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The Evidentiary Hurdles of Arbitration

By Matthew K. Edling

Both California and the Federal Rules of Civil Procedure seek “to take the ‘game’ element out of trial preparation” by enabling parties to obtain the evidence necessary to evaluate a case prior to trial. See WEIL & BROWN, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL (The Rutter Group 2007) § 8:1; *Emerson Elec. Co. v. Sup. Ct. (Grayson)* 16 Cal. 4th 1101, 1107 (1997). The purpose of discovery is to preserve and narrow evidence for trial, promote settlement, and avoid surprise at trial. Arbitration differs. The primary arbitration venues—Judicial Arbitration

and Mediation Services (JAMS), American Arbitration Association (AAA), and the Financial Industry Regulatory Authority (FINRA)—restrict a party’s right to discovery. While the means of obtaining evidence prior to an evidentiary hearing are inhibited, arbitrators have greater discretion as to what is relevant and material and what is not.

Case Management

In any arbitration, there is some form of preliminary hearing or case-management conference where the parties and the arbitrators should discuss necessary discovery, including

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The Reliability, Admissibility, and Power of Electronic Evidence

By Zachary G. Newman and Anthony Ellis

It is impossible to ignore that electronic communication has become the predominant and preferred form of communication in all aspects of business and social interaction. Negotiations, settlement discussions, confidential communications, transaction closings, and the completion of contracts for goods or services are all accomplished through email, BlackBerry Messenger, Bloomberg Messenger, and even text messages. With the rapidly increasing popularity

of social, business, and personal networking forums, it seems clear that this evolution in the way that we communicate as a society is only going to continue and expand. Yet, despite the fact that electronic data is permanent, nearly indestructible, and easily transferrable, the public at large continues to view email and other electronic communications with an air of informality that was rarely associated with traditional professional letters or memoranda. Nowhere is this more obvious

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MESSAGE

from the Chairs



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The Trial Evidence Committee continues on its road to adding diversity to our membership, programs, written resources, and leadership. The current issue of *Proof* is a great example.

“The Evidentiary Hurdles of Arbitration” by Matthew K. Edling is a great overview of all of arbitration—evidence and procedure. This is an excellent review now and on the eve of accepting representation in an arbitration. Arbitration remains a nuanced method of dispute resolution. Thinking through strategies beforehand will save you from being a victim of nuance.

A thorough background on electronically stored information (ESI) is essential for every litigator. Zachary G. Newman and Anthony Ellis contributed their article, “The Reliability, Admissibility, and Power of Electronic Evidence,” which shows that inquiry on the admis-

sibility of ESI underscores the old saying that everything old is new again—except in certain circumstances. And you’d better know those circumstances. This is a must-read, especially if you plan to go to trial soon, as you will undoubtedly offer into evidence or try to exclude ESI.

We look for balance in our publications, and “Protecting Insurance Broker Communications from Discovery” by Kara Altenbaumer-Price is an excellent set of pointers about protecting communications. The substance of these important communications can be shielded—be sure you know how to do so! Of course, please submit your “counterpoint”—effective methods of compelling communication—for the next issue.

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Protecting Insurance Broker Communications from Discovery

By Kara Altenbaumer-Price, J.D.

A recent federal district court ruling has added insurance brokers to the list of non-attorneys who may be protected by the attorney-client privilege in certain circumstances. The Southern District of Texas ruling held that certain communications between a company and its insurance broker made during a dispute between the company and its insurance carrier were not subject to discovery. See *In re Tetra Tech., Inc. Sec. Litig.*, 2010 WL 1335431 (S.D. Tex. Apr. 5, 2010). This ruling expanded the long-standing view that the attorney-client privilege can be extended to accountants and other subject-matter experts who serve as nonattorney consultants.

The communications at issue regarded hurricane-related repairs and were between various company employees, the company's counsel, and the company's insurance brokers. *Id.* at *4. The plaintiffs in the securities class action sought discovery of the communications, arguing that inclusion of the brokers in the communications destroyed any attorney-client privilege. *Id.* The court disagreed.

The court held that the "scope of the attorney-client privilege is shaped by its purposes." *Id.* at *5. In this context, the purpose of the communications was to facilitate legal advice with regard to the coverage dispute between the company and its insurance carrier. "What is vital to the privilege," the court held, "is that the communications be made in confidence for the purpose of obtaining legal advice from a lawyer." *Id.* The presence of a third party did not destroy the privilege. It did not matter that the dispute in which these communications were sought and the dispute in

which they were made was not the same.

The court made clear that communications between a company and its insurance broker that are not made for the purpose of facilitating legal advice are not privileged. *Id.* Thus, the day-to-day communications between a broker and an insured are not protected from discovery. Communications between a company and its insurance carrier would not be protected as privileged because carriers, unlike brokers, are not the company's agents, particularly in the context of a coverage dispute.

While the final determination of whether a particular communication was made to facilitate legal advice is a factual question for the court in a given scenario, there are steps attorneys and their clients can take to help ensure as much protection from discovery as possible for communications with brokers. They are as follows:

- Differentiate communications related to a dispute from the day-to-day, broker-insured interaction by documenting the nature and beginning date of the dispute or other legal matter in which the broker is being consulted.
- Include in-house counsel (or outside lawyers) in the communication.
- Label written communications as attorney-client privileged or attorney work product.
- Where applicable, mark the communication as being at the direction of counsel.
- Consider an engagement directly between counsel and the broker for the purposes of consulting on the legal dispute. 



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District Courts Extend *Twombly* to Affirmative Defenses

By Brian Robison and Alithea Z. Sullivan

The Supreme Court raised the bar for federal-court plaintiffs in 2007's *Bell Atlantic Corp. v. Twombly*¹ by clarifying the standard for deciding motions to dismiss for failure to state a claim. Previously, a claim would be dismissed only if it appeared "beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."² *Twombly* rejected this standard in favor of a rule requiring a complaint to state "enough facts to state a claim to relief that is plausible"—not merely "conceivable."³ Under *Twombly*'s standard, plaintiffs' claims would come under increased scrutiny, forcing complainants to allege sufficient factual bases for their contentions or face dismissal. Accordingly, *Twombly* has been widely regarded as an added obstacle for plaintiffs—and an unalloyed benefit to defendants.

