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# Business as Usual:

## Email Evidence and the Business Records Exception in the Ninth Circuit

At a time when businesses are increasingly utilizing more ephemeral methods of communication such as chat, text, and instant messaging, email has become the standard form of business communication. Indeed, cases where companies do not use email for everyday business are the exception rather than the norm. Despite that, many practitioners still find to their dismay that sometimes even though a business communication is an email, it is not automatically admissible as a business record. In its very omnipresence, email poses a unique challenge because it encompasses a wide variety of types of communications, from formal reports and memorandums, to off-the-cuff, casual bantering among employees. As such, judges frequently question the trustworthiness of business emails. The challenge to the modern practitioner seeking to admit business emails, is in determining how to best alleviate those concerns.

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As recent federal cases demonstrate, cautious counsel can surmount this obstacle by establishing certain hallmarks of trustworthiness to satisfy the business records exception, asking *inter alia*, whether the author has the requisite knowledge to support the emailed statements, and whether the organization has a coherent business email practice.

Consider three different emails offered in a hypothetical contract dispute between a "Mom & Pop" small business (plaintiff) and its manufacturer WidgetCo (defendant) regarding the interpretation of an ambiguous contract scope provision:

The first, and most common, case involves emails between internal and external parties. For example, plaintiff's counsel seeks to admit Email #1 from WidgetCo's VP to Mom confirming the contract terms the parties have agreed to. The executive's statement would be admissible against WidgetCo since it is a statement by a party-representative offered against that party; admissions by a party opponent do not constitute hearsay. Fed. R. Evid. 801(d)(2).

Federal law provides for the admissibility of out-of-court statements under a variety of other circumstances, including to show the declarant's state of mind. Fed. R. Evid. 803(3). An email summarizing matters that were discussed during a particular event or meeting could also be offered to circumstantially demonstrate that the event or meeting occurred. Fed. R. Evid. 803(3). Alternatively, an email may be offered to establish the effect the email had upon the recipient, or, even more fundamentally, to show that the email has actually been sent or received by a specific party. Fed. R. Evid. 801(c).

### • Emails Among Internal Parties and NonParties: Is it Hearsay or Does it Fall Within an Exception?

What about purely internal emails sent among a party's employees or those sent to nonparties? Consider these two scenarios:

• Email #2: Mom, who negotiated the contract, writes to Pop to tell him about the outcome of ne
the terms agreed upon.

• Email #3: Mom writes to Aunt B, who does not work for their business, about the negotiations to ask her if Aunt B thought that the scope terms, as Mom understands them, are fair. Mom also writes that she feels like WidgetCo was trying to bully them into a tough deal.

Here, plaintiff's counsel wants these emails admitted to demonstrate Mom's understanding of the scope terms, but cannot argue that the emails are not hearsay because they are not made by party opponents. Instead, faced with a hearsay issue, many attorneys will instinctively turn to the business records exception, assuming that emails, with their ubiquitous presence in the modern workplace, certainly qualify. The reality is that the business records exception is no guarantee when it comes to email because its applicability is heavily fact-based. For that reason, the examples above likely will end with different results.

Judges are often concerned about the trustworthiness of emails, even in the business environment, because of their frequently informal and spontaneous nature. Even if counsel is able to question an email's author – here, Mom – on the stand regarding the substantive content of Emails #2 and 3, many judges may balk at admitting the emails themselves. As Judge Mark B. Simons of California's 1st District Court of Appeals has observed: "As a trial judge, I was sensitive to, almost allergic to efforts to convert conversations or testimony into exhibits that can be published to the jury and, subsequently, provided to the jury during deliberations." The business records exception, therefore, steps in to try to allay those concerns by benchmarking objective factors that can establish some degree of trustworthiness so that judges can feel more comfortable with admitting what would otherwise be considered written hearsay.

Federal Rule of Evidence 803(6) provides that "[a] record of an act, event, condition, opinion, or diagnosis" is admissible if:

- The record was made at or near the time by someone with knowledge;
- The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- Making of the record was a regular practice of that activity, as demonstrated by the testimony or certification of the custodian or another qualified witness; and
- The opponent does not establish that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6).

What modern practitioners may forget is that the prevalent use of emails for business does not obviate the basic elements required by the business records exception. The standard for the admission of electronic business records fundamentally remains no different than the one applicable to paper business records.

## • The Ninth Circuit Rejects Automatic Admissibility of Emails Under the Business Records Exception.

In its seminal decision in Monotype Corp. PLC v. International Typeface Corp., 43 F.3d 443 (9th Cir. 1994), the Ninth Circuit clearly stated that it had no intention of giving email any special treatment. There, defendant ITC tried to enter a non-party email as a business record because the author knew about the transaction, wrote the email to his superior, and the record was kept in the course of regularly conducted business. Id. The Monotype court held that email was not automatically admissible as a business record, observing that "[e]-mail is far less of a systematic business activity than" other computer-generated business records. Id. at 450.

Although the Ninth Circuit has not revisited the issue since the Monotype decision, several district courts within the circuit have since found emails admissible under the business records exception. Unfortunately, many courts have not laid out a detailed explanation for their analysis. In Volterra Semiconductor Corp. v. Primarion, Inc., No. C-08-05129 JCS, 2011 WL 4079223, at *7 (N.D. Cal. Sept. 12, 2011), the court explained that "[plaintiff had] laid a foundation at trial establishing that the email was admissible under the business record exception to the hearsay rule" but did not describe that foundation.

