

Admissibility of computer documents at trial

From Web pages to corporate e-mail, California offers procedures for the admission of electronic evidence



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It is a foregone conclusion that today's society has become completely dependent upon the computer. One would need only be reminded of the "Y2K bug" and the near widespread panic it generated nearly eight years ago. The familiar stories of chaos of an apocalyptic order which was to be delivered to us by the Y2K bug illustrate a basic truth: in this new millennium, we, the public, have embraced the premise that computers are indispensable to our present way of life. How can it not, now that the estimated number of pages on the Web exceeds 25 billion pages and there are over 40 million Web sites?

Consider the 4.4 million daily transactions on eBay reported in 2005, the ability to access your children's grades on a school Web site, tuning in online to a jazz radio station in Norway, watching live as food is distributed to earthquake victims half a planet away, or a radiologist interpreting an MRI seated in front of a video screen a thousand miles away from where the patient is lying inside the scanner – all examples of the ubiquitous nature of computers in every facet of our daily lives. "75 percent of Americans use the Internet and spend an average three hours a day online." B*rad Stone, "Hi-Tech's New Day", Newsweek, April 11, 2005, p. 62.*

Not surprisingly, the legal profession is not immune to the influence of the digital age as trial lawyers are increasingly called upon to wrestle with the peculiar legal issues posed by computer technology. Recently, in an action involving the wrongful death of a young father who left behind a wife and young children, our law office was called upon to establish the association between two corporate defendants in order to prove a commonality of their interests. We naturally turned to the Internet, located the defendants' Web sites, found exactly what we were looking for, printed out the pages from their Web sites, and submitted them as evidence with the court. The defendants never challenged our evidence, but it raised a question in our minds, "Can we even do this?"

In this article, we explore the methods under California law by which computerized records may make its way into a courtroom and into evidence. In doing so, we also take this opportunity to re-familiarize ourselves with the process for the admission of "written" records into evidence at trial.

Authentication

In most trials, the computerized record is ultimately reduced to a printed paper document. As a practical matter, the printed paper form is easier and more economical to use at trial. Moreover, during the examination of a witness or in the statements to a jury, writings on a solid piece of paper often have more persuasive effect than the amorphous quality of a megabyte. Government Code section 14741 provides the following:

> "Record(s)" means all paper, maps, exhibits, magnetic or paper tapes, photographic films and prints, and other documents produced, received, owned or used by an agency, regardless of media, physical form or characteristics.

Thus, if the admission of a printed computerized record becomes a matter of dispute, one of the first questions may be whether the record was

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appropriately authenticated under California Evidence Code section 1400 et. seq. In effect, is the record what the proponent claims it to be?

Curiously, this issue as applied to Internet Web sites has been addressed in California only in published opinions at the federal court level with some widely disparate results and little reconciliation between them. (*Wady v. Provident Life And Accident* (2002 U.S. Dist.) 216 F.Supp.2d 1060 and *Moose Creek, Inc. v. Abercrombie & Fitch Co.* 2004 (U.S. Distr. 331) F.Supp.2d 1214.) are the cases in point. In *Wady*, the plaintiff sought to defeat the defendant insurance company's motion for summary judgment, in part by trying to introduce documents that the plaintiff's attorney obtained from the defendant's own Internet Web site. Notwithstanding an affidavit from the plaintiff's attorney attesting to his procurement of the documents from the defendant's own Web site, the United States District Court concluded that this attempt at authentication was inadequate. In doing so, the Court reiterated:

> Anyone can put anything on the Internet. No Web site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation. . . . the Court holds no illusions that hackers can adulterate the content on any Web site from any location at any time. For these reasons, any evidence procured off the Internet is adequate for almost nothing.

(*Id.* at 1065-1066.)

In *Moose Creek, Inc.*, the plaintiff sought a preliminary injunction against the defendant prohibiting the latter from selling goods with a logo of a moose. Over the plaintiff's objections based on lack of authentication, the defendant was allowed to introduce evidence of a large number of Internet advertisements demonstrating many retailers selling goods carrying a picture of a moose similar to plaintiff's. Cognizant of the *Wady* case, the court in *Moose Creek, Inc*. attempted to distinguish its holding by focusing on the purpose for which the Internet records were being offered and the probability that the defendant would later be able to authenticate the Internet records.

In *In re Vinhnee* (9th Cir. BAP, Dec. 16, 2005) 336 B.R. 437, a California bankruptcy appellate panel dealt with the issue of the admissibility of paperless electronic records. Computer-generated, non-image documents are susceptible to challenge. Someone who is aware of the process by which a computer generates documents must testify, and the inquiry must include "system control procedures, including control of access to the pertinent databases, control of access to the pertinent programs, recording and logging of changes to the data, backup practices, and audit procedures utilized to assure the continuing integrity of the records." (*Ibid.*) Failure to meet these standards can result in rejection of the proffered evidence.)

To reduce the anxiety a trial attorney may experience when confronted with uncertainty as to whether a computerized record will be admitted or excluded at trial, it is best to resolve the issue up front by the following means:

- Serve Requests For Admission pursuant to California Code of Civil Procedure section 2033.060(g) and Evidence Code section 1414(a);
- Obtain a signed stipulation by counsel for all parties pursuant to Evidence Code section 1400(b); or
- Make a Request for Judicial Notice pursuant to Evidence Code section 450 et. seq.

