint of the ultimate object of the litigation and the narrower one of the precise judgement from which the appeal is to be taken.

      The Golden Rule of Appellate Practice: Thou shall not sandbag the trial court or opposing counsel. This means to preserve error, an attorney must make an adequate record: This may take the form of an objection or other comment to the trial court, on the record, of the specific problem no matter how insignificant the problem may appear at the time. This rule prevents a party from trying a case on one theory and then disavowing that theory on appeal.

2. Know the difference between a Writ and an Appeal.

General Overview and Prefiling Considerations (The quoted portions below are from a publication from the California Courts of Appeal, found at https://www.courts.ca.gov/documents/4DCA-Div1-Handout-on-Writs.pdf):

"A writ is a directive from [the appellate] court to a trial court, an administrative agency, or a person to do something or to stop doing something. Unlike appeals, which are heard as a matter of right, writ petitions are generally heard as a matter of discretion, and they are governed by equitable principles.

"Appellate courts generally grant writ relief only when the petitioner (1) has no other plain, speedy and adequate remedy in the ordinary course of law; and (2) will suffer irreparable injury if such relief is not granted. If the order, judgment or decision you intend to challenge is directly appealable, you are considered to have an adequate remedy in the ordinary course of law unless you can show extraordinary circumstances (e.g., a need for immediate relief). Check Code of Civil Procedure section 904.1 to see what orders and judgments are directly appealable; for rulings not covered by that section, you may also wish to look at the cases dealing with the ruling in question to see if the issue was resolved by an appellate opinion or a writ opinion.

"The irreparable injury requirement is more difficult to define. It is not established by the mere facts that the challenged ruling is wrong and because of it you will have to spend time and money on unnecessary further litigation. Loss of money damages generally also is not considered irreparable injury. The threatened destruction of one's home or business may constitute irreparable injury, although the threatened foreclosure of unimproved commercial property may not. An order directing release of privileged information, disclosure of attorney work product, or invasion of a protected privacy interest ordinarily will qualify as irreparable injury. You need to judge the circumstances and the severity of the consequences to determine whether you are likely to qualify for extraordinary writ relief." (*Author's Note: See the publication listed above for more detail on the types of writs available, the time limits for them, the required content of the writ, and other procedural and substantive information*.)

The availability of the extraordinary writ in an appellate court for review of a lower court action must be examined in the context of the final judgement rule. The principal of appealability is that the judgement or order must be final to be appealable. Underlying this rule is judicial economy. The issues in the writ will be:

Are there no other adequate means, such as direct appeal, to attain the relief desired?
Will the petitioner be damaged or prejudiced in a way not correctable on appeal?
Was the trial court's order erroneous as a matter of law?
Does the trial court's order raise new and important problems, or issues of law of first impression?

NOTE: Discovery orders may be addressed via writ: Ordinarily, a trial judge's orders on discovery are not reviewable until after final judgment because of their interlocutory nature. However, if the pretrial order involves potential irreparable injury (e.g. damage from a compelled disclosure of privileged information), the writ should be issued.

End of Article

(Brian J. Purtill practiced civil litigation from 1984 to 2018. He has been a mediator with Arbitration and Mediation Center in Santa Rosa since 1996, and since August of 2018 has served as the Dean at Empire College School of Law)

HOW TO RECEIVE ONE HOUR OF SELF-STUDY MCLE CREDIT IN GENERAL LAW

Below is a part multiple choice, part true/false quiz. Submit your answers to questions 1-20, indicating the correct letter next to questions 1 – 11, and T or F next to questions 12 – 20, identify the name of the article and issue (Hearsay, Fall 2021 Bar Journal) along with a $25 payment to the Sonoma County Bar Association at the address below. Please include your full name, State Bar ID number, and email or mailing address with your request for credit.

***Reception@SonomaCountyBar.org** • Sonoma County Bar Association, 111 Santa Rosa Ave., Ste. 222, Santa Rosa, CA 95404*

Hearsay/Evidence Article for SCBJ

MCLE Questions:

Multiple Choice:

1. A proper method to use for the authentication of social media documents which were found on the opposing party's webpage/account is:

   A: That party's Responses to a Request for Admissions

   B: That party's answers in oral Deposition

   C: A letter from the opposing attorney agreeing that the documents were found on the opposing party's website.

   D: A only

   E: A and B

2. The two primary evidentiary hurdles in seeking to admit social media evidence at trial are:

   A: authentication and hearsay.

   B: authentication and best evidence rule.

   C: relevancy and foundational requirements

   D: best evidence rule and hearsay.

3. Common ways to authenticate social media postings include:

   A. Testimony from a witness to testify about what s/he observed.

   B. Evidence of social media postings obtained from a device taken directly from the sender/receiver or found in the sender/receiver's possession.

