A TRIAL LAWYER'S TAKE ON THE ADMISSIBILITY OF ELECTRONIC RECORDS IN COURT

SESSION #M010
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It seemed as if paper was raining from the skies in Manhattan. And, for days after the collapse of the World Trade Center towers on 9/11, random pieces of paper continued to rain on Manhattan. To most people on the streets, these were meaningless pieces of paper. But to many these papers no doubt held special and unique promise: insurance policies for unpaid benefits to holocaust victims and their families; schools awaiting funds from wills and trusts; key pieces of evidence for upcoming trials. Although copies of some of these documents eventually may be authenticated in a court of law, the financial toll resulting from the authentication proceedings or the complete loss of irreplaceable documents may never be documented.

In the wake 9/11, it has become more apparent than ever that companies must continue pushing towards a paperless society. And, more recently, with the Enron/Arthur Andersen debacle, record keeping is at the forefront of news headlines. These watershed moments in history, coupled with the increased reliability on electronic and imaged documents, have raised awareness of records management practices. With the resulting focus on records and information managers ("RIM"), a prudent RIM should have a basic understanding of how electronic records are admitted in court. Several other authors and speakers have been focusing on the issue of discovery.[1] Still, the RIM should have an understanding of the step-by-step process that occurs in admitting documents at trial to better grasp the import of document production in discovery and, of course, general records retention.[2] Accordingly, the focus of this article is on salient issues surrounding the actual court admission process, once the electronic records have been obtained through discovery.[3] To that end, this article will cover the following:

1) What are the salient principles that govern the admissibility of records in court?

2) What types of challenges do different types of electronic records face to become admitted in a court?

3) What is the importance of a retention policy and schedule in a courtroom?

I. ADMISSIBILITY & DISCOVERY PRINCIPLES

Once documents have undergone the discovery process, parties need to prepare to have key documents admitted in court. In doing so, the parties and the court must heed fundamental principles of

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[1] See, e.g., Ebiner, L. & Yano, L. "Discovery of Computer Records." In *California Deposition and Discovery Practice*, Chapter 2A, DeMeo, J., ed. Matthew Bender & Co., Inc.: San Francisco, CA 2002; Artynian, A. "Legal Impediments to Discovery and Destruction of E-Mail." In *Journal of Legal Advocacy & Practice*. ____ 2000.

[2] This article is intended as a primer of fundamentals for non-lawyers. It is not intended to provide in-depth legal advice or analysis of the evidentiary rules and exceptions covered in entire law school courses and volumes of treatises. See, e.g., Lempert, R. & Saltzburg, S. *A Modern Approach to Evidence*. West Publishing 1982; Green, E. & Nesson, C. *Problems, Cases and Materials on Evidence*. Little, Brown & Co. 1983; Mauet, T. *Fundamentals of Trial Techniques*, Second Edition. Little, Brown & Co. 1988.

[3] Discovery is the formal legal process used before trial to obtain evidence from parties and witnesses, by any of several means including depositions, document demands, interrogatories, and subpoenas. These are discussed in a little more detail later in this article.

admissibility - in part affected by the conduct of the parties during discovery - in order to have those key records admitted. Thereafter, the parties must overcome a series of legal obstacles, designed to ensure that only trustworthy documents are admitted in court. The process involves "authentication" of the documents, followed by the court's ruling - after sufficient evidence, witness testimony and other legal challenges have been heard - as to whether or not the document will become an exhibit for the jury to see and use in its final deliberations.

A) The Effect of Discovery on Court Admission

1) *Discovery Does Not Equate to Admissibility*

The rules of discovery allow an opposing party to obtain all documents "reasonably calculated to lead to the discovery of admissible evidence."[4] Most RIM's have had or will have to deal with production of records that fall under this broad umbrella, either through a deposition, a subpoena, or a demand for production of documents, sometimes accompanied by interrogatories.[5] Given the breadth of documents that can be "discovered" through any of these demands, it is important to note that not all discoverable documents are admissible in court. The attorneys and parties may get to see thousands of documents, but if the attorneys want a particular document to be admitted in court, that document will need to satisfy the Best Evidence Rule, authentication and other admissibility requirements discussed below.

