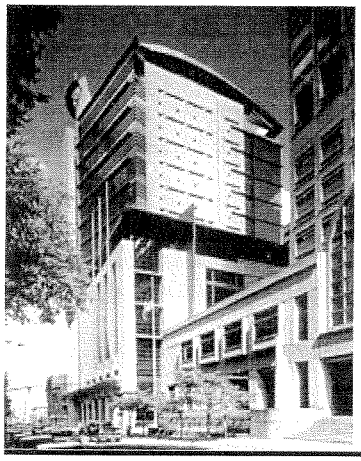


A Quarterly Newsletter of the Oregon Chapter of the Federal Bar Association

FOR THE DISTRICT OF OREGON

Volume XII, No. 3 *Fall 2007*

IN THIS ISSUE

THE DEVELOPING STANDARDS FOR AUTHENTICATING ELECTRONIC EVIDENCE

By Kathryn Mary "Kary" Pratt

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, questions of authenticity caused courts to exclude electronic business records that would have been routinely admitted into evidence in the past. One of these decisions was by the Ninth Circuit's Bankruptcy Appeals Panel. The other was 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 BR 437 (BAP 9th Cir 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 it can be established 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 BR 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

THE PRESIDENT'S COLUMN

By Katherine Heekin, Board President of Federal Bar Association Oregon Chapter

I am honored to serve as this year's President of the Oregon Chapter. I recently attended the annual meeting in Atlanta of all of the Federal Bar Association's chapters and circuits. At a dinner, I sat next to a lawyer who had just returned from an assignment with the State Department in the Green Zone in Baghdad, Iraq. At a meeting the next day, I sat beside a lawyer who had served in the 101st Airborne in Iraq. A retired colonel told me about her experience as a senior legal officer to Trial Chamber III of the International Criminal Tribunal for the former Yugoslavia at The Hague. Stories of significant civil war battles aired on my hotel room television's public broadcasting channel.

At Jimmy Carter's Presidential Library, I saw a voting machine used in the 1980 election in my hometown, Ann Arbor, Michigan. My neighbor's name appeared on the ballot for county commissioner. I also learned about The Carter Center's efforts to promote democracy and human rights around the world. A week later, I was in Phoenix, debating with accountants whether or not the ACLU coined the phrase "separation of church and state," which does not appear in the U.S. Constitution. This week I started to read Jack Goldsmith's *The Terror Presidency*. Goldsmith served in the Department of Justice's Office of Legal Counsel for 10 months, advising the President on how the law applies to the war on terror. Finally, during the summer, I attended a wedding at which the wedding favor was the Preamble to the Constitution. The Preamble states, "We the People of the United States, in Order to form a more perfect Union, establish Justice * * *." All of those experiences made me think of how vital the rule of law is to freedom.

Unfortunately, in my view, it is easy to lose sight of our duty to protect the rule of law, and it may seem at times as though what we do doesn't make a difference. But we can make a difference if we use our voice, our vote, and our reason. As a result, the Oregon Chapter sent letters to Senators Gordon Smith and Ron Wyden asking them to support Senate Bill 1638, the Federal Judicial Salary Restoration Act. The letters appear on the Chapter's Web site at www.vangelisti.com/fbaoregon.htm. I encourage you to write or call the Senators with your support as well.

I also encourage you to attend our monthly luncheons (the third Thursday of every month at the University Club), to write for our award-winning newsletter, and to attend and participate in CLEs, the annual dinner, the annual picnic, and the summer social. Check out the Chapter's Web site at www.vangelisti.com/fbaoregon.htm for upcoming events and dates. For newsletter ideas, contact Tim Snider with Stoel Rives at twsnider@stoel.com or 503-294-9557. I am always available to hear or read your comments, suggestions, and ideas. You can email me at Katherine@HeekinLawOffice.com or call 503-222-5578.

Finally, I thank Helle Rode, last year's President, and last year's Board for their hard work. At the annual meeting, our Chapter won a Presidential Excellence Award, a Meritorious Newsletter Award, and a Presidential Citation Award. I look forward to continuing our service and success with this year's Board.

THE DEVELOPING STANDARDS FOR AUTHENTICATING ELECTRONIC EVIDENCE

Continued from page 1

some of the software was customized, and asserting that the hardware and software are standard for the industry, regarded as reliable, and periodically updated. *Id.* at 448. To ensure 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 ensuring 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] (5th ed 2002), 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.

In re Vinhnee, 336 BR at 446.

The *Vinhnee* Court also relied on the *Manual for Complex Litigation* (4th ed 2004), 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 BR at 445. Despite what appeared on its face to be an acceptable authenticating declaration, the Court ultimately concluded that American Express had failed to meet its authentification burden as the 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 FRD 534 (D Md 2007)

In *Markel*, a couple brought suit in the U.S. 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 lightning. The parties filed cross-motions for summary judgment. In a 101-page opinion, 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 requirements is not easily reduced to a few paragraphs. However, it is clear from his opinion that, in order to show that electronically stored information ("ESI") is admissible, its proponent must demonstrate that it is

- Relevant under FRE 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 rules in 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.

