Social Media, Internet and E-mail Evidence at Trial: Admissibility of Electronic Evidence

Overcoming the Challenges of Authentication, Relevance and Hearsay to Get Evidence Admitted

WEDNESDAY, SEPTEMBER 25, 2013
1pm Eastern  |  12pm Central  |  11am Mountain  |  10am Pacific

Today’s faculty features:

Nicole D. Galli, Partner, Benesch Friedlander Coplan & Aronoff, Philadelphia
David J. Walton, Member, Cozen O’Connor, West Conshohocken, Pa.
Todd Nunn, Partner, K&L Gates, Seattle

The audio portion of the conference may be accessed via the telephone or by using your computer’s speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.
Tips for Optimal Quality

Sound Quality
If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory and you are listening via your computer speakers, you may listen via the phone: dial 1-866-869-6667 and enter your PIN when prompted. Otherwise, please send us a chat or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality
To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.
For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

- In the chat box, type (1) your **company name** and (2) the **number of attendees at your location**
- Click the SEND button beside the box

If you have purchased Strafford CLE processing services, you must confirm your participation by completing and submitting an Official Record of Attendance (CLE Form).

You may obtain your CLE form by going to the program page and selecting the appropriate form in the PROGRAM MATERIALS box at the top right corner.

If you’d like to purchase CLE credit processing, it is available for a fee. For additional information about CLE credit processing, go to our website or call us at 1-800-926-7926 ext. 35.
Program Materials

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ sign next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today’s program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.
Social Media, Internet, and Email: Exploring the Challenges to Admissibility of Electronic Evidence at Trial

Strafford Publications
August 8, 2013 CLE Webinar
By: Nicole D. Galli
Pretrial Considerations

- All litigators – and litigants - need to keep social media in mind when conducting discovery
  - Especially important in certain areas such as personal injury, employment, and family law, but can come up in any type of case
- Can conduct independent research regarding facts, witnesses, parties, judges, attorneys, jurors, public opinion – but must do so ethically
- Authentication issues
  - Best way to be able to get information in at trial is to obtain it via proper means beforehand
- Formal discovery
Discovery of Social Media

- From whom can you get the discovery, and how?
  - Self-help
  - The party/user themselves
    - Formal/informal discovery
  - The sites
    - With user consent/authorization
    - Via subpoena? (Fed. R. Civ. P. 45)
Discovery of Social Media

How can you physically obtain the discovery?

- Electronically
  - Facebook allows download of all of a user’s posts for all time (Download Your Information)
  - By third-party, user, or site?

- Printouts

- Actual access to site
  - Production of log-in information
  - Given to opposing party or possibly even to judge. See, e.g., Barnes v. CUS, No. 3:09–cv–007642010, WL 2265668 (M.D. Tenn. June 3, 2010) (judge as “friend”).
Social Media Research: Self-Help

- Conduct search on each social networking site to determine if party or witness has a social media presence.

- Search engine queries (on, e.g., Google, Bing, or Yahoo!) can be a simple and cost-effective way to uncover information, if not otherwise restricted because of an individual’s privacy preferences.

- If the information is not publicly available because of privacy settings, more formal discovery will be necessary.
Social Media Research: The Ethics of Self-Help

• Applicable Model Rules of Professional Conduct (attorneys’ own conduct)
  
  • Rule 4.1(a)
    • “In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.“
  
  • Rule 4.2
    • “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”
  
  • Rule 8.4
    • “It is professional misconduct for a lawyer to:
      • (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation”
Social Media Research: The Ethics of Self-Help

- Applicable Model Rules of Professional Conduct (conduct of attorneys’ agents)
  - Rule 5.3(b)
    - “a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer”
  - Rule 8.4
    - “It is professional misconduct for a lawyer to:
      - (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another”
Social Media Research: The Ethics of Self-Help


• **Question posed:** Where a witness’ private social media page is only accessible with the witness’ permission (i.e., by accepting a “friend” request), may a lawyer direct a third party to “friend” the witness in order to access the witness’ account, but conceal the affiliation with the lawyer and the real purpose behind “friending” the witness?

• **Answer:** A lawyer may not have a third party (assistant/paralegal) attempt to “friend” witness to obtain certain information, without revealing connection with attorney.
  