If, for instance, a defendant in an environmental contamination case wants to prove that the contamination came from sources other than his own operations, he might subpoena the records of operations of every other previous owner or company that operated on the site. If one of those other operators happens to be a major oil company, the amount of records that would have to be produced could be daunting.

Unfortunately, even if a document cannot become an exhibit at trial, discovery rules allow parties to go on a rather intimidating fishing expedition through company documents under the auspices of seeking documents that could reasonably lead to finding otherwise admissible documents. And, as discussed below, an inadmissible document still can be used to a limited extent at trial. Thus, even the most daunting discovery demand must be given careful attention, as it can drain valuable company resources.

2) *Spoliation of Evidence Doctrine*

The ENRON/Arthur Andersen debacles, and other recent charges against Wall Street firms such as Merrill Lynch, typify the power of the spoliation of evidence doctrine. Courts are free to issue monetary and even criminal sanctions to parties who knowingly destroy documents that are a part of a litigation matter or a tax audit. In the Arthur Andersen case, the court came down hard on the individuals who made the decision to destroy ENRON documents that were the subject of a tax audit. Similar sanctions could apply to matters undergoing litigation. And, all parties involved in the destruction process that either knew or had reason to know of the litigation or audit are subject to the wrath of the court, including the possibility of criminal sanctions and jail time.

B) Fundamental Principles of Admissibility

As a general rule, corporations have one of three ways to explain their case in a court of law: 1) via the corporation's own product; 2) via testimony from persons on the witness stand; and, 3) via documentary evidence. The admissibility of electronic records draws primarily on principles from the

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[4] *Federal Rule of Civil Procedure*, Section 26(b)(1).

[5] A "deposition" is where a party or a non-party are called to provide testimony before the attorneys and there is a court reporter who gets in writing all conversations between and among the witness and the attorneys, including every question posed and the corresponding answer the witness gives to the attorneys. A "subpoena" is the legal instrument used to demand production of documents from a non-party in a lawsuit. The "demand for production of documents," on the other hand, is the legal instrument used to obtain documents from actual parties to the lawsuit. "Interrogatories" consist of written questions posed on a party-witness, which the witness must answer in writing usually within 30 days.

latter two, and in almost all instances a witness is necessary to prove the validity of the document sought to be admitted. Often, parties will call a RIM to establish such validity. Thus, a RIM should have some understanding of the basic guiding principles namely: the treatment of electronic records as "writings," authentication issues, and the business records exception to allow otherwise inadmissible electronic documents.

1) *Electronic Records as Writings and The Best Evidence Rule*

Rule 1001 of the Federal Rules of Evidence ("FRE") defines "writings" as consisting of "letters, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation."[6] This definition clearly encompasses electronic records, which for all intents and purposes are considered "writings" in court. Thus, when it comes to having an electronic record admitted in court, judges generally turn to the basic laws that govern the admissibility of traditional written documents. The most fundamental of these principles is the Best Evidence Rule, which is the seminal principle used to assure the court that the contents of a writing are trustworthy.

Many trial attorneys consider the Best Evidence Rule[7] to be an outdated principle. Nonetheless, its spirit dominates the admission process: "to ensure that the exact contents of a writing are brought before the trier of fact [the judge or jury]." The rule is this: "in proving the terms of a writing, where the terms are material, the original writing must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent."[8] Thus, someone trying to have an electronic record admitted in court must convince the judge that the electronic version of a document is the "original writing." As discussed more fully in Section II below, this is particularly challenging if the RIM is unable to capture the exact version, date and time of the document at hand. The proponent must authenticate the electronic record to establish that the end product is indeed an "original."

