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e-Admissibility: The Next Step Beyond e-Discovery

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ABSTRACT

Today, litigators hide from the specter of electronic evidence. Questions of how to gather digital evidence and how such evidence will meet traditional requirements of admissibility in court loom in the minds of today's trial attorneys. The new Federal Rules of Civil Procedure further beg the question of admissibility: how does one guarantee the authenticity and reliability of something intangible?

A seasoned trial attorney may find herself asking, "How do you admit a thumb drive as a trial exhibit?" The quandary of how to admit an ocean of electronic evidence into court introduces us to the world of e-Admissibility.

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Introduction

The Rules of Civil Procedure. The Rules of Evidence. Trial advocacy. Remember how law school professors haunted their students with seemingly amorphous rules on discovery, admissibility and how Clarence Darrow might try a case? Today, litigators hide from the specter of electronic evidence. Questions of how to gather digital evidence and how such evidence will meet traditional requirements of admissibility in court loom in the minds of today's trial attorneys.

The new Federal Rules of Civil Procedure, amended to set electronic information on equal footing with traditional evidence throughout the discovery process, jolted lawyers who have a hard enough time programming TiVo into an inevitable digital reality. The new Rules further begged the question of admissibility: how does one guarantee the authenticity and reliability of something intangible?

Federal Rule of Civil Procedure Rule 34(a) defines "electronically stored information" (ESI) as "data compilations stored in any medium that can be translated into a reasonably useable form."[1] This information can take various shapes and forms, including voice mail, instant messages, email or cellular phone text messages. Moreover, ESI can be found in unusual places, like thumb drives, MP3 players and portable phones. A seasoned trial attorney may find herself asking, "how do you admit a thumb drive as a trial exhibit?" The quandary of how to admit this ocean of electronic evidence into court introduces us to the world of e-Admissibility.

e-Admissibility: Application of the Traditional Rules of Evidence to e-Discovery

My bow tie-wearing evidence professor drilled into us the basics of determining whether evidence is admissible. First, is it relevant? Second, can the evidence be authenticated? Third, does the evidence constitute hearsay? Fourth, is the Best Evidence Rule satisfied? Finally, does the probative value of the evidence substantially outweigh the danger of unfair prejudice?

The traditional road to determining admissibility presents new twists and turns when confronted with ESI. Several resources exist to guide the beginner: Michael Arkfeld's Electronic Discovery and Evidence offers a comprehensive review of the admissibility of electronic evidence;[2] case law addresses the proper handling of e-Discovery in forms ranging from email to instant messages to Internet archives; and the recent opinion by Chief Magistrate Judge Paul Grimm[3] provides a thorough outline of admissibility standards for ESI. Though helpful, these resources taken together can easily overwhelm the e-discovery beginner and even those seasoned in proffering evidence in digital form. The following pages will supply a road map to the new and developing world of e-Admissibility, from the basics of traditional evidence rules to current and potential applications of those rules to ESI.

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[1] Fed.R.Civ.Proc. 34.

[2] See Michael R. Arkfeld, *Electronic Discovery and Evidence*, Chapter 8, (2006-2007 ed.) for a thorough review of electronic evidence admissibility.

[3] *Lorraine v. Markel American Insurance Company,* 241 F.R.D. 534 (D. MD 2007).

Relevance: Narrowing the Scope of e-Discovery

Federal Rule of Evidence 401 defines relevant evidence as 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 than it would be without the evidence."[4] The standard is one of reasonableness, asking: "would a reasonable person believe the evidence is what it purports to be?"[5]

ESI takes many forms and spans many locations. This inherent adaptability results in a proliferation of material, creating a problem of volume. The recent litigation involving Jack Abramoff produced 467,747 e-mails from one individual.[6] But of that staggering number, only a fraction of these emails actually contained information relevant to the case. At the time of trial, the government sought to admit just 260 of those 467,747 emails.[7]

Attorneys charged with reviewing the content of these enormous productions often find themselves lost in an information overload of email strings, multi-page Excel files and other forms of seemingly limitless ESI. To manage the sheer volume of e-discovery, litigation teams must begin with the basic determination of relevance. In cases containing a virtual tsunami of email, for example, firms can utilize technology to isolate relevant material, using dates, individuals, subject lines and other key terms related to the lawsuit. What litigation team can afford not to use all possible means to narrow the scope of review? Moreover, what trial lawyer could realistically present such an overload of information to a jury?

