Hello Folks and welcome back to the Good Judge-Ment podcast. I am Wade Padgett.

*And I am Tain Kell. So let me get this straight – we are able to return to the Motherland known as Athens, GA but we are recording this episode via Zoom because we cannot make our respective schedules work in a way that lets us get to Athens. Do I have that right?*

Unfortunately, that’s right. We have a series of episodes dealing with evidence that we need to record and have available by the time we lead NJO in December. Because we are both dealing with a backlog of cases, we return to Zoom.

*Ok, I get it. I am just excited to talk about our favorite topic – Evidence. Wade, tell everyone what fun and exciting evidence we are going to discuss in this episode.*

Well, rather than deal with a particular evidence section, I thought it would be good to deal with how judges should look at electronic evidence such as social media. How it can be introduced and how judges should review those submissions.

*Lord knows that we have social media posts and comments tendered as evidence all the time. In every type of case. But I have a sneaking feeling we might get into more evidence issues than merely social media posts. (I read the show notes!) Let’s get started.*

**[Wade] –** In this evidence series that we have recorded for veteran judges and for our new judges who are attending NJO, we have stressed that the judge needs to have a process for dealing with evidence issues that arise in court.

**[Tain]** – *That’s right. We are not attempting to teach evidence like it was taught to us in law school. I recall fondly the Professor introducing a topic and we would spend a week or two dealing with that single topic within the larger umbrella of Evidence. While we are doing some of that in this series, in this episode we are going to look at a particular type of evidence and the issues that arise for the judge to consider when the evidence is tendered.*

**[Wade] –** To be honest, many times when evidence involving social media, text messages, etc. are tendered, there are no objections raised. Tain, one of the big things that we should all recall under the Evidence Code is that an objection requires a contemporaneous objection, right?

**[Tain] –** *Yep, that is a part of Rule 103 which requires a contemporaneous objection. (See Croyle v. State, \_\_ Ga. App. \_\_, 860 S.E.2d 844, 854-855 (2021), citing Williams v. Harvey, \_\_ Ga. \_\_, 858 S.E.2d 479 (2021). We also recorded a prior episode on the topic of contemporaneous objections (recorded 6/1, published 10/5 on Apple Podcasts)*

**[end scripted portion]**

- Way back in summer 2017, presentation at summer conference by Carrie Christie with Rutherford & Christie in Atlanta (used her written materials as a guide) dealing with this same topic. Shout out! And credit!

- When presented with social media post (let’s use a Facebook post as an example – but acknowledge it is equally applicable to Instagram, Twitter, Tic-Toc, text message, etc.), and receiving a contemporaneous objection, the judge should:

**RELY ON THE PROCESS** –

1. Is the [social media] **relevant** under Rule 401?
2. Is it **authentic** under Rule 901?
3. If it is offered for truth of matter asserted in the post, is it **hearsay** under Rule 801?
	1. If hearsay, does it fit within an **exception** under 803/804/807?
		1. Quick reminder, 803 is exceptions to hearsay rule; 804 is exception where declarant not available and 807 is the residual exception.
4. Is the form of the evidence (i.e. screenshot, copy, whatever) is it an **original or duplicate** that is admissible under Rule 1001-1008?
5. **Rule 403** – is the probative value substantially outweighed by the danger of unfair prejudice?

- We will take up each aspect of the analysis individually but for now, let’s look at the process from an 1,000 foot perspective

**THE PROCESS OVERALL**

- If anything can be gleaned from these evidence episodes, reinforce message that judge should engage in a process when evaluating evidence objections

- Not only makes a good record but also ensures the judge does not overlook a required analysis or rule application (also just a good way to act as a judge)

- Attacking the evidence issue presented in the manner suggested by Ms. Christie is the same we have reiterated in this entire series

– start with **relevance** (if it is not relevant, does not come in. Period. End of analysis.)

- If relevant, is it **authentic**? (We have recorded prior episodes on authentication – it is a low hurdle but it is a hurdle nonetheless. Could reasonable jury or factfinder find that the item is what the proponent claims it to be? (Milich definition). Remember, it is entirely possible that it is a fake – that is for cross-examination to work through. As a preliminary matter, is it what the proponent claims it to be?)