2) *Authentication Issues*

The issue of authentication should be of paramount concern to a RIM. FRE 901 requires the authentication or identification of "writings" before admission in court. The most common methods used to authenticate electronic documents are either by testimony of a witness with knowledge that the "writing" is what it is claimed to be or by evidence describing a process or system used to produce an accurate result. In either case, when it comes to electronic documents, lawyers and courts often call on the RIM to attest to the process used to generate an original from the electronic system. If, for instance, an electronic change order is at issue, the judge will need testimony from the RIM to convince her that the change order presented to the court is a true and accurate representation of the "writing" proposed for admission.

3) *Hearsay and the Business Records Exception*

One of the most likely challenges used to keep electronic records out of court is a principle called the Hearsay Rule. This rule forbids the admission of statements made outside the courtroom, which are being introduced in court to prove the truth of the statements contained therein.[9] For instance, the statements contained in e-mails generally would be prohibited under this rule. This is because the statements contained in e-mails are made outside the halls of the courtroom. This rule would practically preclude the admission of all documents, except for key exceptions such as the business records

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6 Although individual states will have their own variations on the rules of evidence, including the definition of a writing, for purposes of this article the author will apply the Federal Rules of Evidence, which most states tend to emulate.

7 FRE Rule 104(b).

8 Lempert & Saltzburg, supra, Ch. 11, Section 3, page 1007.

9 FRE Rule 802.

exception.[10] The business records exception allows the admission into evidence of otherwise inadmissible hearsay statements/documents that are maintained during the regular course of business. At the core of this exception is the assumption that records kept in the regular course of business are trustworthy, and the RIM is often called upon to establish the business record keeping process to prove this position.

4) *Other Legal Challenges to Admissibility in Court*

Similar to obstacles used to challenge production of documents in discovery, the opposing party may raise challenges to the admission of electronic documents in court, which are fact specific to the case at hand. Some such challenges might include privilege, confidentiality, and privacy claims. In addition, a party may try to raise the Parol Evidence Rule and the Statute of Frauds, which are legal maxims that generally require certain types of documents to be evidenced by a writing, such as wills and trusts. These challenges are not explored in this article, as they most often are resolved during the discovery process, well before parties reach the courtroom steps.

C) Introduction at Trial

1) *Authenticating the Records*

Continuing with the example of the environmental case noted in section (A)(1) above, if one of the documents produced is a photograph on microfiche of a major fire that occurred during the producing parties' operations, the admission of that photograph in court would hinge on whether a witness exists who can attest to its authenticity. The original photographer would be ideal to attest that the image is a true and accurate depiction of whatever appears in the photograph. In the alternative, a witness who was present at the time may be able to verify that the photograph is a fair representation of the scene depicted. The more critical the photo is to a case, the more important it will be for the actual photographer to authenticate the document. In the case of electronic records, the RIM in some instances may be that crucial witness needed to authenticate the records sought to be introduced at trial. The RIM would be called to attest to the reliability of the records maintenance program, so that the court is assured of the trustworthiness of the document at hand.

Parties to a lawsuit can study and flaunt an incriminating photograph or electronic record, but if it cannot be authenticated it will never become an exhibit in court. Nevertheless, the photograph may still be placed on the list of potential exhibits at trial, in case the parties reach a mutual agreement to allow the photograph to be admitted without having to authenticate it. Generally, if all sides agree on the admission of a document, most courts will allow the document to be introduced at trial.

2) *Having the Record Marked as an Exhibit*

Before trial begins, the parties will provide the judge with a list of the documents they each seek to have admitted as exhibits at trial. Depending on the relationship of the attorneys, the parties will usually agree about the admissibility of the more innocuous documents. In those instances, the court will automatically mark them as exhibits for the jury to use in their deliberations. Then, when it comes to more controversial documents, the court will force the parties to go through the authentication procedures noted above.[11] The parties may even agree as to the authenticity of some of the other documents. At that point, the court may mark them as exhibits, but it will postpone a decision on their admissibility until some or all witnesses have testified and other documents have been admitted.