Authentication: Is the ESI What It Is Claimed to Be?

Relevant evidence under Federal Rule of Evidence 401 must be authenticated pursuant to Federal Rule of Evidence Rule 901(a). In other words, can the party offering the evidence show that the ESI is what the party claims it to be?

OBSERVANCE OF THE AUTHENTICATION RULE

Case law reveals numerous horror stories of lawyers failing to properly authenticate ESI. Some ignore the rules of evidence outright, while others attempt to lay the required foundation for the evidence themselves, rather than using a person with knowledge of the evidence. As noted in Lorraine, courts considering the admissibility of electronic evidence frequently note that a witness with personal knowledge may provide authentication.[8] Though the law will undoubtedly continue to evolve, sufficient guidance on the authentication of ESI currently exists to avoid becoming an unwitting addition to the growing collection of electronic evidence horror stories.

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4 Fed.R.Evid. 401.

5 Michael R. Arkfeld, *Electronic Discovery and Evidence*, § 8.10[D], 8-37 (2006-2007 ed.).

6 *U.S. v. Safavian* 435 F.Supp.2d 36, 40 (D.D.C. 2006).

7 Id. at 36.

8 *Lorraine* at 546, citing *U.S. v. Kassimu*, 2006 WL 1880335 (5th Cir. May 12, 2006).

AUTHENTICATION OF INSTANT MESSAGES

Some major companies have resorted to forbidding employees to use instant message ("IM") programs. These companies hope to prevent IM communication from becoming a discoverable stored data source in future litigation. Moreover, if litigation arose, how could an attorney authenticate an "instant message"?

The case of In the Interest of: F.P illustrates this challenge and solution. This case involved a school bully who threatened his victim using instant messages. In the messages, the appellant referred to himself by name, his "IM" history mirrored other statements he made and referenced outside facts related to the appellant.[9]

The Court held that the traditional rule of evidence establishing authentication can be shown by direct or circumstantial evidence:

> "We see no justification for constructing unique rules for admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity."[10]

Because the use of IM programs continues to grow as an accepted form of communication, the traditional rules of authentication apply equally to them. Case law thus far appears to favor application of traditional authentication rules wherever possible over the creation of new laws tailored to ESI.

CHALLENGES UNIQUE TO THE AUTHENTICATION OF CYBER THREATS & CRIMES

There is an old saying I learned in law school: "What would Grandma say?" Emails, instant messages and tags on blogs have appeared that would upset Grandma greatly. News articles cite instances of hate messages that threaten physical harm appearing on Web community sites such as MySpace, Friendster or YouTube.[11] The ability to remain anonymous on the web compounds the problem of tracking the author of threatening messages.

Schools and individuals take cyber-threats very seriously. One example involves a student having an instant message icon picturing a person with a gun firing at the person's head. Beneath the image was a teacher's name. This image was shared via instant messaging with 15 other students. The school suspended the student for this incident, a suspension upheld in court.[12] Another example of online threats drove one technology blogger to cancel public events and fear leaving home.[13]

The ability to anonymously post messages on the Internet, ranging from insults to physical threats, can require the services of computer experts to track down the author. One technology blogger who was a victim of a threat reported she did not have enough evidence for charges because "any decent hacker can make themselves undiscoverable."[14]

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9 *In the Interest of: F.P*, 878 A.2d 91, 96.

10 *Id.*

11 J. Kornblum, "Rudeness, threats make the Web a cruel world," USA Today, A1-A2, July 31, 2007.

12 D. McCullagh, "Police blotter: Student sues over IM-related suspension," CNET News.com, June 30, 2006, *http://news.com.com/Police+blotter+Student+sues+over+IM-related+suspension/2100-1028_3-6090123.html*.

13 Kornblum at A2.

14 Id.

Expert computer forensics investigators face many challenges in pursuing those who commit crime online.[15] Computer forensics involves the "acquisition, authentication, and reconstruction of information located on a computer hard drive."[16] As with other experts, forensics investigators must meet the requirements of Federal Rule of Evidence 702 and are subject to an expert hearing. As cyber-crime investigation grows, practice guides on authentication and training resources for investigators have emerged to support experts and lawyers alike.

