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SI 655
Management of Electronic
Records

Week 04
February 9, 2009

Evidence, Discovery, and
Admissibility

Outline

- Evidence
- Electronic records and evidence
- Legal evidence
- Discovery
- Sedona Guidelines
- Federal Rules of Civil Procedure
- DVD: MER 2006: Mock Pre-Trial Conference

This issue of evidence

- Records as “evidence” of transactions
 - Key distinctions between generic information systems and recordkeeping systems
 - Records are created, captured, and set aside in the normal course of business as evidence of transactions
 - Courts and auditing procedures typically use broader definitions of evidence.

Why do organizations create and keep records?

- Organizations keep records for two reasons:
 - Legal Requirements
 - Laws, Regulations, Auditing Requirements
 - Business Needs
 - Critical information, performance monitoring, organizational memory and learning, competitive analysis, precedent, etc.

Paper records and evidence

- Records
 - Content and contextual information (metadata) bound in a single document or system of records
 - Eye-readable
- Records systems
 - Under central control (separation of control from interest in tampering)
 - Organized in systems to support specific business processes
 - Fixed retention periods with disposition plans

Electronic Records & Evidence

- How are electronic records different from paper records?
 - Volume and duplicability
 - Persistence (destroyability / recoverability)
 - Dynamic, Changeable Content
 - Metadata
 - Environment Dependence & Obsolescence
 - Dispersion and Searchability

(Sedona June 2007)

Volume and Duplicability

- 93% of all newly recorded information is on electronic media (70% of which is never converted to hard copy)
- Newly recorded information on paper only is 0.01% of the total
- One-third of electronic information is never printed on paper
- Marginal cost/effort to produce copies is almost 0

Persistence (destroyability/ recoverability)

- Long-term retention requires regular maintenance and migration activities
- Deleting information from a system does not ensure that it has been destroyed
 - This is particular problem when information is easy to replicate

Dynamic, Changeable Content

- Purpose of electronic systems: maintain current information
- Ability of update automatically in response to new information
- Ease of overwriting and updating

Metadata

- Key data about records (typically bound to a paper record)
- Electronic Records Metadata
 - System Generated
 - User-generated
 - Internal (embedded)
 - External

Metadata Bound to Physical Records

Authority *EO 12958*
By *AT* NARA Date *4-9-98*
RE/E: *TATodman:dtm*
(Working Office and Offices)
4/18/69

REPRODUCED AT THE NATIONAL ARCHIVES

DECLASSIFIED
PA/HO, Department of State
E.O. 12958, as amended
Date: April 21, 2005

6667

DEPARTMENT OF STATE

Approved in S, 4/21/69

Memorandum of Conversation

Time: 4:45 p.m.
DATE: April 17, 1969
Place: The Secretary's Office

SUBJECT: U.S. Policy Toward Africa

PARTICIPANTS: His Excellency Burudi Nabwera, Ambassador of Kenya
Mr. Leo P. Odero, Counselor of the Embassy of Kenya

The Honorable William P. Rogers, Secretary of State
Mr. Terence A. Todman, Country Director for East African Affairs

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After an exchange of courtesies, the Ambassador said relations between the United States and Kenya were excellent and he had nothing of a bilateral nature to raise. However, he wanted to mention two points concerning U.S. policy toward Africa in general. First he wished the U.S. would formulate and follow an independent policy toward Africa instead of always following the lead of other major Western powers such as the U.K. and France. He said the practice of following others occurred during the previous U.S. administration and appeared to be continuing.

POL / AFR - US

Metadata bound to physical records



Nancy Wombat

http://www.flickr.com/photos/illuminated_photography/3154846755/

Metadata and Digital Records (State Department E-Telegrams at NARA)

- Automatic Decaptioning: Z
- Capture Date: 10 MAY 1999
- Channel Indicators: n/a
- Current Classification: UNCLASSIFIED
- Concepts: TROOP DEPLOYMENT, AIR CAPABILITIES, COMBAT OPERATIONS, MILITARY
- Control Number: n/a
- Copy: SINGLE
- Draft Date: 30 SEP 1973
- Decaption Date: 28 MAY 2004
- Decaption Note: 25 YEAR REVIEW
- Disposition Action: RELEASED
- Disposition Approved on Date:
- Disposition Authority: morefirh
- Disposition Case Number: n/a
- Disposition Comment: 25 YEAR REVIEW
- Disposition Date: 28 MAY 2004
- Disposition Event:
- Disposition History: n/a
- Disposition Reason:
- Disposition Remarks:
- Document Number: 1973STATE194280
- Document Source: ADS
- Document Unique ID: 00
- Drafter: S/S-O:RWRIGHT
- Enclosure: n/a
- Executive Order: 11652 - XGDS.....