- If relevant and authentic, does the tendered evidence meet the hearsay definition? (we will deal with “offered for the truth of the matter asserted” in a minute).

- If hearsay, does it come in under an exception? (803, 804 and 807)

- If relevant, authentic and admissible under hearsay, is there any issue with the **form of the evidence** (i.e. original vs. copy)? (if you thought authentication was a low hurdle, introducing a copy is merely a speed bump and is not usually an issue). (# of times people offered their iPhone as evidence in divorce case)

- If relevant, authentic, admissible under hearsay and no issue with form of the evidence, does it come in under Rule 403? (Remember that 403 is an issue as to ALL evidence, not just social media)

- If you followed this process when evaluating almost any evidentiary objection dealing with tangible evidence, you probably render a good result!

**RELEVANCY**

- We know the rules of evidence actually state an obvious point – Rule 402 makes it clear: “All relevant evidence shall be admissible, except as limited by constitutional requirements or as otherwise provided by law or by other rules, as prescribed pursuant to constitutional or statutory authority, applicable in the court in which the matter is pending. Evidence which is not relevant shall not be admissible.”

- So what makes evidence “relevant?” (Rule 401-“evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would without the evidence.”)

- There are degrees of relevance. Just because an exhibit does not totally prove or disprove a point in controversy is NOT the question. Some evidence is slam dunk proof. Others are merely layups and partially prove or disprove something.

- Assume in our make believe trial, there is an issue of adultery. A FB post showing the defendant posing with a female other than the Plaintiff/Wife after the date of the marriage but before trial and bearing the caption “My Girl” does not prove adultery – but it is relevant to the issue.

(Other examples – in a case where plaintiff claims disability as result of a tort and there is a photo of plaintiff participating in a mud run, or cross-fit competition post accident, that’s relevant; Defendant in criminal case posting photo of him wearing the sneakers that were stolen during the burglary after the date of the burglary – relevant.)

**AUTHENTICATION**

- Because we have discussed authentication on a bunch of our prior episodes, particularly those dealing with some of the full case analysis we recently recorded, we are only going to deal with authentication briefly here

- Authentication is NOT a guarantee that the FB post was not edited, manufactured or “ghosted.” Instead, the question that Prof. Milich asks is whether a reasonable factfinder could say that the FB post from the opposing party is what it claims to be. That is all that authentication requires.

- Remember we previously discussed the “low tech” method and the “high tech” method of authentication.

- Under the “high tech” method (rarely used because of cost), an expert from FB or other computer expert establishes that someone using a particular IP address posted the information on “X” date; that the FB account had a password that was known by the poster; etc. You might occasionally see this method in cases involving child porn, etc. because the computer experts come in and seize the offending computer and show when certain content was downloaded, where it was stored, etc. They can also establish whether that particular computer was used to post things on the internet.

- The “low tech” method, the parties can actually establish the necessary authentication (although I rarely see anyone do it correctly). Usually, the information is authenticated by looking at the account itself. Does the page contain an actual photo of the party, does it include his known nickname, address, high school, relatives, friends, etc.? Does the page include parts of conversations that can be verified as having been carried out? (i.e. exchange with sister about her wedding; going to the UGA game and evidence of attendance, etc.? If so, it is likely that the post was made to the party’s FB page by the party.

- Cases have referred to authentication under the low tech method as “circumstantial evidence taken as a whole” that would support authentication. (See *Allen v. State*, 347 Ga. App. 731, 736-737 (2018) (“The proponent’s burden of authentication is light.” “There need be only some competent evidence in the record to support authentication, which can consist of merely circumstantial evidence.”)

**HEARSAY**

- “Out of court statement, offered to prove the truth of the matter asserted.”

- In our example of the FB post with “My Girl” caption under the photo of husband with another woman, does it matter whether the lady in the photo is actually his girl? Is that the “statement” being made in the photo? Let me answer that question with another example – on FB, if I post a picture of me with friends at a UGA game and the caption says “Dawgs are the best!” the “ statement” is not that the Dogs are the best team – more likely the statement is that I attended a game with those particular friends. In the “My Girl” photo, the “statement” being made is that husband was with this lady on the date in question.

