IADC COMMITTEE NEWSLETTER

TRIAL TECHNIQUES AND TACTICS

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Many trial lawyers misunderstand what does and what does not constitute a 'business record' as an exception to the hearsay rule. Nowhere is this more true than with e-mails. As this article discusses, the mere fact that a business or an organization uses e-mail to communicate does not mean that the e-mail is a business record. More is required to establish the required foundation.

Emails as Business Records

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The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice.

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Over the past year, I have heard anecdotally that a number of federal judges think too many lawyers appearing before them do not have a working knowledge of the Rules of Evidence. Common complaints are that lawyers treat witness examinations like a deposition, use exhibits without establishing the required foundation, and seem lost when faced with hearsay objections. This was underscored to me recently when, while attending oral argument on a number of motions in limine, the district court judge admonished all the attorneys in her courtroom that the upcoming trial "was not an arbitration." She expected trial counsel to know the evidentiary rules and, if they did not, they were to learn them – and quickly. What caught this particular judge's attention was Rule 803(6), the hearsay exception for records of regularly conducted activity – or "business records." This is an exception that the judge thought was overused.

An examination of the case law reveals that the judge was right. Federal Rule of Evidence 803(6) is not well understood, and often is invoked based on the rationale that because the business uses email, the email must be a business record. But laying the foundation under Rule 803(6) is not that simple. This article discusses the basics of Rule 803(6) when it comes to emails. As you will see, and as one of my colleagues reminded me, admitting an email as a business record is no slam dunk.

Rule 803(6)

As every lawyer knows, "hearsay" is an out-of-court statement offered for the truth of the matter asserted. Fed. R. Evid. 801(c). Rule 802 makes hearsay inadmissible, unless a statute or rule otherwise authorize. Rule 803, in turn, provides for various exceptions to the rule against hearsay regardless of whether the declarant is available to testify.

Among the exceptions is Rule 803(6) which permits "records of regularly conducted activity." Rule 803(6) is based on the traditional business records exception. This exception is premised on the notion that business records are reliable due to "systematic checking, by regularity and continuity which produce habits of precision, by actual experience in relying upon, or by a duty to make an accurate record as part of a continuing job or occupation." Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, 4 Federal Rules of Evidence Manual, § 803.02[7] (11th ed. 2015) (quoting Advisory Committee Note to Paragraph (6) of 1972 proposed rules). By its terms, Rule 803(6) extends beyond records of businesses. It applies to all records made as part of any "regularly conducted activity," whether by a "business, organization, occupation, or calling, whether or not for profit." Fed. R. Evid. 803(6)(B)

The foundation for admitting "records of a regularly conducted activity" has four elements: (1) the record must be made contemporaneously by or from information transmitted by someone with knowledge; (2) the record must have been kept in the course of a regularly conducted activity; (3) making the record must be a regular practice of that activity; and (4) the foregoing conditions are established by the testimony of a custodian, other qualified witness, or by certification that complies with Rule 902(11) or (12) or by other statute permitting certification. If these elements are satisfied, then the opposing party may still seek to exclude the record if the opponent can show that the source of information, the method of creating the record, or other circumstances related to its preparation demonstrate that the record is untrustworthy. According to the Advisory Committee Notes, records created in anticipation of litigation are often untrustworthy because they are biased, rendering them unsuitable under Rule 803(6). See Fed. R. Evid. 803 Advisory Committee Note to 2014 amendments.

The pervasiveness of emails has presented litigants with a treasure trove of potentially relevant evidence. Not surprisingly, parties often seek to admit them as business records. A common argument in support of their admission, as noted above, is that all emails written in a business setting must fall within the exception. The courts, however, have refused to buy in to this overly-simplified rationale.

Case Law

In 2013, the Fourth Circuit, in a criminal case, considered emails that had been admitted under Rule 803(6) in United States v. Cone, 714 F.3d 197 (4th Cir. 2013). In Cone, the trial court admitted emails for a non-hearsay purpose, but declined to give the jury a limiting instruction to that effect, stating the jury would decide "if they're believable or not." Id. at 219. The government argued that the emails were admissible under 803(6). The Fourth Circuit disagreed. "While properly authenticated emails may be admitted under the business records exception, it would be insufficient to survive a hearsay challenge simply to say that since a business keeps and receives emails, then ergo all those emails are business records falling within the ambit of Rule 803(6)(B)." Id. at 220. Because no foundation was established to support the district court's conclusion that the emails were kept as a "regular operation of the business," the Fourth Circuit found the emails were inadmissible under 803(6). Id.

District courts in other jurisdiction have also concluded that emails do not necessarily qualify as business records. Rather, the proponent of the emails as a business record must show for each the foundational elements that Rule 803(6) prescribes. For example, in Roberts Technology Group, Inc. v. Curwood, Inc., No. 14-5677, 2016 U.S. Dist. LEXIS 64538 (E.D. Pa. May 17, 2016), the court explained that emails are not admissible across the board as business records:

> There is no absolute bar to emails being admissible under the business records exception. Nor is there an absolute right to admission of emails under the business records exception. It is "insufficient to survive a hearsay challenge simply to say that since a business keeps and received emails, then ergo all those emails are business records." "An email created within a business entity does not, for that reason alone,. satisfy the business records exception of the hearsay rule."

Id. at *4 (citations omitted).

In In re Oil Rig "Deepwater Horizon," No. 2179, 2012 U.S. Dist. LEXIS 3406 (E.D. La. Jan. 11, 2012), the court held that "[t]he individual elements required [under Rule 803(6)] to trigger the exception's applicability show that there is no categorical rule that emails originating from or received by employees of a producing defendant are admissible under the business records exception." Likening emails to telephone calls or interoffice memoranda whose content must record regularly-occurring activity for the exception to apply, the court observed that "the business records exception does not supply a rule that would render admissible all emails found on a defendant's computer server." Id. at *16-17.

Similarly, in Brown v. West Corp., No. 11cv284, 2014 U.S. Dist LEXIS 62476 (D. Neb. May 6, 2014), the court rejected the argument that emails among the defendant's employees "fall under a per se exception to the hearsay rule as business records." Id. at *7. Each email, instead, "must be analyzed to determine whether it meets the elements of the business record exception and whether any additional statements within the emails require a separate exception." Id. And, as another court observed, to qualify for the exception, "all persons involved in the process must be acting in the regular course of business—otherwise, an essential link in the trustworthiness chain is missing." Candy Craft Creations, LLC v. Gartner, No. 14-5677, 2015 U.S. Dist. LEXIS 148165, at *4 (S.D. Ga. Nov. 2, 2015) (quoting T. Harris Young & Assoc.'s Inc., v. Marquette Elec., Inc., 931 F.2d 816, 828 (11th Cir. 1991)).

As these cases show, admissibility of emails as business records is not automatic. Rule 803(6) requires that the foundation be laid for each email. A party seeking to introduce, or one seeking to prevent, the admission of emails as business records needs to understand the rule and the case law interpreting the rule. Courts will not permit an email to be introduced simply because a business uses it.

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