

May 15, 2007

## Maryland Federal Court Tightens Reins on Admissibility of Electronic Evidence

On May 4, 2007, a Maryland United States Magistrate Judge entered an order dismissing cross-motions for summary judgment because the parties failed to establish the admissibility of e-mails relied upon to establish the meaning of an arbitration agreement. While the dismissals were without prejudice, citing the significant costs associated with discovery and the common mistakes made by counsel, Chief Magistrate Judge Paul W. Grimm took the opportunity to issue a 100-page order meticulously outlining the requirements for admitting electronically stored information (ESI) into evidence.

Judge Grimm clearly believes that the admissibility issues surrounding ESI have been neglected. While courts and practitioners have focused on the discoverability of ESI, “[v]ery little has been written, however, about what is required to insure that ESI obtained during discovery is admissible into evidence at trial, or whether it constitutes ‘such facts as would be admissible in evidence’ for use in summary judgment practice.” This order provides a useful guide to the underlying facts associated with different types of ESI that must be adduced before the evidence can be used in court. “Given the pervasiveness today of electronically prepared and stored records, as opposed to the manually prepared records of the past, counsel must be prepared to recognize and appropriately deal with the evidentiary issues associated with the admissibility of electronically generated and stored information.”

### Context of the Dispute

The order in *Lorraine v. Markel American Insurance Company*, Civil Action No. PWG-06-1893 (D. Md. May 4, 2007), involves a dispute over the amount of damage caused by a lightning strike to the plaintiff's yacht.

Plaintiffs sought enforcement of a private arbitrator's award finding that certain damage to their yacht was indeed caused by a lightning strike. Plaintiffs' insurance carrier counterclaimed to enforce the arbitrator's award, which not only concluded that certain damage to the yacht's hull was caused by lightning, but also concluded that the damage incurred was limited to an amount of \$14,100, plus incidental costs, not the \$36,000 claimed by Plaintiffs.

The question before the court was whether the arbitrator exceeded his authority under the arbitration agreement by assigning a value to the damages attributable to the lightning strike that was less than the \$36,000 claimed by Plaintiffs. Because the language of the arbitration agreement was ambiguous, to resolve the ambiguity the court would need to assess documentary evidence to determine the parties' intent concerning the scope of the arbitration agreement. The available evidence included the arbitration agreement, the award, and copies of e-mails between counsel.

Both parties attached e-mails as exhibits to their summary judgment motions. None of the emails was properly authenticated. There were no affidavits or depositions, and most of the facts were provided solely by counsel in their briefs. Because both parties failed to support their respective motions with admissible evidence, the judge dismissed both motions without prejudice to allow resubmission with appropriate evidentiary support.

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## Remember the Fundamentals

Judge Grimm specifically noted that “unauthenticated e-mails are a form of computer generated evidence that pose evidentiary issues that are highlighted by their electronic medium.” He then seized the opportunity to review the evidentiary rules governing the admissibility of all documents, and to discuss the particular evidentiary hurdles posed by e-mail, and by other types of electronic documents that were not presented by the motions before him.

## ESI Issues Emerge

Judge Grimm identified these common types of ESI that are posing evidentiary difficulties, at least in part because the Federal Rules of Evidence do not provide separate standards for the admissibility of electronic data:

- E-mail
- Website Postings
- Digital Photographs
- Computer-Generated Documents
- Data Files
- Text Messages and Chat Room Dialogue
- Computer Stored Records
- Computer Animation
- Computer Simulation

## First Things First

Federal Rule of Evidence 104 governs the process for determining admissibility and must be considered at the outset. The interplay between Rules 104(a) and 104(b), the types of preliminary evidence that can be considered, and the roles of judge and jury can pose challenges in practice. Rule 104(a) provides that inadmissible evidence may be considered in determining preliminary questions of admissibility under Rule 104(a); however, that provision does not extend to determinations of relevancy conditioned on fact under Rule 104(b). In short, the court noted that there is a significant difference between the way Rules 104(a) and 104(b) operate for purposes of admitting ESI. Judge Grimm observes:

...if an e-mail is offered into evidence, the determination of whether it is authentic would be for the jury to decide under Rule 104(b), and the facts that they consider in making this determination must be admissible into evidence. In contrast, if the ruling on whether the e-mail is an admission by a party opponent or a business record turns on contested facts, the admissibility of those facts will be determined by the judge under 104(a), and the Federal Rules of Evidence, except for privilege, are inapplicable.