But the benefits of *Twombly* may not be so one-sided after all. In several recent cases, defendants have been held to the heightened pleading standards of *Twombly* for their affirmative defenses. Although the trend has drawn little attention from commentators, this view is quickly finding favor in more and more jurisdictions.

While no court of appeals has confronted the issue, many federal district courts have weighed in on whether *Twombly*'s pleading requirements apply to affirmative defenses in defendants' answers. The majority of these courts—in Texas,⁴ New York,⁵ California,⁶ Wisconsin,⁷ Illinois,⁸ Louisiana,⁹ Minnesota,¹⁰ Vermont,¹¹ Missouri,¹² Kansas,¹³ and Florida¹⁴—have opted to apply *Twombly* to affirmative defenses. Some of these courts extended *Twombly* on the basis of pre-*Twombly* precedent, confirming that "an affirmative defense is subject to the same pleading requirements as the Complaint."¹⁵ Other courts, concluding that "sauce for the goose is sauce for the gander,"¹⁶ found *Twombly* applicable to both claims and affirmative defenses, because the purpose underlying the requirement—"to provide enough notice to the opposing party that indeed there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case"¹⁷—applies equally to both. The courts also played down the additional burden that *Twombly* would place on defendants, observing that defendants were permitted leave

to amend their pleadings¹⁸ and stressing that *Twombly*'s requirement that a pleading include "more than labels and conclusions"¹⁹ is nothing new, because even before *Twombly*, a bare-bones recital of a boilerplate affirmative defense was considered insufficient.²⁰

However, district courts in Pennsylvania,²¹ Alabama,²² and Colorado²³ have deemed *Twombly* inapplicable to affirmative defenses under various theories. Some of these courts concluded that *Twombly* sought to interpret only Federal Rule of Civil Procedure 8(a) (concerning claims) and did not intend to alter the interpretation of Federal Rule 8(c) (concerning affirmative defenses).²⁴ Others found it "reasonable to impose stricter pleading requirements on a plaintiff who has significantly more time to develop factual support for his claims than a defendant who is only given 20 days to respond to a complaint and assert its affirmative defenses."²⁵

Other jurisdictions are uncertain. District courts in Delaware,²⁶ Tennessee,²⁷ New Jersey,²⁸ and Massachusetts²⁹ have explicitly declined to decide the question. Two districts—the Eastern District of Michigan³⁰ and the Western District of Oklahoma³¹—have issued widely divergent opinions.

Although many district courts have extended *Twombly* to the pleading of affirmative defenses, the issue is far from settled. District courts in more than half of the states have not yet decided whether the *Twombly* pleading standard applies to affirmative defenses. Moreover, the courts of appeals may be willing to invalidate their pre-*Twombly* holdings treating affirmative defenses and complaint claims equally in a way that district courts were not. Until more courts weigh in on the matter and clarify the state of the law, *Twombly*'s expansion is an issue potential defendants should monitor with care. 



Brian Robison



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Endnotes

1. 550 U.S. 544 (2007).
2. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).
3. *Twombly*, 550 U.S. at 570.
4. *Mumphrey v. Credit Solutions of Am., Inc.*, No. 3:09-cv-1208-M, 2010 WL 652834, at *1 (N.D. Tex. Feb. 24, 2010); *Lehman Bros. Holdings, Inc. v. Cornerstone Mortgage Co.*, No. H-09-0672, 2009 WL 2900740, at *3 & n.11 (S.D. Tex. Aug. 31, 2009); *Teirstein v. AGA Med. Corp.*, No. 6:08cv14, 2009 WL 704138, at *6 (E.D. Tex. Mar. 16, 2009);

Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc., No. 05-CV-0233-WWJ, 2008 WL 4391396, at *1 (W.D. Tex. Sept. 22, 2008).

5. Tracy ex rel. v. NVR, Inc., No. 04-CV-6541L, 2009 WL 3153150 at *7 (W.D.N.Y. Sept. 30, 2009); Aspex Eyewear, Inc. v. Clariti Eyewear, Inc., 531 F. Supp. 2d 620, 622 (S.D.N.Y. 2008).

6. CTF Development, Inc. v. Penta Hospitality, LLC, No. C 09-02429-WHA, 2009 WL 3517617, at *8 (N.D. Cal. Oct. 26, 2009); Anticancer Inc. v. Xenogen Corp., 248 F.R.D. 278, 282 (S.D. Cal. 2007). But cf. Sorensen v. Spectrum Brands, Inc., No. 09cv58-BTM, 2009 WL 5199461, at *1 (S.D. Cal. Dec. 23, 2009) (using pre-*Twombly* standards to determine sufficiency of affirmative defenses without mention of *Twombly*'s potential applicability).

7. Voeks v. Wal-Mart Stores, No. 07-C-0030, 2008 WL 89434, at *6 (E.D. Wis. Jan. 7, 2008); Greenheck Fan Corp. v. Loren Cook Co., No. 08-cv-335-jps, 2008 WL 4443805, at *1-2 (W.D. Wis. Sept. 25, 2008).

8. OSF Healthcare Sys. v. Banno, No. 08-1096, 2010 WL 431963, at *2 (C.D. Ill. Jan. 29, 2010); Darnell v. Hoelscher, Inc., No. 09-204-JPG, 2009 WL 4675884, at *1-2 (S.D. Ill. Dec. 4, 2009); Bank of Montreal v. SK Foods, LLC, No. 09 C 3479, 2009 WL 3824668, at *3-4 (N.D. Ill. Nov. 13, 2009); SEG Liquidation Co., LLC v. Stevenson, No. 07-C-3456, 2008 WL 623626, at *2 (N.D. Ill. Mar. 6, 2008).

9. Cosmetic Warriors Ltd. v. Lush Boutique, LLC, No. 09-6381, 2010 WL 481229, at *1 (E.D. La. Feb. 1, 2010).

10. E.E.O.C. v. Hibbing Taconite Co., No. 09-0729, 2009 WL 5610134, at *5-6 (D. Minn. Dec. 7, 2009).

11. In re Montagne, No. 08-10916, 2010 WL 538216, at *3 (Bankr. D. Vt. Feb. 8, 2010).

12. Premium Standard Farms, LLC v. Travelers Property & Cas. Co., No. 09-0699-CV-W-GAF, 2009 WL 4907063 (W.D. Mo. Dec. 14, 2009) (applying *Twombly* "plausibility" standard).