AUTHENTICATION OF EMAIL

Few individuals have been able to avoid using email as a necessary mode of communication in today's world. Email message matter ranges in subject from business deals to children's soccer games to dating. In response to the inevitable trend in communication, courts have addressed the authentication of email messages in many cases.

In United States v. Safavian, the Court pointed to Federal Rule of Evidence 901(b)(4) as one method of authenticating email. Rule 901(b)(4) examines the evidence's "…appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."[17] The Court specified the following distinctive email characteristics:

- Emails have the "@" symbol.
- Email addresses may contain the first and last name of the person in the address.
- Email text can authenticate as being from the purported sender by their contents.[18]

The Safavian Court further rejected the argument against authentication on the basis that email strings may be fraudulent. The Court held this goes to weight of evidence, not authentication, and stated:

The possibility of alteration does not and cannot be the basis for excluding e-mails as unidentified or unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents (and copies of those documents). We live in an age of technology and computer use where e-mail communication now is a normal and frequent fact for the majority of this nation's population, and is of particular importance in the professional world. The defendant is free to raise this issue with the jury and put on evidence that e-mails are capable of being altered before they are passed on. Absent specific evidence showing alteration, however, the Court will not exclude any embedded e-mails because of the mere possibility that it can be done.[19]

In sum, because the risk that someone might alter a prior email message in an email string does not mean that all email strings should be excluded. In cases of suspected tampering, expert testimony can be used to show any fraudulent alteration and would likely constitute powerful impeachment evidence of the person who altered the email.

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15 Law enforcement has many groups, private organizations, and other resources available to them for training and support. The Guidance Software Inc. site "Computer Enterprise Investigation Conference" and organizations such as SEARCH: The National Consortium for Justice Information and Statistics are just two examples.

16 *Williford v. State of Texas*, 127 S.W.3d 309, 311 (Tex.App.-Eastland, 2004).

17 *Safavian* at 40.

18 *Id*

19 *Id.* at 41 (emphasis added).

AUTHENTICATION OF IMAGES AND TEXT PRINTED FROM A WEB PAGE

Cases often address the issue of how a particular web page appeared over a period of time. Like other forms of ESI, webpages require someone with personal knowledge to authenticate them.[20] "Personal knowledge" requires that the witness provide evidence about the suit actually being litigated, not just about web pages in general. In one case, a party submitted an affidavit from the administrative director for an Internet Archive used in another suit to authenticate print-outs of the web page in their own case. The Court held that the party failed to provide proper authentication by submitting a copy of an affidavit from different litigation and affidavits of persons without personal knowledge of the internet archiving system.[21]

In a copyright infringement case, the defendant challenged the printed images and text from their own web page. The Plaintiff offered the images and text to show the infringement of their magazine. The Court found the Declaration established authentication by: 1) true and correct copies of documents produced by Defendant in discovery; 2) true and correct copies of pictures from Magazine or from Plaintiff's website; or 3) true and correct copies of pages printed from the Internet that were printed by Declarant or under his direction.[22] The print-outs included the dates of the print-out and the website address.

The Court analysis held that discovery documents are deemed authentic when offered by a party opponent.[23] The photos and print-outs from the web page with dates and web addresses had a "circumstantial indicia of authenticity" that would support a reasonable juror in the belief that the documents are what offering party claims they are.[24]

AUTHENTICATION: PERSONAL KNOWLEDGE & OTHER TRADITIONAL AUTHENTICATION RULES

Litigation teams must carefully select who they offer to authenticate electronic evidence. Those chosen must have personal knowledge to authenticate e-Discovery, including actual involvement in the lawsuit and direct knowledge of the evidence.

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[20] *Sun Protection Factory, Inc. v. Tender Corp.*, 2005 WL 2484710, slip op. at 6, n. 4 (M.D.Fla. October 7, 2005) and *In re Homestore.com, Inc. Security Litigation*, 347 F.Supp.2d 769, 782 (C.D.Cal.2004).

[21] *St. Luke's Cataract and Laser Inst. v. Sanderson*, 2006 WL 1320242, Slip Copy, 2 (M.D.Fla.).

