

Inside Medical Liability

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2017 THIRD QUARTER

New Tactics for Lowering Readmissions

A N D

MPL under MACRA

Inside Medical Liability

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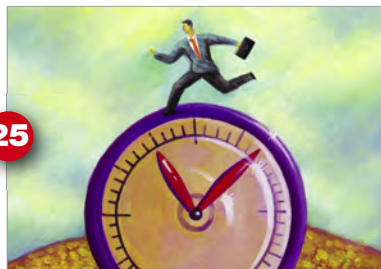
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“The general goal is to help patients better endure, or more quickly recover from, the physical trauma of major surgical procedures.”

—Cover story

BY DAVID M. JONES

Bug Fixes Coming for the Federal Rules of Evidence: Click 'Like' to Install

Ready for download on December 1, 2017 will be two amendments to Federal Rule of Evidence 902, allowing for the self-authentication of electronic information. The changes may facilitate more efficient and focused forensic e-discovery and case preparation. They should also make it easier to admit at trial powerful evidence from electronically stored information (ESI) gathered from “publicly facing” social media, digital environments, and electronic hardware.

In the “old days...”

In the recent past, courts confronting whether and how to admit forensically-captured ESI under Rule of Evidence 902(11) often analogized such evidence to business or telephone records. For example, in February 2015, the Colorado Court of Appeals considered a case involving a murder in which the 36-year-old leader of a “street family” of homeless and runaway teens was convicted of orchestrating the killing of a victim by way of conversations memorialized on the defendant’s Facebook account.¹ To establish the authenticity of evidence gleaned from Facebook, the prosecutor produced an affidavit from a Facebook records custodian to show that the records in fact were those of Facebook. The affidavit



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from the Facebook records custodian stated that the records included basic subscriber information, IP logs, messages, photos, and expanded content for the profile pages linked to the defendant; the custodian also stated that the records provided were made and kept by the automated systems of Facebook in the course of its regularly conducted activity, as a regular practice of Facebook.²

To link the substance of the postings to the defendant, the prosecutor presented testimony from several percipient witnesses. The witnesses were necessary to establish the defendant’s name as it was registered to his account; to identify photos of the defendant on his profile; to identify communications with the defendant via the account; and to confirm the defendant’s nickname as it was used in the various posts in his account. The

prosecution’s diligent efforts in establishing the authenticity of the defendant’s Facebook profile paid off—the information posted to the defendant’s account was incriminating, and the jury entered a guilty verdict that was later upheld on appeal.

The forthcoming updates to Federal Rule of Evidence 902, if they had been in place and adopted when *Glover* was prepared and tried, would likely have streamlined not just the prosecutor’s presentation of evidence in the courtroom, but also the legal team’s workup and preparation for trial.

Self-authentication and the amendments to Rule 902

Pursuant to Rule of Evidence 902, various items of evidence are self-authenticating; they require no extrinsic evidence to estab-

lish that they are what they purport to be. Examples of self-authenticating evidence include newspapers, certain government documents, and certified copies of public or business records.³ With the proposed amendments in place, electronic evidence will attain a status similar to that of more traditional self-authenticating documents.

Rule 902(13) will cover records “generated by an electronic process or system that produces an accurate result”⁴ such as a metadata report showing forensically verifiable details of information downloaded from a computer; or showing time, date, and location details obtained from GPS software on a smartphone.


Rule 902(14) would allow a copy of data to be considered self-authenticating when taken from “an electronic device, storage medium, or file, if authenticated by a process of digital identification”⁵—for example, a comparison of a series of alphanumeric characters called MD5 Hash values that serve as a document’s proverbial “DNA.” For both items of evidence, the proponent of the evidence must still meet the requirements of Rule 902(11), which include certification of a cus-

tomian or other qualified person to certify the records of regulated-conducted activity.

Importantly, because these amendments to Rule 902(13) and (14) focus on the electronic processes and devices from which ESI is captured, these amendments should allow trial counsel to present his or her forensic e-discovery professional as the proponent of electronic evidence. This avoids, for example, involving a records custodian from the latest social media outlet from which the records were obtained. And it may obviate the need to track down ephemeral witnesses indifferent—or hostile—to the parties and events at issue. In the case of *People v. Glover*, these amendments would likely have simplified the prosecution’s efforts to authenticate the statements recorded in Facebook postings. That may have kept more focus on the actual content of those postings—the stuff of which good competitive storytelling is made.

Significance of the amendments

As with other rules of evidence, the arcane language of these new provisions gives way, with careful thought, to a practical framework

to help tell your client’s story to the jurors in the jury box, using language and common experience we can all understand. Although it remains to be seen how courts will apply the amendments to FRE 902—and whether individual states’ rules committees will adopt similar language across the country—lawyers can keep in mind these principles to inform their allocation of discovery resources, their retention of forensic e-discovery consultants, and their deposition and trial preparation. Just as with our ubiquitous electronic devices, an appropriate update of the Rules of Evidence keeps us humming along, bug-free. 

For related information, see www.hallefans.com and www.summit-litigation-support.com.



Footnotes

1. See *People v. Glover*, 363 P.3d 736 (Colo. App. 2015).
2. Id. at 740.
3. See, e.g., FRE 902(1) – (9).
4. Fed.R.Evid. 902(13) (proposed amendment 2016).
5. Fed.R.Evid. 902(14) (proposed amendment 2016).

Acknowledgment: The author would like to thank Joe Buccholz, Head Trial Consultant at Summit Litigation Support, for his input in preparing this article.



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