Email Messages at Trial

BY T. RAY GUY

Every litigator knows that email messages cause discovery headaches. And as a trial lawyer friend of mine once wrote, "They are the cockroaches of litigation—impossible to eradicate and outliving all other forms of evidence."

But email messages also provide a real-time written history of a business dispute—an as-it-happened record of the events making up the controversy. An event or communication that would never have been documented in a memorandum to the file or a letter is now memorialized in 30 seconds by an email message.

And at trial, email messages have credibility arguably exceeding that of oral testimony because of my favorite litigation truism: witnesses change their stories, but documents do not. Prose committed contemporaneously to paper or to electronic memory can carry persuasive power exceeding that of unsupported, memory-based oral testimony.

The two primary obstacles to the admissibility of email messages are authentication and overcoming hearsay objections. In practice, the authenticity of email messages is seldom contested, especially if the sender or a recipient—a "witness with knowledge" under Federal Rule of Evidence 901(b)(1)—is available to testify. Absent a witness concerning the specific message, authenticity can be proven under Rule 901(b)(9) ("Evidence About a Process or System") by testimony about the email system from an expert, under Rule 702, or a lay-witness opinion, under Rule 701.

Authentication is only half the battle. Even if the author or a recipient is on the stand identifying an email message, it remains hearsay—a statement not made while testifying at the trial—if it is offered to prove the truth of the assertion in the statement. There are several ways to overcome a hearsay objection.

Not Offered for the Truth. The message is not inadmissible hearsay if you do not care whether it is true—if, for example, you just need it to establish chronology, or the fact that it was said. Expect a limiting instruction that the message cannot be considered for its ostensible truth.

Business Record. The business records (or "shop book") exception to the hearsay rule, codified in Rule 803(6) ("Records of a Regularly Conducted Activity") can prove up an email message.

Present Sense Impression. An exception especially appropriate for the prevalence of unfiltered, immediate email is found in Rule 803(1), under which a "statement describing or explaining an event or condition, made while or immediately after the declarant observes it," is admissible.

Statement Against Interest. If the author is not available at trial, an email message that was "so contrary to [his] proprietary or pecuniary interest or had so great a tendency to invalidate [his] claim" that he must have believed it to be true, is admissible under rule 804(b)(3).

Used to undercut testimony of opposing party or adverse witness. Obviously an email communication that contradicts the opposing party's position or is inconsistent with an adverse witness's trial testimony is extraordinarily useful in cross-examination. The Rules address the use of such messages in two ways:

1. As an Opposing Party's Statement. Under Rule 801(d)(2), the former "admission of a party opponent" is now "an Opposing Party's Statement," and is not hearsay if it is properly attributed to the opposing party. Like the foregoing bases for admission, it does not require that the declarant be available to testify, but like the following grounds which do, the statement is most commonly woven into the examination of the adverse party or its representative.

2. As a Witness's Inconsistent Statement. An email message from a witness who is *not* the adverse party, or someone authorized to speak on its behalf, which is inconsistent with his trial testimony is admissible under Rule 613. Again, expect a limiting instruction.

Used to support testimony of your own witness. Email communications can also *support* your witness's testimony in *direct* examination.

Rebutting Fabrication Claim. A message authored or adopted by a testifying witness that is consistent with his trial testimony does not constitute hearsay and is admissible under Rule 801(d)(1)(B) if offered to rebut a claim of recent fabrication or of testimony shaped by improper influence or motive.

Refreshed Recollection and Recollection Recorded. The message can be used either to refresh the witness's recollection, under Rule 612, or as memorialization of an event when it was fresh in the witness's memory, under Rule 803(5). Usually the message itself will not be admitted unless offered by the opposing party. And such use of an email implicitly admits that the witness's memory is not complete and *needs* refreshing or is dependent on the past record. But it is usually better than nothing; a contemporaneous piece of paper, even if it is not actually seen by the jury, undoubtedly helps dispel any notion that the witness's version of the facts could have been concocted the week before trial.

Conclusion

Properly used, email messages can undercut adverse trial testimony or buttress favorable testimony. Collections of such messages can frame the chronology of a dispute and take the jury back to the time when the controversy arose. Good trial lawyers see past the discovery headaches and spend appropriate time in trial preparation planning for their admissibility and effective use. **HN**

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