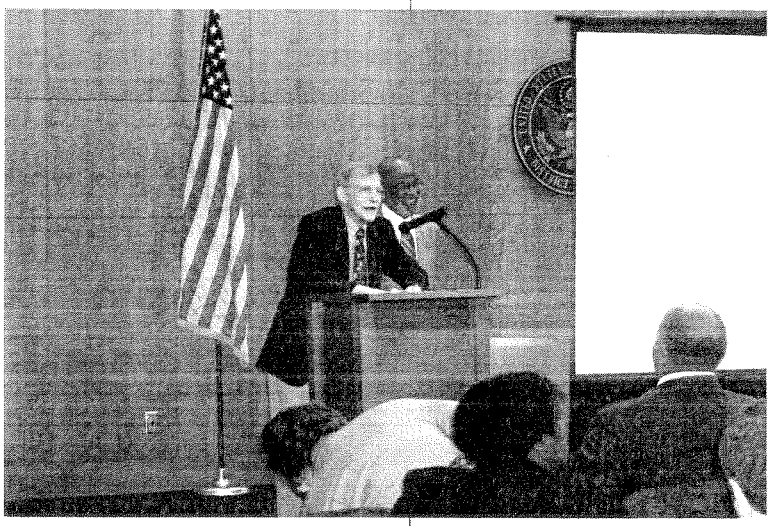
In sum, there is no definitive standard for the admission of electronic records yet. Practitioners in the Ninth Circuit should be prepared to present evidence to satisfy the paradigm in *Vinhnee* and should be acquainted with the detailed discussion of admitting electronic records Judge Grimm laid out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

AN INTERVIEW WITH JUDGE THELTON HENDERSON

By Ron K. Silver, Assistant U.S. Attorney for the District of Oregon

The Federal Bar Association was honored to host Judge Thelton Henderson from the Northern District of California for a special screening of the award-winning documentary *Soul of Justice: Thelton Henderson's American Journey*. Judge Henderson joined us on August 6, 2007 at the Mark Hatfield Courthouse. During the Kennedy administration, Judge Henderson was the first African American attorney hired by the Justice Department to enforce civil rights laws. The inspiring film told of his experiences from growing up in Watts to joining the Federal Bench in San Francisco. The Judge spoke to the audience before and after the screening. Judge Henderson then sat down with Assistant U.S. Attorney Ron Silver and gave an oral history of his experiences in the South and his impressions of many of the pivotal figures of the civil rights movement. The following are some excerpts from the oral history:



RKS: With you being in the South, meeting a man like [Robert] Moses who is committed in the movement, how did you deal with the * * * almost monastic lifestyle or thought process that John Doar [Judge Henderson's superior at the Civil Rights Division] wanted out of his folks down there, and yet at the same time you are interacting with people like Moses, who are inspiring you—how did you deal with that?

Judge: As best as I could. John set the guidelines. You can't mingle. You can't live, certainly, with the civil rights people. If I wasn't in a town like Birmingham where you had the A.G. Gaston Hotel, I had no place to stay. I would end up staying at the closest military base. The living part I dealt with it that way. The social part, I had to interact. Part of it was being there and being the eyes and ears. It was sort of contradictory roles: don't mingle, but mingle and find out what is going on. I did the best I could. I hung out, and as I said in the movie, I think the smartest thing I ever did at the start—I didn't plan it—was to tell King, "Don't tell me anything you don't want Bobby Kennedy to know." Up until then, there had been a reservation. I could tell. You know, "Who is this Henderson guy? I don't know. He works for the government." I was being friendly. After I did that it all opened up. People came to me, you know, "Hey, let's go get an ice cream cone together." I was one of the boys. Then I had complete access. In fact, I got a sense that some of it was that they were briefing me so I could tell Burke Marshal what they wanted Burke to know. I had to be careful of that too, taking back a loaded message.

RKS: Disinformation.

Judge: Disinformation. So I was trying to sort all of that out with no training and just use the best judgment I could bring to bear to do it.

RKS: In terms of a sense of wanting, did you ever go through periods of wanting to, essentially, take off your Department of Justice label and say, "Hey, you know what, this is my fight now," and switch sides?

Judge: Oh yeah. I went through that a number of times. I referred to it in the movie where I said I was constantly torn between what I was seeing. I was seeing beatings, I was seeing voting rights things, and people dragged in a bus from a posse or something and beat. Reporting it, and that was frustrating. I wanted to go up and say, "Put that man down," but I couldn't do that. I was wanting to chuck that role and be an activist * * *. I was at the Masonic or Elk temple, I can't remember, in Jackson when Medgar Evers was still alive. They had a big rally. Lena Horne was there, Harry Belafonte. It was huge. I was there. Lena Horne talked, Belafonte talked. It was very moving. The place was packed. People were flowing out into the street. Then people started going across the stage giving money. I saw farmers and people. I don't know what they gave; they were dirt poor. They had come to this thing and were putting money in this [container]. I just said, "Goddamn it, I could buy and sell in my salary half of these people," and I got in line. I knew that would be the end. "I am going to go and give some money. I am going to contribute to this." But the line was so slow, that by the time I got up, I came to my senses and I got out of line. Because that would have been the end. That would have ended it, just like the car thing did. But I had those moments where I just wanted to do more.

