



Evidence In Civil Litigation: 2007 Trends & Developments

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New Rules of Electronic Evidence

- FRCP Amended Effective December 2006
- Focused on identification of ESI and trying to get parties to identify issues early during the meet and confer process
- Some stylistic changes this year



Changed Rules

- Rule 16 **Scheduling Order**
- Rule 26(f) **Early Meeting of Counsel**
- Rule 26(a) **Initial Disclosures**
- Rule 26(b) **Duty to Disclose**
Limits on Scope
Inadvertently Produced Material
- Rule 33 **Interrogatories to Parties**
- Rule 34 **Demand for Documents**
- Rule 37(f) **Sanctions**
- Rule 45 **Subpoenas**



Unchanged Rules

- FRE 401 **Relevance**
- FRE 901 **Authenticity**
- FRE 801 **Hearsay**
- FRE 1001 **Original Writing Rules**



What ESI is Affected?

- Databases
- Internet or Intranet content
- Text Messages, IM
- Computer stored records, documents
- Computer animation or simulations
- Digital photographs
- Email



United States v. Safavian, 435 F. Supp.2d 36 (D.D.C. 2006)

- Defendant argued emails produced by former law firm improperly admitted, because not properly authenticated
- Gov't offered certification from record custodian under FRE 902(11)
 - Court rejected, but admitted under FRE 901 (look like email addresses, used @, etc.)
 - Other email authenticated under 901(b)(3) (compared to other, authenticated email)
- Whether email string was altered can be argued to jury, does not go to authentication



United States v. Safavian, 435 F. Supp.2d 36 (D.D.C. 2006)

- Defendant argued emails produced by former law firm improperly admitted, because hearsay
- Admissions by party opponent – FRE 801(d)(2)A
- Adoptive admissions – FRE 801(d)(2)(B)
- Co-conspirator statements in furtherance of conspiracy
- Not hearsay (e.g., not for truth of matter, state of mind)



United States v. Safavian, 435 F. Supp.2d 36 (D.D.C. 2006)

- Summary:
 - Authentication requirement not rigorously applied
 - Hearsay was carefully analyzed



Lorraine v. Markel, 241 FRD 534 (D. Md. 2007)

- One year later, Judge Grimm reminds all that the rules apply
- Cross motions for summary judgment
- Both denied without prejudice; neither party was able to get emails admitted
- Wrote extensively on basic requirements (cites *Safavian* throughout)



Lorraine v. Markel, 241 FRD 534 (D. Md. 2007)

- Authenticity FRE 901-902
 - Cites Manual for Complex Litigation 11.447: “Computerized data . . . Raise unique issues concerning accuracy and authentication.”
- **Possible Issues**
 - How is the ESI routinely made?
 - If a database, how do you know the output is accurate?
 - Use of the “hash values” (MD 5 and SHA)?
 - Use of metadata?
 - Someone else types email at another’s computer?



Lorraine v. Markel, 241 FRD 534 (D. Md. 2007)

- Hearsay FRE 801-807
- Issues
 - Is it a “statement by a person”?
 - Hearsay exception?
 - Business record (then self-authenticating, FRE 902(11)); Is employee required to make and maintain such emails?
 - E-mail chains?



Lorraine v. Markel, 241 FRD 534 (D. Md. 2007)

- Original Writing Rule FRE 1001-1008
 - aka “Best Evidence Rule”
 - Must use original or duplicate original to prove the content of a writing
- Issues
 - With ESI, what is the original?
 - What is a “duplicate original”?
 - Are you really trying to prove the “content of a writing”?
 - Can avoid by using expert testimony (can express opinions based on matters not in evidence)



FRCP: ESI at Trial

- Practical issues related to ESI
 - How? Print outs? Computer? Wired courtroom?
 - Identification of native documents without Bates numbering



FRCP: ESI at Trial

- Practical issues related to ESI
 - Ensuring documents have not been altered
 - E-mail chains?
 - Who is real author?
 - Who really sent it?
 - Who is custodian of documents located on shared servers?



FRCP: ESI At Trial

- Practical solutions for admissibility
 - Stipulations of admissibility
 - Requests for admission of facts that establish admissibility and genuineness



FRCP: Managing the Risks

- Practical solutions for admissibility
- Lay witnesses can lay foundation for admissibility of documents
 - E.g., testimony about operation and reliability of computer systems, how documents are used within a business, what fields mean
 - Fact witness can testify about events reflected in the document



FRCP: Managing the Risks

- **Practical solutions for admissibility**
- **Expert witnesses can get the evidence admitted**
 - If issues about authenticity, expert testimony (might using hash or metadata)
 - Expert witness can offer opinions based on information in ESI (materials relied upon do not need to be admissible)



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