13. Hayne v. Green Ford Sales, Inc., No. 09-2202-JWL-GLR, 2009 WL 5171779, at *2-3 (D. Kan. Dec. 22, 2009).

14. FDIC v. Bristol Home Mortgage Lending, LLC, No. 08-81536-CIV, 2009 WL 2488302, at *2 (S.D. Fla. Aug. 13, 2009); Torres v. TPUSA, Inc., No. 2:08-cv-618-FtM-29DNE, 2009 WL 764466, at *1 (M.D. Fla. Mar. 19, 2009); Home Management Solutions, Inc. v. Prescient, Inc., No. 07-20608-CIV, 2007 WL 2412834, at *3 (S.D. Fla. Aug. 21, 2007).

15. See, e.g., Cosmetic Warriors Ltd. v. Lush Boutique, LLC, No. 09-6381, 2010 WL 481229, at *1 (E.D. La. Feb. 1, 2010) (citing Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999)); OSF Healthcare Sys. v. Banno, No. 08-1096, 2010 WL 431963, at *2 (C.D. Ill. Jan. 29, 2010) (citing Heller Financial, Inc. v. Midway Powder Co., Inc., 883 F.2d 1286, 1294 (7th Cir. 1989)).

16. Kaufmann v. Prudential Ins. Co., No. 09-10239-RGS, 2009 WL 2449872, at *1 (D. Mass. Aug. 6, 2009).

17. Hayne, 2009 WL 5171779, at *3.

18. *Id.* at *4.

19. *Twombly*, 550 U.S. at 545.

20. In re Montagne, No. 08-10916, 2010 WL 538216, at *3 (Bankr. D. Vt. Feb. 8, 2010); OSF Healthcare Sys., 2010 WL 431963, at *2; Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc., No. 05-CV-0233-WWJ, 2008 WL 4391396, at *1 (W.D. Tex. Sept. 22, 2008); Voeks v. Wal-Mart Stores, No. 07-C-0030, 2008 WL 89434, at *6 (E.D. Wis. Jan. 7, 2008).

21. Romantine v. CH2M Hill Eng'rs, Inc., No. 09-973, 2009 WL 3417469, at *1 (W.D. Pa. Oct. 23, 2009).

22. Westbrook v. Paragon Sys., Inc., No. 07-0714-WS-C, 2007 U.S. Dist. LEXIS 88490, at *1-2 (S.D. Ala. Nov. 29, 2007).

23. Holdbrook v. SAIA Motor Freight Line, LLC, No. 09-cv-02870-LTB-BNB, 2010 WL 865380, at *2 (D. Colo. Mar. 8, 2010).

24. See Romantine, 2009 WL 3417469, at *1; Westbrook, 2007 U.S. Dist. LEXIS 88490, at *1-2.

25. Holdbrook, 2010 WL 865380, at *2.

26. See Sun Microsystems, Inc. v. Versata Enterprises, Inc., 630 F.Supp.2d 395, 408 n.8 (D. Del. 2009) (explaining disparity of opinions among district courts and concluding that resolution was unnecessary).

27. See Del-Nat Tire Corp. v. A to Z Tire & Battery, Inc., No. 2:09-cv-02457-JPM-tmp, 2009 WL 4884435, at *2 (W.D. Tenn. Dec. 8, 2009) (declining to address issue).

28. Huertas v. U.S. Dep't of Educ., No. 08-3959, 2009 WL 2132429 (D.N.J. July 13, 2009) (noting absence of case law in jurisdiction and proceeding to apply pre-*Twombly* precedent).

29. Kaufmann v. Prudential Ins. Co. of Am., No. 09-10239-RGS, 2009 WL 2449872, at *1 (D. Mass. Aug. 6, 2009) (assuming, without deciding, that *Twombly* applies to affirmative defenses).

30. Compare First Nat'l Ins. Co. of Amer. v. Camps Serv., Ltd., No. 08-cv-12805, 2009 WL 22861, at *2 (E.D. Mich. Jan. 5, 2009) (rejecting *Twombly*'s application to affirmative defenses), with United States v. Quadrini, No. 2:07-CV-13227, 2007 WL 4303213, at *4 (E.D. Mich. Dec. 6, 2007), and Shinew v. Wszola, No. 08-14256, 2009 WL 1076279, at *2-5 (E.D. Mich. Apr. 21, 2009) (finding *Twombly* applicable).

31. Compare Gibson v. Officemax, Inc., No. CIV-08-1289-R (W.D. Okla. Jan. 30, 2009) (extending *Twombly* to affirmative defenses), with Schlottman v. Unit Drilling Co., No. CIV-08-1275-C, 2009 WL 1764855, at *1 (W.D. Okla. June 18, 2009) (declining to address whether *Twombly* applied to affirmative defenses), and Henson v. Supplemental Health Care Staffing Specialists, No. CIV-09-397-HE (W.D. Okla. July 30, 2009) (refusing to extend *Twombly*).

Twombly has defined more and more standards by which federal court pleadings can be judged. Brian Robison and Alithea Z. Sullivan's "District Courts Extend *Twombly* to Affirmative Defenses" explores those standards in the context of the affirmative defense. Indeed, defendants should be as vigilant as plaintiffs as to the

demands of *Twombly*.

We want all perspectives reflected in our work on the Trial Evidence Committee. Please, give us yours!

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Message from the Chairs

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Evidentiary Hurdles

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document production; depositions; discovery from third parties; the dates by which pretrial briefs, exhibit lists, and witness lists are to be exchanged; and the expected length of the trial (including time limits on the testimony by each side at the hearing) and the witnesses expected to testify. See, e.g. AAA L-3.

Contrary to popular belief, arbitrations are not always faster to resolution. It may be difficult to find a set of days/weeks that work for multiple attorneys and arbitrators. If you think it will be a five-day hearing, be sure, because your arbitrator or panel of arbitrators will set it accordingly. As discussed in greater detail below, because there are few if any per se bases to exclude evidence presented during your evidentiary hearing, the hearing may take longer than you would otherwise expect. Speaking from experience, if you are too lean in your trial calculation, you may finish presenting your case weeks or months before the other party has a chance to present theirs.