I would get arrested a lot and pulled over when I was at the scene of some demonstrations and a lot of activity going

AGENDA

Thursday, November 29

12:30 - 1:30 Registration

1:30

"It's more than Spell Check: Writing to Maximize Persuasion and Action for Judges"

Judge Donald Ashmanskas - Moderator
Judge Susan Graber, *Ninth Circuit Court of Appeals*
Judge Tom Coffin, *Magistrate Judge for Oregon*
Chief Justice Paul De Muniz, *Oregon Supreme Court*
Judge Darlene Ortega, *Oregon Court of Appeals*
Kelly Zusman, *Assistant U.S. Attorney for Oregon*
Steven Wax, *Federal Public Defender*

3:00

"That's Easy for You to Say: The Power of the Spoken Word in Court, in the Hallways, and on the Phone"

Kelly Beckley - Moderator
Presiding Judge Mary Anne Bearden, *Lane County Circuit Court*
Judge Anna Brown, *Oregon District Court*
Judge Mike Hogan, *Oregon District Court*
Alex Gardner, *Assistant District Attorney*
Karin Immergut, *U.S. Attorney*
Peter Richter, *Miller Nash LLP*
Bill Barton, *Barton & Strever, PC*

4:25

"How Judges Make Choices: Commentary and Research Findings"
Catrin Rode Ph.D.
Carmen Voilleque

5:00

"Bold, Spicy, and Sophisticated: Learning about Effective Partnerships through the Metaphor of Great Food and Wine Pairings"
Wine and Cheese Social
David Gremmel, *Rogue Creamery*

Registration Fee:
5+ years, $100; < 5 years, gov't or legal aid atty, $50.00; Students, $10
No Deadline to Register
CLE Credit Pending

Name: _____
Company: _____
Address: _____
Address: _____
City: _____
Phone: _____
E-mail: _____

Friday, November 30

9:00

"Changing the Doctrinal Discourse on Diversity and Affirmative Action with All Deliberate Speed"
Professor Ana Maria Merico
James E. Rogers College of Law at University of Arizona

10:15

"If You Don't Like the Law, Change It!: Communicating with Decision Makers and Opinion Leaders"

Judge Berle Schiller, *Eastern District of Pennsylvania*
Chief Judge David Brewer, *Oregon Court of Appeals*
Kerry Tymchuk, *State Director to Senator Gordon Smith*
Chandra Brown, *V.P., Oregon Iron Works, Inc.*
Michelle Giguiere, *Govt'l. Relations Specialist, Ball Janik, LLP*
Martha Pelligrino, *Governmental Affairs, City of Portland*
Betsy Boyd, *Federal Affairs, University of Oregon*

12:00

"Practice What is Preached: First Person Conversations and Lunch with Members of the State and Federal Judiciary"

1:00

"Two Dead Philosophers and A Rich Guy: The Surprising Role of Digital Media and Story Telling in 21st Century Communication (Legal and Otherwise)"
Randy Harrington, Ph.D.

2:15

"Confessions of a High Speed Business Professional"

Carmen Voilleque - Moderator
Corey Yraguen, *President of Oregon Iron Works, Inc.*
Michael Coughlin, *President of Burley Design, LLC*
Melinda Eden, *Northwest Power and Conservation Council*
Mary Olson, *Port of Portland Commissioner*
Diane Walton, U.S. Dept. of Labor, San Francisco Division
Ryan Deckert, *President of the Oregon Business Association*

3:45

"If They Don't Get It, They Don't Have It: The Profound Challenges of Crossing Barriers of Culture and Capability"
Professor Stephanie Wood
Professor Daniel Close

Mail your registration and check to:
(Make checks payable to LCBA)
Kellie King
U.S. District Courthouse
405 E. 8th Avenue, Suite 5500
Eugene, Oregon 97401

Questions? Call (541) 431-4141 or
Email: Jolie_Russo@ord.uscourts.gov

THE 2007 DISTRICT OF OREGON CONFERENCE

THURSDAY, NOVEMBER 29 - FRIDAY, NOVEMBER 30
US FEDERAL COURTHOUSE
EUGENE, OREGON

THE ONLY EASY DAY WAS YESTERDAY:
The Challenges of Legal Communication in the 21st Century

The US Navy SEAL Team motto says it all - "The only easy day was yesterday" - a clear statement that the future will hold more challenge and more change, not less. Daunting as this may sound, it also inspires us to work smarter, work together and rethink the way we interact with each other, our clients and the community as a whole.

