Electronic Evidence — Who's Liable?

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In 2003 and 2004, the decisions in *Zubulake v. UBS Warburg* made litigation counsel directly responsible for the indifference of their clients' information technology departments. *Zubulake* opened a new field of concern for lawyers and a growing realization that ignorance of esoteric computer voodoo could lead to embarrassment or, worse, liability.

The year after *Zubulake* featured continuing legal education programs in which lawyers were exhorted to learn how computers work and why e-mail is "dangerous." Soon, lawyers began publicly using terms like e-discovery and e-preservation. In December 2006, the Federal Rules of Civil Procedure were amended to eliminate the differences between electronically stored information (ESI) and paper-based information, and to impose on trial counsel new responsibilities related to the identification, preservation, and production of ESI.

Decisions about the application of new rules (and old principles) to ESI have increased. Opinions have evolved from issues of discoverability to issues of privilege, privacy, and admissibility. This article summarizes recent noteworthy opinions.

Lorraine v. Markel American Insurance Co., 241 F.R.D. 534 (D. Md. 2007), dealt with the admissibility of ESI. The plaintiff and the defendant filed cross-motions for summary judgment challenging a $14,000 arbitration award. To their respective motions, each side attached unauthenticated copies of e-mails, "ostensibly supplied as extrinsic evidence of the parties' intent with regard to the scope of the arbitration agreement." *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. at 537. The court noted that the parties had failed to comply with the rule requiring that motions for summary judgment be supported by admissible evidence, and dismissed both motions without prejudice. E-mails, the court said, "are a form of computer generated evidence that pose evidentiary issues that are highlighted by their electronic medium." *Id.*

The court provided a lengthy, practical, and scholarly analysis of problems that are, by and large, unique to electronic evidence, including authenticity of intangible electronic documents, such as e-mail, website postings, text messages, chat room content, computer stored records and data, computer animations and simulations, and digital photographs. The court also examined hearsay issues in the context of computer-generated or computer-stored statements and the original writing rule as it applies to ESI. At slightly more than fifty pages, *Lorraine v. Markel Ins. Co.* is the most comprehensive articulation of the application of the Federal Rules of Evidence to ESI.

In *In re Subpoena Duces Tecum to AOL LLC*, 550 F. Supp. 2d 606 (E.D. Va. 2008), the court examined the interplay between third-party discovery of ESI and the Electronic Communications Privacy Act (the Privacy Act), 18 U.S.C. §§ 2701-03 (2000). In that case, a subpoena *duces tecum* was served on America Online seeking all of a subscriber's e-mails for a set time period. The court found that the Privacy Act creates a zone of privacy to protect Internet subscribers from having their personal information publicly disclosed by unauthorized parties and noted that the Privacy Act imposes penalties on Internet service providers and others who divulge private information. The Privacy Act makes no exception for disclosures made pursuant to third-party subpoenas; consequently, for this reason and others, the court quashed the subpoena.

Victor Stanley Inc., v. Creative Pipe Inc., et al., 250 F.R.D. 251 (D. Md. 2008), is a cautionary tale about the waiver of privilege. The defendants' counsel had foregone the opportunity to agree to a "clawback" provision in the event that privileged matter was inadvertently produced during discovery. During discovery, the defendants inadvertently produced 165 documents containing privileged matter after conducting a key-

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Bulletin: New Rule Added to Federal Rules of Evidence

On September 8, 2008, the U.S. House of Representatives unanimously passed a bill adding Rule 502 to the Federal Rules of Evidence, which previously had been approved by the Senate. President Bush is expected to sign the legislation.

Rule 502 is intended to control the rising cost of e-discovery and document production in litigation by providing a limited safe harbor against inadvertent production of privileged material. For Fourth Circuit practitioners, the new rule may provide some guidance as to whether a strict or limited waiver standard applies to inadvertent disclosures. *See In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984) (strict waiver); *Martin Marietta Corp. v. United States*, 856 F.2d 619 (4th Cir. 1988) (limited waiver); *see also Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 237 (D. Md. 2005) (citing cases and discussing waiver in context of voluminous e-discovery).

The new rule, explanatory notes, and statements of congressional intent may be found at http://www.uscourts.gov/rules/index2.html#502pass (last visited September 18, 2008).

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word search of the ESI and a cursory manual review of the non-searchable ESI. The court found that the recent amendments to the Federal Rules do not change the Fourth Circuit's strict rules on privilege waiver. In making the determination whether the efforts of defense counsel were reasonably designed to prevent inadvertent disclosure of privileged material, the court said that the burden fell to the defendants to prove that the keyword search they performed on the text-searchable ESI was reasonable. To do this, the court stated that defendants would, first, have to identify the terms used in the keyword search. Second, the defendants would have to demonstrate that the persons who selected the keywords were qualified to design a proper search. Finally, the defendants would have to demonstrate that there was quality-assurance testing sufficient to show that the keyword search worked. In this case, the defendants did not pass any of these tests, and the court ruled that they had waived the privilege asserted for the 165 documents.

For lawyers, an inescapable fact is that most of the information needed to prove a case — other than witness testimony — presently exists somewhere in electronic form. The obvious (and less obvious) differences between ESI and paper-based information are typically resulting in courts' studying the medium, as much as the information itself, in order to resolve familiar issues like privilege or admissibility. Like it or not, understanding the medium now plays a significant role in a lawyer's ability to argue that information is or is not discoverable, admissible, or privileged. ■