

USING TEXT MESSAGES & COMMON EVIDENTIARY ISSUES

Do You Want Your Own Client's Texts?

We frequently serve discovery requests and issue subpoenas in an effort to get the cell phone records of an opposing party, but lawyers should consider the benefits of getting their own clients' texts when first investigating the case. The focus of this paper concerns using your own client's messages, or your client's family/friends' messages, which present unique evidentiary hurdles since they cannot be used as admissions of a party opponent.

Here are just a few reasons why you should get your client's messages:

A. Establishing a Timeline. Litigants often cannot recall key dates and times. Most messaging apps will show the date and time. For example, Apple iPhones will show the exact minute for each text sent and received, and you can easily "screenshot" the messages to preserve the time and message. There are numerous how-to video on YouTube and other platforms that show you how to "swipe right" to show times for each text on a iPhone.

B. Refresh Memories. By the time client's come through our door, memories have often faded. Going back through messages with your client that were sent in the moments or in the days following an event will usually refresh the client's memory and almost always produce newly-remembered information that may have been missed. Text messages can technically be used to refresh a client or witness memory during their testimony pursuant to Tenn. R. Evid. 612.

C. Corroborate the Client's Story. Even in an admitted liability case, there will be facts in dispute. Your client will be questioned and potentially attacked on what he/she says was done or said. Conversely, in the event the text messages are "bad" for the case in that they don't completely bolster the client's version of events, the attorney will be better equipped to represent the client knowing this on the front end.

D. Identify Problems Early. Getting your client's messages early on can make a big difference in how you view the case and whether you want to take it. In case of disputed facts where credibility will be at issue, this is a must.

E. Preserving Evidence. You may think to yourself that the opposing party will subpoena the client's phone records, so I'll just deal with it then. That could be a mistake and potentially lead to issues later in the case. Most of the bigger cellular carriers, *e.g.*, AT&T, Verizon, etc., do not store text and data usage after one year, and typically you cannot get the content of the messages from the providers. Litigants and lawyers have a duty to take reasonable efforts to preserve evidence and a failure to do so can lead to possible sanctions. See Tenn. R. Civ. P. 34A.02; also see Tatham v. Bridgestone Americas Holdings, 473 S.W.3d 734 (Tenn. 2015)(holding that spoliation sanctions does not require intentional misconduct, but may be based on inadvertent spoliation if the party should have known the evidence was relevant).

Lawyers and litigants have a duty to take res preserve evidence.

F. Giving Your Decedent or Plaintiff a Voice. In a wrongful death case or a case where the plaintiff is catastrophically injured, getting the decedent or plaintiff's text from the time before, during, and after the incident at issue may be the only way for the jury to know what was going through the person's mind. The information may bolster your damages, *e.g.*, demonstrates firsthand knowledge of the pain, fright, etc. the decedent experienced before death. In a wrongful death case, text messages from the decedent can be a powerful and chilling piece of evidence. The author recently tried a health care liability case involving the failure to diagnose a brain bleed in a 25 year old patient in the ED who sadly past away some days later. The text messages between the decedent and his family were admitted and published to the jury which allowed the jury to see firsthand the pain and sensations the young man experienced before and after the ED visit.

Rule 901. Authentication

The manner of authenticating text messages, under Tenn. R. Evid. 901, is largely no different than authenticating any other written document. Tennessee Rule of Evidence 901 provides, “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier that the matter in question is what its proponent claims.” Tenn. R. Evid. 901(a). Evidence may be authenticated through, “[t]estimony that a matter is what it is claimed to be” or “[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” Tenn. R. Evid. 901(b)(1), (4). Testimony from either the party sending the message or recipient of the message will usually suffice.

For a more detailed discussion regarding authentication of text messages and social media messages, see State v. Burns, 2015 WL 2105543 (Tenn. Crim. Ct. App., May 5, 2015) and State v. Jeremiah McDaniel, 2022 WL 558283 (Tenn. Crim. Ct. App., Feb. 24, 2022).

Prior Consistent Statements – Using Texts to Corroborate Your Client’s Testimony.

Often we want to introduce our client’s text messages to bolster the client’s testimony of the facts, but that doesn’t necessarily make it relevant and will always present a hearsay issue.

When a past statement, e.g., text message, is inconsistent, any party may use it to impeach even their own clients, under Tenn. R. Evid. 613, but what about prior consistent statements of our own client/witness?

