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TABLE OF CONTENTS

Articles »

A Practical Guide to Admitting ESI at Trial

By Joseph A. Martin and Christine S. Baxter

The process for admitting ESI into evidence at trial involves largely the same considerations as admitting more conventional discovery materials.

Intentional Spoliation: No Evidence, No Tort, No Problem?

By Joseph C. Sullivan

Every jurisdiction should punish intentional and malicious conduct directly, especially where such conduct is aimed toward circumventing the search for truth.

The Permissible Use of Evidence of Insurance Coverage

By Andrew P. Hoppes

Depending on the facts and issues in the case, an insurance policy or indemnity agreement, or at least some reference to it, can easily end up in front of the jurors.

Summaries May Help, but Must Still Meet Rules 611(a), 1006

By James "Marty" Truss

Parties should not be allowed to enter into evidence case summaries or compilations of evidence tantamount to a written closing statement under the guise of Rule 1006.

Young Lawyers Corner »

Affidavit Evidence: Heightened Scrutiny Due to Robo-Signing

By Rose Marie L. Fiore

Statements in an affidavit must be truthful, but it is equally important that the procedural aspects of obtaining affidavit evidence ensure its reliability and admissibility.

News & Developments »

Title Insurers Owe No Independent Duty of Due Care

Negligence claims cannot be asserted against title-insurance companies because the terms of the contract dictate the scope of the obligations.

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ARTICLES

A Practical Guide to Admitting ESI at Trial

By Joseph A. Martin and Christine S. Baxter – July 18, 2012

Since the 2006 amendments to the Federal Rules of Civil Procedure, which made explicit the discoverability of electronically stored information (ESI), a robust body of case law has developed addressing nearly every aspect of electronic-discovery practice. Courts have considered and decided such issues as when the duty to preserve ESI arises, the appropriate allocation of the costs of e-discovery, the sanctions appropriate for failing to satisfy one's e-discovery obligations, and, most recently, whether the use of more efficient review methodologies, such as predictive coding, can satisfy a party's e-discovery obligations. *See, e.g., Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004); Sean M. Georges, "Zubulake and E-Discovery: Did You Get Your Wake-Up Call?" 50-Oct *Res Gestae* 12 (Oct. 2006); Kenneth J. Withers, "Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure," 7 *Sedona Conf. J.* 1 (Fall 2006); Ophir D. Finkelthal, "Scope of Electronic Discovery and Methods of Production (pt. 3)," 38 *Loy. L.A. L. Rev.* 1591 (Summer 2005); *Moore, et al. v. Publicis Group SA, et al.*, No. 11-1279 (S.D.N.Y. April 26, 2012).

Receiving less attention has been the topic of the admissibility of ESI at trial. To be sure, business litigators are indebted to Chief Magistrate Judge Paul Grimm for his thorough dissertation on the topic in his 2007 decision in *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (D. Md. 2007). But although Judge Grimm provided an authoritative exposition on the rules and case law governing the admissibility of ESI at trial and on summary judgment, his decision was not a mechanical how-to guide for trial lawyers.

The following two sample direct examinations of authenticating witnesses illustrate the mechanics of admitting ESI at trial. The first addresses the mechanics of admitting email when the authenticating witness is not particularly cooperative. The second addresses the critical issue of maintaining the chain of custody for the proffered ESI sufficient to show the information was not altered or tampered with from the time it existed on the computer from which it was extracted to the time it is offered at trial.

These sample examinations relate to a familiar fact pattern: a former employee now working for a competitor. Imagine you represent the former employer, Corporation, in an action against Former Employee and Competitor alleging claims for misappropriation of trade secrets, breach of contract, breach of fiduciary duty, and tortious interference. During his employment with Corporation, Former Employee was a sales professional privy to Corporation's confidential sales strategies, pricing, and customer lists. Despite signing a noncompete agreement when he began his employment with Corporation, Former Employee ultimately left Corporation for a similar position with Competitor. Corporation has since lost a number of key clients to Competitor.

During discovery, Corporation forensically imaged Former Employee's laptop computer. From that imaging, Corporation obtained a number of emails, including a smoking-gun email exchange

sent one week before Former Employee left Corporation to work for Competitor. That email exchange reads as follows:

From: CEO@competitor.com
Sent: Thursday, November 10, 2011, 9:04 AM
To: formeremployee@gmail.com
Subject: Employment offer

We are prepared to offer you a base salary of \$80,000. We recognize this is only \$5,000 more than your current salary with Corporation, but we are confident the intangible benefits of working here will make the change worthwhile.

Best regards,

CEO

From: formeremployee@gmail.com
Sent: Thursday, November 10, 2011, 10:12 AM
To: CEO@competitor.com
Subject: Re: Employment offer

As we've discussed on several occasions, if you want me to deliver Corporation's key clients to you, it's going to cost you more than \$80,000. Please make an offer that better reflects what I'm bringing to the table.

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At trial, you call Former Employee to testify regarding the email. He testifies that he began working for Competitor on November 17, 2011, but denies using the promise of delivering Corporation's clients to Competitor to negotiate a higher salary. You intend to confront Former Employee with the November 10 email exchange and ask the court to admit the email into evidence. But how?

Initially, and as with all documentary evidence, you need to consider carefully how you plan to use the email at trial, taking into account its relevance (Fed. R. Evid. 401), anticipating hearsay objections (Fed. R. Evid. 801), addressing best-evidence concerns (Fed. R. Evid. 1003 & 1001(e)), and tailoring your authentication efforts accordingly.

Fortunately, as with more conventional evidence, establishing the relevance of email simply requires a showing that the email has "any tendency" to make a consequential fact more or less probable. Fed. R. Evid. 401. But nearly all email exchanges raise hearsay concerns, and embedded email chains, like the one quoted above, have the potential to raise unique issues. Consider, for example, an email chain in which a defendant writes to a third party, "looking forward to meeting with you tomorrow," and the third party responds the following afternoon, "it was great to meet you this morning." If offered to prove that a meeting took place between them on the morning in question, the defendant's email will be admissible as the statement of a party

opponent (Fed. R. Evid. 801(d)(2)(A)), but the third party’s reply is hearsay. On the other hand, if offered only to establish that the parties corresponded, neither portion of the chain would be hearsay. For best-evidence purposes, email is rarely problematic, as the evidence rules expressly provide for the admissibility of duplicates produced by an electronic process that accurately reproduces the original unless the circumstances would make it “unfair to admit the duplicate.” Fed. R. Evid. 1003 and 1001(e).

More Than One Path to the Finish Line

As with other forms of evidence, email must be properly authenticated to be admissible. In a perfect world, a witness would definitively confirm that the email offered into evidence is an accurate copy of the email he or she previously sent or received. *See* Fed. R. Evid. 901(b)(1). But witnesses can be fickle when it comes to answering questions about email, particularly damning email, often hedging their bets and making statements such as “I may have sent that email, but I just can’t be sure.”

With these witnesses, courts routinely permit a party to authenticate an email by establishing distinctive characteristics regarding the email and the circumstances surrounding it. Did the witness ever communicate with the sender/receiver by email? Did they ever communicate regarding the subject matter of the email? Did such communications take place at or around the date of the proffered email? Did the witness use the sending/receiving email address identified on the email? Was it used at or around the date of the email? Does the witness recall the communication referenced in the email? And, importantly, does the witness have any reason to doubt that he or she sent or received the email? *See* Fed. R. Evid. 901(b)(4). Remember, the key to authenticating an email is simply to provide sufficient information to support a finding that the email is what you say it is.

With these considerations in mind, you proceed with the testimony of Former Employee necessary to authenticate the November 10 email exchange and to ask the court to admit it into evidence:

YOU: You’ve been handed what’s been marked as Plaintiff’s #1 for identification. Can you tell me what this document is?

EMPLOYEE: It looks like an email from me responding to an email from Competitor’s CEO, but I just can’t be sure.

YOU: Do you recall sending this email?

EMPLOYEE: Not specifically, no.

YOU: Do you have any reason to believe you did not send this email?

EMPLOYEE: No.

YOU: The email address here—formeremployee@gmail.com—is that your email address?

