

What 'Best Evidence'?

Archival Discourse and Judicial Decisions

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SAA (Chicago, IL)
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Outline

- “Best Evidence”
- Metadata and the Courts
- Judicial Resources



- [Rule 802. Hearsay Rule](#)
- [Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial](#)
- [Rule 804. Hearsay Exceptions; Declarant Unavailable](#)
- [Rule 805. Hearsay Within Hearsay](#)
- [Rule 806. Attacking and Supporting Credibility of Declarant](#)
- [Rule 807. Residual Exception](#)

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

- [Rule 901. Requirement of Authentication or Identification](#)
- [Rule 902. Self-authentication](#)
- [Rule 903. Subscribing Witness' Testimony Unnecessary](#)

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

- [Rule 1001. Definitions](#)
- [Rule 1002. Requirement of Original](#)
- [Rule 1003. Admissibility of Duplicates](#)
- [Rule 1004. Admissibility of Other Evidence of Contents](#)
- [Rule 1005. Public Records](#)
- [Rule 1006. Summaries](#)
- [Rule 1007. Testimony or Written Admission of Party](#)
- [Rule 1008. Functions of Court and Jury](#)

ARTICLE XI. MISCELLANEOUS RULES

- [Rule 1101. Applicability of Rules](#)
- [Rule 1102. Amendments](#)
- [Rule 1103. Title](#)

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Best Evidence Rule

- To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by [an] Act of Congress.

Fed. R. Evid. 1002

Best Evidence Rule

- **Original:** is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it.... If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original”. **Fed. R. Evid. 1001(3)**
- **Duplicate:** includes a counterpart produced by the same impression as the original or by mechanical or electronic re-recording or by other equivalent techniques which accurately reproduces the original. **Fed. R. Evid. 1001(4)**

Best Evidence Rule

- A duplicate is admissible to the same extent as an original, unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. **Fed. R. Evid. 1003**
- An original is not required if it is lost or destroyed, except when lost or destroyed through bad faith, or if it is otherwise unobtainable. **Fed. R. Evid. 1004**