The Tennessee Supreme Court discussed an exception to the rule against prior consistent statements in Sate v. Herron, 461 S.W.3d 890 (Tenn. 2015), which held:

One exception to this general rule permits the admission of prior consistent statements to rehabilitate a witness whose testimony is attacked on cross-examination as “recent fabrication” or “deliberate falsehood.” This exception permits the prior consistent statement to be used as a means of rebuffing such attacks and showing that the witness's trial testimony is consistent with statements made before any improper influence or motive to lie existed. Thus, a prior consistent statement may be admitted pursuant to this exception only when the witness's testimony has “been assailed or seriously questioned to the extent that the witness'[s] credibility needs shoring up.” Prior consistent statements admitted pursuant to this exception are not to be used as substantive evidence of the truth of the matter asserted and are to be used only to rehabilitate the witness's credibility. . Furthermore, upon request, a trial court should instruct the jury as to the limited purpose for which a prior consistent statement has been admitted.

Herron, 461 S.W.3d at 905. It should be noted that, under Herron, a prior consistent statement used to rehabilitate the witness is not hearsay because it is not viewed as being offered for the truth of the matter asserted but, instead, offered to rehabilitate the witness’s credibility. See id at 905.

RULE AGAINST HEARSAY & POSSIBLE EXCEPTIONS

The most obvious challenge with offering out-of-court text messages of your client or a favorable witness is getting around Tenn. R. Evid. 802's prohibition of hearsay evidence. Every case and scenario will present its own challenge, and it may not be possible to find an applicable hearsay exception, but below are some examples that could apply:

Rule 803(2) Excited Utterance Exception.

To rely on the Excited Utterance exception, you must show that the statement in the text message:

- Relates to a "startling event or condition;" and
- Was made at a time when the declarant was still under the "stress or excitement" of the startling event or condition.

What is a "Startling Event or Condition?"

A "Startling Event or Condition" is undefined by the Rule, but the Tennessee Supreme Court has held that the "event must be sufficiently startling to suspend the normal, reflective thought process." State v. Franklin, 308 S.W.3d 799, 823 (Tenn. 2010). Rule 803(2) does not require that the statement, alone, establish the "startling event" requisite and thus courts should consider extrinsic proof to establish this requirement.

Motor Vehicle Accident – Startling Event?

Yes, generally. This will likely be case dependent, but the Tennessee Supreme Court in Davidson v. Lindsey, 104 S.W.3d 483 (Tenn. 2003), acknowledged that a MVA is startling event and a plaintiff's statement to law enforcement at the scene of the wreck explaining the events leading up to the wreck was admissible as an excited utterance. See also Irwin v. Anderson, 2012 WL 6589932 at 2* (Tenn. Ct. App., Dec. 17, 2012).

An Injurious or Painful Incident – Startling Event?

Potentially. See State v. Gordon, 952 S.W.2d 817 (Tenn. 1997)(a child’s statement regarding painful urination subsequent to sexual assault was considered an excited utterance); See also Coyle v. Kristjan Palusalu Maritime Co., 83 F. Supp. 2d 535 (E.D. Penn. 2000)(holding that a longshoreman’s statement to his supervisor shortly after a fall met the hearsay exception where the fall was a “startling event” and the statement was made no long thereafter).

Witnessing a Fall or Serious Injury to Another?

Potentially. See e.g., Brunsting v. Lutsen Mountains Corp., 601 F.3d 813 (8th Cir. 2010) (reversing the lower court’s exclusion on the basis of hearsay and finding that the statement of a witness to a near-fatal ski injury relating to the incident was within the excited utterance exception).

Rule 803(3) Then Existing Mental, Emotional, or Physical Condition.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Any Text Message describing the author's then-present:

- State of Mind
- Emotion
- Sensation
- Physical Condition
- Intent
- Plan
- Motive
- Mental Feeling
- Pain
- Bodily Health

can qualify for this hearsay exception, which can be very broad with smart lawyering.

A Particularly Important Exception

Since text messages are sent and received in real time, this hearsay exception should never be overlooked. We live in a fast-paced world where we often describe our current surroundings, feelings, and future plans (intent) via text messages.

In a healthcare liability case, the messages sent and received by the injured person should always be explored. In my experience, patients and their family members text more than usual in the setting of the hospital or doctor's office. This could be for any number of reasons, e.g., prefer to have a non-verbal conversations about sensitive info, they're bored, they're scared, the patient's family is worried and wanting updates, etc. If you're the plaintiff's attorney, get the messages and get them early. They could give you key insights, or, at worst, alert you to problems early on that can be addressed.