EMPLOYEE: It was.

YOU: Did you use that email address in November 2011?

EMPLOYEE: Yes, I’m sure I did.

YOU: Did you ever use that email address to send an email to Competitor’s CEO?

EMPLOYEE: Yes.

YOU: Was that in November 2011?

EMPLOYEE: I believe so.

YOU: What address did you use for Competitor's CEO when you emailed him?

EMPLOYEE: I don't recall.

YOU: Was it CEO@competitor.com?

EMPLOYEE: I assume so.

YOU: Are you currently employed by Competitor?

EMPLOYEE: Yes, I am.

YOU: And when did your employment start?

EMPLOYEE: November 17, 2011.

YOU: In the course of your employment, do you communicate with the CEO by email?

EMPLOYEE: Yes.

YOU: What email address do you use to communicate with the CEO?

EMPLOYEE: I believe it's CEO@competitor.com.

YOU: Before you joined Competitor, did you discuss with the CEO the compensation you would receive if you went to work for Competitor?

EMPLOYEE: Sure.

YOU: Were those discussions in November of 2011?

EMPLOYEE: Some were.

YOU: Were any of those discussions by email?

EMPLOYEE: Yes.

YOU: Can you please read this email exchange starting with the CEO's email to you, followed by your response?

EMPLOYEE: [complies]

YOU: Does this email exchange refresh your recollection as to whether you used the promise of driving Corporation's clients to Competitor to negotiate a higher salary with Competitor?

EMPLOYEE: Did I send this email? Probably. But I wasn't trying to hurt anyone. I just wanted to be paid what I thought I was worth.

YOU: Your Honor, I ask that the document marked for identification as Plaintiff's #1 be admitted into evidence as Plaintiff's Exhibit 1.

THE COURT: Any objections? None? The document is admitted.

Despite Former Employee's resistance, you were able to elicit testimony regarding the email's distinctive characteristics and context sufficient to convince the court that the email is what you say it is and, therefore, that the email is admissible.

Avoiding Missteps on the Path to the Finish Line

Now consider a slightly different scenario. Former Employee challenges the authenticity of the email, claiming that Corporation cannot establish that the copy of the email offered at trial is a copy of the actual email exchange between him and the CEO that Corporation claims to have obtained from his laptop. So how does Corporation convince the court otherwise?

An important step in this process is establishing the chain of custody of the email from the time it resided on Former Employee's computer to its being offered into evidence at trial. This may require testimony from an authenticating witness familiar with the means by which a copy of the email was obtained from the computer and how the email was handled in the discovery process.

Often, the solution is to call a representative of your e-discovery vendor at trial:

YOU: Were you employed in November 2011?

VENDOR: Yes.

YOU: By whom?

VENDOR: Electronic Discovery Specialists, or EDS.

YOU: What does EDS do?

VENDOR: We're hired by law firms to assist with data preservation, collection, processing, and production in litigation.

YOU: Were you hired in connection with this case?

VENDOR: Yes. Your client, Corporation, hired me back on November 18, 2011.

YOU: What were you hired to do?

VENDOR: I was asked to image the hard drive of a laptop I was told was used by Former Employee.

YOU: At some point, did Corporation make the laptop available to you?

VENDOR: Yes, on November 19.

YOU: What, if anything, did you do with the laptop when it was made available to you?

VENDOR: Following industry standards, I made a forensic image of the laptop's hard drive.

YOU: Did you use a particular computer program for that purpose?

VENDOR: Yes, I used OneCase, a program that permits e-discovery professionals to make an exact duplicate of a computer's hard drive without altering any of the data during the process.

YOU: Before using OneCase on the laptop here, had you ever used it before?

VENDOR: Yes, I was on the development team that created OneCase. It's a proprietary EDS product. I've used it many times to do the same thing I was asked to do here, make a forensically sound image of a computer hard drive.

YOU: As part of the development process, did you test OneCase to determine whether it worked as you intended it to work?

VENDOR: Absolutely, it went through rigorous testing, both internally and by an outside company that tests and certifies software applications for law enforcement and governmental entities, and we perform this testing every time we update the software. OneCase was certified back when we developed it, and it has been certified every year since.

YOU: During this testing and certification process, were any deficiencies or problems identified with the software?

VENDOR: No, never.

YOU: On how many occasions before this case had you used OneCase to make a forensically sound image of a computer hard drive?

VENDOR: I would conservatively estimate about 250 to 300 times.

YOU: And during those 250 to 300 times, did you ever experience a failure with the OneCase software inasmuch as it failed to make a forensically sound image of a computer hard drive?

VENDOR: No, never.

YOU: In this case, after you used the OneCase software to image Corporation's hard drive, did you do anything to test whether a forensically sound image of the hard drive had been created?

VENDOR: Yes, we always QC the process, using another software tool to compare, bit-by-bit and byte-by-byte, the image of the hard drive with the contents of the actual hard drive. We found that they matched identically.

YOU: So what, if anything, did you do with the image of the laptop's hard drive after you made it?

VENDOR: I immediately loaded it onto a new, fresh-out-of-the-box, external hard drive. I marked that hard drive with the date and time of the imaging, noting that I performed the work, and I noted the make, model, and serial number of the machine from which I took the image. I then sealed the hard drive in an evidence pouch and drove the hard drive to my office, where I placed the pouch into my company's safe. Each of us techies has our own safe, and we don't share combinations. The following morning, I opened the safe, took out the pouch, found it intact. I opened the pouch and connected the hard drive to my computer. From there, I ran searches on the data using keywords that your office provided to me, and I extracted all of the files that had keyword hits. I then loaded those files onto a review tool, and, at your request, I printed hard copies of all emails that Former Employee sent to or received from Competitor's CEO. Once printed, I drove to your office and handed the copies to you.

YOU: Before you came in here today, did I ask you to do something for me?

VENDOR: Yes, you gave me a copy of the email you pre-marked as Plaintiff's #1 and asked me to check the review tool onto which I loaded the files from Former Employee's laptop to confirm that Plaintiff's #1 is an exact duplicate of the same November 10 email on my system.

YOU: And did you do that?

VENDOR: Yes, I did.

YOU: And what did you find?

VENDOR: It's an exact duplicate.

Effectively establishing the chain of custody leaves little room for Former Employee to challenge the authenticity of the smoking-gun email.

Crossing the Finish Line

As these examinations reveal, the process for admitting ESI into evidence at trial involves largely the same considerations as admitting more conventional discovery materials. If you are attuned to the ways in which ESI may raise unique issues, you need only approach ESI with the same reasoned assessment of the relevance, hearsay, best evidence and authentication concerns that you would undertake for any other trial evidence.

Keywords: litigation, business torts, e-discovery, authentication, admitting evidence

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Intentional Spoliation: No Evidence, No Tort, No Problem?

By Joseph C. Sullivan – July 18, 2012

“One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances.” Restatement (Second) of Torts § 870 (1977). This Restatement section is powerful because it manages to encapsulate, in fewer than 30 words, one of the most fundamental concepts of our legal system, namely that acts committed intentionally with the purpose to cause harm should be properly punished when harm does indeed result. As elementary as this concept may seem, a vast majority of states simply refuses to recognize this principle when it comes to the intentional spoliation of evidence.

Spoliation is “the destruction or significant alteration of evidence.” *Tinder v. Lewis County Nursing Home District*, 207 F. Supp. 2d 951, 958 (E.D. Mo. 2001); see also *Desselle v. Jefferson Parish Hosp. Dist. No. 2*, 887 So. 2d 524, 534 ((La. App. 5th Cir. 2004) (“The theory of spoliation of evidence refers to an intentional destruction of evidence for purpose of depriving opposing parties of its use”). As those who watch legal television dramas can attest, spoliation can take the form of shredded documents (such as a police report or medical records), “lost” or “misplaced” pieces of real evidence (such as a knife or gun), or otherwise altered evidence (such as tampered audio or video recordings). Spoliation is condemned in every jurisdiction in the United States, yet only a handful of states actually recognize intentional spoliation as an actionable tort. The vast majority of states prefer to utilize jury instructions and negative inferences to combat its effects. If the legal system seeks to assign liability and an appropriate sanction to those who commit intentional wrongs, it would seem obvious that those who intentionally destroy evidence to deliberately hinder that system should be subject to liability. Nonetheless, while every state condemns and openly memorializes their steadfast opposition to intentional spoliation, few are willing to recognize a cause of action to deter and punish such behavior from occurring in the first place.

