



Admissibility of Text Messages: Challenging Authenticity

By Joshua C. Gilliland, Esq
Professional Development Manager

A criminal defendant appealing his conviction on ineffective counsel and insufficient evidence to support his convictions challenged text message evidence. *State v. Loye*, 2009 Minn. App. Unpub. LEXIS 660, 1 (Minn. Ct. App. 2009).

The Defendant's key argument at trial was challenging his victim's credibility as the only witness to his attack upon her. *Loye*, 2. Judging by his conviction, this obviously did not work out well for him.



The Defendant argued the court erred in excluding text messages the victim sent after the assault. The Defendant claimed these messages were relevant and were not barred as hearsay. *Loye*, 3.

The Court found no error. *Loye*, 3.

Trial Procedure & Rules of Evidence

The trial court did allow some text message evidence that the victim "loved" the Defendant. *Loye*, 3.

Instead of offering text messages acquired from a cell phone with a tool such as [Paraben](#), a collection expert who could explain collection methodology or a subpoena to a cell phone service provider to produce text messages, the Defense counsel offered a handwritten transcript of the text messages. *Loye*, 4.

There was no one offered to authenticate this handwritten text message transcript. The Prosecution objected to introducing the trial exhibit. *Loye*, 3.

The Defense successfully used the handwritten transcript to refresh the victim's recollection and read into the record. *Loye*, 4. The handwritten notes were only admitted as a court exhibit and never went to the jury.

Flashbacks to Trial Advocacy



Trial Advocacy and Evidence professors teach law students that “authenticity is a precondition to the admissibility of evidence.” *Loye*, 4.

The Court found that the Defendants failed to lay any foundation with the handwritten text message transcript, thus the trial court properly excluded the evidence. *Loye*, 4. This might have been different if the Defendant had offered either the cell phone or a transcript from the cell phone service provider.

“If I Can’t Have It, No One Can”

The Defense tried arguing in the alternative that no text message evidence should have been admitted. *Loye*, 4-5. The Defense claimed that since the handwritten transcript was read to the jury to refresh the victim’s recollection, “The court erred by letting defense counsel cross-examine the alleged victim with the evidence without an accurate record that could be entered into evidence.” *Loye*, 5.

Claiming prejudice because a jury has to rely on their own memories instead of text messages did not fly with the Court. The Court noted jurors often rely on testimony and there was no explanation how this was prejudicial. *Loye*, 5.

Admissibility Battles Can Be Avoided

Defense counsel could have avoided their inability to authenticate text messages with better case planning. A subpoena could have been sent to the cell phone service provider on the victim’s text messages over the relevant time period. A collection examiner could have defensibly imaged the victim’s (or the Defendant’s) text messages. Photos could have been taken of the phone itself with the text messages. However, none of those things happened.