THE DEVELOPING STANDARDS FOR AUTHENTICATING ELECTRONIC EVIDENCE

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Until recently, courts treated electronic evidence in the same way as paper evidence in terms of admissibility and authenticity. But, in the last two years, Courts have started to delve into the question of what type of evidentiary foundation is required for such evidence to be admissible. In two significant rulings, one in December 2005 and one in May 2007, Courts have excluded electronic business records because of questions of authenticity that would have been routinely been admitted into evidence in the past. One of these decisions was by the Ninth Circuit's Bankruptcy Appeals Panel. The other is a 101 page opinion issued by a Maryland Federal District Court Judge who is very well respected in the field of electronic discovery. This article briefly describes these two significant decisions and how they might impact your practice.

***IN RE VINHNEE*, 336 B.R. 437 (9TH CIR. B.A.P. 2005)**

In *Vinhnee*, American Express claimed that Mr. Vinhnee had failed to pay his credit card debts, and it took legal action to recover the money. But the original judge determined that American Express failed to authenticate its electronic records, and that it could not admit its own business records into evidence. American Express tried a second time to get the records admitted and was again refused on the grounds that it failed to sufficiently establish a foundation of authenticity for the records offered into evidence. Finally, American Express challenged the judgment on appeal ‹and lost a third time.

The *Vinhnee* decision is important because the Court held, in effect, that electronic records are not automatically presumed to be admissible unless you can establish that the document proffered is identical to the originally created record. Citing

FRE 901(a), the Court stated: “Authenticating a paperless electronic record, in principle, poses the same issue as for a paper record, the only difference being the format in which the record is maintained: one must demonstrate that the record that has been retrieved from the file, be it paper or electronic, is the same as the record that was originally placed into the file.” *In re Vinhnee*, 336 B.R. at 444. The Court noted that “the focus is not on the circumstances of the creation of the record, but rather on the circumstances of the preservation of the record during the time it is in the file so as to assure that the document being proffered is the same as the document that originally was created.” *Id.*

The *Vinhnee* Court rejected the vague declaration American Express offered from its custodian of records, noting that American Express needed to go beyond merely identifying the makes and models of the equipment, naming the software, noting that some of the software was customized, and asserting that the hardware and software are standard for the industry, regarded as reliable, and periodically updated. *In re Vinhnee*, 336 B.R. at 448. To assure continuing accuracy of the records, the Court required additional foundational testimony regarding:

- The proponent's policies and procedures for use of the equipment, database and programs;
- How access to the pertinent database is controlled and, separately, how access to the specific program is controlled;
- How changes in the database are logged or recorded;
- The structure and implementation of backup systems; and
- Audit procedures for assuring the continuing integrity of the database.

Id. at 449.

For a "generally serviceable modern foundation," the court cited Edward J. Imwinkelried, "*Evidentiary Foundations*" §4.03[2], which suggests the following 11-step foundation for authenticating computer records:

- The business uses a computer.
- The computer is reliable.
- The business has developed a procedure for inserting data into the computer.
- The procedure has built-in safeguards to ensure accuracy and identify errors.
- The business keeps the computer in a good state of repair.
- The witness had the computer read out certain data.
- The witness used the proper procedures to obtain the readout.
- The computer was in working order at the time the witness obtained the readout.
- The witness recognizes the exhibit as the readout.
- The witness explains how he or she recognizes the readout.
- If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

Id. at 446.

The *Vinhnee* panel also relied on the *2006 Manual for Complex Litigation*, which noted that a judge should "consider the accuracy and reliability of computerized evidence" and that a "proponent of computerized evidence has the burden of laying a proper foundation by establishing its accuracy." *In re Vinhnee*, 336 B.R. at 445. Despite what appeared on its face to be an acceptable authenticating declaration, ultimately, the Court concluded that American Express had failed to meet its authentification burden as proponent of the evidence. As a result, American Express "suffered the ignominy of losing even though its opponent did not show up." *Id.* At 450.

LORRAINE V. MARKEL AMERICAN INSURANCE CO., 241 F.R.D. 534, 538 (D. MD. 2007)

In the *Markel* case, a couple brought suit in the United States District Court of Maryland against their insurance company, in a dispute over the cause and amount of damages to their yacht which had been struck by lightening. The parties filed cross motions for summary judgment. In a 101 page opinion, District of Maryland Judge Paul

Grimm dismissed both of these motions because the electronic documents at the center of the case could not be authenticated - and therefore were not admitted into evidence.

Judge Grimm's extensive analysis of the evidentiary and authenticity analysis is not easily reduced to a few paragraphs. However, it is clear from the opinion that, in order to show that ESI is admissible, its proponent must demonstrate that it is:

- Relevant under Federal Rule of Evidence 401
- Authentic under FRE 901(a)
- Not hearsay if offered for its substantive truth or, if it is hearsay, admissible under an applicable exception under FRE 803, 804 and 807
- An original or duplicate, in the form in which the ESI is offered or, if not, admissible secondary evidence to prove the content of the ESI under the "original writing" FRE 1001-1008, and
- Substantially more probative than prejudicial under FRE 403.

Judge Grimm addresses each of these issues, focusing primarily on the standards under FRE 901(a) and the original writing rules contained in FRE 1001-1008.

Right now, many commentators expect that, at least for now, Judge Grimm's analysis will set the standard for analyzing evidence issues with regard to electronic discovery. Thus, until a uniform standard is developed and adopted, the *Markel* opinion is a "must read" for anyone heading into Court with electronic evidence that is crucial to their case.

CONCLUSION

There is no definitive standard for the admission of electronic records yet. Practitioners in the Ninth Circuit should be prepared to present evidence to satisfy the paradigm in *Vinhnee* and should be acquainted with the detailed discussion of admitting electronic records Judge Grimm laid out in *Markel*. The American Bar Association's "Digital Evidence Project" is working in a treatise which is expected to cover evidentiary

foundations for electronic records, but there is no listed publication date for that treatise. Members of the Sedona Working Group (an elite gathering of respected judges, top litigators, technology experts and leading legal minds who were largely responsible for the changes to the Federal Rules of Procedure relating to electronic discovery) are also working on a new publication to address the technical mechanics of authenticating electronic records. When completed, this publication is expected to be given significant weight by the federal bench and will likely set out some basic standards that will be followed by most, if not all, Circuits. However, this publication is likely still a year or two away.

In the meantime, practitioners would be well advised to heed Judge Grimm's warning in *Markel:* "[A]lthough it may be better to be lucky than good, as the saying goes, counsel would be wise not to test their luck unnecessarily. If it is critical to the success of your case to admit into evidence computer stored records, it would be prudent to plan to authenticate the record by the most rigorous standard that may be applied." *Markel*, 241 FRD at 559. In addition, if you are opposing the admission of electronic evidence, you should scrutinize the declaration or testimony your opponent uses to authenticate that evidence and be prepared to challenge the foundation laid for its authenticity.