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E-EVIDENCE

Admissibility of E-mails:

Getting Them In and Keeping Them Out

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With the recent passage of the amendments to the Federal Rules of Civil Procedure, the legal press has been filled with articles containing e-discovery advice. At some point, "e-discovery" will need to be converted into "e-evidence" for the purposes of summary judgment or trial. Faced with having spent your clients' time and money to both produce e-discovery and mine your opponents' e-discovery to find the "smoking gun," it is critical to ensure you can get those e-mails into evidence — or keep them out.

Many practitioners think that e-mails are like business letters and will be admitted into evidence just as easily. E-mails, however, may be more prone to problems of authenticity and hearsay than traditional written documents. People often write e-mails casually, dashing off comments with an informality they would never use with a letter. Little care is given to grammar and context. Their signature or even their name may be omitted. Authenticating an e-mail presents issues not faced with a traditional letter with its formal letterhead, paragraph structure and signature block.

Additionally, e-mails are arguably more susceptible to after-the-fact alteration. Most e-mail systems, for instance, allow a person forwarding an e-mail to edit the message being forwarded. Such alteration would not be discernible to the recipient. E-mails are also more prone to a kind of hearsay-within-hearsay problem: an "e-mail chain" attaches to an e-mail every e-mail that came before it in a discussion. It is not enough to get the most recent e-mail into evidence when that e-mail attaches a string of previous e-mails. All of the prior e-mails may need to be separately authenticated and found admissible.

Given the dramatic shift toward the use of e-mails in business communications, courts and practitioners are likely to encounter issues of e-mail evidence more frequently than in the past. Are e-mails so different from traditional written documents that the rules of evidence are out of date? We think that there are practical ways to employ the rules of evidence to confront the special admissibility problems posed by e-mails.

AUTHENTICATION

In order to ensure that an e-mail will be admitted into evidence, a proper foundation for its authenticity must be laid. Authentication is necessary not only at trial but also at the summary judgment stage. Although challenges to the admissibility of evidence are not always raised in response to summary judgment motions, a lawyer should be prepared to submit evidence, in the form of affidavits, to support the authenticity of any e-mail that he or she intends to introduce. In several instances, courts have excluded e-mails at the time of dispositive motion — not because the e-mails were clearly inauthentic, but because evidence was not submitted to support their authenticity in the face of a challenge. One such case is the Western District of Pennsylvania's *Bouriez v. Carnegie Mellon University*.

Similarly, a lawyer may need to depose a witness to establish the authenticity of an e-mail, based on the witness' personal knowledge, or to have that witness available at trial. Stipulations and requests for admissions can eliminate authentication issues or narrow the scope of those e-mails that will be problematic. In federal court, the parties may choose at their Rule 26(f) conference to agree to a process for stipu-

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lating to the authenticity of e-mails each party produces during discovery to avoid unnecessary expense.

The bar for establishing authenticity is not high under Federal Rule of Evidence 901. In the 3rd U.S. Circuit Court of Appeals, a court need only be able to legitimately infer that a document is genuine to find it to be "authentic." Deeper questions concerning trustworthiness might go to the weight of the evidence. In *U.S. v. Safavian*, faced with a mountain of e-mails, the court refused to require detailed authentication.

Some e-mails can be self-authenticated under Rule 902(7). Business labels, including signature blocks, that evidence the company from which an e-mail was sent, or even the name of a company in an e-mail address, might be sufficient proof of authenticity on their own. Other circumstances, such as the distinctive characteristics of an author's e-mail address or the subject matter and style of the e-mail itself, may also be sufficient to establish authenticity.

An e-mail often has attached to it the e-mail or series of e-mails to which it is responding, creating an e-mail "chain," also known as a "string" or "thread." Some courts have found that each e-mail in a chain is a separate communication, subject to separate authentication and admissibility requirements. A lawyer should thus be prepared to authenticate every step of a chain.

The Pennsylvania Superior Court, however, has noted that uncertainties of authenticity for e-mails are the same as for traditional written documents: "A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationary [sic] can be copied or stolen," according to *In re F.P.* The court therefore rejected the notion that e-mail is inherently more unreliable than traditional written documents, as well as the argument that e-mail cannot be properly authenticated within the existing framework of Pennsylvania law.