- But let’s not leave the “offered for the truth of the matter asserted” issue just yet. Assume for a minute that husband testified that he was out of town on a work-related trip on the date that the photo was taken (I don’t know – assume it was on new year’s eve and everyone was wearing happy new year hats – or the name of the bar which is actually in town was in the background of the photo). It does not matter whether the “statement” made by the post was true – it matters when the photo was taken. Therefore, under those facts, you as the judge, never reach the issue of hearsay exceptions because the statement was not offered for its truth – offered to disprove that on the date in question, the husband was not actually on a work-related trip to Omaha.

- So we have established that not all “statements” are verbal – they can be written, photos, even head shakes or head nods. So, the statement was not made during this hearing – out of court (check) statement (check) offered to prove the matter asserted (check). It is hearsay, right? NOT SO FAST MY FRIEND -*the great philosopher Lee Courso from ESPN Gameday*

- The great thing about our evidence rules is that they are codified – so look at the definition of hearsay under Rule 801

- 801(d) says that evidence that otherwise would be considered hearsay is subject to the following “exclusions and conditions”

- Prior consistent and inconsistent statements of a witness who testifies in this hearing are excluded from the hearsay rule

- Same with “admissions” by a party-opponent. Let’s wallow around here for a minute

- Logic tells you that an admission under this rule ***has to be*** a statement of the other party – you cannot simply introduce prior statements that line up with what was testified here by your own client – that would be bolstering. Now, if they accuse your client of recent fabrication or being inconsistent on his/her testimony, you can use the prior statement as a prior consistent statement – but not until an attack is made.

- Remember the reason for the hearsay rule in the first place – you cannot cross-examine a declarant who is not present. Well you can never “cross-examine” yourself – so you are going to have to eat whatever words you previously uttered.

- Same is true with the statements of your agent or employee – you will be responsible for those statements and they are not considered hearsay. They are an “out of court statement offered to prove the truth of the matter asserted” but, for policy reasons, we have excluded them from the definition of hearsay. (and co-conspirators are included within the large umbrella of “agents” here – but more on that in another episode).

- If not hearsay or fall within the exclusions of the hearsay rule, you NEVER REACH THE EXCEPTIONS under 803/804/807. The law treats those statements as not being hearsay at all!

- If the social media you are ruling on is like most I have seen in court, it will be the FB page of the opposing party. If you get into a more rare case where there is an attempt to introduce a FB post by a non-party, you WILL likely end up in the exceptions of 803/804/807. But because we have an entire episode dealing with the most common hearsay exceptions as part of this series, and because we know we are not going to reach the exceptions in our “My Girl” FB post in our running example, we are not going to address the exceptions here.

**FORM OF THE EVIDENCE (A/K/A “Best Evidence Rule”)**

- As mentioned before, if authentication is determined to be a “low hurdle,” a best evidence objection is barely a speed bump. The level of proof required to overcome a best evidence objection is extremely low. If you have a case (i.e. a probate case involving which will is the original) where there is a legitimate question as to which document is the original and that document really “is” the case, then pay attention to a best evidence objection. Otherwise, move along swiftly with the analysis.

- I know we already mentioned this, but you cannot introduce a cell phone or laptop into evidence. When the party tries to hand you the phone and ask that you take a look at what the other party posted on social media, politely decline and explain that you cannot send the phone to the Court of Appeals.

- Most often, the party has performed some form of a screen shot of the FB post and figured out a way to print it onto old school paper. So for this episode, let’s assume that wife has taken a screenshot of the husband’s FB post and tenders that as exhibit 3.

- A quick look at §24-10-1002 might make you wary “To prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph shall be required.” But look at Rule 1003.

- Rule 103 “A duplicate shall be admissible to the same extent as an original unless:

(1) A genuine question is raised as to the authenticity of the original; or

(2) A circumstance exists where it would be unfair to admit the duplicate in lieu of the original.”