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[10] FRE Rule 803(6). Several other exceptions to the hearsay rule exist, but the business records exception is the most commonly used to overcome the hearsay problems inherent with electronic records.

[11] Of course, the documents have to be relevant. The issue of relevance entails a completely separate legal analysis that goes beyond the scope of this article.

3) *Having the Record Admitted as an Exhibit*

Even if the parties agree about the authenticity of a photograph or an e-mail, the judge still may not allow the jury to see it. The witnesses may testify about the photograph or the e-mails during the trial, but mere testimony does not guarantee that the jury can take a printout of the e-mail or a copy of the photograph with them to the deliberating room. The judge must issue a final decision on the admissibility of the documents as an exhibit before the jury can see them or consider them. However, if the judge determines, for instance, that the photograph would unduly prejudice, mislead, or confuse the jury, then the jury will not be allowed to see it or use it in any of its deliberations.[12]

II. THE ADMISSIBILITY OF DIFFERENT TYPES OF ELECTRONIC RECORDS

Depending on the electronic savvy of the judge in a court case, parties may have completely diverse experiences in attempting not only to have electronic documents admitted in court, but also in using enabling technology in the courtroom necessary to read or interpret electronic documents. For the most part, courts tend to welcome the practical aspect of using electronic technology to show documents to a jury. However, the parties will bear the expense of setting up the technology in the courtroom, as most courts these days still are not equipped with their own technology.[13]

In any event, in determining the admissibility of electronic records, each type of electronic record poses different admissibility challenges. Following are examples of some of those challenges.

A) E-Mails

Most trial attorneys agree that having e-mails admitted is not a difficult task, so long as the author or even the recipient are on the witness stand to verify its contents. Perhaps the most notorious case to date dealing with the admission of e-mails is the U.S. v. Microsoft case. In that case, the U.S. government used the discovery process to obtain all e-mails contained in the Microsoft system. It would be safe to say that the government spent countless hours perusing every single e-mail, paying particular attention to the e-mails exchanged by high-level managers and officers. Then, when the government found the most incriminating e-mails, it was time to determine how the relevant e-mails would be admitted in court. In all likelihood, the authors of the e-mails were called to attest to their content, and either an IT professional from Microsoft or a RIM had to be called to attest to the reliability of the entire e-mail system, including transmission and storage mechanisms.

B) Internet Cookies

Perhaps more challenging than having e-mails admitted in court is the admission of a log of websites or web pages visited by a party. For instance, how does a prosecuting attorney establish the guilt of an individual who downloads child pornography? In discovery, the prosecutors would seize the individual's home computer. After, forensic information technology ("IT") experts would analyze it to uncover the incriminating sites the individual visited on the Internet. The defendant of course would claim that the cookies on his computer were not the result of any of his searches. So, when it comes to proving in court that the cookies found in the computer resulted from the defendant's own searches, other witnesses and authentication techniques come into play. The IT forensic expert may be called to attest to patterns of usage that connect the defendant with the websites, including a look at some of the websites the defendant visited at his place of employment. The employer's RIM or an IT person might be called to attest to the operation of the system and how cookies of the websites he visited while at work can be traced to his office desktop. The combined patterns of his office desktop usage with that of his home

[12] Here again, the different kinds of prejudice and relevance legal challenges go beyond the depth needed to accomplish the goals for this article.