Thursday, November 29

"It's more than Spell Check: Writing to Maximize Persuasion and Action for Judges"

"That's Easy for You to Say: The Power of the Spoken Word in Court, in the Hallways, and on the Phone"

"How Judges Make Choices: Commentary and Research Findings"

"Bold, Spicy, and Sophisticated: Learning about Effective Partnerships through the Metaphor of Great Food and Wine Pairings"
Wine and Cheese Social

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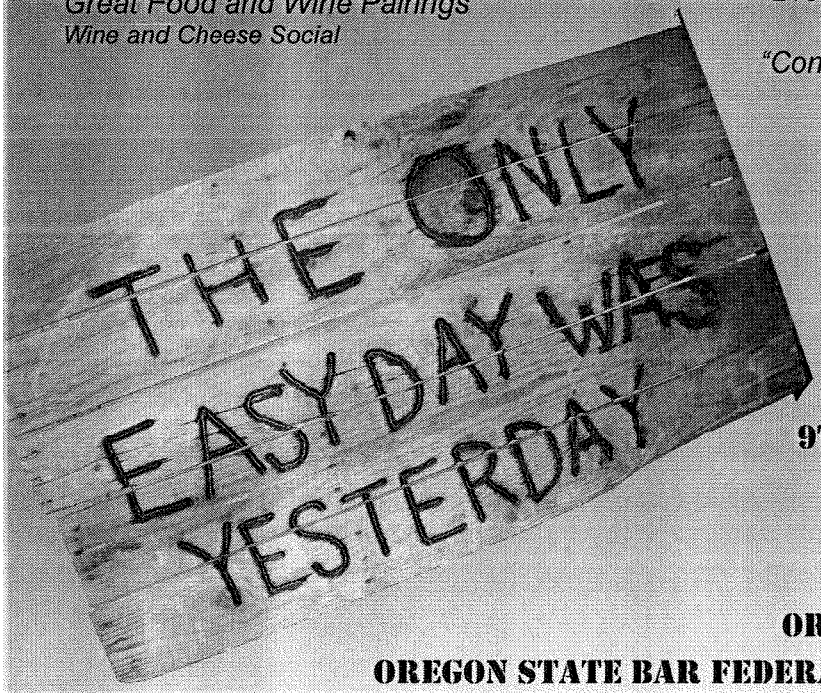
"If They Don't Get It, They Don't Have It: The Profound Challenges of Crossing Barriers of Culture and Capability"



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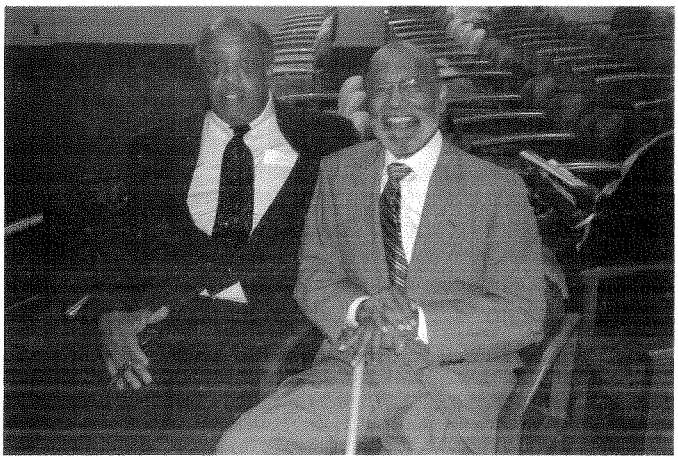
on. I would pull out my Justice ID and they would let me go. You have got to pull that out, and James Bevels, in particular, and Andy Young used to sort of razz me.

* * * One day King said, prophetically, "One of the best things you could do...." We were sort of getting beyond the relationship. "One of the best things you could do for us," and he sort of chuckles, "is get arrested, or better, get beat up. Because that would show that if you are black, it doesn't matter that you are a government lawyer." As Andy said in the movie, "you are just another nigger." King didn't say that, but that was his point. I just felt so



Judge Haggerty & Judge Henderson

bad that I said, "Okay, next time I get arrested, I am not going to pull out my badge; I am going to take it like they did." But that was a time, as I alluded to in the movie, I got arrested and taken to this jail. This one cell in the building, the black cell. I saw a mattress, vomit on the floor, a filthy mattress. I said, "I'll fight another day," and I pulled out my [ID] again. But I had that conflict all throughout as what my role really was or what could I do, or what did I need to do to be true to myself was a lot of it. I felt guilty having that shield of the badge when I saw so many brave people going to jail and getting beat up.

[Judge Henderson also described his experiences with the FBI, Robert Kennedy, and many of the legendary figures from that time, such as John Doar and Burke Marshall at the Department of Justice, and Robert Moses, Fred Shuttlesworth, and Arthur Shores. Arthur Shores was one of the few African American attorneys in Birmingham, Alabama. His life was threatened several times, and his house was blown up by the KKK in 1963.]