Prehearing Discovery

“The popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness—characteristics said to be at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure.” *National Broadcasting Co., Inc. vs. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1999). Generally, arbitrators are “guided by the principle that discovery should provide sufficient information to allow all parties to prepare for and present a full and fair hearing.” Lawrence R. Mills & Thomas J. Brewer, *A Courtroom Lawyer’s Guide to Arbitration*, Vol. 31 No. 3 LITIGATION, 45 (2005). However, arbitrators rarely permit the interrogatory or deposition practice that is available in judicial litigation. *Id.* If you cannot obtain the discovery you require, you can request discovery through a motion to the arbitrator(s) or the court. In certain circumstances, California courts have statutory power to grant discovery if arbitrators will not; however, courts exercise that right sparingly. See, e.g., *Long v. Hauser*, 52 Cal. App. 3d 490, 492 (1975); *Alexander v. Blue Cross of Cal.*, 88 Cal. App. 4th 1082, 1087 (2001).

Written Discovery

Judicial actions and arbitrations require you to obtain proof of your claims or defenses. How you obtain that proof differs greatly in arbitration compared to litigation. The California Discovery Act provides various methods by which discovery may be obtained, including depositions, interrogatories,

document inspection, and requests for admissions. Code of Civ. Proc. § 2019.010. Arbitration differs greatly. The AAA Commercial Rules make no provision for discovery requests except in large, complex matters (claims of more than \$1 million), where the arbitrator may exercise discretion “upon good cause shown consistent with the expedited nature of arbitration.” Rule L-4. In other words, all discovery requests must be approved by the arbitrator. Standard interrogatories are generally not permitted, but a request for information and documents is allowed under FINRA’s discovery guidelines. This, as the name suggests, is an abbreviated hybrid of an interrogatory request and request for documents focusing on the identification of individuals, entities, and time periods related to the dispute. There is no equivalent tool for requests for admission. JAMS requires the parties to complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, names of individuals they may call as witnesses at the Arbitration Hearing, and names of all experts who may be called to testify at the arbitration hearing, together with each expert’s report that may be introduced at the arbitration hearing. Rule 17(a).

While it’s clear that written discovery is greatly curtailed in arbitration, parties are not without tools to effectuate pretrial discovery. FINRA, JAMS, and AAA provide for required document exchanges. If you require more discovery, identify this early in the action so that you can alert the arbitrators. Across all three forums, additional discovery may be available, but the requesting party will have to move for it to be compelled.

Depositions

In judicial proceedings in California, depositions are generally available as a matter of right. Code of Civ. Proc. § 2025.210(a)-(b). In arbitration, depositions are difficult to obtain. JAMS Rule 17(b); AAA L-4; FINRA Rule 12510. JAMS allows each party to take “one deposition of an opposing party or of one individual under the control of the opposing Party.” Rule 17(b). The AAA has no provision for depositions unless the action is complex. L-4. By rule, depositions are strongly discouraged by FINRA. Rule 12510.

In general, other than JAMS’s one deposition as a matter of right, the requesting party must request depositions through a motion to the arbitrator or panel, and these depositions are permitted only under very limited circumstances, generally limited to perpetuation of testimony for



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ill or dying witnesses, accommodating essential witnesses who are unable or unwilling to travel long distances for a hearing, expediting large or complex cases, and accommodating extraordinary circumstances. See e.g. FINRA Rule 12510. Once the arbitrator(s) order a deposition or the parties agree to one, the deposition or excerpts from it may be offered into evidence by any party.

If the parties agree or the arbitrator is persuaded to order depositions, do not assume that you can compel nonparty discovery. The federal rules apply to all persons whether they are litigants or not. This is not the case under arbitration rules. If you believe you will need third-party subpoenas, identify the witness and/or documents early so that you can raise this with your arbitrator or panel. If the panel agrees to issue a subpoena, you will still need to effectuate the subpoena in a court of competent jurisdiction. This process is not expedient.

In an arbitration I recently tried, the parties opted to strictly follow FINRA's discovery rules. We exchanged documents and identified experts, but we didn't exchange expert reports or take depositions. While it is possible that facts, issues, and documentary evidence might have been more streamlined had everything been vetted prior to the hearing, the same 10 best documents for each side would have come in and the same expert opinions would have been reached at trial. While every case is different, and my recent arbitration had a finite number of witnesses and documents, effective direct examinations and cross-examinations were meted by both sides based on documents and testimony that would otherwise have been unsurprising and distilled.

Arbitration Hearing

Arbitrations follow the same format as judicial trials relating to the presentation of evidence. The largest differences between the two relate to admissibility, opening statements, and closing arguments.

Is Anything Inadmissible?

Generally, exclusionary rules of evidence do not apply, and arbitrators are allowed a great deal of discretion as to what is "pertinent and material." See, e.g., AAA Rule 31(A) ("The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary."). While arbitrators may be guided by the Federal or California Rules of Evidence, just about everything, with some exceptions for work product, attorney-client privileges, and settlement negotiations, can come into evidence as long as they are relevant. See, e.g., JAMS Rule 22(d) and 22(f). For example, an arbitrator may identify or create evidence, conduct his or her own independent investigation of the facts, and consult with experts who have not been called as witnesses by either party. Michael Hunter Schwartz, *From Star to Supernova to Dark, Cold Neutron Star: The Early Life, the Explosion and the Collapse of Arbitration*, 22 W. ST. U. L. REV. 1, 18 (1994). An arbitrator is even permitted, under California law, to consult with a disinterested attorney for advice regarding his or her conclusions of law, provided he or she discloses as such in his or her award. *Canadian Indemnity Co. v. Ohm*, 271 Cal. App. 2d 703, 708-09 (1969)

The federal rules apply to all persons whether they are litigants or not. This is not the case under arbitration rules.

Prehearing Meet and Confer

There are some items you should discuss with your opposing counsel prior to the evidentiary hearing.

Shared Costs on Exhibits

All parties will need exhibit binders at trial for each arbitrator, opposing counsel, the witness, a paralegal, and an extra copy, plus you'll need your own copy. Discuss with opposing counsel the prospect of a joint binder to save costs. Chances are you may have some of the same exhibits. Regardless, you will know the scope of the exhibits before trial, allowing you to follow up on this point. Depending on the number of exhibits, this can save thousands of dollars.

Stipulations

Issue and factual stipulations can reduce the number of witnesses, testimonial length, and the length of the hearing. This saves you and your client money.