MVA Hypothetical Example: In a case involving a motor vehicle wreck, the plaintiff alleges injuries that include an ankle fracture and a rotator cuff tear requiring surgery, although the rotator cuff tear wasn't diagnosed until several months after the wreck. The defense attacks causation as to the shoulder injury by pointing out the medical records from the ER on the night of wreck don't mention shoulder pain, and the defense identifies an IME expert who will testify that an acute rotator cuff tear from a trauma will be immediately symptomatic and thus it wasn't caused by the wreck since she didn't report shoulder pain. The plaintiff argues that she did have severe shoulder pain immediately following the wreck and told the ER providers about it, although her ankle fracture was more concerning at the time.

After going through the plaintiff's texts, you find this useful exchange between the plaintiff and her mother:

Plaintiff: *Oh my god, I was just in a wreck.*

Mom: *Are you okay?*

Plaintiff: *No, I think my ankle is broken and my shoulder is killing me...
EMTs are taking me to the ER...
Can you come meet me at the ER?*

Mom: *Yes! Leaving Now.*

The above exchange is relevant to demonstrate the plaintiff's immediate shoulder pain. The plaintiff, herself, or the mother, can authenticate the message under Rule 901. Although the statements are hearsay (when offered by the plaintiff), they fall within Rule 803(3) because they clearly describe then existing sensations, pain, and bodily health. The statements would likely also be admissible under Rule 803(2) as an excited utterance.

Rule 803(4) Statements for Purposes of Medical Diagnosis and Treatment.

Statements made for purposes of medical diagnosis and treatment describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment.*

*Unlike its Federal counterpart, TRE 803(4) requires a showing that the statement was made for diagnosis and treatment, not either.

Most clients aren't texting with their medical providers, so this exception is often overlooked. However, many large network providers have secure messaging apps within their patient portals where patients can send and receive messages. These may not always make it in the legal medical record, so it's worth quizzing your clients (or the injured plaintiff if you are defending) about use of the patient portals.

Even though clients don't typically message or text with their medical providers, it's useful to remember that Rule 803(4) does not specifically require the statement be made to a physician or even a medical provider, if the other prerequisites are met, which may open the door for messages between family members or friends. See e.g. State v. McLeod, 937 S.W.2d 867 (Tenn. 1996); State v. Rucker, 847 S.W.2d 512 (Tenn. Crim. App. 1992)(allowing statements from a third party relating the patients history and conditions).

Statements from a child to a parent?

Possibly. A well-recognized evidence treatise, *Tennessee Law of Evidence* §8.09[7], addresses that precise circumstance and submits that a child's statement to a parent indicating that the child's head hurt would qualify under Rule 803(4) where the statement could be seen as being made for diagnosis and treatment (perhaps the parent would give the child an aspirin). See Cohen, Sheppard, Paine, Tennessee Law of Evidence, §8.09 (6th ed. 2011 LexisNexis Matthews Bender)

Rule 106. Writings or Recorded Statements – Completeness

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that the time of any other part or any writing or recorded statement which ought in fairness be considered contemporaneously with it.

Rule 106, or the Rule of Completeness, is typically thought of as simply echoing Tenn. R. Civ. P. 32.01, which allows for completeness in the use of deposition testimony at trial. However, unlike Rule 32.01, Tenn. R. Evid. 106 is not limited to deposition testimony. In fact, Rule 106 is not even limited to using the same writing offered by the opponent. Rule 106 may also be used in conjunction with the authority supporting the use of prior consistent statements to bolster your client's testimony after the opponent makes an insinuation that the witness is lying. On its face, nothing in Rule 106 would prevent the introduction of statements in a text message, so long as the statements "ought in fairness be considered contemporaneously" with the writing or recorded statement being offered by the opponent.

MVA Hypo Cont... Going back to the MVA hypothetical with a causation dispute over the shoulder injury. During direct exam at trial, the plaintiff testifies that her shoulder pain began immediately following the wreck, even though the rotator cuff tear was not diagnosed until much later. During cross examination, defense counsel impeaches the witness using the ER records and the History of Present Illness section describing plaintiff's statements which mention only ankle pain and don't say anything about shoulder pain. Although defense counsel has not blatantly accused the plaintiff of lying, the insinuation is just that since the records contradict her testimony. In this hypo, the plaintiff can rely on Rule 106 to rehabilitate using a text message sent from the wreck scene to plaintiff's mother stating, "I think my ankle is broken and my shoulder is killing me." Note that in this scenario the text message can also be admitted as substantive proof of the matter asserted because it meets the exception found in Rule 803(3).