[22] *Perfect 10, Inc., v Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146, 1154 (C.D. CA 2002).

[23] *Id. citing Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889, n. 12 (9th Cir. 1996).

[24] *Perfect 10* at 1154.

Hearsay: Does the Electronic Evidence Constitute a "Statement"?

ESI that is offered for its substantive truth may qualify as hearsay as defined by Federal Rule of Evidence 801. This possibility raises a whole prospective list of exceptions and arguments related to admissibility and authentication of ESI.

TRADITIONAL HEARSAY RULES

The Lorraine Court reviewed the five basic questions for hearsay analysis: 1) does the evidence constitute a statement; 2) was the statement made by a "declarant"; 3) is the statement being offered to prove the truth of its contents; 4) is the statement excluded from the definition of hearsay; and 5) if the statement is hearsay, is it covered by one of the exceptions?[25]

One fundamental question governs whether ESI constitutes hearsay: is the ESI a statement? In a copyright infringement case, a defendant challenged printed images and text from the web page being offered to show the defendant's infringement. The Court held that to the extent those images and text were "being introduced to show the images and text found on the websites, they are not statements at all, and thus fall outside the ambit of the hearsay rule."[26] Conversely, discovery that may be challenged on hearsay grounds may have non-hearsay uses, such as email messages being offered to show a relationship and custom of communicating by email between individuals.[27]

Again, ESI offered as evidence at trial must be reviewed for the simple hearsay proposition: is it being offered as a statement? If the evidence is being offered to show copyright infringement, custom of email communications or some other non-statement purpose, it should not be considered hearsay.

EMAIL AS A PARTY ADMISSION

Case law is rife with examples of email messages being held as party admissions. A party admission is defined as the party's own statement offered against itself.[28] In Siddiqui, the defendant challenged the authentication of email messages and brought hearsay objections. The Court dismissed the hearsay objections finding the email messages sent by the defendant to another individual constituted a party admission.[29]

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25 *Lorraine* at 562-563.

26 *Perfect 10* at 1155.

27 *U.S. v Siddiqui*, 235 F.3d 1318, 1323 (C.A.11 (Ala.), 2000).

28 Fed.R.Evid. 801(d)(2)(A).

29 *Siddiqui* at 1323.

ELECTRONIC EVIDENCE AS A PRESENT SENSE IMPRESSION OR EXCITED UTTERANCE

Thousands of consumers stood in line for hours to purchase the iPhone. Personal Digital Assistants (PDAs) like the iPhone allow individuals to send an email, take a photo, record video and send photos and text messages in addition to making a phone call. Individuals now have the opportunity while witnessing an event to send someone a text message or even a video clip of the incident. The legal repercussions of this ability to instantly create potential evidence have yet to be fully realized. At the very least, such capabilities invite the renewed use and exploration of hearsay exceptions.

Two traditional hearsay exceptions immediately spring to mind when imagining the scenario of an iPhone user witnessing – and potentially recording and sharing – the details of an accident. The general prohibition of hearsay evidence would normally preclude use of that iPhone owner's recording in court as evidence unless the owner was personally available to testify and authenticate the recording. Case law has carved out exceptions to the hearsay rule to account for circumstances in which the evidence proffered seems particularly trustworthy, even if the witness cannot appear in person to testify.

Courts have defined one such exception, "present sense impression," as a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."[30] A second exception, "excited utterance," is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[31] The proliferation of cell phones with cameras, video, text or email abilities will likely increase electronic present sense impressions. A declarant may witness an event, capture it in with a cell phone photo, and then immediately send the photo to someone, while concurrently observing the incident. This occurrence arguably will meet the requirements for a present sense impression or excited utterance exception to the hearsay rule, as the declarant has made a statement describing an incident while perceiving the actual event.[32]

The prospect of a cell phone video clip qualifying as a present sense impression stretches the minds of many lawyers. While other grounds exist to challenge a 7-second video clip, this form of ESI could be very powerful evidence at trial in the absence of a testifying witness.

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30 Fed.R.Evid. 803(1).

31 Federal Rule of Evidence 803(2)

32 The *Lorraine* opinion reviews several cases with emails as present sense impressions, including case involving an email from employee to boss about substance of telephone call with defendant in mail/wire fraud case qualifying as a present sense impression. *Lorraine*, 569-570, citing *United States v. Ferber*, 966 F.Supp. 90 (D.Mass.1997).