RKS: Did [Shores] ever acknowledge or admit to being afraid because of what he was doing, or was it unspoken?

Judge: * * * Even during the time when the house was bombed. He sort of knew he was a target and might be bombed. I don't recall him ever saying he was afraid or was going to back off or was going to move out of town or anything * * *. I think that what you had to do then was stand up and be counted. Part of it was not admitting fear. I wouldn't doubt if there was anybody that didn't have real fear, including Reverend King. He knew people wanted to kill him. I was at the A.G. Gaston motel with him when someone came in. A lot of people thought I was more than what I was. They thought I wasn't only a Justice Department attorney, I was some super FBI agent with guns and I was trained. They would come to me and say, "There is somebody here and we think Dr. King is in danger. What are you going to do about it?" "I don't know what I am going to do." Dr. King never flinched. That is one of the things that I admired about him. As you have seen in the newsreel, that speech, "I may not get with you to the mountain," but I think he knew his days were numbered. I think that was pretty much the movement. I never saw anybody. They talked about safety, you know, and I was in a couple of instances where deputies were surrounding a church. You are in real danger in those rural areas, but no one ever said they were afraid. You talked about safety and what to do in a tight spot. I don't think anyone ever mentioned running. It was just not acceptable.

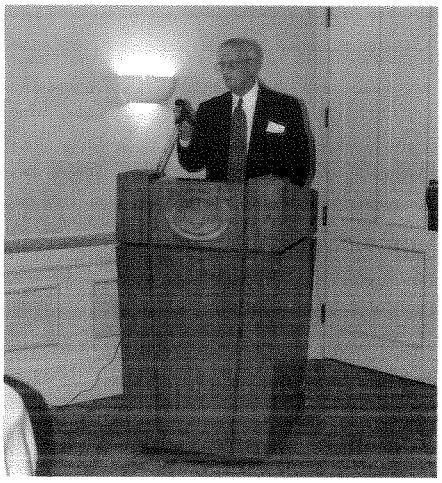
JUDGE EDWARD LEAVY AND MAGISTRATE JUDGE MARK E. CLARKE SPEAK TO FBA

Judge Edward Leavy was the featured speaker at the FBA's Annual Luncheon held on June 28, 2007 at the University Club. Judge Leavy spoke about the Ninth Circuit Court of Appeals' motion practice, describing the significant growth of the practice since he first became a federal appellate judge 20 years ago, and providing background on how motions are distributed and decided within the court system. For today's appellate court, there are 27 regular, active judges and 23 senior judges, with at least one judge representing each of the nine states that form the Ninth Circuit, along with the Northern Mariana Islands and Guam. In 1987, there were approximately 6,000 notices of appeals filed; today that figure is over 16,000, with 39 percent of those representing immigration appeals and over 30 percent pro se filings.

Procedural motions are handled by the Clerk's Office, while the Appellate Commissioner handles motions for appointment of counsel and attorney fee petitions. A single Ninth Circuit judge may rule on an emergency motion; two judges may rule on a substantive motion involving injunctive relief; and three-judge panels hear mandamus, dismissals, and motions for summary affirmance. Judge Leavy explained that they typically hear oral arguments for preliminary injunctions only—all other motions are decided on the briefs.

To provide a snapshot of motion practice in the Ninth Circuit today, Judge Leavy explained that for the month of April 2007, 415 motions were decided by a three-judge panel, 201 motions were handled by the Commissioner, and 647 procedural motions were handled by the Deputy Clerk—for a single-month total of 1,263 motions. The average screening disposition for substantive motions is 271 cases per month.

On September 20, 2007, Magistrate Judge Mark Clarke described his evolving judicial style and staff changes in Medford at the Federal Bar Association's monthly luncheon. Magistrate Judge Clarke, an Oregon native, joined the ranks of Oregon's federal judges on February 28, 2007. He sits with Judge Owen Panner at the James A. Redden U.S. Courthouse in Medford. Magistrate Judge Clarke graduated cum laude from Southern Oregon University in 1980 and received his law degree in 1983 from the University of Oregon School of Law. He practiced as an associate attorney with Bullivant, Houser and Bailey, P.C. in Portland from 1983 to 1990 and then as a shareholder with Frohnmayer, Deatherage, Pratt, Jamieson, Clarke & Moore in Medford from 1990 until being appointed to the bench. He was the founding president of the Southern Oregon Federal Bar Association and the president of the Oregon Association of Defense Counsel in 2005.


Judge Leavy

Right now, unlike his predecessor Magistrate Judge Jack Cooney, Magistrate Judge Clarke holds FRCP 16 conferences. He said that his many years as a trial lawyer taught him that realistic, rather than artificial, deadlines are important. He will set early trial dates because, in his experience, a trial date helps lawyers to focus. As a result, whether or not there is consent for him to try the case, he and Judge Panner will set an early trial date rather than wait to set the date in a pretrial order. The trial date will be set so that it works for both Judge Panner and him.