Discovery

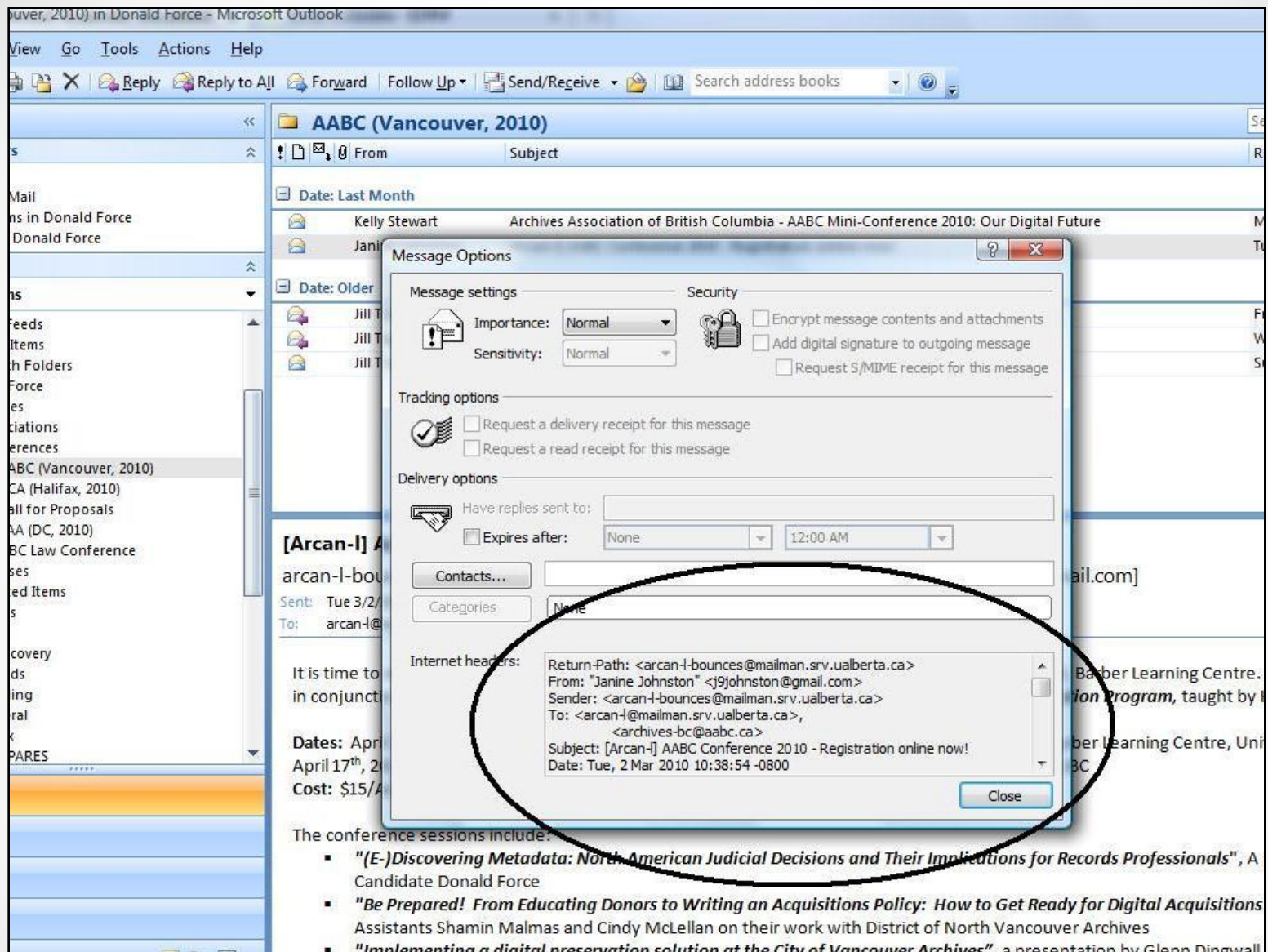
- Parties may obtain discovery of any matter, not privileged, that is relevant to the claim or defense of any party. **Fed. R. Civ. P. 26(b)(1)**



Metadata

- A characterization or description documenting the identification, management, nature, use, or location of information resources (data) (**SAA Glossary**)
- Secondary data that organize, manage, and facilitate the use and understanding of primary data (**Black's Law Dictionary**)





Return-Path: <arcan-l-bounces@mailman.srv.ualberta.ca>
From: "Janine Johnston" <j9johnston@gmail.com>
Sender: <arcan-l-bounces@mailman.srv.ualberta.ca>
To: <arcan-l@mailman.srv.ualberta.ca>,
 <archives-bc@aabc.ca>
Subject: [Arcan-l] AABC Conference 2010 - Registration online
 now!
Date: Tue, 2 Mar 2010 10:38:54 -0800
Message-ID: <005e01caba37\$9d3fc450\$d7bf4cf0\$@com>
MIME-Version: 1.0
Content-Type: multipart/alternative;
 boundary="-----=_NextPart_000_008D_01CABA0C.0B52CC70"
X-Mailer: Microsoft Office Outlook 12.0
Content-language: en-us
Thread-index: Acq6N5ylxqlg9LOuSRyCWsHSDl2bww==

Metadata

- *Williams v. Sprint/United Mgmt. Co.* (D. Ks., 2005)
- *Ky. Speedway, LLC v. NASCAR* (E.D. Ky., 2006)
- *Wyeth v. Impax Labs., Inc.* (D. Del., 2006)
- *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec.* (S.D. N.Y., 2008)
- *Lake v. City of Phoenix* (Sup. Ct. Az., 2009)
- *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency* (S.D. N.Y., 2011)*



Williams v. Sprint/United Mgmt. Co.

(D. Ks., 2005)

- “the Court holds that when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact.”

Williams v. Sprint/United Mgmt. Co.