For example, while the courts of New York condemn intentional spoliation, they do not recognize spoliation of evidence as a cognizable tort action. *Weigl v. Quincy Specialties Co.*, 601 N.Y.S.2d 774, 776, 158 Misc. 2d 753, 757 (N.Y. Gen. Term 1993). In *Weigl*, the plaintiff was working in a university laboratory when she was engulfed in flames as a result of an inadvertent ignition of experimental materials on her laboratory coat. When the plaintiff requested the laboratory coat during the course of discovery, she was informed by the university that it was “unable to locate” the coat. 601 N.Y.S.2d at 777, 158 Misc. 2d at 755. The plaintiff asserted a claim for spoliation of evidence that was dismissed via summary judgment on the ground that New York does not recognize that claim. Likewise, the Supreme Court of New York refused to consider a claim for spoliation of evidence where the evidence indicated that a physician destroyed the medical records of the plaintiff. *Hillman v. Sinha*, 77 A.D.3d 887, 910 N.Y.S.2d 116 (N.Y. App. Div. 2nd Dept. 2010). The Supreme Court of New York held that “existing New York remedies . . . including preclusion of proof favorable to the spoliator, adverse inference instructions, or, in the extreme cases, striking responsive pleadings or dismissing the complaint . . . were adequate to deter spoliation and to appropriately compensate its victims.” 77 A.D.3d at 888, 910 N.Y.S.2d at 117.

Texas also refuses to recognize a claim for intentional spoliation, preferring instead to rely on an adverse-inference instruction. For instance, in *Trevino v. Ortega*, 969 S.W.2d 950, 951 (Tex. 1998), the Supreme Court of Texas determined that it would not recognize spoliation as a separate cause of action because it “does not give rise to independent damages, and because it is better remedied within the lawsuit affected by spoliation” The Supreme Court of Texas explained that Texas courts were already equipped with tools to punish spoliation, “ranging from a jury instruction on the spoliation presumption to, in the most egregious case, death penalty sanctions.” 969 S.W.2d at 953. *Trevino* was later cited by a Court of Appeals of Texas case that held that Texas courts were “averse to creating a new tort that would only lead to duplicative litigation, encouraging inefficient litigation of issues better handled within the context of the core cause of action.” *McIntyre v. Wilson*, 50 S.W.3d 674, 686 (Tex. App. 2001).

California, which at one time recognized intentional spoliation as a separate cause of action, now holds that “a tort cause of action does not lie against a person who has intentionally destroyed or suppressed evidence relevant to a lawsuit.” *Warden v. Cross*, 94 Fed. Appx. 474, 475 (9th Cir. 2004) (applying California law). The Supreme Court of California specifically held that a tort remedy for spoliation of evidence would produce an “endless spiral of lawsuits over litigation-related misconduct.” *Temple Cmty. Hosp. v. Superior Court*, (1999) 20 Cal. 4th 464, 473, 976 P.2d 223, 230 (Cal. 1999). Puzzlingly, the same Supreme Court of California previously held that “[n]o one doubts that the intentional destruction of evidence should be condemned. Destroying evidence can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits . . . destroying evidence can also increase the costs of litigation” *Cedars-Sinai Medical Center v. Superior Court*, (1998) 18 Cal. 4th 1, 8, 954 P.2d 511, 515 (1998). Apparently, at some point between 1998 and 1999, California courts decided that preventing derivative actions was a more worthwhile goal than combating acts intended to “destroy fairness and justice.” 18 Cal. 4th at 8, 954 P.2d at 515.

While just a small sampling of cases throughout the United States, the aforementioned citations are nonetheless instructive of the inherent hypocrisy that states demonstrate when it comes to intentional-spoliation claims. Courts are expressly tasked with the role of determining whether acts taken by litigants were done intentionally and with malice, yet if those acts concern spoliation of evidence, the vast majority of courts refuse to even consider the issue. Moreover, the recognition that intentional spoliation is a condemnable act that destroys fairness and increases litigation costs is, on most occasions, immediately followed by an explicit condemnation of the creation of a separate tort to deter and punish such behavior.

If intentional-spoliation claims are being adequately remedied and prevented via adverse inferences and other evidentiary safeguards, why would there be any concern of “duplicative” or an “endless spiral” of derivative actions as California and Texas warn? Can Texas truly denounce the creation of a tort for intentional spoliation as “encouraging inefficient litigation” while at the same time reminding its citizens that the imposition of the death penalty could serve as a prospective remedy? If courts recognize that damages caused by intentional and malicious acts can serve as the basis for cognizable claims before a lawsuit is filed, why should that analysis change once a lawsuit is actually filed? Indeed, any intentional act that is taken to frustrate the legal process and that results in

unnecessary increased costs, incomplete discovery, and speculative verdicts should be especially targeted for deterrence and sanctions via a cognizable cause of action.

While most states refuse to recognize a claim for intentional spoliation, a handful of states have allowed the claim as a separate cause of action. Alaska, ever the frontier state, initially recognized the claim of intentional spoliation of evidence in *Hazen v. Municipality of Anchorage*, 718 P.2d 456 (Alaska 1986). In *Hazen*, arresting officers recorded the arrest of the plaintiff for suspected prostitution. During an evidentiary hearing, the plaintiff requested that the audiotape be produced. The attorney for the arresting officers advised the court that the tape would be preserved. However, “immediately after that statement, a male voice whispered, ‘Wait ’til you hear what is on the tape now.’ This remark was not audible in the open courtroom but was picked up by a microphone.” 718 P.2d at 459. After an investigation of what appeared to be tampering with the audio contained on the arrest tape, the plaintiff moved to assert a claim for alteration and destruction of evidence. The Supreme Court of Alaska, relying on a now overruled California case, recognized the plaintiff’s claim as a valid cause of action. The Supreme Court of Alaska “pointed out that ‘new and nameless torts are being recognized constantly’ and that the ‘common thread woven into all torts is the idea of unreasonable interference with the interests of others.’” 718 P.2d at 463–64; citing *Smith v. Superior Court for the County of Los Angeles*, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (Cal. App. 1984) (overruled in *Cedars Sinai*, *supra*). Analogizing intentional-spoliation claims with the pre-existing tort of intentional interference with business relations, the Supreme Court of Alaska concluded that “[i]f the arrest tape was intentionally altered, this was an unreasonable interference with these expectancies that can be remedied in tort.” 718 P.2d at 464.

The Supreme Court of Ohio established the tort of intentional spoliation in *Smith v. Howard Johnson Co.*, 67 Ohio St. 3d 28, 615 N.E.2d 1037 (Ohio 1993). *Smith* requires the following factors to assert a spoliation claim: pending or probable litigation involving the plaintiff, knowledge on the part of the defendant that litigation exists or is probable, willful destruction of evidence by the defendant designed to disrupt the plaintiff’s case, disruption of the plaintiff’s case, and damages proximately caused by the defendant’s acts. 615 N.E.2d at 1038, 67 Ohio St. 3d 28. The Supreme Court of New Mexico joined Ohio in recognizing the tort of intentional spoliation in *Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 905 P.2d 185 (1995) (overruled on other grounds by *Delgado v. Phelps Dodge Chino, Inc.*, 131 N.M. 272, 34 P.3d 1148 (2001)). In *Coleman*, the plaintiff fell 66 feet at a potash mine after a lift on which she was riding malfunctioned. During the course of discovery, it was revealed that certain parts of the lift were lost when the lift was disassembled by the defendant. The plaintiff moved to assert a claim for the intentional spoliation of evidence. The Supreme Court of New Mexico recognized the plaintiff’s claim, holding that “the intentional destruction of potential evidence in order to disrupt or defeat another person’s right of recovery is highly improper and cannot be justified.” 120 N.M. at 649, 905 P.2d at 189.