## Five ESI Admissibility Considerations

While the Federal Rules of Evidence do not independently address the admissibility of ESI, five distinct yet interrelated evidentiary issues govern the admission of electronic evidence at trial, or its acceptance as an exhibit during summary judgment.

- *Issue #1 – Relevancy.* Is the ESI relevant as determined by Rules 401, 402, and 105? Does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be?

- *Issue #2 – Authenticity:* If relevant, is the ESI authentic as required by Rules 901 and 902? Can the proponent show that the ESI is what it purports to be?
- *Issue #3 – Hearsay:* If the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception as provided by Rules 803, 804 and 807?
- *Issue #4 – Original Writings:* Is the form of the ESI that is being offered as evidence an original or duplicate under the original writing rule? If not, is there admissible secondary evidence to prove the content of the ESI pursuant to Rules 1001-1008?
- *Issue #5 – Probative Value Balancing Test:* Is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403?

## Recommendations Regarding the Use of ESI

In this case, counsel collectively encountered several fundamental deficiencies that resulted in dismissal of both motions. In order to avoid roadblocks in the admission of electronic evidence, this opinion cautions counsel to keep the following in mind:

- Step One: Demonstrate relevancy. It is important to articulate multiple grounds of relevance as opposed to putting all “eggs in a single evidentiary basket,” which the judge may view as inapplicable.
- Step Two: Establish authenticity. In order for ESI to be admissible, it must also be authentic. In other words, counsel must demonstrate that a matter is what it is claimed to be. Authentication with ESI may be done via personal knowledge testimony, comparison by the fact finder or an expert, hash marks and hash values, metadata or appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with circumstances.
- Step Three: Resolve any potential hearsay issues. Determine whether the evidence constitutes a “statement,” whether the statement was made by a “declarant,” whether the statement is being offered to prove the truth of its contents, whether the statement is excluded from the definition of hearsay, and whether the statement is covered by one of the hearsay exceptions if it is hearsay.
- Step Four: Comply with the original writing rule. When offering ESI at trial or in support of a motion for summary judgment, counsel must determine whether the original writing rule is applicable, and if so, counsel must be prepared to introduce an original, a duplicate original, or be able to demonstrate that one of the permitted forms of secondary evidence is admissible. This is especially important when ESI exhibits are closely related to the controlling issue, and when counsel is proving the contents of the ESI.
- Step Five: Demonstrate the absence of unfair prejudice. Courts are particularly likely to consider whether admission of ESI would be unduly prejudicial when evidence contains highly offensive language, when analyzing computer animations to determine if there is a substantial risk that the jury may mistake them for actual events, when considering admissibility of voluminous electronic data, and when the court is concerned about the reliability or accuracy of the information contained within the ESI.

## Final ESI Considerations

Assuming that other courts share Judge Grimm's concerns, proponents of evidence obtained from ESI will need to pay more attention to these foundational requirements when gathering the ESI, and when submitting such evidence to the courts..

As Judge Grimm notes,

...[while] these rules may not apply to every exhibit offered, as was the case here, each still must be considered in evaluating how to secure the admissibility of electronic evidence to support claims and defenses. Because it can be expected that electronic evidence will constitute much, if not most, of the evidence used in future motions practice or at trial, counsel should know how to get it right on the first try.

Counsel should plan to authenticate all ESI by the most rigorous standard that may be applied. There is no one size fits all approach, but gathering the relevant evidence to support admissibility during discovery will save time and expense, while increasing the odds of successful admission of ESI at trial and on summary judgment.



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