  • **See** Mod. R. Prof. Cond. 4.1, 5.3(b), 8.4
Social Media Research: The Ethics of Self-Help

- Association of the Bar of the City of N.Y., Comm. on Prof’l Ethics, Formal Op. 2010-2
  - **Question posed:** May a lawyer, either directly or through an agent, contact an unrepresented person through a social media website and request permission to access her web page to obtain information for use in litigation?
  - **Answer:** Attorney/agent does **not** engage in unethical conduct where she “friends” an unrepresented person **and** does so with full disclosure of her identity/agency relationship.
    - However, attorney/agent may not “resort to trickery” or engage in “affirmatively deceptive behavior” in order to gain access to an otherwise private social networking page.
Social Media Research: The Ethics of Self-Help

  - **Question posed:** May a lawyer view and access the social media pages of a party in order to obtain information about that party for use in a lawsuit, if the lawyer does not “friend” the party but relies only on public information posted by the party that is accessible to all members in the network?
  - **Answer:** There are no ethical impediments to obtaining information that is publicly available on a party’s social media page, even if the person is represented by counsel.
    - Lawyer may ethically view and access the social media accounts of a party, so long as the party’s profile is publicly available to all members in the network.
    - However, a lawyer may not “friend” a represented party.
Formal Discovery of Social Media

- In many cases, discovery requests to parties should include:
  - Request for information (pictures, messages, posts) contained in social media
    - Include in definitions, in description of electronic media
    - Narrowly-tailored requests for specific information – e.g., “All pictures related to . . .”
  - Request username/password, depending on case
  - Request written user consent to obtain from site
Objections to Discovery of Social Media

- **Users**
  - Privacy
  - Relevance

- **Sites**
  - Stored Communications Act
    - Applies, at least, to email-type communications and likely to “private” postings
User Objections: Privacy

- In numerous cases, users have contended that their right to privacy bars discovery of social media information.
  - This has generally been rejected – there is no expectation of privacy in social media information (and it may be discoverable anyway).
    - *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (users of social media “lack a legitimate expectation of privacy in . . . materials intended for publication or public posting”).
User Objections: Privacy

- Furthermore, content is not protected from discovery merely because a user “locks” or marks such content as “private.”
  - *EEOC v. Simply Storage Mgmt., LLC, et al*, 270 F.R.D. 430, 434 (S.D. Ind. 2010) (although “a requesting party is not entitled to access all non-relevant material on a site, . . . merely locking a profile from public access does not prevent discovery either”).
  - *Romano*, 907 N.Y.S.2d at 657 (“plaintiffs who place their physical condition in controversy may not shield from disclosure material which is necessary to the defense of the action”).
User Objections: Privacy

- Even if any legitimate expectation of privacy existed, the requesting party’s need for the information often outweighs any privacy concerns
  - *Romano*, 907 N.Y.S.2d at 654, 675 (“defendant’s need for access to the information outweighed any privacy concerns on the part of the plaintiff”).

- User’s agreement to a social networking site’s terms and conditions may constitute a waiver of any such expectation
  - *Lopocaro v. City of New York*, 950 N.Y.S.2d 723 (N.Y. Sup. Ct. 2012) (“[w]hen a person creates a Facebook account, he or she may be found to have consented to the possibility that personal information might be shared with others, notwithstanding his or her privacy settings . . .”).
User Objections: Privacy
Example from Case Law

  - Plaintiff sustained injuries that allegedly caused him physical impairment and curtailed his activities
  - Plaintiff’s public Facebook page suggested otherwise
  - Defendant moved to compel production of his username, password, etc.
  - Plaintiff objected on grounds the information was confidential and protected against disclosure
  - Court disagreed, using reasoning articulated in *Romano*, also noting that the terms and conditions of the social media sites warn against potential disclosure
User Objections: Relevance

- Although the recent trend has been to allow extensive discovery of social media content—even that marked as “private” on a user’s profile—requesting parties are not granted carte blanche to rummage aimlessly and at-will through a user’s social media accounts. See Mailhoit v. Home Depot U.S.A., Inc., No. 2:11-CV-03896, 2012 WL 3939063 (C.D. Cal. Sept. 7, 2012).

- “Content from a social networking site must be produced during discovery when it is relevant to a claim or defense in the case.” EEOC, 270 F.R.D. at 434.

- Courts warn against propounding discovery requests that are overly broad and, therefore, likely to produce information that is irrelevant and immaterial.
User Objections: Relevance

- Ordering the release of all private messages on a plaintiff’s social media accounts would allow defendants to “cast too wide a net” for any information that may be relevant and discoverable.