RULE 703. Bases of Opinion Testimony by Experts.

While it may be unorthodox, it may be possible to inform the jury of the existence of certain messages and contents through an expert.

Through Your Own Expert:

You'll recall that one use for reviewing text messages is to know the times messages are sent/received. These messages may allow you or your experts to construct a timeline which might be otherwise impossible. So long as the particular expert can establish that the information reviewed, *i.e.*, text messages with time stamps, contain information regularly relied upon by experts in the particular field, the expert witness can explain his/her reliance on the messages to the jury under Rule 703, even though the messages themselves may not be admissible.

Through Your Opponent's Expert:

Producing your client's text messages in written discovery and/or during discovery depositions will most likely result in the messages being provided to your opponent's experts, along with a sea of other materials. Documents and materials reviewed by an opposing expert in formulating the expert's opinions are fair game for cross examination.

MVA Hypo. Cont.. Again, going back to the MVA hypothetical. Plaintiff's text to her mother expressing the shoulder pain at the scene was produced to the defense in written discovery. The defendant provided all written discovery to its expert orthopedic doctor who performed an IME. The orthopedic expert testifies during the defense case-in-chief that the plaintiff's rotator cuff tear couldn't have been from the wreck, because an acute, traumatic rotator cuff tear will become symptomatic immediately after the trauma, and since nothing was mentioned at the ER about shoulder pain, the shoulder injury was not caused by the wreck.

Wouldn't you love to be the one who gets to cross examine the doctor? Chances are the expert would be educated about the text right before his testimony, but what if it fell through the cracks and he didn't know about it? What a rare moment that could be.

Conclusion

The evidentiary issues that could arise in the context of text messages are vast, just like any other statements. The above information is a quick overview of just a few techniques to think through from an admissibility standpoint as well as from a utility standpoint. Lastly, while most of this information focused on text messages, the rules and analyses should equally apply to any real time messaging, including social media, which should always be explored.

A review of Tennessee caselaw demonstrates that, in today's age of technology, statements contained within text messages, emails, and social media postings are commonly treated as any other witness statement for evidentiary purposes and are amenable to hearsay exceptions just like any other traditional forms of evidence. See e.g., *State v. Cook*, 2013 WL 9570493 (Tenn. Crim. App., Sept. 4, 2013)(holding that text messages sent by victim to the defendant were admissible and relevant to show the defendant's state of mind, intent, and motive); *State v. Brown*, 2019 WL 1514551 (Tenn. Crim. App., April 8, 2019)(upholding the trial courts admission of text messages to demonstrate the state of mind and intent of the defendant); *State v. Rivera*, 2016 WL 2642635 (Tenn. Crim. App., May 6, 2016)((a) upholding trial court's rule that victim's hearsay statements were admissible to show victim's mental state, and (b) upholding trial court's admission of text messages were admissible to show victim's mental state and plans, notwithstanding hearsay objection); *State v. Owens*, 2021 WL 2452158 (Tenn. Crim. App., June 16, 2021)(holding that text messages were properly admitted under hearsay exception for "statements against interest" provided by Rule 804); *State v. Enix*, 2021 WL 2138928 (Tenn. Crim. App., May 26, 2021)(upholding admission of text messages between victim and a friend on that grounds that the statements showed the victim's state of mind, which was relevant to the defendant's intent, notwithstanding the defendant's hearsay objections); *State v. Lowe*, 2016 WL 4909455 (Tenn.

Crim. App., July 12, 2016)(upholding admission of text messages between defendant and boyfriend because they were information relied upon by expert witness and properly admitted under Tenn. R. Evid. Rule 703); *State v. Jackson*, 2018 WL 6266163 (Tenn. Crim. App., Nov. 29, 2018)(upholding trial court's admission of photos taken of text messages on the defendant's phone); *State v. Justice*, 2009 WL 1741398 (Tenn. Crim. App., June 15, 2009)(noting that text message sent by a third-party to the girlfriend of the defendant that she was mad and upset fell under the hearsay exception of Rule 803(3) then existing state of mind, present sense impression); *State v. Burns*, 2015 WL 2105543 (Tenn. Crim. App., May 5, 2015)(discussing the authentication of emails, texts, and social media posting through use of circumstantial evidence and upholding admission of social media messages by defendant).