

Date : 12/18/2022 6:55:57 AM

From : "Paul Dulberg"

To : "Alphonse Talarico"

BCc : "Paul Dulberg" , "Tom Kost"

Subject : Mast.wav - How to admit and attach the audio file as evidence that was created and produced by Barbara G Smith

Dear Mr Talarico,

Per our phone discussion a few days ago the question arose about how to attach the "Mast.wav" audio file, produced in response to our subpoena of Barbara G Smith's records, to our reply to Flynn's Sur response to our motion to exclude Mast's deposition.

The purpose of attaching "Mast.wav" as an exhibit is to illustrate for the court the off the record discussion about Mast's equipment failures and the fact that Mast was only able to view 1 exhibit of 15 uploaded during the deposition.

My understanding is the audio file can be attached as an exhibit in numerous ways as described in the Illinois Rules of Evidence.

Below I have added a link to a color coded guide for reference:

https://www.tdrlaw.com/wp-content/uploads/2022/02/Illinois_Rules_of_Evidence_Color-Coded_Guide.pdf

Article X - Contents of Writings, Recordings and Photographs

Note that according to the legal definitions in Rule 1001 (page 329):

audio recordings are called "Writings and Recordings"

Rule 1006. summaries to Prove content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court

This is clearly an important rule for us. We can provide a summary of the content as an exhibit and have the actual audio (legally called "writings and recordings") available in court at the time and available for whoever wants it.

We can create a thumb drive containing the digital audio file available for anyone who wants to copy it and inspect the originals or if the court allows we can email the Mast.wav audio file to opposing counsel.

Rule 1007. Testimony or statement of a Party to prove content

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

This interesting rule seems to mean we can prove the content of Barbara G Smith's audio by basically submitting a Request for Admission by opposing counsel to ask them whether they admit the audio is real or not.

Only if opposing counsel denies that the audio is real do we need to authenticate the audio evidence further.

In our case, if defendants admit that the Barbara G Smith audio file is real in court or by using an RFA, then no more authentication is necessary.

Rule 1008. Functions of the court and Jury

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines—in accordance with Rule 104(b)—any issue about whether:

- (a) an asserted writing, recording, or photograph ever existed;
- (b) another one produced at the trial or hearing is the original; or
- (c) other evidence of content accurately reflects the content.

Interesting. In this rule the authenticity of an audio may come down to being a question of fact for a jury to decide during a trial.