[13] It is interesting to note that highly sophisticated technology may affect the impressions of the jury. Juries take notice of the expense involved in setting up technology, and may favor the party who comes in with basic paper documents. The decision of how technologically sophisticated to get in court depends on the type of case.

personal computer would be given to the jury in determining the guilt or innocence of a defendant who denies the charges.[14]

C) Word or WordPerfect, Excel, Power Point Documents

Any WORD, WordPerfect, Excel or Power Point document could end up as an exhibit in court. These types of documents may face authentication challenges, especially if the document at hand was transmitted electronically. The parties must convince the court that the printout offered before the court is deemed to be an original. At that point, the court must be shown, possibly with the testimony of a RIM or IT professional, that the document printed from the system is an authentic rendition. The RIM or IT professional's testimony would be needed only in instances where one of the parties challenges the authenticity of the document. The key here is for the RIM or IT professional to establish that the system generated an exact snapshot of the document, as of the date and time at issue.

Another practical challenge parties may face is the readability of the documents, if drafted with technology that is now defunct. In most cases, the party who wishes to introduce the document at trial must provide the technology necessary to read the document. By the time the parties get to trial, the discovery process has taken care of ensuring that data can be read and interpreted. This is because courts will order the producing party to provide the technology necessary to read or interpret documents, even if the process is expensive.[15]

D) Admitting Imaged Documents into Evidence

As noted above, the authenticity of an imaged document depends greatly on whether a person is still around to authenticate its validity. The photograph example noted above illustrates this point. However, documentary evidence may be allowed with the testimony of a RIM who can attest to the trustworthiness and integrity of the system that stores the documents. Companies these days are going to great lengths to ensure that contact information for previous employees are kept up to date and even retained indefinitely in the event one of those former employees is needed to authenticate an imaged document at trial.

E) Enterprise Planning Systems

The modern day treatment of enterprise systems can be traced to the 1960's, when computer systems first entered the corporate scene. In the 1969 case of United States v. De Georgia,[16] a defendant appealed his conviction for interstate transport of a stolen automobile from the Hertz Corporation ("Hertz"). In establishing that the vehicle was stolen, the prosecution relied on information from a Hertz enterprise system. The system indicated that the car was not rented or leased to anyone during the time when, according to the defendant, he had only borrowed it from a friend who was supposedly leasing it from Hertz. Hertz used this computer system to maintain its entire automobile rental and lease information in lieu of any paper record-keeping system. The court held that "it is immaterial that . . . [a] business record is maintained in a computer rather than in company books." The court stated that the law "does not require that, to be admissible, the record must be in writing." The court also concluded that the same protections exist with respect to electronic records as exist for paper documentation. These protections include the preliminary requirement that the prosecution lay a sufficient foundation for the trustworthiness of the evidence under FRE Section 104(b). The court went on to state that "the opposing party is given the same opportunity to inquire into the accuracy of the computer and the input procedures used, as he would have to inquire into the accuracy of written business records." Thus, in

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14 See also, TBG Insurance v. Zieminski, 2002 Cal.App. Lexis 1839 (February 2002) (where a company fired an employee in part for downloading pornography at his work desktop, and while he claimed someone else was using his computer at work, the employer obtained discovery of his laptop computer, which corroborated cookies of similar website visits.)

15 See, e.g., National Union Electric Co. v. Matsushita Electric 494 F. Supp. 1257, 1262 (E.D. Pa. 1980)(where the court ordered a company to translate data for the opponents at great expense to the company).

16 420 F. 2d 889 (9th Cir. 1969).

addressing computerized business records, the court indicated that for evidentiary purposes computer data should be treated as indistinguishable from written material.

It is not likely that a company's entire enterprise planning system will be admitted as an exhibit in court. Parties and courts are more interested in having admitted a few reports generated from the system. In fact, courts often will admit a written abstract or summary of its contents. Then, as to particular reports, the court will need proof that the report generated is indeed a true snapshot of the document at issue before the court.