Magistrate Judge Clarke is willing to waive the pretrial order in simple cases, such as auto accident cases and uncomplicated negligence matters. He is willing to work through disputes over the phone, even during depositions. He is willing to do most anything by phone except for pretrial conferences (where the parties and the court have to review documents) and trial. In the near term, he plans to grant oral argument when requested because he wants to meet the lawyers and he thinks oral argument is helpful. As he gets to know the lawyers and gains experience on the bench, that approach may change. He expects the lawyers to meaningfully meet and confer, which means having substantive conversations over the phone, not a cursory exchange of emails. He will not dismiss a motion if the parties fail to confer; instead, he will hold the motion in abeyance until the lawyers confer.

Magistrate Judge Clarke believes lawyers should rarely file a motion for sanctions. He places a premium on professionalism, meaning respect and courtesy for other lawyers, the court staff, and the judge. He looks forward to settlement conferences because he enjoys the human interaction and the problem solving. However, he is willing to give the parties their day in court if that is what they want, because having been a trial lawyer he understands that a jury trial is sometimes the best way to resolve a dispute. He expects the lawyers to manage their cases, but will jump in the fray if necessary.

His overall goals are as follows:

- To not take himself too seriously (he emphasized that it is a privilege to hold the position, but he never wants to lose his sense of humor);
- To treat all parties, lawyers, and staff with dignity and respect;
- To issue decisions that reflect sound judgment and compassion and are fair; and
- To serve the public in general and make a difference.

In closing, Magistrate Judge Clarke talked about his parents growing up on wheat farms in two small Oregon towns, Condon and Arlington. He explained that their upbringing and his own experiences visiting those places shaped him and to some extent his judicial philosophy. That impact, he said, is aptly expressed by *The Code of the West*, which was part of the program at his uncle's funeral, held in Condon, at the beginning of September.

The Code of the West is:

- Live each day with courage;
- Take pride in your work;
- Always finish what you start;
- Do what has to be done;
- Be tough, but fair;
- When you make a promise, keep it;
- Ride for the brand (interpreted to mean to champion the client's cause, not your own);
- Talk less and say more;
- Remember that some things aren't for sale; and

- Know where to draw the line.

Magistrate Judge Clarke's clerks are Win Kellerman and Karen Gilbert, who had served Magistrate Judge Cooney for over a decade. His courtroom deputy is Rebecca Moore, a former administrative assistant to Judge Schiveley in Jackson County Circuit Court. Moore is the initial and primary point of contact for all matters. The District Court Web site does not list her telephone number at this time. She can be reached at 541-608-8770. The Clerk of the Court in Medford is Wendy Koble.

UPDATE TO THE DISTRICT OF OREGON LOCAL RULES OF CIVIL PRACTICE ANNOTATED

By Kathryn Mary "Kary" Pratt

The ***2006 District of Oregon Local Rules of Civil Practice Annotated*** provides annotations for the published cases interpreting the District of Oregon Local Rules of Civil Practice between June 1, 1998 and August 2006. This quarterly column will provide an update to that publication. This column includes annotations to published cases for the period from June 2007 through August 2007. The 2008 edition of the ***District of Oregon Local Rules of Civil Practice Annotated*** will be available for sale in January 2008. The new edition will contain all of the updates to the 2006 edition through December 31, 2007, as well as a new section on electronic filing.

ANNOTATIONS TO LOCAL RULE 7.1(a)

United States v. Miljus, No. 06-1832-PK, 2007 WL 2363300 (D Or Aug. 15, 2007)

In a tax lien foreclosure case, the defendants moved to stay further proceedings pending outcome of bankruptcy. A co-defendant argued that the motion should be denied for failure to confer under LR 7.1(a). Judge Papak held that "[a] court should consider whether the failure to confer has prejudiced the non-movant and whether the conference would have been futile." He then ruled that the failure to confer under LR 7.1(a) did not justify dismissal because the co-defendant failed to articulate how the failure to confer prejudiced him, noting that the co-defendant wrote several motions to the Court and that he would have resisted the motion to stay even if the moving defendants' counsel had conferred with him, so a conference would have been futile.

ANNOTATIONS TO LOCAL RULE 7.1(c)

Green v. Praxis Partners, LLC, No. 07-CV-301-HU, 2007 WL 1965598 (D Or July 2, 2007)

The plaintiff filed a motion to remand based on the failure of the defendants to promptly notify her of the removal. The motion was filed with an accompanying memorandum. The Court denied that motion sua sponte because the plaintiff failed to support the motion with a memorandum as required by LR 7.1(c). However, after the plaintiff refiled the motion, with a supporting memorandum, the Court considered it on the merits.

ANNOTATIONS TO LOCAL RULE 7.1(e)

Young v. City of Portland, No. 06-1823-AA, 2007 WL 2492305 (D Or Aug. 28, 2007)

The defendant moved for summary judgment. The plaintiff did not respond to the defendant's motion within the time required by LR 7.1(e). The Court issued an order to show cause as to why the motion should not be granted without considering the plaintiff's response and advised the plaintiff that the failure to respond to the order would result in the motion being granted. The plaintiff did not respond to the order to show cause. As a result, the Court granted the defendant's motion for summary judgment.