- Absent a threshold showing that the discovery requests are reasonably calculated to lead to the discovery of admissible evidence, parties may not “engage in the proverbial fishing expedition, in the hope that there might be something of relevance in [users’] Facebook account.”
User Objections: Relevance
Example from Case Law

  - Plaintiff, who alleged sexual harassment and retaliation against her supervisor, claimed that supervisor retaliated against her harassment complaints by improperly accessing her e-mail account.
  - Defendant requested—and moved to compel—production of all e-mails contained in plaintiff’s account.
  - Court did not allow defendants’ discovery request for all of Plaintiff’s email communications, and instead ordered Plaintiff to disclose those e-mails that were allegedly intercepted, holding that the contents of only those e-mails were probative of claims or defenses in the litigation.
Overcoming User Objections: Narrowly-Tailored Requests

- Most effective approach to discovery is to serve “properly limited” requests that seek production of specific documents that are relevant to the claims and defenses of the case. *Mackelprang*, 2007 WL 119149, at *8.

- Appropriate scope of discovery into user’s claim for emotional distress included user’s postings, messages, status updates, wall comments, and blog entries that “revealed, referred, or related to any emotion, feeling, or mental state,” as well as “communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.” *EEOC v. Simply Storage*, 270 F.R.D. at 436.
Overcoming User Objections: Setting Forth a Factual Predicate

- Relevance of private information can be demonstrated by making threshold showing that publicly-available information on user’s social media page contradicts or undermines the user’s claims or defenses.


- *See also* *Tompkins*, 278 F.R.D. at 388 (“in order to compel production of a private social media account, the party seeking access must demonstrate ...some credible facts that the account holder posted information or photographs that are ‘material and necessary’ in the prosecution or defense of the action”).
Setting Forth a Factual Predicate: Example from Case Law

  - Plaintiff involved in accident filed suit, seeking damages for injuries caused to his leg, lost wages, lost future earning capacity, pain and suffering, scarring, and embarrassment
  - Review of the public portion of Plaintiff’s social media profiles revealed photographs and content posted by Plaintiff that demonstrated otherwise
  - Followed reasoning in McMillen, as well as Romano and others
  - “Based on a review of the publicly accessible portions of [plaintiff’s] Facebook and MySpace accounts, there is a reasonable likelihood of additional relevant and material information on the non-public portions of these sites”
  - Ordered production of usernames, log-in names and passwords and prohibiting alterations/deletions of information/posts on the accounts
Setting Forth a Factual Predicate: Example from Case Law (of what not to do)

  - Plaintiff claimed to have been injured in automobile accident, and Defendant denied insurance coverage
  - Defendant sought “full printout” of Plaintiff’s social media website pages and pictures
  - Court relied heavily on *Romano, Thompson, and McMillen*
  - Defendant did not make threshold showing that content of Plaintiff’s public postings undermined her claims in the case
  - Absent such showing, Defendant not entitled to delve “carte blanche” into the non-public sections of Plaintiff’s social networking accounts
Discovery of Social Media: Site Objections

- Stored Communications Act, 18 U.S.C. § 2701, *et seq* ("SCA")
  - Requires that an entity providing electronic communication services ("ECS") or remote computing services ("RCS") not knowingly divulge to any person or entity the contents of a communication that is stored by that service or that is carried on that service, respectively
    - Courts have found that social networking websites are either ECS or RCS providers, or both.
Discovery of Social Media: Site Objections

- Parties may not use a civil subpoena *duces tecum* to obtain a user’s stored communications or data directly from service provider
  
  - See *Viacom Int’l, Inc. v. YouTube Inc.*, 253 F.R.D. 256, 264 (S.D.N.Y. 2008) (SCA prohibits disclosure of information pursuant to civil subpoena because Act “contains no exception for disclosure of such communications pursuant to civil discovery requests”).
  
  - See *Crispin v. Christian Audiegier, Inc.*, Case NO. CV 09-09509, 2010 WL 2293238 (C.D. Ca. May 26, 2010) (site not required to produce user’s communications in response to subpoena where private messages are akin to email and production is, thus, barred under SCA).
Discovery of Social Media: Site Objections

- Facebook instructs parties to obtain substantive, content-based information from each other through the discovery process and encourages the responding party to “produc[e] and authenticat[e] contents of their accounts” by using its “Download Your Information” tool.

