ARTICLE:

LORRAINE v MARKEL: UNNECESSARILY RAISING THE STANDARD FOR ADMISSIBILITY OF ELECTRONIC EVIDENCE

WRITTEN BY:
BRIAN W. ESLER

In the United States, federal courts only have jurisdiction to decide actual 'cases or controversies."[1] Thus, federal judges are not constitutionally permitted to issue opinions on matters that are moot. The 101-page decision by United States Magistrate Judge Paul W. Grimm in *Lorraine v. Markel and American Insurance Co.*[2] aptly demonstrates the controversial nature in issuing such advisory opinions. Here, Judge Grimm was determined to issue this voluminous treatise of an opinion, despite the fact that the parties had advised the court that the case was settled, so that there was no longer any need to consider the pending motions that resulted in this opinion.[3] By publishing a judicial opinion, rather than a law review article, Judge Grimm's thoughts on the admission of evidence take on the weightier cloak of (an albeit unpublished)[4] precedent. While the opinion is undoubtedly useful in some respects as an academic primer on the rules of evidence and the admission of electronic evidence, such advisory opinions are nonetheless to be discouraged.

Ironically, *Lorraine* involved the enforcement of an arbitration award under the Federal Arbitration Act ('FAA').[5] Here, both parties moved for summary judgment, which essentially admits that there are no factual issues in dispute and that the matter may be decided as a matter of law,[6] seeking confirmation of their interpretation of the arbitrator's award, and the arbitrator's powers arising from the underlying arbitration agreement.[7] A federal court's review under the FAA is severely limited and federal courts rarely, if ever, address the substance of the arbitrator's opinion. Thus, section 9 of the FAA states that any party may apply to the court 'for an order confirming the award and thereupon the court must grant such an order unless the award is vacated, modified or corrected . . .."[8] Notably, the court did none of those things in ruling on the parties' cross-motions for summary judgment.

Apparently, both parties attached directly to their motions various e-mails as exhibits, together with other printed documents that they believed were relevant to interpreting the arbitration agreement. It should be noted that certain federal district courts actually seem to encourage such a practice,[9] though it technically runs counter to the requirement that summary judgment motions be supported by affidavit.[10] Moreover, the first

1 *U.S. CONST., Art. 3, § 2, Cl. 1.*
2 *2007 ILRWeb (P&F) 1805, 207 WL 1300739 (D. Md. May 4, 2007).*
3 *As explained by the court in a February 6, 2007 letter ruling (on file with the author) that preceded the opinion, the court was notified on February 2, 2007 that the matter had settled, and that the parties had voluntarily dismissed the case. Despite that notification, the court issued its letter ruling nunc pro tunc to take effect on February 1, 2007.*
4 *But see Fed. R. App. Pro. 32.1: 'A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been (i) designated as 'unpublished' . . . and (ii) issued on or after January 1, 2007.'*
5 *9 U.S.C. § 1 and following.*
6 *Fed. R. Civ. Pro. 56.*
7 *The plaintiff argued that the arbitration agreement fixed the damages at $36,000, and that the arbitrator exceeded his authority by awarding a lesser amount once liability was established. The defendant moved for confirmation of the arbitrator's award of only $14,000 in damages. Hence, only $22,000 was at issue.*
8 *9 U.S.C. § 9.*
9 *For example, D.C. Colo. L.Civ.R. 56.1.*
10 *Fed. R. Civ. P. 56(e).*

rule of evidence is that judges will generally consider any evidence offered unless the opposing party objects to its admission.[11] Here, apparently, neither party objected to the admission of the other party's evidence, which renders the court's refusal to consider any of the parties' evidence somewhat odd.

Both parties relied substantially on e-mails between counsel to support their opposing interpretations of the arbitration agreement. Although the court refused to consider any of the e-mails, it nonetheless decided that a primer on the admission of electronic evidence (whether e-mails or otherwise) was in order. Thus, the court explained (Slip Op., at 7):

> Given the pervasiveness today of electronically prepared and stored records, as opposed to the manually prepared records of the past, counsel must be prepared to recognize and appropriately deal with the evidentiary issues associated with the admissibility of electronically generated and stored evidence. Although cases abound regarding the discoverability of electronic records, research has failed to locate a comprehensive analysis of the many interrelated evidentiary issues associated with electronic evidence. Because there is a need for guidance to the bar regarding this subject, this opinion undertakes a broader and more detailed analysis of these issues than would be required simply to resolve the specific issues presented in this case.

The opinion undoubtedly does provide an excellent starting point for further research regarding the admissibility of electronic evidence, although its academic discussion of the evidence rules is largely divorced from any practical application to the dispute actually presented.

Judge Grimm begins his analysis by laying out five standards that electronic evidence must satisfy:

(1) the electronic evidence must be relevant (under FRE 401);
(2) the electronic evidence must be shown to be authentic (under FRE 901);
(3) the electronic evidence must not be hearsay (under FRE 801) or must otherwise fit within a hearsay exception under FRE 803, 804, or 807;
(4) the evidence must constitute an 'original' under the original writing rule, or if not, must be able to be admitted pursuant to the secondary evidence rules (FRE 1001-1008); and
(5) the probative value of the electronic evidence must substantially outweigh any dangers of unfair prejudice or any other factor identified in FRE 403.