Schreiner v. Kmart Corp., No. 06-1134-HA, 2007 WL 1725620 (D Or June 14, 2007)

Eleven months after the defendant removed a premise liability action from Klamath County Circuit Court, the defendant filed a Motion for Summary Judgment and filed a separate Concise Statement of Material Facts, as required by LR 56.1(a). The plaintiff failed to file any responsive brief within the time allowed by LR 7.1(e)(1), or any written good cause for avoiding dismissal by that date. The Court exercised its discretion to involuntarily dismiss the case under FRCP 41(b) "'[f]or failure of the plaintiff to prosecute or to comply with [the Federal Rules of Civil Procedure] or any order of the court.'" (Quoting *Ferdik v. Bonzelet*, 963 F2d 1258, 1260 (9th Cir 1992).) In the alternative, the Court evaluated the unopposed Motion for Summary Judgment and found it meritorious because the facts submitted by the defendant in its Concise Statement of Material Facts would be deemed admitted under LR 56.1(f) because of the plaintiff's failure to file any response.

ANNOTATIONS TO LOCAL RULE 15.1

Boles v. Hill, No. 04-1529-CO, 2007 WL 1723503 (D Or June 7, 2007)

A pro se plaintiff filed a Second Amended Complaint and an Amended Complaint that did not substantially alter the plaintiff's claims. The Court considered these pleadings as amendments by interlineation pursuant to LR 15.1(e).

ANNOTATIONS TO LOCAL RULE 54.1

Corridean v. Restore Financial Services Network,

LLC, No. 06-CV-524-HU, 2007 WL 1989622 (D Or July 6, 2007)

Reviewing the Findings and Recommendations of Magistrate Hubel de novo, Judge Brown upheld the decision to deny the prevailing party's costs. The Court reviewed the declaration submitted by the prevailing party's counsel in support of the request for costs and the exhibit attached thereto, noting that "[n]o original invoices are appended, or submitted separately, to substantiate the claimed amounts or to provide the information the Court requires to determine if the costs should be charged. * * * [T]here is no itemization of the * * * printing and copy costs and thus, no information provided as to what per page price was charged, what documents were being copied or printed, for whom, and how many copies were made. There is no information provided as to what UPS Next Day Air was sending, why next day air was required, and no indication of why a postage charge was incurred * * *." The Court found that the exhibit to the prevailing party's counsel's declaration was a list of charges without supporting documentation, and therefore not "appropriate documentation" under LR 54.1(a)(1).

ANNOTATIONS TO LOCAL RULE 56.1

Carr v. City of Hillsboro, 497 F Supp 2d 1197 (D Or 2007)

The plaintiff objected to Magistrate Stewart's Findings and Recommendations, arguing that she erred in finding that he blocked student access to school buses in a First Amendment, false arrest, and false imprisonment case. The Court held that the finding was correct because, under LR 56.1(f), the school district had specifically alleged in its Concise Statement of Material Facts that "[t]he area where [Carr] was standing interfered with the flow of student traffic from the school to the buses, as he was standing in the bus loading zone," and that the plaintiff had missed his opportunity to rebut that fact by failing to include within his own Concise Statement any allegations to the contrary.

Corry v. Hall, No. 06-71-HO, 2007 WL 2669813 (D Or Aug. 6, 2007)

Because the plaintiff failed to respond to the defendant's Concise Statement of Facts, the Court deemed those facts admitted pursuant to LR 56.1(f) and granted summary judgment.

ANNOTATIONS TO LOCAL RULE 100

Green v. Praxis Partners, LLC, No. 07-301-HU, 2007 WL 1965598 (D Or July 2, 2007)

In this case, the plaintiff moved for remand, claiming that its counsel had not been served with a Notice of Removal within a reasonable time. The Court noted that LR 100.4(e)(1) requires that LR 100.2(a) initiating case papers must be filed conventionally, and, as a result, defense counsel was required to perfect conventional service in any manner permitted by the Federal Rules of Civil Procedure under LR 100.7(b). Although the plaintiff's counsel received the Notice of Removal, she claimed that it was not served properly because she did not receive it for two weeks because it was incorrectly addressed. She submitted no declaration, affidavit, or exhibit in support of that contention. The defendant's counsel submitted declarations from its legal assistants indicating that the proper address was used on the envelope even though it was wrong on the certificate of service. The Court held that, although Federal Rule of Civil Procedure 11(b)(3) provides that by presenting factual allegations and contentions in a submission the attorney certifies that to the best of the attorney's knowledge, information, and belief, those allegations and contentions have evidentiary support, given the disputed facts it "would have been prudent for plaintiff to have submitted evidentiary support with her motion." Nonetheless, the Court accepted the contentions of the plaintiff's counsel that the envelope was misaddressed, but denied the motion on other grounds.