If these methods fail to resolve the issue, a hearing outside the presence of the jury pursuant to Evidence Code sections 402 and 403 becomes necessary.

In a "402 hearing," the burden of proof for the admissibility of the record falls upon the proponent of the proffered evidence (See Evid. Code, § 403(a).) The Evidence Code then provides a list of methods to authenticate the computerized record, most notably:

- Testimony from a witness who saw the record being created or executed (§1413);
- Testimony from an expert witness making comparisons to prove the genuineness of the record (§1418);
- Testimony from a witness that the record was received in response to a communication sent to the purported author of the record (§1420);
- The writing refers to matters that are unlikely to be known to anyone other than the purported author of the computerized record (§1421);
- Computer printouts are self authenticating (See *Ampex Corp v. Cargle* (2005) 128 Cal.App.4th 1569, 1573.) California case law has drawn a distinction between records that a computer generates on its own and records that a human operator inputs into the computer. The former, such as an automated time signature attached to the creation of a document, is presumed to be authentic, and if challenged, would only need to be authenticated by proving that the computer was operating properly (See *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1450.)

Secondary evidence rule

To prove the content of a writing, introducing the original writing would be preferred. However, proffering the original computerized records at trial can raise real logistical problems. Fortunately, California law permits the use of secondary evidence to prove the content of a writing where there is no genuine dispute concerning its material terms, the record has been authenticated and there is no unfairness in admitting the secondary evidence (See Evid. Code, §1521.)

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Consequently, printed representations of a computer record are typically used in lieu of the original electronic form. To facilitate the use of the printed form at trial, California Evidence Code section 1552 (a) creates a presumption that a printed representation of computer information is an accurate representation of the computer information or program it purports to represent. Evidence Code section 1553 creates the identical presumption for printed representations of images stored on video or digital media. It is important to remember that these presumptions are rebuttable. If there is evidence that a printed representation is inaccurate, the party who seeks to admit the printed representation has the burden of proof by a preponderance of evidence that the print is an accurate representation of the original record. Again in a "402 hearing," such a task could be near Herculean and involve the taking of testimony by witnesses and the production of the original computer record to be compared against the printout or photocopy. Anticipation and preparation is often the key to the record's admissibility or exclusion at trial.

Hearsay exception

The final hurdle for the admissibility of a computer record is whether the information contained therein falls within a hearsay exception. California cases hold that "computer print-outs are admissible if they fit within a hearsay exception." (*People v. Hawkins, supra,* 98 Cal.App.4th at 642.) Ordinarily, the exception most cited for these type of records is the "business records" exception set forth in Evidence Code section 1271 (See *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 797.) Of course, the other exceptions to the Hearsay Rule set forth in Division 10, Chapter 2 of the California Evidence Code may be applicable depending upon the nature of the computer record's contents and should be considered.

Additional considerations on admissibility of computer information [State of California guidelines]

"Since the content of a record may change if the equipment is not working properly, an organization may be required to present evidence that its equipment was operating reliably on the day the computer record was prepared. A computer operations log indicating the absence of any malfunctions is generally adequate. Errors in computer records can also result from errors in computer programs. An organization may be required to present evidence related to the development and testing of programs. An expert witness to determine its accuracy or reliability often examines programs. An organization may be required to present the specific version of the computer program used to process the data or manage the electronic document being entered into evidence. A different version of the program may be considered if it is the only one available, but the absence of the exact version may raise serious questions on the trustworthiness of the computer records." (Source: California State Department of General Services, http://www.documents.dgs.ca.gov/pd/recs/erm-s4.pdf.)

"Computer printouts prepared in the ordinary course of business activity are perceived to have higher trustworthiness than similar computer printouts prepared for trial. However, if the organization can show an adequate audit trail leading to data creation and merely a time lag before printing, the acceptability of the printouts is improved." (Source: California State Department of General Services, http://www.documents.dgs.ca.gov/pd/recs/erm-s4.pdf.)

"An approved records retention schedule can have a profound impact on court proceedings because the schedule establishes a retention period and specified disposition time. Although an approved retention schedule for a record requested does not guarantee the court's acceptance of it, the fact that a record is scheduled definitely helps meet the requirement of a record being created as a 'regular practice' of the agency. Courts also accept the defense that records have been disposed of under an approved records retention schedule. Electronic records keeping systems incorporate the ability to associate a specific electronic document (as part of a specific record) with a specific electronic retention schedule providing further assurance of the link between the retention policy and the disposition of the specific record in question. Courts have imposed penalties on entities that failed to have current records retention schedules or failed to follow established procedures to manage and safeguard records properly. Dismissal of cases, fines and sanctions has been imposed for failure to produce required records. If records are willfully withheld or the entity cannot demonstrate a good faith effort to find them, in some extreme cases criminal sanctions have been imposed." (Source: California State Department of General Services, http://www.documents.dgs.ca.gov/pd/recs/erm-s4.pdf.)

Conclusion

Undoubtedly, the exponential use and proliferation of e-mails, text messages, video sharing databases, and Internet Web sites will impose an increasing demand upon trial attorneys to contend with its legal ramifications in litigation long into the foreseeable future. Revisiting the rules of evidence in the early stages of litigation and planning for potential challenges to critical pieces of evidence will prove invaluable to the successful outcome of the case.

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