West Virginia likewise recognizes the tort of intentional spoliation of evidence. See *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003). In *Hannah*, the Supreme Court of Appeals of West Virginia stated its belief that “intentional spoliation of evidence is misconduct of such a serious nature; the existing remedies are not a sufficient response.” 213 W. Va. at 715, 584 S.E.2d at 571. The Supreme Court of Appeals of West Virginia adopted the following elements,

which it explained had been accepted by the majority of jurisdictions recognizing the tort: pending or probable civil litigation, knowledge of the spoliator that the litigation is pending or probable, willful destruction of evidence, intent of the spoliator to interfere with the victim's prospective civil suit, a causal relationship between the evidence and the inability to prove the lawsuit, and damages. 213 W.Va. at 716, 584 S.E.2d at 575. While expressly recognizing that the existing remedies of adverse inferences and jury instructions were insufficient to combat intentional spoliation, the Supreme Court of Appeals of West Virginia recognized the “need to condemn a party who takes advantage of the adversarial system by destroying evidence that is essential . . . courts must deter parties from destroying evidence that may weaken their cases.” 213 W.Va. at 716, 584 S.E.2d at 575.

Several other jurisdictions have taken appropriate steps to deter and punish intentional spoliation. See *Burge v. St. Tammany Parish*, 336 F.3d 363 (5th Cir. 2003) (Louisiana); *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846 (D.C. 1998) (District of Columbia); *Rizzuto v. Davidson Ladders, Inc.*, 280 Conn. 225, 234; 905 A.2d 1165, 1173 (2006) (Connecticut) (recognition of tort necessary to “compensate the victims of spoliation and to deter future spoliation”); *Estate of Madeleine Willson v. Addison*, 361 Mont. 269; 258 P.3d 410 (2011) (Montana—applies “only to non-parties to the litigation”); *J.S. Sweet Co., Inc. v. Sika Chemical Corp.*, 400 F.3d 1028 (7th Cir. 2005) (Indiana—applies only where the alleged spoliator owed the movant a duty to preserve the evidence subject to the spoliation claim). In the vast majority of these jurisdictions, there has been an explicit recognition that the remedies usually applied in intentional spoliation cases (in other words, adverse inferences and jury instructions) are simply inadequate and insufficient to deter and punish the specter of intentional spoliation.

The purpose of our legal system should not be focused on ways to lessen dockets or further the ease of administrative inconveniences. While those engaged in the practice of law are undoubtedly too experienced (or cynical) to ascribe to the old adage that justice should be done though the heavens fall, every jurisdiction should seek to punish intentional and malicious conduct directly, especially where such conduct is purposefully aimed toward circumventing the search for truth. While the recognition of intentional spoliation not only creates a cause of action that can be relied on to both deter and punish such improper conduct, the symbolic effects may prove to be even more invaluable. Such recognition confirms that our legal system will take any and all steps necessary to maintain the sanctity of the search for justice and that courts will not turn a blind eye to intentional and malicious acts that interfere with that search or apply a Band-Aid to the problem with a jury instruction or related adverse inference. Laws are meant to establish a minimum level of decency by which all citizens must abide. When our courts fail to recognize, or even consider, the deterrence and punishment of intentional spoliation, our courts fail to uphold the level of decency that the legal system should serve to establish and maintain.

Keywords: litigation, business torts, spoliation, evidence, cause of action

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The Permissible Use of Evidence of Insurance Coverage

By Andrew P. Hoppes – July 18, 2012

Ask almost any litigator to complete this sentence: “Evidence of liability insurance coverage is . . .” The usual answer will be something like “not admissible.” As a general proposition, that answer is accurate, but not in every situation.

Federal Rule of Evidence 411 codifying the admissibility of evidence of liability insurance is, as one commentator explained, “only an exclusionary rule in a limited sense.” David P. Leonard, *The New Wigmore: A Treatise on Evidence: Selected Rules of Limited Admissibility*, § 6.9 (rev. ed. 2002). While it bars admission of evidence of liability insurance “to prove whether the person acted negligently or otherwise wrongfully,” it allows admission of evidence of liability insurance “for another purpose, such as proving a witness’s bias or prejudice or proving agency, ownership or control.” Fed. R. Evid. 411.

The grounds for admission specified in Rule 411 are not exclusive, which means that the “number of possible alternative uses of the existence or non-existence of liability insurance is, of course, unlimited.” Leonard, *supra*, at § 6.9. Moreover, despite objections under Federal Rule of Evidence 403, courts have also admitted arrangements, such as indemnity agreements, which are similar to insurance but may not qualify as “liability insurance” under Rule 411.

Given the underlying role of liability insurance in personal-injury law, Rule 411 is of obvious importance to practitioners in that field. However, the business-torts lawyer also needs to be familiar with it. Numerous scenarios could arise in cases involving misrepresentation, trade secrets, and tortious interference in which a party might seek to admit evidence of insurance or a similar arrangement. The resolution of objections will depend on the proponent’s purpose for admitting the evidence and the balancing under Rule 403 of the relevance versus unfair prejudice caused by its admission.

Contrary to the knee-jerk reaction of most litigators, insurance and insurance-like evidence can reach a jury under the right circumstances. For instance, a court may admit evidence of insurance to establish the meaning and effect of a contractual provision and trade usage. *See Posttape Assoc. v. Eastman Kodak Co.*, 537 F.2d 751, 758 (3d Cir. 1976). Or a court might admit evidence of insurance if it demonstrates that an underlying contract was viewed as binding by the parties. *See Morton v. Zidell Explorations, Inc.*, 695 F.2d 347, 351 (9th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983). Or a court might admit evidence of an indemnity agreement as proof that defendants in a trade-secret-misappropriation action knew they did not own the trade secrets, and as evidence of the proper measure of the plaintiff’s damages. *See DSC Commc’ns Corp. v. Next Level Commc’ns*, 929 F. Supp. 239, 242-45 (E.D. Tex. 1996).

Rule 411 and Its Rationale and Origins

Federal Rule of Evidence 411, entitled, “Liability Insurance” and included within Article IV of the Rules (“Relevance and its Limits”) took effect in 1975. Amendments in 1987 and 2011 were “technical” and “stylistic” and not intended to be substantive or “to change any result in any

ruling on evidence admissibility.” See Fed. R. Evid. 411 (Advisory Committee Notes, 1987 and 2011 Amendments). Rule 411 reads as follows:

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, or proving agency, ownership, or control.

The reason for the rule is “concern[] over unfair prejudice—that if a jury were to learn of the party’s coverage or lack of coverage by liability insurance, it would relax its standards in determining both fault and damages.” Leonard, *supra*, at § 6.1.

In describing four permissible uses of liability insurance evidence (a witness’s bias or prejudice, agency, ownership, or control) the rule uses the phrase “such as” to indicate that these examples are not the only permissible ones. *Id.*, at § 6.9. But even if admission is sought for a permissible use, evidence of insurance must still pass muster under more generally applicable rules of evidence, most importantly Rule 403. See Fed. R. Evid. 411, Advisory Committee Notes, 2011 Amendments. Rule 403 allows a court to “exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice”

Witness bias or prejudice is a self-explanatory use and not as likely to arise in the context of business torts. “The paradigm case for use of evidence of insurance to show bias is cross-examination of a claims adjuster or insurance company doctor,” but any “economic tie . . . likely to influence the witness to favor the insurance company” can be shown through evidence of liability insurance. Wright and Graham, *Federal Practice and Procedure*, Vol. 23, § 5367 (1980). Thus, this article will focus on cases related to “agency, ownership or control,” and other unspecified uses that fall within the “such as” language.

Is It Liability Insurance or Something Else?

Rule 411 applies only to “liability insurance.” What exactly that means, and whether Rule 411 applies to arrangements such as indemnity agreements, will affect a decision to admit or exclude such evidence. Commentators have defined liability insurance as “any contract whereby the insurer assumes the risk of liability for damages to the person or property of others, which liability has been allocated to the insured either by a rule of common law or by statute.” Leonard, *supra*, at § 6.7.1, quoting, William R. Vance, *Handbook on the Law of Insurance*, § 196, at 999 (3d ed. Buist M. Anderson rev. 1951).