  See Facebook, Inc., “May I obtain any information about user’s account using a civil subpoena?,” available at http://www.facebook.com/help/?ref=pf#!/help/205949546109965/?q=may%20obtain%20contents&sid=0hFnFsZ3GtMFvJgSU (last visited Apr. 24, 2013).

- MySpace, similarly, will produce certain public information regarding an account, but has refused to produce private messages or other content in the absence of a search warrant or a letter of consent to production executed by the owner of the account. See Mackelprang, 2007 WL 119149, at *2.
Discovery of Social Media: Site Objections

- SCA does not apply to the user of the electronic communications service him/herself
  - Networking sites may release user’s records with “the lawful consent” of the user. 18 U.S.C. § 2702(b)(3) (2013).

- If the user refuses to execute a consent form, the requesting party may move to compel execution and seek a court order requiring the user to do so.
  - *Romano*, 907 N.Y.S.2d at 657 (ordering plaintiff to execute authorization).
Admissibility of Social Media at Trial

- Federal and state rules of evidence still apply
- Must demonstrate authenticity
  - Prove it is from/by user – toughest issue
  - Trace searches – lawyer as witness?
- Must be relevant (FRE 401)
- Probative value must outweigh danger of unfair prejudice (FRE 403)
- Must be prepared to overcome hearsay objection (not hearsay, admission, present sense impression; or use for impeachment only)
Thank you!
Nicole D. Galli, Esquire
Benesch Friedlander Coplan & Aronoff, LLC
1650 Market Street, Suite 3611
Philadelphia, PA 19103
(267) 207-2948
ngalli@beneschlaw.com
Authentication of Electronically Stored Information ("ESI") at Trial

Presented By:
David J. Walton
DWalton@cozen.com
610.832.7455
Applicable Rules of Evidence – 901 and 902

• Federal Rule of Evidence 901 – Requirement of Authentication or Identification

• Rule 901(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
Applicable Rules of Evidence – 901 and 902

• Rule 901(b) sets forth a non-exclusive list of examples of ways to authenticate evidence.
Rule 901(b)(1)

- Rule 901(b)(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.
- This type of authentication is often used for electronic evidence, including, for example, emails, text messages, chat room transcripts, and copies of websites or web pages.
- Authentication is easy if you have testimony from the witness who actually drafted, for example, the email or text message.
- Or you can rely on a witness that has personal knowledge of how the ESI is typically generated. In that case, the authenticating witness must provide “factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so[.]” Lorraine v. Market Am. Ins. Co., 241 F.R.D. 534, 555-556 (D. Md. 2007)
Rule 901(b)(1)

- Ask your witness the following questions:
  - What is the electronic evidence (i.e., a digital file that contains a contract)?
  - Who created the file?
  - Where was the file stored?
  - How do you know the file is in its original form?
  - Who had access to the file?
  - Did anyone edit the file?
Rule 901(b)(3)

• Rule 901(b)(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

• For instance, the jury could compare an email with other emails that have already been produced and authenticated. Email A, which bears the same address as previously-authenticated Email B, can be compared with Email B and authenticated under this Rule. *United States v. Safavian*, 435 F. Supp. 2d 36 (D.D.C. 2006).
Rule 901(b)(4)

- Rule 901(b)(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
- Email or text messages can be authenticated under this Rule.
- Distinctive characteristics of an email include the email address or screen name, content of the email with which the proponent is familiar, and/or testimony by a witness that a party spoke to them about the subject of the email. *United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000).
Rule 901(b)(4)

- Hash marks are unique numerical identifiers assigned to a file. They can be inserted into the original electronic document when it is created to provide it with a distinctive characteristic used for authentication.
Rule 901(b)(4)

- Metadata is a distinctive characteristic of an electronic record that can be used to authenticate it.
- Metadata includes a file’s name, location, format, type, size, date, and permissions (who can read, write and run the file).
Rule 901(b)(7)

- Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
Rule 901(b)(7)

- This Rule can be used to authenticate computerized public records. For instance, it can be used to authenticate federal, state and local agency records, IRS tax returns, social security records, correctional records, or law enforcement records.

- To authenticate the evidence, you must show that the office from which the records were taken is the legal custodian of them. *Lorraine v. Market Am. Ins. Co.*, 241 F.R.D. 534, 548 (D. Md. 2007).
Rule 901(b)(7)

• You can show legal custodianship by a certificate of authenticity from the public office or the testimony of an official who is authorized to testify as to custodianship.