Settlement

The panel or panelists may ask whether the parties would like to take one last opportunity to explore settlement possibilities. Have an answer.

citing Cal. Civ. Proc. Code 1282.2(g) (West 1994).

Because strict rules of evidence do not apply in arbitrations, motions in limine are rarely made or granted, evidentiary objections are generally overruled, and evidence is rarely excluded during arbitration. See, e.g., JAMS Rule 22; AAA Rule 31(A); FINRA Rule 12604. As such, attorneys should employ creativity in presenting their case and be constrained in their objections. However, if you are going to object, do not simply cite the rule of evidence. Argue the policy behind the rule. For example, if a document lacks foundation, explain why that lack of foundation makes the document irrelevant or overly prejudicial. If you want to introduce a business record, ask your opposing counsel if he will require a custodian of records to authenticate the documents. If he does not, then the problem is solved. If he does, in my experience, the arbitrator is not likely to require or appreciate the noncontroversial testimony of document custodians. But make sure the records were truly made in the ordinary course of business; otherwise those documents may be rightly excluded on hearsay grounds.

Opening Statements

Like any trial, your opening statement is your opportunity to introduce your case, persuade the panel to your version of the facts, and explain why these facts should lead to your desired outcome. Arbitrators, like jurors, “feel most deeply and retain most vigorously” information they hear and believe first. See California Trial Handbook, § 19.2 at 69 (3d ed. 2004 Supplement). If you are the respondent, do not defer your opening statement and allow your opponent to paint a clear, uninterrupted picture to the panel. Make your case and state why your proposed outcome is the proper one.

While opening statements, like judicial trials, are not evidence, the line dividing a proper statement of “what the evidence will show” and “improper” argument is not nearly as precarious. Be creative. Push the boundaries of demonstrative evidence and consider providing summary materials to the panelists in a digestible and persuasive form that might not be admissible in a bench or jury trial. Depending on the complexity of your case, a glossary of terms may be useful. Propose one to your opposing counsel.

That said, as in a jury trial, the best opening statements are straightforward and emphasize expected testimony and key documents previously exchanged between the parties. Because the arbitrator or panelists may have extensive experience in the matter before them or none at all, discuss applicable law during your opening statement and its application to the evidence you will present. If your case involves statutory terms or turns on

a particularly focused legal issue, highlight the statutes or relevant law to your finder(s) of fact early in the process.

Closing Argument: Written Briefs or Oral Closing?

Submitting briefs seems to have become the default method in closing arguments. This is unfortunate, and I recommend an oral closing argument immediately after the close of evidence rather than a post-hearing briefing. An oral closing means the arbitrator starts work sooner. Depending on the panel and the issues involved, closing briefs might not be submitted until a month or more after the close of evidence. The review of additional briefs will drive the costs up for your client.

The time to think about the type of closing argument you would like is before the hearing begins. If you do not discuss this with opposing counsel, experience suggests that parties will end up writing briefs. Raise the matter with opposing counsel prior to your hearing. I have found that, often, parties can agree to an oral close as opposed to briefing if they simply discuss the matter prior to the time constraints and stress of trial.

If you do choose an oral closing over submitting a brief, prepare your key documents as you would in a jury trial. If you are using an electronic system of evidence presentation (e.g., Trial Director or Sanctions), prepare your key documents and integrate them with your closing presentation. If you prepare a presentation, provide copies for the arbitrator and counsel. When it comes time to write the award, the arbitrator will be able to reference your opening statement and closing argument.

Helpful Tips for Arbitration Success

No “Kitchen Sink” Claims for Relief or Affirmative Defenses

By the time a court case reaches the jury, “alternative” positions plead in the complaint or answer have likely been eliminated. This elimination should be done in arbitration as well, but before the filing of the statement of the claim or answer. Because the arbitrator will first judge your case based on the statement of claim or the answer/counterclaim, eliminate the weaker arguments from your first pleading. Better to have three strong claims than waste time explaining five claims you chose to drop or have little chance of recovering. Unlike a jury, which is likely unaware of pretrial tactical moves, the arbitrator will know the claims you chose not to try or defenses you chose to withdraw. Substantial changes may cause the arbitrator to question your remaining claims. Begin from a

position of strength and maintain this strength from pleading through the close of evidence.

“Split the Baby” Arguments

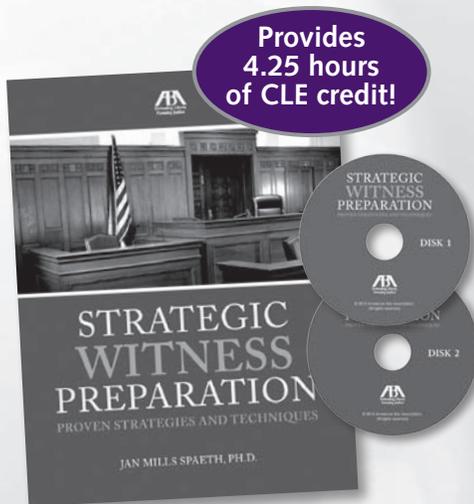
In my experience, an arbitrator wants to find a middle ground between the parties’ positions. Make sure you present evidence and argument so that the arbitrator has a path to the middle, especially if you are the respondent. The most effective methods of ensuring the middle ground are effective damages and liability experts and your cross-examination. Do not brazenly argue only liability and fail to address alternative calculations for the claimant’s damages. For example, if you are arguing a suitability case before FINRA, explore not only the claimant’s investment portfolio and trading history, but also any dividend or interest payments that the claimant received on the allegedly unsuitable investment(s). You or your expert should create a demonstrative exhibit

identifying the dividends/interest payments received and back out of the potential damages. In your closing argument, address these calculations again in a summary fashion along with your legal theories of comparative fault, causation, etc. and provide hard copies of your closing argument with slides summarizing and referencing your damages calculations. At decision time, if you have not persuaded the arbitrator to go your way entirely, you will have provided the arbitrator with a means to “split the baby,” ideally in a way that your client can live with.

Conclusion

While the means of accumulating and presenting evidence differ substantially between court trials and arbitration, with careful preparation, an attorney should be able to identify what he or she needs to try the case and prepare for success. 