In *DSC Commc’ns Corp. v. Next Level Commc’ns*, two former DSC employees started Next Level and allegedly stole DSC’s trade secrets. After DSC filed litigation, the former employees sold Next Level, complete with the alleged stolen trade secrets, to a company called General Instruments Corporation (GI). Part of what the former employees received in return was GI’s agreement to indemnify them against the DSC litigation. The district court held that an indemnity agreement was not liability insurance and not covered by Rule 411. *Id.* at 244. Other courts, however, particularly in the Eighth Circuit, have treated indemnity agreements and similar arrangements as inadmissible under Rule 411. See, e.g., *Garnac Grain Co. v. Blackley*,

932 F.2d 1563, 1570 (8th Cir. 1991) (the trial court should have excluded evidence of a fidelity bond, even though the bond was “not technically ‘insurance against liability,’” because the exclusion fulfilled the intent of Rule 411); *see also* Leonard, *supra*, at § 6.7.1 & n. 37.

The *DSC Commc’ns* court identified six characteristics of liability insurance. It found that the indemnity agreement only met three, and the missing three characteristics were dispositive. The court noted that GI, just like a liability insurer, had been paid to assume the risk at issue, was able to pay for the judgment, and had agreed to indemnify the two former employees for losses they had sustained to a third party, their former employer, as opposed to paying them for a loss they directly suffered.

But this was not enough to make the agreement liability insurance. Unlike an insurer under a liability insurance policy, GI could not spread the loss among its policy holders because it had none (this was an isolated agreement rather than an insurance policy written as part of an insurance business), could not incentivize the former employees to avoid liability with the threat of higher future premiums because this was a one-time contract, and was not insuring against future risk. The last factor was most critical to the court, and it was supported by its finding that when the former employees and GI entered into the indemnity agreement, the employees “*had already committed the acts that gave rise to this lawsuit.*” *DSC Commc’ns*, 929 F. Supp. at 244.

It is worth noting, however, that the *DSC Commc’ns* court held that the indemnity agreement was admissible whether it was liability insurance or not. *Id.* at 242. Nonetheless, the proponent and opponent of “insurance” evidence need to consider whether the contract in question will be treated as “liability insurance” under Rule 411 or something else in shaping admissibility arguments.

Ways to Introduce Evidence of “Insurance”

Evidence of insurance may be admitted to establish an agency relationship. *See Hunziker v. Scheidemantle*, 543 F.2d 489, 495 n.10 (3d Cir. 1976). In *Hunziker*, the Third Circuit held that the district court, in a wrongful death case arising from a plane crash, could admit evidence that one defendant insured another to establish a disputed agency relationship between them. As commentators have explained, the rationale for this use of insurance evidence is that a party does not usually insure someone for whose conduct it will not be liable. Conversely, “the failure to obtain liability insurance that covers a particular person would evidence lack of responsibility for that person’s conduct.” Leonard, *supra*, at § 6.10.2. *But see* Wright and Graham, *supra*, at § 5365 (suggesting that the absence of insurance coverage is clearer proof of the lack of an agency or employment relationship than the existence of such insurance indicates the existence of such a relationship, because a cautious principal might insure someone who is not an agent or employee, given the possibility that the principal could nevertheless be held liable for that person’s conduct).

Evidence of insurance coverage also may be admitted in a business-tort case as evidence of a meaning or existence of a binding contract. In *Morton v. Zidell Explorations, Inc.*, 695 F.2d 347, 351 (9th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983), the court of appeals ruled that the trial court had properly admitted evidence that the plaintiffs had purchased builder’s risk insurance.

The evidence of insurance was important because the plaintiffs denied that there was a valid written contract between them and the defendant. However, the disputed contract required the plaintiffs to purchase the risk insurance, which the plaintiffs did. Thus, the evidence of insurance was admitted to prove that the plaintiffs “deemed themselves bound by the contract” as they had partially performed it. *Morton*, 695 F.2d at 351.

In *Posttape Assoc. v. Eastman Kodak Co.*, 537 F.2d 751, 757–58 (3d Cir. 1976), the court of appeals held that the trial court erred by excluding evidence that the plaintiffs had purchased insurance coverage that protected the plaintiffs from losses due to defective movie film. *But see* *Wright & Graham*, *supra*, at § 5364 n.11 (questioning whether the insurance in *Posttape* was liability insurance or casualty insurance, but reaching no conclusion based on the ambiguous statement of facts). The defendant alleged that a contractual provision and trade custom in the industry limited the defendant’s liability for defective film. The defendant wanted to admit evidence of the plaintiffs’ insurance purchase to show that the plaintiffs were aware of the limitation of liability as both a contractual provision and trade usage, which the plaintiffs disputed.

The court of appeals found that “the existence of such [insurance] coverage might have been so unusual that the purchase itself would have significance in the circumstances.” Furthermore, in a point that might resonate in many business-tort cases, the court of appeals noted that this type of business claim was not one likely to result in unfair prejudice: “It is doubtful that there would be any prejudice because the parties were both commercial entities, [and] the injury was not likely to stir the emotions” *Id.* at 758.

Even if a proponent can demonstrate a plausible, permitted rationale to admit evidence of insurance under Rule 411, courts will nevertheless exclude it if the value of the proposed use of the evidence is substantially outweighed by the unfair prejudice it might create. *See Palmer v. Krueger*, 897 F.2d 1529, 1537–38 (10th Cir. 1990). In *Palmer*, the plaintiff-daughter, representing her mother’s estate, sued her step-brother, representing her step-father’s estate, seeking damages for her mother’s death when her step-father crashed the parents’ small plane. The trial court excluded evidence about the role an insurance dispute played in stoking tensions between the step-siblings. The court of appeals agreed with the trial court “that the probative value, if there was any at all with regard to those matters, was so small,” that it “was dramatically outweighed by the undue prejudice that would have resulted if insurance had been brought into the case.”

Courts may be more inclined in business-tort cases to admit evidence of indemnification agreements than liability insurance, given the reference in Rule 411 to the latter but not the former. In *DSC Commc’ns*, for example, the court emphasized that the indemnity agreement was obtained after the former employees engaged in the alleged theft of the trade secrets. *But cf. Matosantos Commercial Corp. v. SCA Tissue North America, LLC*, 369 F. Supp. 2d 191, 195–96 (D.P.R. 2005) (applying the rationale of Rule 411 to bar evidence of an indemnity agreement when, unlike in *DSC Commc’ns*, the agreement was entered into before the alleged wrongful conduct was not probative of the key issues in the case and was potentially prejudicial to the defendant).

Under the *DSC Commc'ns* facts, the court held that the evidence of the indemnity agreement, whether insurance or not, was admissible because “the fact that [the former employees] felt it was necessary to ‘insure’ against the contingency that they might be found to have stolen [DSC’s] trade secrets is evidence that they believed that they may not have owned the trade secrets. As such, this evidence is relevant to the issue of whether [the former employees] owned the alleged trade secrets.” *DSC Commc'ns*, 929 F. Supp. at 248.

The indemnity agreements were also relevant to the plaintiff’s damages because they were part of the consideration that the former employees received for selling their new company, “whose assets consist almost exclusively of the ideas that [DSC] claims were stolen.” *Id.* Thus, the court held that the value the former employees received for Next Level was a permissible way to measure DSC’s damages. The district court found little chance of unfair prejudice under Rule 403 by admitting the indemnity agreements, especially when, as in the Third Circuit’s *Posttape* decision, this was a commercial dispute.

The *DSC Commc'ns* court also held that defense counsel had opened the door to admission of the indemnity agreements in two ways. First, in voir dire, the former employees’ counsel had, despite the existence of the indemnity agreement, told the potential jurors that this case was “a question of life and death” for the two former employees. *DSC Commc'ns*, 929 F. Supp. at 249. In similar situations, defense counsel would be well-advised to proceed with caution before making dramatic appeals to the jurors regarding the potential financial consequences of a judgment.

