

## Bodies of evidence?



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Until 40 years ago or so, federal law enforcement could not obtain a warrant for “evidence” of a crime. Officers could only obtain a warrant for “fruits, “instrumentalities” and “contraband.” In addition, the chain of custody was a physical, documentary chain of custody. But in February 2007, *Traffic World* — a sister publication of *The Journal of Commerce* — published an article of mine claiming that the electronic data connected to smart containers, depending on the system employed, could be used in the chain of custody.

As a result of that article, questions arose as to accuracy of the claims and whether the courts would accept electronic evidence as admissible if the legal thresholds were met. The question is simple: Can there be a digital chain of custody, and can electronic evidence be presented in court?

There are two sets of federal procedures: criminal procedures and civil procedures. For some time, the Federal Rules of Criminal Procedure have allowed the issuance of a warrant for seizure of evidence of a crime, fruits of a crime, contraband and property designed for, intended for or used in the commission of a crime. Therefore, the seizure of computers and their electronic, digital contents have been allowed in criminal proceedings.

Thus, a smart container’s electronic information can be used in court if it fits into one of the above categories. In fact, there is a Computer Crime and Intellectual Property Section in the Criminal Division of the Department of Justice for that purpose.

Until December 2006, the Federal Rules of Civil Procedure, however, did

not allow the paper or documentary rules to be applied to electronic or digital discovery. In 2006, however, the U.S. Supreme Court approved amendments to several rules. In short, the changes allow electronically stored information (ESI) to be requested during discovery for admission in trials in U.S. courts, assuming, of course, that it meets the legal thresholds for the admission of evidence. Furthermore, ESI evidence that includes virtually all electronic records and communications, including e-mails, may be obtained through subpoena in criminal cases and by pretrial discovery in a civil case.

While electronically stored information can be requested during discovery, this does not mean it is automatically admissible. Like any piece of potential evidence, it must meet normal thresholds. It must be relevant, authentic, not hearsay, original, and its value must outweigh any prejudicial effect it could have.

Finally, electronic evidence must be authenticated just like documentary or paper evidence must be, and retrieved from an electronic file that is the same as the one in which the evidence was placed originally. Ultimately, however, the Federal Rule of Evidence 1001 describes what digital products can be admitted into evidence and used as evidence in a trial.

Smart containers can provide an electronic receipt showing evidence of contents and evidence of shipping; the identity of the authorized individual supervising the stuffing of the container, and verifying its contents at the point of origin; the identity of the authorized person opening the container at destination; data transfer of

logistics; and booking information from the shipper. There is even an electronic record of date, time and place of arming and activating the smart container. There is also the electronic tracking and breach history of the container during its movement.

All of this electronic data is maintained in digital servers used by global call centers, carrier servers and shipper servers as well as in other computers. Because digital data also can be transferred by satellite, there is likely to be an electronic record of all satellite transmissions and their contents. There also could be e-mails reporting events associated with the container’s movement from origin to destination.

In effect, digital evidence can be treated in the same way as documentary evidence would be treated, from its discovery (origin) through its controlled treatment, movement to and disposition in the evidence room (destination) to its use now in civil and criminal trials.

Electronic evidence is becoming more important in the jurisprudence system in light of the new rules of Federal Civil Procedure. Its use in the chain of custody is now accepted. And its practical applications to trade issues such as controlling transshipments in textiles, certifying origins of products, identifying those potentially connected to terrorists’ activities and serving as a digital history of the container’s global movement is reality.

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