In contrast, in Age Group Ltd. v. Regal West Corp., No. C07-1303BHS, 2008 WL 4934039, at *2-3 (W.D. Wash. Nov. 14, 2008), the court determined that plaintiff's foundation regarding an email was insufficient for the business records exception. The author testified that she "neither had personal knowledge of the missed shipments nor recorded the statement at or near the time of the missed shipments." Id. Finding that plaintiff failed to present evidence that the author had either made or recorded her statement based on personal knowledge of the issues discussed in the email, the court excluded it as inadmissible hearsay. Id.

## • Federal Guidance From Outside the Ninth Circuit: Deepwater Horizon's Emphasis of the Fundamental Hallmarks of Trustworthiness under Rule 803(6)

Several courts outside of the Ninth Circuit have taken a closer look at the application of the business records exception to emails in an attempt to provide guidance for practitioners. A recent notable effort can be found in In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mex. ("Deepwater Horizon") 2012 WL 85447 (E.D. La., Jan. 2012). Plaintiffs sought to have approximately 300 emails produced by defendants collectively admitted as business records (even if they were admissible under other theories), arguing that: (1) the emails had been created as part of ongoing and normal business activities; and (2) the courts' "increasingly liberal view of emails as corporate business records" warranted admission. Id. at *1.

The court disagreed, and instead explained that the elements of Rule 803(6) must be applied to each email – on an email by email basis. The court laid out the following five requirements:

- The email must have been sent or received at or near the time of the event(s) recorded in the email.
- The email must have been sent by someone with knowledge of the event(s) documented in the email.
- "The email must have been sent or received in the course of a regular business activity,…which requires a case-by-case analysis of whether the producing defendant had a policy or imposed a business duty on its employee to report or record the information within the email."
- It "must be the producing defendant's regular practice to send or receive emails that record the type of event(s) documented in the email."
- A custodian or qualified witness must attest that these conditions have been fulfilled. Id. at *3.

The court further explained: "[i]t is not enough to say that as a general business matter, most companies receive and send emails as part of their business model." Id.

Several courts have since followed Deepwater Horizon, recognizing that practitioners needed guidelines for when Rule 803(6) would apply to emails. See, e.g., Its My Party, Inc. v. Live Nation, Inc., No. JFM-09-547, 2012 WL 3655470 at *5 (D. Md. Aug. 23, 2012) (unpublished) (excluding emails because "more specificity is required regarding the party's record keeping practices to show a particular e-mail in fact constitutes a reliable business record."); United States v. Cone, 714 F.3d 197 (4th Cir. April 15, 2013); Candy Craft Creations, LLC v. Gartner, No. 2:12-cv-91, 2015 U.S. Dist. LEXIS 148165, at *2-8 (S.D. Ga. Nov. 2, 2015) (plaintiff's customer emails regarding complaints were not within the scope of any regularly conducted business activity and not sufficiently reliable); Roberts Technology Group, Inc. v. Curwood, Inc., No. 14-5677, 2016 U.S. Dist. LEXIS 65438 (E.D. Pa. May 17, 2016) (party must show specific foundational evidence showing that emails are trustworthy).

Back in the Ninth Circuit, the court in Rogers v. Oregon Trail Elec. Consumers Co-op., Inc., No. 3:10-CV-1337-AC, 2012 WL 1635127, at *10 (D. Ore. May 12, 2012) expressly adopted the Deepwater Horizon test, observing that "[h]olding emails to some standard under the business records hearsay exception, as opposed to broadly accepting them as admissible business records, is the best approach." There, defendant sought to admit emails regarding disciplinary warnings against the plaintiff. Id. at *8. Defendant's manager Ray declared: "I do have personal knowledge that [Exhibits G and H] are personnel records that are made and kept in the regular course of [defendant's] regularly conducted business activity and are routinely relied on by [defendant] in that business activity." Id. at *10.

Applying Deepwater Horizon, the Rogers court found this was inadequate. Id. Specifically, "Ray [did] not articulate whether the individuals sending the email have personal knowledge of the events discussed therein; [did] not put forth evidence of a policy that imposed a business duty on [defendant] employees to send and retain emails…[and] did not analyze the applicability of the test on an email-by-email basis." Id. The court further observed that "[d]isciplinary memoranda are designed to be a formal record…and carry a stronger presumption of accuracy and reliability than email, which is an informal mode of communication that is not inherently reliable." Id.

These decisions provide useful guidance for resolving the question whether Emails #2 and #3, described above, are admissible under the business records exception to the hearsay rule. If counsel can establish that Mom's regular duties included reporting on negotiations to Pop and that this was one such report, Email #2 will likely be admitted as a business record. Email #3, however, will probably be rejected because even though it constitutes evidence of Mom's understanding of the contract's scope, it was not sent in the normal course as a regular business report or record, and therefore lacks the hallmarks of trustworthiness described by Rule 803(6).

Applied more broadly, cautious counsel should carefully assess each email and develop the foundation necessary to establish the requisite trustworthiness to satisfy the business records exception, including asking: (1) who is authoring the communication; (2) whether the author has the appropriate knowledge to support the statements at the time the email was written; (3) whether the organization has a coherent business email practice, and (4) whether the email qualified under that practice. Considering these questions will help ensure that an attorney is well prepared to establish the trustworthiness required by the business records hearsay exception even under the most stringent judicial review of business emails.

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