- It is beyond frustrating to hear people argue “best evidence rule” when it comes to photographs. Please look at the definition of an original under §24-10-1001 – an “original” of a photograph includes a negative and any print made from the negative. If the “data” is stored on a computer, any printout which is shown to accurately reflect the data stored on the computer is an original. Please do not entertain any “best evidence rule” objections to photos which are based on the fact that the original photographer is not on the stand. Although it is really an authentication issue, lawyers inevitably raise a “best evidence rule” objection when the actual photographer is not on the stand when a photo is being introduced. (Video or photo is admissible where “operator of machine which produced it, or one who personally witnessed the events recorded testifies that the video accurately portrayed what the witness saw take place at the time the events occurred.” *Moore v. State*, 305 Ga. 251 (2019); *Sowell v. State*, 327 Ga. App. 532 (2014))

**RULE 403**

- The impact of §24-4-403 cannot be overstated – but…

- You admittedly need to include a 403 analysis in almost every evidentiary objection you handle in court

- But remember: **§24-4-403** “should be used ‘only sparingly’ because it permits the exclusion of concededly relevant evidence.” *Burns v. State*, 345 Ga. App. 822, 824 813 S.E.2d 425, 427 (2018), citing *Olds v. State*, 299 Ga. 65, 70 (2016).

- “[T]he exclusion of evidence under O.C.G.A. §24-4-403 is an extraordinary remedy which should be used only sparingly….” *Lowery v. State*, 347 Ga. App. 26 (2018), “Relevance and probative value are related, but distinct, concepts. Relevance is a binary concept—evidence is relevant or it is not—but probative value is relative. Evidence is relevant if it has “any tendency” to prove or disprove a fact, whereas the probative value of evidence derives in large part from the extent to which the evidence tends to make the existence of a fact more or less probable.” *Olds v. State*, 299 Ga. 65, 75 (2016).

- Under Rule 403, balance should be struck in favor of admissibility. *State v. Voyles*, 345 Ga. App. 634 (2018).

- Under Rule 403, you are asking the question as to whether the probative value of the evidence is ***substantially*** outweighed by the danger of ***unfair*** prejudice.

- You perform the 403 analysis last because you must first determine whether the evidence is even relevant. Same with authentication, hearsay and best evidence – you have decided it is worthy of being introduced – now you need to decide if there is some **unfair** prejudice (all relevant evidence is prejudicial – it would not be relevant otherwise – see *Armstrong v. State*, 310 Ga. 598 (2020) that **substantially** outweighs probative value.

- Having discouraged you from using 403 as a sword and merely using it as a shield, I do think you need to consider the “rest” of 403 (ala Paul Harvey and the *Rest of the Story*)

- 403- “Relevant evidence may be excluded if its probative value is 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.

- Look at that “waste of time or needless presentation of cumulative evidence” phrase

- This rule, when the objection is raised, does allow the judge to exclude further evidence of a dead horse.

 - Can be a useful tool in the old toolbox in certain settings

- There are those who attempt to stipulate to certain facts in an attempt to prevent the other side from introducing evidence on that point.

- Parties cannot prevent introduction of evidence by willingness to stipulate; *Scott v. State*, 250 Ga. 195, 198 (1982), citing *Franklin v. State*, 245 Ga. 141, 150 (1980).

- However, the appellate cases say that a part of the 403 analysis should include an acknowledgement of whether the point made by the evidence is in controversy. If not, the probative value falls. If controverted, the probative value is high. That analysis should be a part of your 403 mantra. (*Houseworth v. State*, 348 Ga. App. 119. 129 (2018) “This is because probative value depends upon the need for the evidence. When the fact for which the evidence is offered is undisputed or not reasonably susceptible of dispute, the less the probative value of the evidence.”)

*So that’s it for our episode on evidence evaluations of social media – which really was just reinforcement of the principle that judges should engage in a process when evaluating any evidence objection.*

Remember to start with relevance, then move to authentication, then hearsay, then best evidence, and finally – but ALWAYS – conclude with 403.

*Thank you for listening to the Good Judge-Ment Podcast.*

Thanks to everyone who has reached out to us at goodjudgepod@gmail.com. We have received a bunch of great ideas for episodes and those are in the works.

*You, too, can have these two yahoos discuss an issue you want us to discuss but we cannot read your mind. So send us an e-mail at goodjudgepod@gmail.com.*

You can visit our website, goodjudgepod.com, for the episode notes from this and all other episodes.

*Again, thanks for listening to the Good Judge-Ment Podcast. And remember…*