Second, defense counsel also described for the jury the terms of the sale of the former employees’ new company to GI, with the exception of the indemnity agreement. The court held that under the completeness doctrine, to avoid giving the jurors a misimpression of the value of the new company, the evidence of the indemnity agreement was admissible. *Id. See also Galaxy Computer Servs., Inc. v. Baker*, 325 B.R 544, 551–52 (Bankr. E.D. Va. 2005) (in a case involving breach of fiduciary duty and tortious interference, the court admitted an indemnity agreement where the agreement was between two former officers of the plaintiff and a defendant company with which the officers allegedly conspired to harm the plaintiff, the officers’ former employer).

Conclusion

For the party with insurance or an indemnity agreement, and the party without it, relying on the generalization that evidence of insurance is not admissible without giving careful consideration to the implications of Rule 411 (and Rule 403) is done at that party’s own peril. Depending on the facts and issues in the case, the insurance policy or indemnity agreement, or at least some reference to it, can easily end up in front of the jurors. Litigators may have some ability to control whether such evidence gets admitted by shaping their case and arguments, particularly if they focus on the issue in advance.

Keywords: litigation, business torts, indemnity agreements, liability insurance, evidence, admissibility

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Summaries May Help, but Must Still Meet Rules 611(a), 1006

By James "Marty" Truss – July 18, 2012

Virtually every trial would be much easier, quicker, and less expensive if a party could dispense with the formality of offering numerous pieces of evidence through multiple witnesses in favor of a single comprehensive “summary” document compiling only the most salient excerpts from the vast fruits of the discovery process. In this way, the party could present its entire case in a summary fashion through one key witness and, if allowed by the court, use slanted descriptions of the compiled data to present a virtual closing argument from the witness stand. Because the data compiled during discovery in much civil litigation amounts to an unwieldy mass of voluminous writings and other physical evidence, trial lawyers are occasionally tempted to skirt various rules of evidence by disguising written closing arguments or narrative witness scripts as summaries of voluminous materials under Federal Rule of Evidence 1006.

A Rule of Convenience

Summaries, charts, graphs and calculations can often provide a more efficient and, in some cases, the only practicable method of introducing voluminous evidence. A proponent attempting to prove the contents of writings, recordings, or photographs must ordinarily offer into evidence the original, a requirement widely known as the best-evidence rule. *See* Fed. R. Evid. 1002. Rule 1006 provides a useful exception to the best-evidence rule, however, when the introduction of the original writings, recordings, or photographs would be inconvenient or unwieldy. The rule is a codification of the common-law practice of allowing summaries of voluminous materials under certain circumstances.

Amended effective December 1, 2011, as part of the recent re-styling of the rules to make them more easily understood, Rule 1006, entitled “Summaries to Prove Content,” provides:

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

On its face, Rule 1006 is a straightforward rule of convenience designed to avoid the cumbersome task of sifting through reams of paper or enduring countless hours of recordings to extract a small amount of probative evidence. Despite its apparent simplicity, courts regularly grapple with the potential confusion of proper Rule 1006 summaries and other sorts of strictly demonstrative or pedagogical summaries.

Along with the economic burn rate of spending a day in trial, the steady increase in the amount of electronic evidence adds systemic pressure to the trial process, tempting counsel to introduce summaries of voluminous data whenever feasible. When combined in the cauldron of zealous advocacy, these factors have led some trial lawyers to generate exhibits more akin to written closing arguments than to the summaries of voluminous writings contemplated by Rule 1006.

Cobbling together excerpts from various disparate writings, photographs, and recordings into a comprehensive narrative script, the most aggressive practitioners masquerade compilations of the entire case as Rule 1006 summaries, pushing the outer limits for demonstrative exhibits with overly slanted inferences and interpretive descriptions of the assembled materials. These sorts of case road maps, scripts, or written closing arguments are not the types of convenience-based summaries properly within the scope of Rule 1006.

Summaries Admissible in Evidence under Rule 1006

There is some conflict regarding whether Rule 1006 allows summaries of evidence already presented to the jury or if is instead limited to summaries of voluminous evidence not otherwise admitted. Compare *United States v. Bishop*, 264 F.3d 535, 547–48 (5th Cir. 2001) (allowing a Rule 1006 summary of evidence already presented to the jury), with *United States v. Buck*, 324 F.3d 786, 790 (5th Cir. 2003) (distinguishing Rule 1006 summaries of voluminous material not otherwise admitted from demonstrative aids summarizing admitted evidence). A plain reading of the rule, however, indicates that Rule 1006 summaries should generally (or at least principally) only include evidence not otherwise admitted. Allowing the use of a summary of already admitted evidence would, in effect, allow a proponent to potentially repeat its entire case shortly before deliberations to the jury. See *United States v. Whitfield*, 590 F.3d 325, 364 (5th Cir. 2009) (court should avoid the use of a summary of previously admitted evidence to simply repeat entire case shortly before jury deliberations).

Using Rule 1006 as a basis to admit summaries of already admitted evidence also ignores the reasoning behind the rule in the first instance. The rule is designed to avoid having to introduce certain voluminous writings by allowing the introduction of a summary as proof of the content of voluminous writings where those writings “cannot be conveniently examined.” See *United States v. Janati*, 374, 396 (4th Cir. 2004) (The “purpose of this Rule is to reduce the volume of written documents that are entered into evidence.”). It is the voluminous nature of documents that cannot otherwise be presented to a court that justifies the use of Rule 1006.

Under Rule 1006, the summary itself is the evidence admitted as proof of the content of the writings or other material summarized. Thus, for a Rule 1006 summary of evidence to be admissible, the materials underlying that summary must also be admissible. See, e.g., *United States v. Oros*, 578 F.3d 703, 708 (7th Cir. 2009); *United States v. Bray*, 139 F.3d 1104, 1112 (6th Cir. 1998). Because Rule 1006 is not an exception to the hearsay rule, the underlying voluminous writings must themselves fall within some exception to the hearsay rule. See *Soden v. Freightliner Corp.*, 714 F.2d 498, 506 (5th Cir. 1983). While the underlying documents need not be offered into evidence—and, considering the purpose of the rule, generally should not be offered into evidence—they must be produced or made available to the other parties at a reasonable time before the summary is offered into evidence. Fed. R. Evid. 1006. The trial court can also require that the materials be produced in court so that the accuracy of the summary can be tested.

Rule 1006 summaries can be powerful devices. Because a Rule 1006 summary is admitted as surrogate of the underlying voluminous evidence, the jury is allowed to take the summary into

deliberations and base a verdict on it. Courts generally take care to ensure that Rule 1006 summaries are not used to carry argumentative matter, attorney comments, or conclusory statements into the jury room. In *United States v. Smyth*, the Fifth Circuit noted that because “summaries are elevated under Rule 1006 to the position of evidence, care must be taken to omit argumentative matter in their preparation.” 556 F.2d 1179, 1184 n. 12 (5th Cir. 1977). The rule is not a back-door vehicle for the admission of evidence that is otherwise inadmissible because it is irrelevant, misleading, inauthentic, hearsay, or otherwise prejudicial. Other courts have cautioned against allowing parties to use Rule 1006 summaries to repeat their entire case to the jury right before closing arguments. *See Whitfield*, 590 F.3d at 364.

Although the particular requirements for admissibility of a Rule 1006 chart or summary vary somewhat by circuit, the following elements include the requirements most commonly imposed:

To be admissible, a chart must summarize documents so voluminous “as to make comprehension ‘difficult and . . . inconvenient,’” although not necessarily “literally impossible”; the documents themselves must be admissible, although the offering party need not actually enter them; the party introducing the chart must make the underlying documents reasonably available for inspection and copying; and the chart must be “accurate and nonprejudicial.” In addition, as part of the foundation for a chart, the witness who prepared the chart should introduce it.

United States v. Hemphill, 514 F.3d 1350, 1359 (D.C. Cir. 2008) (quoting *Bray*, 139 F.3d at 1109–10). Although not strictly necessary in many jurisdictions, prudent practice dictates the use of a sponsoring witness who personally prepared or oversaw preparation of the summary.