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Electronic Evidence

Continued from page 1

than the avalanche of data incriminating golfer Tiger Woods. Rumors are one thing, but show the public text messages and it instantly becomes incontrovertible.

For litigators, the advent of electronic data has been both a blessing and a curse. The headaches associated with electronic discovery have been well-documented, and this article will not delve into them again. Suffice it to say that it is not uncommon even in smaller trials to have over a terabyte of data and many thousands of documents to review and produce. Electronic data simply provides a treasure trove of information in every case of every size that can ultimately prove, disprove, or color litigation. Moreover, contemporaneous electronic communications seem to have an air of reliability that is not generally credited to someone's recollection of events, particularly if those events occurred years before the matter ultimately comes to trial.

While we as attorneys have been learning to deal with such concepts as electronic discovery, metadata, email retrieval, and spoliation, litigation lawyers need to remember the basics of evidentiary procedure. Courts are not relaxing evidentiary rules simply because the world has become incredibly informal in terms of communication and interaction. Accordingly, this article focuses on establishing the authenticity of electronic evidence; provides a primer on dealing with hearsay in the context of electronic documents, which is a core evidentiary consideration inherent in electronic communication; and discusses noteworthy cases involving electronic discovery.



Zachary G. Newman



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Reliability and Authentication

Suppose you are representing a client who claims its contractual relationship with one of its largest customers was tortiously interfered with by a competitor. Given your appreciation of the importance of electronic data, you requested all text messages, instant message communications, and, of course, emails. In the documents produced, you find a series of text messages clearly establishing that your client's competitor knew of your client's contract and maliciously convinced your client's customer to breach his contract. Although this appears to be fantastic evidence, it is useless unless you can find a way to introduce it into the litigation.

To do so, you must first establish that the evidence is reliable and authentic. Authentication is the basic process of proving evidence is in fact genuine. The process by which you will have to determine the authenticity, reliability, and admissibility of evidence must start immediately as opposed to the eve of trial. Too often, counsel appear at pretrial conferences without any clue,

let alone a plan, for authenticating and admitting documents into evidence during trial. Litigators need to concern themselves with authenticity and admissibility from day one to successfully manage discovery and conduct a successful lawsuit.

Although there appears to be a public presumption that emails and texts are credible, the fact is that electronic data can be manipulated, re-created, or corrupted with ease. Thus, litigators need to critically analyze the reliability and authenticity of the materials before such materials ever come before the finder of fact, whether a judge or jury, and must pay attention to and address the authentication prerequisites contained in the evidentiary rules.

Given the costs associated with authenticating electronic documents, it is becoming increasingly standard and recommended to obtain an agreement with opposing counsel prior to trial that electronic documents produced by the adverse party or reliable sources be authentic. However, to the extent that no such agreement exists, the relevant federal or state rules will likely outline the methods by which evidence can be authenticated.

In the federal court system, Federal Rules of Evidence (FRE) 901 and 902 govern authentication. FRE 901(a) notes that evidence is authenticated if there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." FRE 901(b) then provides a list of potential ways that a litigant can satisfy this standard. For example, the easiest way to authenticate the data is under FRE 901(b)(1), which allows a witness with personal knowledge to authenticate that the data is what it is claimed to be. One simple way to comply with this standard is to introduce the electronic document during a deposition and have the creator or recipient of the email confirm that the email is genuine.

If such testimony is unavailable, courts have permitted electronic data to be admitted under FRE 901(b)(4), which permits authentication through distinctive characteristics such as the document's "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." In *United States v. Safavian*, the court admitted emails based on the email addresses contained in the "to" and "from" fields, and because other identifiable matters such as the work involved, signatures, and other personal and professional references.¹ The court permitted other emails to be authenticated under FRE 901(b)(3) by allowing the comparison of email addresses and formats to permit related emails into evidence.

Under FRE 902(7), business emails can be self-authenticating with information showing the origin of the transmission or other identifying

marks. This can be done through the authentication of company logos, email addresses, and other corporate identifiers. One trial court found emails to be authenticated when accompanied with a declaration that the emails were retrieved from the company's computers and the printouts were accurate representations of the retrieved messages.²

Information necessary to establish that the document is a business record can be obtained during a deposition. For example, ask the deponent if he or she recognizes the format of the email, or if the email looks the same as if he or she printed out an email in his or her office. Ask the deponent if he or she is familiar with the email addresses, or the domain names contained in the email. Determine if the document was printed out from the deponent's computer system, and authenticate printouts by securing testimony that the deponent believes the information is reliable because it is the same information that is available through the deponent's assigned work computer.

Finally, in certain cases, courts have held that electronic data can simply be authenticated by confirming that they were produced by the adversary during document discovery, as the act of production implicitly authenticates the documents.³

Of note, the mere fact that electronic data can be manipulated is not a substitute for hard evidence that the documents were manipulated or immediate grounds for preclusion. As the *Safavian* court noted:

The *possibility* of alteration does not and cannot be the basis for excluding e-mails as unidentified or unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents (and copies of those documents). We live in an age of technology and computer use where e-mail communication now is a normal and frequent fact for the majority of this nation's population, and is of particular importance in the professional world. The defendant is free to raise this issue with the jury and put on evidence that e-mails are capable of being altered before they are passed on. Absent specific evidence showing alteration, however, the Court will not exclude any embedded e-mails because of the mere possibility that it can be done.⁴

Admissibility of Electronic Data and the Hearsay Rule

Even if you can establish that electronic data are authentic, you are only halfway there. As with all evidence, you also must establish that the documents are admissible under the law. This section focuses on overcoming hearsay objections. Electronic data that is offered for the truth of the matter asserted is classic hearsay and thus generally inadmissible under evidentiary rules. To admit the emails as direct evidence, the proponent needs to satisfy an exception to the hearsay rule.

As with other documentary evidence, it is important to focus on who prepared and transmitted the electronic communication. For example, the argument for admissibility against a company is solidified if the email preparer is an officer or employer of that company.⁵ Emails sent by corporate officers or employees may be considered admissions by a party's agent under FRE 801(d)(2)(D) and therefore fall outside the definition of hearsay.

