Evidence

Unique Facets of Internet Evidence Explained

Knowledge of underlying technology invaluable to authenticity and hearsay objections

BY GARTH T. YEARICK
LITIGATION NEWS ASSOCIATE EDITOR

As the Internet has become an integral part of daily life for most individuals, it has forced lawyers to analyze how the rules of evidence should treat the digital footprints left by parties on their own websites, in e-mail, on third-party websites like Facebook and MySpace, and even in instant messaging. In recognition of this trend, the Section of Litigation recently sponsored a panel discussion, "The Next Frontier: The Admissibility of Electronic Evidence."

Gregory P. Joseph, New York City, a former Section Chair and a speaker at the panel, believes not that the rules of evidence need to be changed to embrace Internet evidence, but that lawyers have to sufficiently learn the underlying technology in order to adequately advocate how the rules should be applied to such evidence.

Joseph has, for example, prepared a framework to establish the authenticity of a web page (*see* box, upper right) that was presented at the panel discussion. He warns: "Litigators have to be prepared to address disclaimers that a website contains hacked material or unauthorized material. That would require you to go further and get testimony from the webmaster or personnel responsible for the site, as a starting point, and perhaps to retain your own electronic expert."

Joseph notes that information produced by a party from its own website is considered prima facie authentic, while materials printed from a third-party's website are not. Likewise, Joseph believes it is a usually a given that e-mails produced from the party's own servers will be presumed authentic.

A federal district court recently came to the same conclusion. *See Sklar v. Clough*. In *Sklar* the court determined, in the context of a summary judgment proceeding, that certain e-mails were "deemed authentic when offered by a party opponent" simply because they had been produced by the defendants during discovery. Joseph cautions, however, that e-mails and other Internet evidence are still subject to a number of objections.

Joseph advises that a principal objection to the admission of e-mail into evidence is that e-mail is not a business record. "There are a number of courts holding that there is no business practice to put down many of the things that are put down in e-mail," Joseph says. "E-mail frequently is not a business record or may be only partially a business record." Joseph points out that although certain e-mails may constitute business records, admissions, or even present sense impressions, strings of e-mail and Internet evidence in general can create embedded hearsay issues, such that each web page or string e-mail may be subject to a separate analysis.

Sheldon M. Finkelstein, Newark, NJ, Co-Director of the Section's Division V (Substantive), also appeared on the panel. He believes that many otherwise experienced litigators have not had the opportunity to address in the courtroom the intricacies of introducing electronic discovery into evidence at trial. "While there certainly is overlap between the introduction of paper documents and electronically created documents, there are significant points of distinction," he says.

"One of the things the program was intended to accomplish was to sensitize litigators to the issues presented," Finkelstein says. "Some courts have expressed serious concerns regarding the authentication and reliability of evidence obtained from the Internet."

Establishing the Authenticity of Website Data

- Witness typed in URL (the "www" address)
- Logged onto site
- Reviewed what was there
- Testifies that printout or other exhibit fairly and accurately reflects it

Finkelstein cautions that this is a developing area of the law and that some courts have created complex procedures governing the introduction of certain types of electronic records. He observes, for example, that one court cited with approval an 11-step test for authenticating computerized business records. "The litigator must be prepared to address the added requirements that may be presented to satisfy a court in applying the traditional rules of evidence, particularly with respect to issues of authentication and hearsay," he says. ◻

Resources:

Sklar v. Clough, 2007 U.S. Dist. LEXIS 49248 (N.D. Ga. July 6, 2007).

Lorraine v. Markel Am. Ins. Co., 2007 U.S. Dist. LEXIS 33020 (D. Md. May 4, 2007).

In re Vinhnee, 336 B.R. 437 (9th Cir. 2005).

Materials presented at the panel are available at www.abanet.org/litigation/prog_materials/2007_aba.html.

Insurance Coverage Litigation

Courts Disagree on Insurance Treatment of Damages Payments

Coverage often depends on whether award is characterized as 'loss' or 'restitution'

BY HENRY R. CHALMERS
LITIGATION NEWS ASSOCIATE EDITOR

Courts continue to wrestle with how to define for insurance purposes judgments and settlements requiring an insured to disgorge ill-gotten gains. The issue is whether to construe the required payment as a loss (which is ordinarily covered) or as a restitution (excluded), with the availability of insurance coverage often hanging in the balance.

One the one hand, many courts have enforced policy provisions that exclude coverage for losses that require the policyholder to make restitution or disgorge wrongfully acquired property. On the other hand, the disgorgement of profits is sometimes used as a measure of the injury sustained by the policyholder, thus constituting damages that are typically insured.

In a leading case, *Level 3 Communications, Inc. v. Federal Insurance Co.*, the U.S. Court of Appeals for the Seventh Circuit found no insurable loss when the insured settled a securities fraud claim by paying the plaintiffs the difference between the actual stock price they paid and what the price would have been but for the insured's alleged fraud. The court concluded that the payment was "restitutionary in character" because it sought "to divest the defendant of the present value of the property obtained by fraud." The court agreed with the insurer that a loss "does not include the restoration of an ill-gotten gain."

A myopic focus on whether profits were wrongfully obtained "is going down the wrong path."

The Ninth Circuit, however, recently distinguished *Level 3* in a case alleging similar securities fraud claims. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Co.* Although the settlement in the underlying lawsuit could have been deemed restitution, the Ninth Circuit reversed a summary judgment for the insurer because alternative, nonrestitutionary interpretations of the settlement were possible. It found that factual issues remained for trial on whether the settlement was restitution as opposed to compensation for the "intrinsic value of the information withheld from the shareholders."

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