F) Electronic Signatures

Legislation such as the Electronic Signatures in Global and National Commerce Act (E-Sign) now makes it possible for courts to admit electronic signature documents.[17] E-Sign states that a signature, contract, or other record may not be denied legal effect, validity or enforceability solely because it is in electronic form. In fact, a contract may not be denied effect, validity or enforceability simply because an electronic signature was used in its formation.[18]

Despite the enabling nature of E-Sign and its state counterparts, the RIM must be careful not to confuse documents formed via electronic means with paper records now stored in electronic media. Courts are required to admit documents created in electronic form. However, courts will be much more critical when a party attempts to introduce an imaged version of a document originally created in writing. In that instance, the party will need to convince the court that the original is no longer in existence, and that the imaged version is a trustworthy facsimile of the original. It is also critical to establish that the imaged version could not have been concurrently or subsequently altered in any way from the original version (i.e. the Best Evidence Rule). In fact, some documents are so critical that few courts will allow anything but the original. These documents include, without limitation, wills, trusts, birth certificates, real estate purchase documents, powers of attorney, living wills, and other similar documents requiring a notarized or witnessed signature or a court seal.

III. THE IMPORTANCE OF A RETENTION POLICY AND SCHEDULE

By far the most important tool a party can use to justify its failure to produce a record is a record retention policy. Conversely, a retention policy may be necessary to authenticate a document sought to be admitted in court. A retention policy can be defined as "a uniform policy to maintain, protect, and dispose of records in a consistent manner based on tax, legal and regulatory requirements, as well as fiscal, operational and historical value."[19] As long as a party can convince the court that a record no longer exists because its was destroyed in compliance with an established company policy, the court may spare that party. However, that depends on other factors as well.

A party can be charged with spoliation of evidence if it knowingly destroys records that are the subject of litigation or a tax audit.[20] And, knowledge does not have to be "actual." Knowledge is based on what a party knows or has reason to know about known or potential litigation. Courts are now more than ever interpreting the knowledge of potential litigation broadly. Therefore, it is imperative that the retention schedule always contains a list of "litigation or tax audit hold" documents. The implementation of this requirement could be a logistical nightmare, but the nightmare is much worse if a court comes

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[17] 15 *U.S.C.* Sections 7001 to 7006, 7021 & 7031.

[18] Id. at Section 7001(a).

[19] As defined by the Records Improvement Institute, LLC. Also, a retention schedule is commonly defined as a list of records a company has, which specifies for how long they must be kept, who needs to keep them, and why they need to be kept (i.e. business needs, tax or legal requirements).

[20] See, Proctor & Gamble v. Haugen, 179 F.R.D. 622, 632 (D. Utah 1998) (where Procter & Gamble was subject to monetary sanctions for destroying relevant e-mails during litigation.)

down on a company for spoliation of evidence. In some instances, criminal charges may be applied, which could mean jail time for some individuals.

Another key factor is reliable testimony from a RIM that will convince the court that the retention policy and schedule has been in existence and has been properly implemented. Courts may scrutinize the dates of implementation and the overall training and application process. If not the courts, the opposing party will likely try to launch attacks that infer purposeful destruction of documents. In fact, parties often use the absence of a key document as a more powerful tool to convince the jury that there is something to hide. If, for instance, a defendant builder in a construction defect case claims he built a home in accordance with building permits, but fails to produce those permits, the plaintiff simply can ask the jury to conclude that the missing permits prove the defendant did not build the home according to code.

On the whole, it is imperative that companies maintain a record retention policy and schedule that sets forth a systematic approach to records retention. Otherwise, as has been seen in the news lately, companies could face not only stiff financial penalties, but also possible criminal charges against the destroying parties.

IV. CONCLUSION

Although the express purpose of this article is to acquaint the reader with fundamental knowledge of the process that takes place to have electronic records admitted in court, the underlying lesson is for the RIM and IT professional to understand the importance of a retention policy and schedule. The RIM and IT professional must each make himself aware of the legal obligations of his employer, which should be included in policy decisions and, of course, during litigation. Control of the electronic information will be the key to convince a judge during trial of the trustworthiness of the evidence before her. A retention policy will set the stage for admissibility of electronic documents in court.