

# Preservation and Presentation of Electronic Records

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*The use of electronic records has become increasingly common in business today. Companies have traditionally relied on hard-copy documents, and most have document retention policies in place. Today, however, as this article explores, businesses must also adopt integrated information technology policies and electronic records retention protocols, as well as be well-versed in their information technologies systems, lest they be caught off guard in the courtroom.*

**A**s businesses large and small rely increasingly on electronic information, document preservation policies need to be rethought to account for the ways in which “paperless” electronic records differ from traditional hard-copy documents. A recent court decision, in which American Express was unable to get its electronic records of a customer’s debt admitted into evidence in a bankruptcy proceeding, provides a cautionary lesson to all businesses on how to maintain information technology systems and preserve electronic records.

## **THE PERILS OF AUTHENTICATING ELECTRONIC RECORDS— IN RE VINHNEE**

In this recent case, Vee Vinhnee applied for Chapter 7 bankruptcy and scheduled the amounts owed on two American Express credit cards

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as debts to be discharged through the bankruptcy proceeding. American Express opposed the discharge of these debts. When Vinhnee did not appear for trial, American Express was permitted to proceed with the trial of its adversary proceeding.

During the trial, the bankruptcy court held that the testimony provided by American Express' custodian of records witness was insufficient to authenticate and admit its electronic records of Vinhnee's debt. The court stated that American Express had to show that the data stored in its information technology system "is an accurate account of records which would otherwise qualify as a business record under [Federal Rule of Evidence] 803(6)." American Express also had to show that electronic records proffered, consisting of computer printouts, accurately reflected the data stored on the company's system. In addition, the court stated that a qualified custodian of records witness must be able to "...testify as to the mode of the records' preparation, that the computer is a standard acceptable type, and that the business conducts its operations in reliance upon the accuracy of the computer in the retention and retrieval of the information...."

Although the court refused to admit the proffered electronic evidence of Vinhnee's debts, it gave American Express the opportunity to file a post-trial declaration containing information sufficient to authenticate the records. The bankruptcy court found, however, that American Express' post-trial declaration was insufficient for two reasons: (i) the declaration did not show that "the business conducts its operations in reliance upon the accuracy of the computer in the retention and retrieval of the information"; (ii) the declaration did not establish that the witness was qualified to provide evidence of American Express' use of the hardware and software comprising its information technology systems, and did not show "that the witness had sufficient knowledge to determine whether the computers were sufficiently accurate in the retention and retrieval of the information contained in the documents" at issue. As a result, the court denied American Express' request that a certain portion of Vinhnee's debt be excepted from discharge in the bankruptcy proceeding.<sup>1</sup>

## **RECORDS CUSTODIANS SHOULD BE WELL-VERSED IN A BUSINESS' INFORMATION TECHNOLOGY SYSTEMS AND ELECTRONIC INFORMATION PROTOCOLS**

The Ninth Circuit agreed with the bankruptcy court that American Express' proffer was insufficient to authenticate the electronic records relied upon to establish the amount of Vinhnee's debts. According to the Ninth Circuit's decision, the central authentication issue for a business record—electronic or otherwise—is: what has happened to the record between the time it was placed in the company's files or information technology system and the time it is offered into evidence at trial. While the authenticity of paper records may be established simply by outlining the procedures for hard-copy document retention (i.e., control over custody and access) that ensure the files are not tampered with, the Ninth Circuit concluded that the digital technology used in creating and preserving electronic information makes it easier to alter the text of an electronic record.

As a result, the Ninth Circuit stated that, in order to authenticate an electronic record, the party proffering such evidence must be able to identify and explain:

- ◆ the computer hardware and software comprising the electronic information database system;
- ◆ the policies and procedures governing the use of the hardware and software, as well as the database in which the electronic record was maintained;
- ◆ the manner in which access to that database was controlled;
- ◆ the manner in which changes in the database were logged or recorded; and
- ◆ the backup systems and audit procedures in place to ensure the ongoing integrity of the database and the electronic records maintained therein.<sup>2</sup>

## **COMPANIES NEED TO ESTABLISH INTEGRATED INFORMATION TECHNOLOGY POLICIES AND RECORDS RETENTION PROTOCOLS**

American Express' failure to authenticate its electronic records in *In re Vinhnee* ultimately cost the company less than \$20,000. While this may be a relatively small amount of money for American Express, the evidentiary ruling by the bankruptcy court, and the Ninth Circuit's affirmation of that ruling, provide an important cautionary lesson. The Vinhnee case demonstrates why businesses should treat their information technology systems and records retention policies as an integrated whole. Businesses should have not only appropriate hardcopy and electronic records retention policies in place, but also should ensure that their records custodians possess the requisite knowledge about the information technology systems on which electronic records are created and preserved.

If it fails to prepare in advance, a company may not be able to rely on its own electronic records in litigation, with potentially catastrophic effects on its ability to defend itself or establish the basis for its own claims.

Companies can begin to address these concerns by identifying key information technology personnel, accounting for issues relating to electronic records when establishing document retention policies, and incorporating those policies into their day-to-day operations.

### **CHECKLIST**

#### **WHAT YOU MUST KNOW TO AUTHENTICATE ELECTRONIC RECORDS**

- ✓ The computer systems comprising the electronic information database system
- ✓ The policies and procedures governing the use of the hardware and software, and the database in which the electronic record was maintained
- ✓ The manner in which access to that database was controlled
- ✓ The manner in which changes in the database were logged or recorded
- ✓ The backup systems and audit procedures

### **NOTES**

- 1 *See In re Vinhnee*, No. LA 03-29549-SB, Bankr. C.D. Cal., May 17, 2004.
- 2 *See In re Vinhnee*, 336 B.R. 437, 445 (B.A.P. 9th Cir. 2005).