   C. The content of the post refers to matters only the writer would know about.

   D. All of the above.

   E. None of the above.

4. Adam was sitting at an outside café on a busy street corner while on vacation in Italy, sipping his cappuccino, eating his pastry, and reading a book, when he saw a car run a red light and cut another car off such that the other car ran off the road and crashed. As he was sipping, he turned to his I Phone and texted to his buddy: "Crazy! I just saw this jerk run a red light and run a guy off the road". He then turned back to his breakfast and his novel. Evidence of his text at the trial of the red-light runner was admissible as:
    A. An excited utterance
    B. A contemporaneous declaration
    C. A dining declaration
    D. Both A and B above.
    E. None of the above; it was inadmissible hearsay
5. Courts have held that text messages are not within the definition of a writing contained in Evidence Code section 250 because:
    A. They don't fit any of the terms in the statute
    B. They are rarely grammatically correct
    C. They are temporary and can be deleted with ease
    D. They did not exist when Evidence Code Section 250 was written or last amended
    E. None of the above; texts are indeed within the definition of a writing in section 250.
6. Electronic evidence which was created prior to trial is considered hearsay if:
    A. It is evidence of a statement made by someone other than a witness during the trial
    B. It is something containing what others have heard and/or said outside the trial
    C. It is a statement offered for the truth of the matter asserted
    D. All of the above
    E. C only
    F. A and C
7. When it appears the opposing counsel is attempting to introduce hearsay evidence, the <u>best approach</u> taken in response should be:
    A. Object if there are legal grounds for doing so
    B. Object if you want to interrupt opposing counsel's flow, even if you're wrong on the law
    C. Consider whether the court will overrule your objection before deciding whether it's worth making, even if you think it's technically correct
    D. Assess the value of the evidence for appeal purposes before objecting
    E. A and C
    F. A, C and D
    G. C and D

8. When a statement has been admitted as hearsay evidence, the person who made the statement (the declarant) may be called and examined by any adverse party as if under cross-examination concerning the statement unless which of the following is true:
    A. the declarant is a party

B. the declarant is a person identified with a party within the meaning of subdivision (d) of Evidence Code Section 776
C. the declarant is already at a party instead of at the trial
D. the declarant has already testified in the action concerning the subject matter of the statement
E. A and B
F. A and D
G. A, B, and D

9. Once you've identified inadmissible hearsay evidence you believe will be introduced by your opponent to which you intend to object, you should:
    A. Raise the objection in a written motion in limine prior to trial
    B. Object at trial when the question is asked or the evidence is offered
    C. Hold off objecting at the time of the testimony for fear of alienating the jury and raise the issue with the judge at the end of that day of trial outside the jury's presence
    D. None of the above
    E. All of the above
    F. A and B only

10. You should first start assessing your case for possible evidentiary appealable issues at which of the following times:
    A. After you've taken the opponent's deposition
    B. After your first client intake interview
    C. After you have received the other side's documents in response to your first discovery requests
    D. After the trial court's ruling on your first discovery dispute

11. Before an expert may rely on hearsay testimony, which of the following must occur:
    A. The hearsay statements must first be independently proven by competent evidence or covered by a hearsay exception.
    B. The hearsay statements must relate only to 'case specific facts'
    C. The expert must have been the author of the hearsay document from which he or she is testifying
    D. The expert must not have ever failed to qualify as an expert witness in any other case.
    E. A and B
    F. B and C

TRUE OR FALSE

12. To properly authenticate information found on social media, you need only prove that the information came from a particular individual's account.

13. It is never appropriate for a witness to testify about what s/he saw, heard or observed on a social media platform, regardless of the circumstances, as such testimony is inadmissible hearsay.

14. One way to authenticate social media evidence is to prove that it refers to matters that are only within the knowledge of the writer/owner of the app upon which it appears.

15. Evidence of the conduct of the social media account owner which occurred after the post in question was entered onto the site is inadmissible to authenticate that post as subsequent post-liability conduct.

16. It is accepted practice for the trial attorney to have saved the electronic evidence on his or her own laptop and print it out later for use in evidence.

17. A police office can never testify as a witness regarding the specific social media outlet used by another.

18. Hearsay evidence is any testimony or evidence that refers to what someone else said, and is any testimony which starts out by the witness saying: "I heard him say . . ."

19. All rulings by the trial court on motions in limine are properly the subject of an appeal.

20. Writ petitions are akin to injunctive relief in that they require a showing of irreparable harm and proof that there is no other adequate remedy, such as an appeal, to correct the trial court's error.

End of MCLE Questions

Submitted by Brian J. Purtill

July 28, 2021