Assuming that the document was not prepared by the opposing party, the vast majority of corporate email is generally introduced into evidence under the business-records exception to the hearsay rule. "A party seeking to introduce an email made by an employee about a business matter under the hearsay exception under FRE 803(6) must show that the employer imposed a business duty to make and maintain such a record."⁶ For a document to be admitted as a business record, "there must be some evidence of a business duty to make and regularly maintain records of this type."⁷ Emails are admissible business records when they are timely recorded, regular activities, they memorialize events and conditions, and they have no indicia of untrustworthiness.⁸

Although this standard may seem to be easily satisfied, counsel should be aware that courts have sometimes adopted a rigid approach to the business-records exception. For example, in *United States v. Ferber*, the court found that emails submitted by the government did not fall under the business-records exception because "while it may have been [an employee's] routine business practice to make such records, there was no sufficient evidence that [the employer] required such records to be maintained."⁹ If the proponent fails to submit information regarding the practice or composition of the emails at issue, a court likely will deem them inadmissible as business records.¹⁰

In addition, counsel should carefully prepare deposition witnesses for examination on this issue. In one case, the court rejected the emails at issue because the email sender testified at deposition that (a) she did not know where she got the information she included in the email about missed shipments, (b) she did know what she was referring to when she made certain statements about vendor charges, and (c) she did not know what she meant when she said that there were missed shipments.¹¹ The court found that the plaintiff failed to present evidence that the email sender either made or recorded her statement based on personal knowledge of the issues of discontinued business, missed shipments, or vendor-compliance charges. Therefore, the court granted the defendant's motion to strike the email as inadmissible hearsay.

Emails forwarded
by a party can
be used to
demonstrate his
or her adoption
of its content.

Furthermore, given the amount of information contained in a single email chain, one has to be aware of multiple levels of hearsay. Courts frequently reject email discovery when the proponent is unable to satisfy hearsay exceptions for each account contained in an email.¹² This concern is particularly apparent when dealing with long email chains, which may result in numerous hearsay and admissibility issues. For example, where there is no evidence that the emailing party had firsthand knowledge of the matters contained in the email but rather was forwarding someone else's version, courts are more likely to preclude the entire email from being admitted.¹³

Litigants also should be aware that the admission of email evidence does not necessarily provide a clear path for email attachments. Information contained in or attached to emails, such as sales records, are potentially subject to independent scrutiny under the evidentiary rules. Attachments will be admissible under the business-records hearsay exception when the underlying data is regularly received by email and the emails were retained as records of each order.¹⁴

Admissions and Hearsay Exceptions

Even if the electronic data is hearsay, emails and texts can be admitted into evidence on other grounds or under one of the standard hearsay exceptions. For example, the proponent may not offer the evidence for the truth of the matter asserted therein but rather to prove that certain meetings or events happened or that certain strategies were employed, as they are not offered to prove the truth of the matters asserted within them but as circumstantial evidence of events or occurrences.

Electronic communications can also be offered against a party as party admissions, rather than as hearsay. When "it is the party's own statement, either in individual or representative capacity," the evidentiary rules take that statement outside the definition of hearsay when it is offered into evidence by the adverse party.¹⁵ Thus, when the proffering party lays a foundation to show that an adversary's email relates to a matter within the scope of the sender's employment, emails sent from his corporate email address likely will be deemed admissions against the employer under FRE 801(d)(2).

Emails also could be admitted as admissions by coconspirators in furtherance of a conspiracy claim.¹⁶ The proponent must show that (a) there was a conspiracy, (b) the declarant and the party against whom the statement is offered were members of the conspiracy, and (c) the statements were made in furtherance of the conspiracy.¹⁷ The prerequisites for admissibility are considered a preliminary question under FRE 104(a), and are

therefore resolved by the court, not the jury.¹⁸ Though the court may consider the content, "for such statements to be admissible, there must be some independent corroborating evidence of the defendant's participation in the conspiracy."¹⁹

An email made by someone else can be attributed directly to a party as an admission under FRE 801(d)(2)(A). The context and content of certain emails can demonstrate that the party "manifested an adoption or belief" in the truth of the statements of other people as he or she forwarded their emails.²⁰ Emails forwarded by a party, therefore, can be used to demonstrate his or her adoption of its content, and can be admitted as an adoptive admission under FRE 801(d)(2)(B).²¹

In addition, there are a number of exceptions to the hearsay rule. For example, under FRE 803(3), a statement is not excluded by the hearsay rule if the statement is of the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will. There is ample authority for the application of these hearsay exceptions, and it is important to analyze each part of the email communication to determine whether a portion of it may be admissible and useful in the event the entire communication is inadmissible. For example, some courts permit a victim's statements about being afraid of the accused to establish a state of mind but may require the redaction of why the victim was afraid.²²

Another approach when faced with otherwise inadmissible electronic data is to offer the information to prove motive, intent, or beliefs, as opposed to proving the truth of the matter asserted. For example, in one sex-discrimination case, the court found that emails referring to a client as an "idiot" and suggesting he be shot were not hearsay as they were not being used to prove the statements were true, but rather were being used to show that the company acted reasonably in firing the employee.²³

The Power of Email and Electronic Data

The impact of the emails can have a long-lasting effect on the court or jurors, regardless of the reason for being admitted into evidence and notwithstanding any related jury instructions as to the limitations of that evidence. The powerful impact that emails can have on a party's theory of the case is well demonstrated in *United States v. Safavian*, which also provides an excellent tutorial on how to authenticate and admit emails

into evidence.²⁴ That case involved the political-corruption prosecution of the General Services Administration's deputy chief of staff. The email evidence—which consisted of over 250 emails—was critical to the case. The government sought a pretrial ruling as to the admissibility of the emails and its intent to have an FBI agent read the emails into evidence before the jury.

The court admitted the majority of the emails as they explained the deputy chief of staff's motive and intent at the time “he undertook certain actions or, arguably, when he made his representations during the investigations by the GSA's Office of Inspector General and the Senate Committee on Indian Affairs.” The jury was to be instructed that the emails could only be considered insofar as they have had some impact on the deputy's “state of mind or provided him with a motive to make false statements or obstruct justice.”

Email evidence has quickly become the driving force behind many court decisions. For instance, in *Demarco v. Lehman Brothers Inc.*, the court denied a motion to dismiss alleged securities violations brought in a class action claiming Lehman Brothers fraudulently induced them with inflated ratings and recommendations to buy stock.²⁵ The internal emails revealed serious concerns over the stock, which flatly contradicted the “buy” rating Lehman Brothers assigned to the stock. These emails, the substance of which was spread throughout the complaint, helped the class-action plaintiffs defeat the motion to dismiss, and immediately educated the court as to the alleged misleading stock rating.