Useful Summaries Are Not Admissible under Rule 1006

In contrast to a Rule 1006 summary, pedagogical or strictly demonstrative summaries are generally not admitted into evidence, but they can be extremely effective in communicating complex or voluminous information to the jury. Demonstrative summaries are generally more widely used, most frequently with expert witnesses and in closing arguments. Because they are primarily tools of persuasion rather than tools of convenience, demonstrative summaries may contain excerpts of key evidence already admitted at trial, along with inferences and conclusions from the evidence when used to illustrate the testimony of an expert witness.

The use of demonstrative summaries and charts is regulated by Federal Rule of Evidence 611(a), which describes the trial court’s authority and responsibility to “exercise reasonable control over the mode and order of examining witnesses and presenting evidence.” Such pedagogical devices can and commonly do draw on an expert witness’s ability under Rules 702, 703, and 705 to summarize data, including material otherwise inadmissible in evidence, on which the expert bases his or her opinion. In addition to the convenience of presenting a condensed summary of voluminous materials, the demonstrative summary is valuable as a method of organizing and highlighting key pieces of evidence and allowing an opinion witness to draw inferences and conclusions from the summary.

While the rules for use of demonstrative summaries are not as strict as those governing the admission of Rule 1006 evidentiary summaries, the trial court should nonetheless guard against the use of demonstrative summaries that are mere vehicles for counsel's argument, unwarranted inferences, or misleading repackaging of the evidentiary record. Even when a demonstrative summary is otherwise accurate, nonprejudicial, and prepared with Rules 611, 702, 703, and 705 in mind, courts frequently employ instructions to ensure that it is not considered by the jury as substantive evidence.

The following is a suggested jury instruction for a situation in which a demonstrative summary was used at trial but not admitted into evidence:

Throughout various points of this trial, you have seen counsel for [party] use [chart, summary, etc.] to assist in the presentation of the witnesses and your understanding of the evidence I have admitted into the evidentiary record. This material is not itself evidence and must not be considered by you as proof of any facts the [chart, summary, etc.] contains.

For situations in which a true Rule 1006 summary has been admitted by the trial court in addition to the use of strictly demonstrative summaries, the following instruction can be added to distinguish their relative import:

During trial, you have also seen counsel for [party] use [Rule 1006 summary] to present [voluminous material] in condensed form for convenience of avoiding the introduction into evidence of [voluminous material]. This summary was admitted by me into the evidentiary record and may therefore be considered by you along with the other evidence admitted in this trial.

When used properly with appropriate control from the trial court under Rules 611(a) and 1006, both pedagogical summaries and true Rule 1006 "convenience summaries" can be very helpful in streamlining the presentation of a case and in educating and persuading the jury. However, aspirations of efficiency and judicial economy should not yield to the rules of evidence such that parties are permitted to enter into evidence case summaries or compilations of evidence tantamount to a written closing statement under the guise of Rule 1006.

Keywords: litigation, business torts, evidence, summaries, Federal Rules of Evidence

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Young Lawyers Corner

Affidavit Evidence: Heightened Scrutiny Due to Robo-Signing

By Rose Marie L. Fiore – July 18, 2012

Affidavit evidence has come under attack recently due to robo-signing allegations in mortgage-foreclosure lawsuits. In late 2010, the media hit the airwaves with stories of robo-signed affidavits after a representative of a foreclosing party estimated during a deposition that he signed approximately 10,000 affidavits in a month. The media dubbed him a robo-signer, and the derogatory nickname won the attention of state attorneys general and courts around the country. Although mortgage-loan servicers seem to have adjusted their practices to account for the increased volume of foreclosures that led to individuals signing numerous affidavits, the scandal portrayed by the media has caused increased scrutiny of affidavit evidence not only in foreclosure cases, but also in other types of cases.

There are a few basic rules for drafting trustworthy affidavits that will withstand scrutiny and challenges to admissibility under Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c)(4) states that “[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” The rule can be broken down into four key elements. Specifically, an affidavit used to support or oppose a motion for summary judgment must be made on personal knowledge, must be based on facts that are admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated in the affidavit.

Personal Knowledge

Absent personal knowledge, statements in an affidavit are hearsay and generally inadmissible as evidence. The recent case of *Sam’s Riverside, Inc. v. Intercon Solutions, Inc.*, 790 F. Supp. 2d 965 (S.D. Iowa 2011), highlights the significance of the personal-knowledge requirement for affidavit evidence in a trademark-infringement lawsuit. The *Sam’s Riverside* court rejected the plaintiff’s employee’s declaration that stated that Internet screen shots were true and accurate representations of certain web pages operated by the defendant because the affidavit did not establish the declarant’s personal knowledge of that information. *Id.* at 978. The court noted that the declaration did not state that the declarant ever visited the web pages or that he had personal knowledge about the contents of the websites mentioned. *Id.* *Sam’s Riverside* teaches that a good affidavit should not merely state that it is based on personal knowledge, but instead, it must show how the affiant obtained such personal knowledge.

It is well settled that statements in affidavits based “on information and belief” violate the personal-knowledge requirement of Rule 56(c). *See Ellis v. England*, 432 F.3d 1321, 1327 (11th Cir. 2005). Other types of qualifying statements, however, such as “to my knowledge” or “I believe,” cause confusion when assessing whether the personal-knowledge requirement is satisfied. In *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d 133 (2nd Cir. 2009), for example, a junior creditor’s successor brought an action against the guarantors of the junior debt. The defendants argued that the plaintiff could not collect because the senior debt had not been repaid.

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To support the defense, a guarantor submitted an affidavit stating that “[t]o my knowledge, [the senior creditor] has not been paid in full.” *Id.* at 138. Because of the “to my knowledge” qualifier, the district court held that there was no admissible evidence to establish that the senior creditor had not been paid, and entered summary judgment in favor of the plaintiff.

In vacating the judgment, the Second Circuit held that the guarantor’s affidavit satisfied the personal-knowledge requirement in Rule 56(c) and raised a genuine issue of material fact as to whether the senior debt had been paid. The Second Circuit stated that it was “unfortunate” that the drafter of the affidavit used the words “to my knowledge” rather than simply stating that the senior creditor had not been paid in full because doing so would have avoided the issue of the significance of the phrase. *Id.* at 138–39. The Second Circuit noted that the affiant stated elsewhere that he was “fully familiar with the facts and circumstances,” so the appellate court held that the phrase “to my knowledge” was redundant and legally insignificant.

Other qualifying phrases cause similar confusion. *See, e.g., Steelman v. Carper*, 124 F. Supp.2d 219, 228 (D. Del. 2000) (holding that an affidavit based on “personal awareness” rather than personal knowledge could not be considered in deciding a motion for summary judgment); *Cermetek, Inc. v. Butler Aypak, Inc.*, 573 F.2d 1370, 1377 (9th Cir. 1978) (an affiant’s “understanding” of certain facts did not satisfy the personal-knowledge requirement); *Transo Envelope Co. v. Murray Envelope Co.*, 227 F.Supp. 240, 242 (D. N.J. 1964) (an affiant being “apprised” that certain facts are true was insufficient). When drafting affidavits, do not use extraneous qualifying phrases that suggest a limitation on personal knowledge. Instead, tailor the statements in the affidavit to facts that are within the affiant’s personal knowledge.

Facts—Not Opinions or Legal Conclusions

“The affidavit is no place for ultimate facts and conclusions of law.” *A.L. Pickens Co., Inc. v. Youngstown Sheet & Tube Co.*, 650 F.3d 118, 121 (6th Cir. 1981) (quoting 6 Moore’s Federal Practice, Part 2, ¶ 56.22(1) at 56-1316 (Supp. 1979)). In *A.L. Pickens*, a case involving a sales agent’s contract action to recover commissions allegedly due, the district court relied on an affidavit stating that the contract included an unfulfilled condition precedent to the company’s obligation to pay commissions and entered summary judgment in favor of the defendant. The Sixth Circuit reversed and held that, although the affidavit was uncontroverted and the affiant was competent, the affiant’s opinion on the ultimate legal question of when a right to payment accrues was not entitled to any weight whatsoever. *Id.* at 121.

