Sedona Releases Commentary on ESI Admissibility: Does it Hurt, Help or Spotlight Best Practice Flaws?

by Gregory Fordham

Those familiar with Electronically Stored Information (ESI), know that its history long predates the 2006 changes to the federal rules.

For example, the case of Bills v Kennecott Corp., 108 F.R.D. 459, 461 (D. Utah 1985) not only used the term ESI 20 years before the 2006 federal rules it also stated that, "It is now axiomatic that electronically stored information is discoverable under Rule 34 of the Federal Rules of Civil Procedure. . . ."

Another case decided more than a decade before the 2006 changes claimed that the discovery of computerized data was now black letter law. (Anti-Monopoly Inc. v Hasbro, Not Reported in F.Supp., 1995 WL 649934 (S.D.N.Y.))

While the headlines about recent decisions involving ESI have focused on the 2006 changes to the federal rules and involved issues like undue burden and expense, accessibility, preservation and sanctions; a newer yet familiar storm is visible on the horizon. The impending tempest is one of ESI admissibility.

Just as in other ESI areas, it has been long established that computer records are subject to the same foundational issues as other evidence. (For example, See U.S. v DeGeorgia 420 F.2d 889, (9th Cir. 1969); U.S. v Russo, 480 F.2d 1228 (6th Cir. 1973); and U.S. v Croft, 750 F.2d 1354 (C.A.Wis. 1984))

The most recent incarnation of this subject involves the decision in Lorraine v. Markel American Ins. Co., 241 F.R.D. 534 (D.Md.,2007). In that case, Judge Grimm decided that, "failure of both parties to observe evidence rules, as they applied to [ESI], precluded any entry of summary judgment."

Judge Grimm then went on to explain that, "[C]onsidering the significant costs associated with discovery of ESI, it makes little sense to go to all the bother and expense to get electronic information only to have it excluded from evidence or rejected from consideration during summary judgment because the proponent cannot lay a sufficient foundation to get it admitted."

The decision in Lorraine is very instructive in its examination of the various Federal Rules of Evidence (FRE) and their interplay governing the admissibility of ESI into evidence. Of equal interest are the decisions in the other cases discussed in Lorraine.

In its March 2008 Commentary the Sedona Conference expands on the information in Lorraine by interweaving practical discussions of ESI issues. One of the Commentary's more unique and interesting examinations involves "Understanding the Threat Landscape" and the inherit reliability or unreliability of ESI considering anti-forensic forces and system interconnectivity.

Although the Commentary cautions against allowing these threats to become a casual means to preclude harmful evidence, a lot of litigators, by now, have experienced the so called "virus" defense. Under the virus defense the claimant seeks to avoid the consequences of possessing contraband or having destroyed the smoking gun by claiming it was all done by a virus.

Despite the warnings against overreaction, after reading the Commentary, one realizes the doubled edged nature of the publication. Will realizations about the threat landscape erode the usefulness of ESI or will the threat along with admissibility issues highlight the weaknesses in the Sedona Best Practices?

For example, it is only in its most recent revision (2007) that the Sedona best practices removed its limitation that the preservation and production of metadata be by expressed agreement of the parties. Interestingly, application metadata embedded in a document could authenticate that document under FRE 902(7). In addition, the authenticity of that data could be substantiated with system metadata which is not subject to a hearsay limitation under FRE 801.

Despite the 2007 changes, the current Sedona best practices still contain preservation weaknesses. For example, principle 8(c) discourages the practice of forensic data collection except in certain cases. Yet without such collection techniques is the authenticity of the evidence not compromised particularly in light of the decision in Lorraine?

In fact, the more one studies the decision in Lorraine and its predecessors along with the Sedona Conference's latest commentary on ESI admissibility, one must question whether this latest commentary reveals new trends or spotlights "Best Practice" flaws.

§§§

Gregory Fordham has written extensively on this subject and the Georgia Bar has approved his e-discovery presentation for CLE credit. His papers are available for download from the K&F website, www.knfcon.com. He regularly advises clients on how to structure their e-discovery plans in order to minimize cost and maximize return. He also has served as an expert witness in many state and federal cases involving e-discovery and computer forensics. He is also a contributing writer for the 2007 Construction Law Update which was published last year by Aspen Publishers. His e-mail is greg@knfcon.com