In *Jamsports & Entertainment, LLC v. Paradama Products*, the court denied summary judgment where the email evidence was considered strong evidence of an intent to engage in anticompetitive behavior as alleged in the lawsuit.²⁶ Emails from the president of the division reflected his attempts to gain exclusivity over sports venues, supporting the plaintiff's claims. In one email, the president said he needed to “lock up” key stadiums and, in another email, he stated he had “made crystal clear” to a venue that if it allowed a competitor access, the venue “may be forcing [him] to look elsewhere.”

In *SEC v. Mozilo*, the court found that certain emails supported a finding that the defendants acted with the intent to deceive or defraud.²⁷ Despite public pronouncements as to the viability and stability of their company's mortgage products, executives' internal and private emails expressed concern over the value of mortgages. In one email, Mozilo admitted that “it is just a matter of time that we will be faced with much higher resets and therefore much higher delinquencies.” In another email, Mozilo informed another defendant that he was aware that borrowers were lying about their income in the application process. In

yet another email, Mozilo wrote that “[w]e have no way with reasonable certainty, to assess the real risk of holding these loans on our balance sheet.” On the basis of these emails, the court refused to find that Mozilo's statement that “[w]e believe we have prudently underwritten” the subject loans was neither false nor misleading.

The case of *Pursuit Partners, LLC v. UBS AG* demonstrates the danger of informal “stream of consciousness” email writing.²⁸ Defending claims of securities fraud and fraudulent concealment in connection with its sale of collateralized debt obligations (CDOs) from the bank, UBS understandably had difficulty in credibly explaining away emails in which one UBS employee named as a defendant in the action emailed a colleague and stated he had “sold more crap to Pursuit.” In another email, a UBS employee sent an email to a UBS director referring to a CDO in their inventory as “vomit.” Not surprisingly, based on these emails, the court held that the plaintiffs met their burden of satisfying the probable-cause standard on the issue of whether UBS had superior knowledge that was not readily available to Pursuit.

Conclusion

Email evidence is becoming more and more prevalent in lawsuits. Therefore, significant time should be devoted to identifying and analyzing the authentication and admissibility issues relative to the electronic data involved in the litigation. Addressing these issues at the earliest possible phase is critical to a successful evidentiary presentation on summary judgment, at a hearing, or at trial.

The groundwork for establishing authenticity and admissibility should begin as soon as the information is gathered and reviewed, as additional discovery may be required to ensure that the electronic evidence can be used in court. 

Endnotes

1. *United States v. Safavian*, 435 F. Supp. 2d 36, 40 (D.D.C. 2006), *rev'd on other grounds*, 528 F.3d 957 (D.C. Cir. 2008).
2. *Scheuplein v. City of W. Covina*, 2009 Cal. App. Unpub. LEXIS 7805, at *26–27 (Cal. Ct. App. Sept. 29, 2009).
3. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 397 (D.Conn. 2008); *John Paul Mitchell Sys. v. Quality King Distribs., Inc.*, 106 F. Supp. 2d 462, 472 (S.D.N.Y. 2000).
4. *Safavian*, 435 F. Supp. 2d 36 at 41 (emphasis in original).
5. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 974 (C.D. Cal. 2006).
6. *Canatxx Gas Storage Ltd. v. Silverhawk Capital Partners, LLC*, Civ. No. H-06-11330, 2008 U.S. Dist. LEXIS 37803, at *36–37 (S.D. Tex. May 8, 2008).
7. *United States v. Ferber*, 966 F. Supp. 90, 98 (D. Mass. 1997).
8. *Phillip M. Adams & Assocs., LLC v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1186 (D. Utah 2009).
9. *Ferber*, 966 F. Supp. at 98.
10. *New York v. Microsoft*, No. CIV A. 98-1233 (CKK), 2002 U.S. Dist. LEXIS 7683, at *9 (D.D.C. Apr. 12, 2002) (declining to admit emails under the business-records hearsay exception because there was a “complete lack of information

regarding the practice of composition and maintenance of the emails).

11. *Age Group Ltd. v. Regal West Corp*, No C07-1303BHS, U.S. Dist. LEXIS 92924, at *7-8 (W.D. Wash. Nov. 14, 2008).

12. *Thomas v. State*, 993 So. 2d 105, 107-08 (Fla. Dist. Ct. App. 2008).

13. *Canatxx Gas*, 2008 U.S. Dist. LEXIS 37803 at *37; *Microsoft*, 2002 U.S. Dist. LEXIS 7683 at *2.

14. *DirectTV, Inc. v. Murray*, 307 F. Supp. 2d 764, 772-73 (D.S.C. 2004).

15. FED. R. EVID. 802(d)(2)(A).

16. FED. R. EVID. 802(d)(2)(E).

17. See *Bourjaily v. United States*, 438 U.S. 171, 175 (1987).

18. See *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969) ("While the practicalities of a conspiracy trial may require

that hearsay be admitted 'subject to connection,' the judge must determine, when all the evidence is in, whether . . . the prosecution has proved participation in the conspiracy. . . .").

19. *United States v. Tellier*, 83 F.3d 578, 580 (2d Cir. 1996).

20. FED. R. EVID. 801(d)(2)(B).

21. *Safavian*, 435 F. Supp. 2d at 43-44.

22. *United States v. Joe*, 8 F.3d 1488, 1493 (10th Cir. 1993).

23. *Brill v. Lante Corp.*, 119 F.3d 1266, 1271 (7th Cir. 1997).

24. *Safavian*, 435 F. Supp. 2d at 36.

25. *Demarco v. Lehman Brothers Inc.*, 309 F.Supp.2d 631 (S.D.N.Y. 2004).

26. *Jamsports & Entm't, LLC v. Paradama Prods.*, 336 F. Supp. 2d 824 (N.D. Ill. 2004).

27. *SEC v. Mozilo*, 2009 U.S. Dist. LEXIS 104689 (C.D. Cal. Nov. 3, 2009).

28. *Pursuit Partners, LLC v. UBS AG*, 2009 Conn. Super. LEXIS 2313 (Super. Ct. Conn. Sept. 8, 2009).

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