Best Evidence Rules: How Do You Offer Original ESI?

The "Best Evidence Rule" requires an original copy of the evidence at issue in order to prove the content of a writing or recording.[33] At first blush, producing an "original" electronic document sounds complex to a lawyer who has never tried a case with ESI.

Federal Rule of Evidence 1001(3) provides one solution to meeting the Best Evidence Rule, stating that "data [that is] stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is an 'original.'"

In Laughner v. State, a child solicitation case involving instant messages and online chat rooms, the investigating officer cut-and-pasted the instant messages from a chat room into another document. The police officer saved the conversations with Defendant after their conclusion, and the printout document the officer produced accurately reflected the content of those conversations. The Court found the printouts to be the "best evidence" of the conversations between the defendant and the officer under Federal Rule of Evidence 1001(3).[34]

Litigators should not feel tied to printing ESI in order to qualify as best evidence under Rule 1001(3). The text of the Rule includes, "other output readable by sight." Presenting electronic evidence with trial presentation technology arguably qualifies under the requirements of the Best Evidence Rule. Moreover, being able to review a Word document or Excel file in its native (technically original) application may hold greater "best evidence" value than printing that same evidence.

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33 Fed.R.Evid. 1002.

34 *Laughner v. State*, 769 N.E.2d 1147, 1159 (Ind. Ct. App. 2002), abrogated on other grounds by *Farjardo v. State*, 859 N.E.2d 1201 (Ind. 2007).

Probative Value Versus Undue Prejudice

Federal Rule of Evidence 403 states that 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.[35] The advisory notes to the Rule define "unfair prejudice" as an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[36]

The Lorraine opinion raises various issues to consider under a Rule 403 analysis, including whether emails are offensive or use highly derogatory language that may provoke an emotional response, whether a jury may mistake computer animations for actual events and other traditional Rule 403 reasons for excluding evidence.[37]

To add to the Lorraine discussion, many articles have addressed "computer generated exhibits" or "computer generated images."[38] These examples range from static digital images or digital images that a trial lawyer could highlight or underline, to animations or digital recreations.[39] Professor Fred Galves has referred to static computer exhibits as a "Glorified Chalkboard."[40] Instead of a chalkboard or large printout, a computer generated exhibit makes the practice of using demonstrative exhibits far more effective than their previous printed counterparts. Moreover, any claim of undue prejudice could be compared to claiming that a static chalkboard or photo with an underlined section causes undue prejudice.[41]

A concern that should be adequately addressed is whether a computer animation or recreation could cause confusion. Jurors may confuse a demonstrative computer generated exhibit as an actual depiction of the event.[42] This point highlights diligence in experts creating as thorough and correct computer generated exhibits as possible.

The argument that technology may cause confusion under Rule 403 will likely be short-lived. Case law recognizes that the wide ownership of "personal computers, expanding use of the Internet and PDAs, among other electronic innovations, [has led] the lay person [to be] . . . increasingly immune to confusion by the encroachment of technology into heretofore primitive communication zones such as the jury room."[43]

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35 *Lorraine at 583*, citing Fed.R.Evid. 403.

36 Fed.R.Evid. 403 (Committee Notes).

37 *Lorraine* at 584.

38 See F. Galves, "Where the Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance," 13 *Harv. J. Law & Tech.* 161, 177-81 (2000) for a discussion of computer generated exhibits.

39 Lori G. Baer & Christopher A. Riley, "Technology in the Courtroom: Computerized Exhibits and How to Present Them," 66 *Def. Couns. J.* 176 (1999).

40 Galves at 177.

41 Galves at 177-178.

42 Baer & Riley at 180.

43 *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 331 F.Supp.2d 136, 142, citing *Datskow v. Teledyne Continental Motors*, 826 F.Supp. 677, 685 (W.D.N.Y.1993) ("Jurors, exposed as they are to television, the movies, and picture magazines, are fairly sophisticated. With proper instruction, the danger of their overvaluing such proof is slight," quoting 1 J. Margaret A. Berger, et al., Fed.Evid. ¶ 403[5] at 403-88 (1992 ed.) (footnotes omitted)).