(D. Ks., 2005)

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Ky. Speedway, LLC v. NASCAR

(E.D. Ky., 2006)

- “In most cases and for most documents, metadata does not provide relevant information. Metadata may or may not provide the information plaintiff seeks concerning specific documents in this Case. Depending on the format, the metadata may identify the typist but not the document's author, or even just a specific computer from which the document originated or was generated.”

Ky. Speedway, LLC v. NASCAR

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Wyeth v. Impax Laboratories (D. Del., 2006)

- “[...] if the requesting party can demonstrate a particularized need for the native format of an electronic document, a court may order it produced. Therefore, the producing party must preserve the integrity of the electronic documents it produces. Failure to do so will not support a contention that production of documents in native format is overly burdensome.”

Wyeth v. Impax Laboratories (D. Del., 2006)

- “[...] if the requesting party can demonstrate a particularized need for the native format of an electronic document, a court may order it produced. **Therefore, the producing party must preserve the integrity of the electronic documents it produces.** Failure to do so will not support a contention that production of documents in native format is overly burdensome.”

Lake v. City of Phoenix

(Sup. Ct. Az., 2009)

- “It would be illogical, and contrary to the policy of openness underlying the public records laws, to conclude that public entities can withhold information embedded in an electronic document, such as the date of creation, while they would be required to produce the same information if it were written manually on a paper public record.”
- “We accordingly hold that when a public entity maintains a public record in an electronic format, the electronic version of the record, including any embedded metadata, is subject to disclosure under our public records law.”

National Day Laborer Organizing Network

v. U.S. ICE Agency (S.D. N.Y., 2010)

- Identifier
- File Name
- Custodian
- Source Device
- Source Path
- Production Path
- Modified Date
- Modified Time
- Time Offset Value
- To
- From
- CC
- BCC
- Date Sent
- Time Sent
- Subject
- Date Received
- Time Received
- Attachments

National Day Laborer Organizing Network v. U.S. ICE Agency (S.D. N.Y., 2010)

- “Some agencies may maintain only a printed or imaged document as the final or official version of a record. Others retain all records in native format, which preserves much of the metadata.”

Summary

- “Best Evidence” rule continues to evolve especially with regards to electronic records
- Not all electronic records are equal
- Lack of understanding of the role of metadata and its relationship to electronic records

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U.S. v. John **Cockerham, Jr.**, Melissa Cockerham, Carolvn Blake, a.k.a. Carol Bradshaw

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HP is Buying Autonomy for \$10 Billion

August 18, 2011

Like I've been saying all year, e-discovery is hot. Now there are 10,000,000,000 more reasons to believe it. Like they say, money doesn't talk, it screams. See *The Word is Out: e-Disco is the Hot New Dance; 2nd Addendum to e-Disco is Hot: Clearwell Sells for \$410 Million!; Going "Gaga" Over Big Deals and Malpractice in e-Discovery.*



Hewlett-Packard's purchase of Autonomy Corp. for Ten Billion Dollars is major news.

This purchase shows that the largest IT corporations now all understand that old-box hardware is yesterday's commodity with no potential for growth. So too are the printers that go with the old boxes and try in vain to perpetuate the ancient world of paper. It is not surprising that HP also [announced its plans](#) to spin-off its personal computer business. The real money, the future, the growth that investor's crave, is in information services. HP, and the others that I predict will soon follow in their footsteps, are all



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friday, august 19, 2011

Privilege Waived? Federal Court Says Don't Blame Your Electronic Discovery Vendor

The buck stops here.

In *Thorncreek Apartments III, LLC v. Village of Park Forest* (N.D. Ill. Aug. 9, 2011), the Northern District of Illinois held that a litigant that was negligent throughout the discovery process and failed "to check the production database created by the [third-party e-discovery vendor] before it went live online and became available to [opposing] counsel" waived privilege with respect to inadvertently produced documents. (emphasis in original). It is noteworthy that the court never called into question the conduct of the e-discovery vendor. Rather, the first line of defense in such cases clearly lies with the litigant who claims privilege.

Looking forward, the necessary re-review of any production database may involve tens of thousands of documents marked as privileged. (In



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