Message Text

PAGE 01 STATE 194280

50
ORIGIN SS-10

INFO OCT-01 ISO-00 SSO-00 /011 R

66602

DRAFTED BY: S/S-O:RWRIGHT

APPROVED BY: S/S-O:RWRIGHT

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INFO AMEMBASSY AMMAN IMMEDIATE
AMEMBASSY BEIRUT IMMEDIATE
AMEMBASSY TEL AVIV IMMEDIATE

S E C R E T STATE 194280

EXDIS

FOLLOWING SENT ACTION TEL AVIV, SEPT 28, FROM SECSTATE RPTD
TO YOU:

QUOTE S E C R E T STATE 194280

EXDIS

E.O. 11652 - XGDS
TAGS: IS, EG, SY, MOPS
SUBJECT: RUMORED EGYPTIAN MILITARY ALERT

FOR AMBASSADOR FROM SISCO



Environment Dependence & Obsolescence

- Some records need to be retained beyond the life of the systems on which they originate
- Maintaining records in an external system usually requires changing the records and/or the metadata associated with them.
- Information systems generally are not designed to do this.

Dispersion and Searchability

- Digital records are easy to replicate and alter (change, annotate, etc.)
 - Multiple variants
- Digital records are not organized in institutional / shared systems
- Automated tools make search easy

Legal Evidence

(Giordano, 2004)

- Computer Evidence issues
 - Admissibility
 - Authenticity
 - Completeness
 - Reliability
 - Believability

Legal Admissibility

- Weight vs. admissibility
- “Hearsay”
 - “a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted”
 - “Hearsay” cannot be cross-examined
- Exceptions
 - “Business Records” – common or routine products of an organization (produced and used in the normal course of business)
 - Best evidence rule (copies in lieu of the original)
- Computer-generated (fingerprints) v. computer-stored records as solution to not excluding all computerized info? (Wolfson)

Admissibility

Tests

- Business Records Exception
 - Used in the “normal course of business”
 - Relied on for normal activities
- Best evidence rule
 - Copies in lieu of the original
 - Original cannot be found
 - Original was destroyed in a regular and controlled business process
 - Format conversions

Authenticity

- Positively tie the evidence to an incident
 - System used produces an accurate result
 - Not altered or tampered with
 - Corroboration (circumstantial evidence)

Reliability

- Current presumption of legitimacy
- Reliability of software used to create records (**and problems with**)
- Identifying the author (source)
- Corroborating evidence
 - Cuckoo's egg case; automatic printouts & log files, connection records; utility programs records; agreement with forensic tools)

Believability

- Circumstantial guarantees of trustworthiness
- Content oriented
- Absence of an incentive to cause prejudice
- Corroboration

Issues

- Business Records Exception
 - Which records are kept in the "normal course of business?"
 - What is the status of computer-generated records that are stored but not kept in a regular fashion?

Discovery

- Request by a party to inspect and copy any pertinent records
- E-discovery covers electronic documents and data (email, web pages, word processing files, databases, etc.)
- Preparation
 - Records retention program
 - Employee education (recordness, retention; retrievability after "destruction; personal emails; spoliation)
 - Format conversion of critical records
 - Catalogs
 - "Persons with knowledge" identified (deposition; interrogatory value)

Sedona Guidelines 1...

- Preserve records in anticipation of litigation
- Proportionality. Balance costs, burden, and need
- Confer early in discovery process
- Discovery requests should be clear and focused
- “Reasonable and good faith effort” does not mean taking “every conceivable step”

Sedona Guidelines 2...

- Responding parties are best able to determine how to comply with requests
- Burden of demonstrating (in)adequacy of production on requesting party
- Access beyond active systems must demonstrate relevancy that “outweigh(s) cost, burden, and disruption”
- Absent demonstrated special need or relevance, respondent not required to “preserve, review or produce deleted, shadowed, fragmented, or residual” ESI
- Respondent to follow “reasonable procedures to protect privileges and objections to production”

Sedona Guidelines 3...

- Electronic tools and processes (sampling, searching, identification criteria) can serve “good faith” obligations
- Production to be in forms/format ordinarily maintained, including metadata to search, retrieve and display
- Review and production costs borne by either requester or respondent depending on “special circumstances”
- Spoliation sanctions mandated only upon finding of “intentional or reckless failure to preserve and produce relevant” information and that such information material to ruling

Federal Rules of Civil Procedure 1...

- Updated and effected December 1, 2006
- Formally align legal process with business reality
- “Electronically Stored Information” (ESI) category. Provides ESI as subject to discovery and production.

Federal Rules of Civil Procedure 2...

- Changes / Issues confronted:
 - Requirement to meet in advance of trial (preserving discoverable information; scheduling discovery)
 - Provide names of holders of relevant information and description of data prior to receipt of discovery request
 - Discovery of information not reasonably accessible (undue burden and cost)
 - Destruction under routine, good faith operations (retention management; safe harbor v. spoliation)
 - Protecting attorney-client / work-product (quick peek; clawback)
 - Subpoenas for ESI (Spiro; www.axsone.com/pdf/FRCV_V8_2007.pdf)

Federal Rules of Civil Procedure 3...

- Implications

- ERM policies and procedures (legal, IT, RM perspectives) essential
- Need to be able to demonstrate suitability and enforcement of policies, procedures, and management of ESI
- IT infrastructure will impact discoverability
- Where and how ESI stored and managed
- Who has ESI and where and how retained
- Abilities to access, search, retrieve ESI in event of litigation

(Spiro; www.axsone.com/pdf/FRCP_V8_2007.pdf)

VIEW

MER 2006 Mock Pre-Trial
Conference DVD