HEARSAY

The second major hurdle for getting an e-mail into evidence is the hearsay rule. By definition, hearsay is an out-of-court statement "offered in evidence to prove the matter asserted." The first way, therefore, to overcome a hearsay challenge to the admission of an e-mail is to claim that it's not hearsay at all.

An e-mail that is an admission by a party-opponent is "not hearsay." If your opponent is an individual, this is a simple test. In the corporate setting, however, damaging admissions may be authored by lower-level employees who do not have the authority to be making such statements. In order for the e-mail to qualify as a party admission, the author needs not only to be acting in the scope of his or her employment but also to have the proper authority.

Party-opponent admissions would also include statements by "a party's agent" concerning matters within the scope of the agency, i.e., "vicarious admissions." In addition, if your opponent's e-mails contain statements of others without reservation, e.g., when a party forwarded e-mails received from others, the e-mails may be introduced in evidence as "adoptive admissions," according to *Safavian*. This kind of statement has indicia of reliability because "the party has manifested an adoption or belief in its truth."

Another way to overcome a hearsay challenge is to fit the e-mail into one of the exceptions to the hearsay rule. These exceptions are permitted because their context makes them likely to be reliable. Many practitioners would consider e-mails as classic examples of business records for corporate entities that routinely use e-mail for both internal and external communication. Under Federal Rule of Evidence 803(6), however, only "if it was the regular practice of that business activity" to make that record can a document come into evidence under the exception. An e-mail might fit this "business records" exception if the company — not just the individual, but the company itself — has a reliable practice of sending, receiving and storing that kind of e-mail. A company might have that kind of practice if it takes and records purchase orders via e-mail. Notably, an e-mail that fits into the "business records" exception may also be self-authenticating, under Rule 902(11), if its authenticity is supported by an affidavit.

Many e-mails, however, do not meet the "business records" exception because they are merely chatter, statements that are made casually and not as a matter of obligation or even routine. An e-mail sent at an employee's sole discretion is not likely to have the necessary indicia of reliability and trustworthiness to be admitted as a "business record." If an employee sends off a quick e-mail to a colleague commenting on the substance of a meeting with a business partner, it may not be admissible. By contrast, minutes of the same meeting kept by the same employee and circulated to all in attendance, in e-mail form, at the request of management could qualify under the "business records" exception.

Although there is not yet a well-established line of cases on this issue, courts appear concerned that if they allow e-mails into evidence as "business records" too easily, people will begin to use the convenience of e-mails to write self-serving internal communications.

With the advent of handheld devices as well as the ubiquity of laptop computers, e-mails may actually be admitted into evidence on the basis of "present sense impressions," or even as "excited utterances," as in *Lorraine*. People are often using e-mail to comment on events as they are transpiring, even during meetings. If one can show that an e-mail was written while perceiving an event or immediately thereafter, or while under the stress caused by a startling event, it might meet the "present sense impression" or "excited utterance" standards of rules 803(1) and 803(2).

Of course, these standards are difficult to meet because contemporaneousness or near-immediacy is necessary. An e-mail might still meet the "present sense impression" standard if written 10 minutes after an event, but many e-mails are written hours or days later.

Just as with authentication, one should be prepared to argue for the admissibility, under the hearsay exceptions, of every e-mail in an e-mail chain, as in *New York v. Microsoft Corp.* One should also be aware, as with authentication, that evidence that is clearly inadmissible at trial cannot be considered by a court on summary judgment. Although Rule 56 does not require an unequivocal ruling that an e-mail will be admissible at trial for a court to consider it on summary judgment, one should be prepared to support its admissibility with an affidavit.

The special problems posed by e-mails do not change the rules of impeachment. A lawyer's ability to cross-examine a witness with a prior inconsistent statement does not change merely because the statement is contained in an e-mail.

BE PROACTIVE

The admissibility problems related to e-mail extend to other forms of electronically stored information, too. Text messages, instant messaging, chat rooms or "team rooms" (in which all materials concerning a project are preserved electronically for the entire project team to access) all present unique evidentiary challenges. Practitioners need to be proactive in their efforts to insure that key pieces of evidence can be admitted at trial. From the time of the initial review of documents through discovery, lawyers need to focus on how to get in or keep out such evidence. •