Where neither party is given an opportunity to object or explain why evidence is offered, such as in this case, it can be difficult to determine these issues.

Judge Grimm's most interesting discussion is likely to be the authentication of electronic evidence. Contrary to many decisions,[12] Judge Grimm suggests that the authentication of electronic evidence may require greater proof than that required for paper documents, such that courts will demand that proponents of electronic evidence establish a more thorough foundation than is usual when introducing paper evidence. Judge Grimm also provides a very thorough analysis of how hash marks and metadata can be used to help authenticate electronic evidence. In particular, he provides an almost step-by-step explanation (with the citation of cases) of how to authenticate the most common forms of electronic evidence (such as e-mail, web pages, chat sessions, computer databases and digital photographs), although seemingly only e-mail communications were actually at issue in the motions under consideration. Although Judge Grimm discusses many means of authentication, he provides only the briefest discussion of the means most commonly used (and the means most likely applicable to authentication of the actual evidence presented by the parties in this case) – that is, stipulation of the parties or a request to the opposing party to admit that the evidence is authentic. Because of these commonly used procedures, authenticity for most evidence is rarely an issue.

Judge Grimm also provides a fairly academic discussion of the hearsay rules, which he correctly notes 'are pervasive when electronically stored and generated evidence is introduced.' Especially with strings of e-mails, there are likely to be portions that constitute hearsay while other portions are not hearsay.[13] The court also discusses the various

[11] *For example, Fed. R. Evid. 103, requiring timely objection to admission of evidence to preserve error; Fed. R. Civ. P. 61: ' The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.'*

[12] *For instance, United States v. Bonallo, 858 F.2d 1427, 1436 (9th Cir. 1988); United States v. Siddiqi, 215 F.3d 1318, 1322-23 (11th Cir. 2000); United States v. Simpson, 152 F.3d 1241 (10th Cir. 1998), International Casings Group, Inc. v. Premium Standard Farms, 358 F.Supp.2d 863, 874 (W.D.Mo. 2005) (all setting a relatively low threshold for authentication of electronic evidence), but see In re Vee Vinhnee, Debtor American Express Travel Related Services Company, Inc. v. Vee Vinhnee, 336 B.R. 437 (9th Cir.BAP 2005) for a contrary view.*

[13] *For a practical discussion of hearsay problems (and solutions) with regards to the admission of chat room 'dialogue,' see United States v. Burt, Case No. 06-3415 (7th Cir. 7/26/07).*

exceptions to the hearsay rule pursuant to which evidence might be admissible. It follows that the application of such exceptions will depend on why the evidence is offered, which again cannot be determined in a vacuum. For this reason, the normal course of proceedings in motions practice is that the opponent of the evidence will raise the hearsay exception (via a motion to strike) giving the proponent an opportunity to explain to the court why the evidence is not hearsay.

Judge Grimm's thorough explanation of the original writing rule (the 'Best Evidence' rule) is again interesting, but largely academic. The original writing rule requires an 'original to prove the contents of a writing, recording or photograph unless secondary evidence is deemed acceptable.' Fed. R. Evid. 1001. As with authenticity, however, objections based on the original writing rule are rarely employed. (Indeed, even the learned jurist admits that FRE 1003, which allows for admissibility of copies unless there is either a genuine issue as to authenticity of the original, or unfair prejudice, has largely eliminated 'best evidence' objections.) Since authentication and original writing objections are usually connected, most counsel will determine in advance whether there is a problem, which there rarely is with respect to copies. Nonetheless, given the ease with which electronic evidence can be innocently altered, Judge Grimm's instincts are correct that best evidence objections may become more common when dealing with electronic evidence.

Oddly, given the context of the dispute, Judge Grimm also spent time discussing Fed. R. Evid. 403, which allows otherwise admissible evidence to be excluded because its probative value is outweighed by the potential for unfair prejudice or other harm to the opposing party. This discussion, while thorough, is completely academic in this context since neither party was claiming that the other party's evidence would in any way unfairly prejudice it (beyond the obvious prejudice of losing the case).

Unfortunately for the world of practicing attorneys, Judge Grimm's treatise on electronic evidence will be considered authoritative by many more courts because it was published as a judicial opinion rather than what it really is – a law review opinion piece. While Judge Grimm may be correct as to many of his points of law, his discussion is almost completely divorced from any of the issues actually presented by the parties in the case under consideration. Such unnecessary digressions regarding the admissibility of evidence that was not even presented, simply makes the process of litigation more expensive. While thorough, Judge Grimm's opinion seems to have lost sight of the overarching purpose of the evidence rules, which is to promote 'the end that the truth may be ascertained and proceedings justly determined' with a minimum of 'unjustifiable expense and delay.'[14] The evidence rules simply cannot be meaningfully applied in the absence of any 'case or controversy,' which requirement was lacking here.

Brian W. Esler is a member of the editorial board

[14] *Fed. R. Evid. 102.*