ANNOUNCEMENTS

ABA Government and Public Sector Lawyers Division CLE—October 26, 2007

The ABA Government and Public Sector Lawyers Division will present *A Day of Ethics and Technology for Government Lawyers* on October 26, 2007 at the RiverPlace Hotel in Portland. The program begins at 9 a.m. and concludes with a complimentary reception at 5 p.m. Topics include strategies for backing up important electronic data, the crossroads of ethics and technology, technology tips on improving law practice efficiency, and ethical considerations in public sector law. More information and a registration form are available at www.governmentlawyer.org/portland_reg_form.pdf.

Annual U.S. District of Oregon Conference in Eugene—November 29 and 30, 2007

The Ninth Circuit Lawyer Representatives, Oregon Women Lawyers, Lane County Bar Association, OSB Leadership College, and OSB Federal Practice and Procedure committee are sponsoring this year's conference in Eugene. The conference topic is "The Only Easy Day Was Yesterday: The Challenges of Legal Communication in the 21st Century." Conference attendees will learn strategies to improve their written and oral advocacy. The conference will be presented at the new Wayne L. Morse U.S. Courthouse from Thursday, November 29, at 1:30 p.m. through Friday, November 30, at 5 p.m., with both Thursday evening and Friday breakfast events scheduled. For more information contact Jolie Russo 503-326-8250 or Kellie King 541-431-4140. An e-registration form will be sent out on the FBA listserv in the near future.

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Katherine Heekin
katherine@heekinlawoffice.com

President-Elect:
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cwangeli@stoel.com

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melissa_aubin@ord.uscourts.gov

Clarence Belnavis
cbelnavis@laborlawyers.com

Benjamin Bloom
bmb@roguelaw.com

Jeffrey Bowersox
jeffrey@blfpc.com

Judge Anna Brown
anna_brown@ord.uscourts.gov

Gosia Fonberg
gosia1@gmail.com

Hwa Go
hwa.go@harrang.com

Chelsea Grimmius
chelseagrimmius@yahoo.com

Todd Hanchett
thanchett@barran.com

Tom Johnson
trjohnson@perkinscoie.com

Erin Lagesen
erin.c.lagesen@doj.state.or.us

Matt Levin
mattlevin@mhgm.com

Johnathan Mansfield
jmansfield@schwabe.com

Kristin Olson
kristin.olson@bullivant.com

Susan Pitchford
sdp@chernofflaw.com

Peter Richter
peter.richter@millernash.com

Seth Row
seth.row@hklaw.com

Owen Schmidt
oschmidt@att.net

Timothy Snider
twsnider@stoel.com

Richard Vangelisti
richard@vangelisti.com

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Missing Electronic Notices?

We have been sending the electronic notices via our listserv. While we have made every effort to obtain our members' email addresses, we need your help to keep our list accurate and current. For those members without email, we are providing the electronic notices by fax. If you have an email address or fax number and have *not* been receiving electronic notices, or if your email address changes, please contact our listmaster: **Chelsea Grimmius**, chelseagrimmius@yahoo.com

Call for Submissions/Publication Schedule

For the District of Oregon **welcomes submissions from everyone as well as our regular contributors. The deadlines are December 1, 2007 and March 15, 2008. We ask only that you advise us in advance if you are preparing a submission. Please direct inquiries to Timothy Snider, 503-294-9557, twsnider@stoel.com.**

New FBA Members Welcome

Membership Eligibility. FBA membership is open to any person admitted to the practice of law before a federal court or a court of record in any of the several states, commonwealths, territories, or possessions of the United States or in the District of Columbia, provided you are or have been an officer or employee of the United States or the District of Columbia, or you have a substantial interest or participate in the area of federal law. Foreign Associate Status is open to any person admitted to practice law before a court or administrative tribunal of a country other than the United States. Law Student Associate Status is open to any law student enrolled at an accredited law school. If you wish to join, please visit www.fedbar.org and click on the "Join Now" link.

Monthly FBA Luncheon— New Location and Food Options!

Please join the FBA Oregon Chapter for our monthly luncheons on October 18, 2007 with Magistrate Judge Pat Sullivan and on November 15, 2007 with Judge Susan Graber.

The luncheons are held at the University Club, 1225 SW Sixth Avenue, Portland, starting at noon.

Please RSVP to Ann Fallihee, afallihee@barran.com, or 503-276-2129. Make sure to indicate if the person attending will need a vegetarian lunch. It is *very important* that you RSVP by 5 p.m. on the Tuesday before the luncheon, so that we can ensure having enough lunches. The cost is $18 for FBA members and $20 for nonmembers. Please send your check, payable to the FBA Oregon Chapter, c/o Ann Fallihee, Barran Liebman, 601 SW Second Avenue, Portland, Oregon 97204, or pay at the door.

OREGON CHAPTER
FEDERAL BAR ASSOCIATION
1001 SW 5TH AVENUE, SUITE 1900
PORTLAND, OR 97204