The recent United States Supreme Court decision, Scott vs Harrris involving the use of excessive force in a high speed chase, highlights the probative value of video in litigation. This case turned on reviewing video from the police car that ultimately rammed the suspect's car off the road.[44] The Supreme Court noted that the Court of the Appeals decision stood in such contrast to the video evidence that the Court of Appeals gave "the impression that respondent, rather than fleeing from police, was attempting to pass his driving test."[45] The Court further noted that the video showed a "Hollywood style" police chase in the middle of the night, complete with running red lights, swerving around other cars, crossing the double yellow line and forcing cars on both sides of the road to avoid being hit.[46] This video evidence allowed the Supreme Court to overturn the lower court's opinion and view the difference between the Court of Appeals decision and what the evidence actually showed. Rather than confusing any issues, the video brought clarity to the case.

Jurors are made up of people with video cell phones who could be fans of multiple lawyer or crime investigation TV shows. One trial presentation consultant noted that when it comes to trial presentation, a jury "only wants to see a good clean image on a big screen, with highlights, zooming and such."[47] The likelihood of confusion from effective trial presentation of video, computer generated graphics, email and other electronic evidence is probably low. To the contrary, one could argue that today's jurors expect electronic evidence of some kind to prove a case.

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44 *Scott v Harris*, 127 S.Ct. 1769 (U.S., 2007).

45 *Id.* at 1775.

46 *Id.* at 1775-1776.

47 Comments of T. Piganelli , Legal Technology Consulting Inc., April 12, 2007.

Conclusion: Review for e-Admissibility

Naturally following the legal community's recent awakening to the significance and inevitability of e-discovery is the new and exciting challenge presented by e-Admissibility. Despite the large volume of e-Discovery that can be produced, it still must be relevant, authenticated, meet the requirements of hearsay and the Best Evidence Rule and have its probative value outweigh its prejudicial effect.

A TECHNOLOGY SOLUTION: REVIEWING FOR E-ADMISSIBILITY WITH CT SUMMATION

When cases can produce nearly half a million emails from one individual, lawyers must tackle the volume challenge of e-Discovery with litigation support software. Tools like CT Summation's iBlaze, CaseVault and Enterprise help cull the large number of email messages down to relevant dates, subjects, authors and other key search terms, making the review process shorter, more organized and more efficient.

CT Summation[48] can be used in several ways to review for admissibility. Subjective reviews should include a determination of whether or not the document is relevant. This relevancy information can be captured in a customized Column or Form view during a document review. This search for relevant information can be expedited by searching objective information such as names, dates and other key terms.

CT Summation offers several options for setting up a document for e-Discovery review. A litigation team could set up 5 different columns for relevancy, authentication, hearsay, Best Evidence Rule and probative value. Additionally, a party could create one column for admissibility. The "Tagging and Foldering" tool can be set up for each admissibility requirement. This would allow a reviewer to simply "check off" each admissibility element for a review.

A reviewer could do the entire admissibility review alongside the rest of the document review. The sheer volume of a case with millions of email messages or other electronic files, however, may preclude this possibility. For example, reviewing all 467,747 emails from the Abramoff case, when only 260 are needed for trial, highlights how extensive this review could become.[49] At a minimum, a litigator should include relevancy in their first subjective review and complete the admissibility review once they have determined the necessary documents for trial.

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48 CT Summation products include Enterprise, iBlaze, webBlaze, and CaseVault.

49 *Safavian* at 36.

In summary, a review of electronic evidence should always include establishing the basics of whether the e-Discovery is relevant, who has personal knowledge to authenticate it, whether the hearsay rule applies, and if so, whether it qualifies under any hearsay exceptions. Special consideration should be given to whether its probative value will be outweighed by any prejudicial effect. Many of these issues can be incorporated into the subjective review of ESI through an evidence management database. Just as basic "objective" information is captured for electronic evidence, the "subjective" review of ESI should attempt to include the basic issues related to admissibility.

Yes, it is a "Brave New World," but technology tools exist to help legal professionals bridge the admissibility gap between paper and ESI. Don't be haunted by the specter of new technologies. Instead, allow technology to assist you to admit ESI into the courtroom.

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