A bare legal conclusion was similarly rejected in *Schubert v. Nissan Motor Corp. in U.S.A.*, 148 F.3d 25 (1st Cir. 1998). In *Schubert*, the First Circuit affirmed the exclusion of a doctor’s affidavit offered in opposition to a car manufacturer’s motion for summary judgment in a products-liability case on the grounds that the doctor’s statement that the victim’s injuries were “consistent with the direct application of force to his back” constituted a legal conclusion without any supporting facts. *Id.* at 30. Likewise, in *Warren Bank v. Camp*, 396 F.2d 52 (6th Cir. 1968), the Sixth Circuit rejected an affidavit by a bank that stated that the comptroller of the currency acted “arbitrarily and capriciously.” *Id.* at 55. These cases make clear that affidavits should state facts only, not legal conclusions or impermissible opinions. For example, an affidavit should

read that the affiant observed “the light was red when the driver went through it”— not that the driver was “reckless” or “negligent.”

Admissible in Evidence

In federal courts, statements in an affidavit must be excluded if they do not comply with the Federal Rules of Evidence. *Reed v. Aetna Casualty and Surety Co.*, 160 F.R.D. 572, 575 (N.D. Ind. 1995). Hearsay statements in an affidavit are not admissible unless the statement comes within a recognized exception to the hearsay rule. *Id.* (citation omitted). A hearsay exception that is routinely used in business-tort cases is the business-record exception. Reliance on business records does not violate the personal-knowledge requirement, so long as the affiant is qualified to, and does, set forth the detailed foundation for the business-record exception to the hearsay rule. *See Fed. R. Evid.* 803(6).

As with the personal-knowledge requirement, the affiant attesting to the foundation for the business-record exception should explain how he or she obtained such knowledge. In some cases, more than one affidavit may be necessary, because an affiant who is competent to testify regarding the substance of a business record may not be competent to testify regarding how the record is kept, including knowledge of computer systems and electronically stored information. Submitting more than one affidavit carries the risk of additional depositions or trial witnesses, but this may be necessary, depending on the facts needed to support the relief requested. In some cases, the affidavit need only set forth the foundation for the business-record exception, and then the attorney can cite to the substantive terms of the record itself without additional affidavit evidence. In other cases, affidavit evidence regarding the substantive information in the business record may be required. A good practice is to tailor affidavits narrowly to only the facts necessary to meet your burden of proof and nothing more.

Competent Witness

The affiant must establish that he or she is competent to lay the foundation or make the statements in the affidavit. *See Fed. R. Evid.* 602. It is usually necessary to include information regarding the affiant’s position with the company, job duties, and responsibilities, as well as that person’s knowledge of the company’s record-making and record-keeping practices. As mentioned above, it may be necessary to include facts regarding knowledge of the company’s computer systems and how and when information is put into the computer system.

In some cases, personal knowledge may be assumed from an affiant’s position and the nature of the matters to which he or she testifies in the affidavit. For instance, where an attorney had negotiated a settlement that the plaintiff sought to enforce and handled all related transactions, the court found it reasonable to assume that the attorney had personal knowledge of the defendant’s failure to make the payments required by the settlement agreement and was therefore competent to submit an affidavit regarding nonpayment. *Lockwood v. Wolf Corp.*, 629 F.2d 603, 611 (9th Cir. 1980); *see also, Sheet Metal Workers International Association Local Union No. 359 v. Madison Industries Inc. of Arizona*, 84 F.3d 1186, 1193 (9th Cir. 1996) (a general manager’s personal knowledge of hiring events could be presumed).

Challenging Affidavits

To challenge an affidavit that does not meet these requirements, litigants with grounds to do so should file a motion to strike the affidavit in a timely fashion and be specific as to the portions of the affidavit that are being challenged. *See, e.g., Jones v. Owens-Corning Fiberglas Corp.*, 69 F.3d 712, 718 (4th Cir.1995) (holding that failure to file a motion to strike in a district court waived challenges to an affidavit on appeal); *Perma Research & Dev. Co. v. The Singer Co.*, 410 F.2d 572, 579 (2nd Cir. 1969) (finding that a motion to strike an affidavit was much too general). *See also*, Fed. R. Civ. P. 56(h) (allowing an award of expenses, including attorney fees, incurred as a result of an affidavit or a declaration that is found to be in bad faith or solely for delay).

Merely alleging robo-signing as a supposed new cause of action is not the proper remedy, and attorneys who have attempted to do so have been unsuccessful. *See, e.g., Me Lee v. LNV Corp.*, 2012 WL 1203403 (C.D. Cal. April 10, 2012) (dismissing robo-signing allegations couched as an attempt to plead fraud claim); *Bascos v. Federal Home Loan Mortgage Corp.*, 2011 WL 3157063, *6 (C.D. Cal. Jul. 22, 2011) (“Rule 9(b) and *Twombly* require plaintiffs to set forth more than bare allegations of ‘robosigning’ without any other factual support.”); *Cerecedes v. U.S. Bankcorp*, 2011 WL 2711071, *5 (C.D. Cal. Jul. 11, 2011) (dismissing robo-signing allegations); *Singer v. BAC Home Loans Servicing, LP*, 2011 WL 2940733, *2 (D. Ariz. July 21, 2011) (holding that allegations of robo-signing do not state a plausible claim for relief).

Conclusion

Obviously, it is critical for statements in an affidavit to be truthful, but it is equally important that the procedural aspects of obtaining affidavit evidence ensure its reliability and admissibility, especially in light of heightened scrutiny in recent times. Each affidavit should be drafted specifically for the particular context in which it is being used and for the specific person who will be signing it. Choose your affiant carefully and keep in mind that you may need more than one person. Do not take shortcuts and do not attempt to automate the process.

Remember to include only facts necessary to establish your claim or defense and eliminate all extraneous phrases, opinions, and legal conclusions. Authenticate documents to be offered as evidence and lay a proper foundation for their admissibility through a qualified witness. Attach the documents you reference in an affidavit or explain why they are not attached. Confirm that the affiant reviewed the exact copy of any documents that are attached and not another version of those documents. Make sure the affidavit is properly notarized if required, or at least that it is made under penalty of perjury. Do not leave blanks in an affidavit to be filled in after it is signed. Communicate with affiants to be sure they understand each statement in the affidavit and can confirm that each is true. Following these guidelines should result in affidavits that will be well received by courts and withstand challenges by the opposing party. Further author sayeth naught!

Keywords: litigation, business torts, affidavits, evidence, robo-signing, mortgage foreclosures

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NEWS & DEVELOPMENTS

Title Insurers Owe No Independent Duty of Due Care

Negligence claims cannot be asserted against title-insurance companies, where the terms of the title-insurance contract dictate the scope of the obligations, according to the Maryland Court of Special Appeals in *Columbia Town Center Title Co. v. 100 Investment Ltd. Partnership*, 203 Md.App. 61, 36 A.3d 985 (Feb. 2, 2012). Similarly, the court found that a title insurer cannot be liable under a theory of vicarious liability because the terms of the policy control.

In *Columbia Town Center Title Co.*, the Maryland intermediate appellate court reversed a circuit-court judgment, holding that two title-insurance companies and a title insurer, Chicago Title Insurance Co., were not liable to the insured under negligence and vicarious-liability theories. The title companies had overlooked a record conveyance of the subject property to a third party prior to the sale to the plaintiff partnership of a larger tract that included the subject parcel. The partnership later sold the property, remaining unaware of the prior conveyance, until the true owner conveyed the property. Forced to buy the property back to clear the chain of title for its purchaser, the partnership, after years of litigation over the terms of the policies, asserted negligence theories against the title companies and the title insurer.

The court of special appeals held that a simple negligence claim will not lie against a title company where the terms of a contract control the scope of the obligations. In so holding, the court distinguished title companies from areas of professional skill and judgment such as attorneys, physicians, architects, and accountants. The court further held that the title insurer, Chicago Title, could not be liable under a theory of vicarious liability and that the terms of the policy must control. A dissenting opinion by Judge Meredith agreed with the majority on the vicarious-liability bar but would have kept the negligence theory intact.

Keywords: litigation, business torts, insurance, liability

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