• Testimony from a witness with knowledge that the records are from a public office that is authorized to keep such records may also be used.
Rule 901(b)(9)

- Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.
- This rule is used to authenticate electronic evidence that is generated by a computer, as opposed to simply stored in a computer. This is evidence that is a product of an electronic process.
Rule 901(b)(9)

- Examples of the type of evidence to be authenticated under this Rule include computer-recorded events, data sets, simulations, and decision trees.
- To authenticate this type of evidence, you must provide evidence of the data input procedures and their accuracy, as well as evidence that the computer was routinely tested for programming errors.
Rule 902 – Self Authentication

• Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the categories of evidence listed in Rule 902.

• ESI can be self-authenticated by any of the examples set forth in Rule 902. However, courts have recognized that Rule 905(b) (official publications), Rule 902(7) (trade inscriptions), and Rule 902(11) (certified domestic records of regularly conducted activity) are particularly apt in the ESI context. *Lorraine v. Market Am. Ins. Co.*, 241 F.R.D. 534, 551 (D. Md. 2007).
Rule 902(5)

- Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.
Rule 902(7)

- Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

- For example, a business email may identify the company.
Rule 902(11)

• Certified domestic records of regularly conducted activity.
Rule 902(11)

- Permits self-authentication
- Admissible under Rule 803(6); and
- Certification that the record:
  - Was made at or near the time of the occurrence or is based on information transmitted by a person with such knowledge
  - Was kept in the regular conducted business activity
  - Was made by the regularly conducted as a regular practice
Admissibility of Social Media and Other
ESI: Hearsay Considerations

Todd Nunn, K&L Gates
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
todd.nunn@klgates.com
No Special Rules of Evidence Apply

- Federal and State Rules of Evidence do not separately address the admissibility of electronic data.

- Courts have used the existing rules of evidence to determine the admissibility of ESI, despite the technical challenges that sometimes must be overcome to do so.
Admissibility of ESI

- Determined by a collection of evidence rules that present themselves like a series of hurdles to be cleared by the proponent of the evidence
- Failure to clear any of these evidentiary hurdles means that the evidence will not be admissible
- Same rules whether civil or criminal case
- Same rules apply whether the context is a summary judgment motion or trial
Is It Hearsay?

- Rules 801-807
- Five questions:
  1. Does the evidence constitute a statement, as defined by Rule 801(a)?
  2. Was the statement made by a “declarant,” as defined by Rule 801(b)?
  3. Is the statement being offered to prove the truth of its contents, as provided by Rule 801(c)?
  4. Is the statement excluded from the definition of hearsay by rule 801(d)?
  5. If the statement is hearsay, is it covered by one of the exceptions identified at Rules 803, 804 or 807?
Does the evidence constitute a statement, as defined by Rule 801(a)?

- “[“Statement”] only applies to verbal conduct (spoken or written) or non-verbal conduct that is intended by a human declarant to be assertive.” – *Lorraine v. Markel Amer. Ins. Co.*, 241 F.R.D. 534, 563 (2007)

  - Denying motion in limine to exclude exhibit of what website looked like on various dates

- “To the extent these images are being introduced to show the images and text found on the websites, they are not statements at all – and thus fall outside the ambit of the hearsay rule.’ . . . Moreover, the contents of Polksa’s website may be considered an admission by a party-opponent, and are not barred by the hearsay rule.” (Citations omitted.)
Was the statement made by a “declarant,” as defined by Rule 801(b)?

- Rule 801(b): “‘Declarant’ means the person who made the statement.” (emphasis added)

- “When an electronically generated record is entirely the product of the functioning of a computerized system or process, such as the “report” generated when a fax is sent showing the number to which the fax was sent and the time it was received, there is no “person” involved in the creation of the record, and no “assertion” being made. For that reason, the record is not a statement and cannot be hearsay.” – *Lorraine*, 241 F.R.D. at 564

- Automatic email notification stating that the Facebook member had received a message and containing the message was not hearsay
- Automatic notification contained no “assertion,” was not made by “declarant” – not hearsay
- Messages in notification: “Facebook’s automatic notification features … are not statements.” – not hearsay
- Messages/statements from Defendant were admissions by party opponent
Is the statement being offered to prove the truth of its contents, as provided by Rule 801(c)?

- If no, it’s not hearsay.

- What else might “statements” be offered for?
  - “[T]o ‘prove that because they were made, listeners had knowledge of the information … or to show the effect on the listener of the statements.’” *Lorraine*, 241 F.R.D. at 565
  - To prove an association between persons *Id.*
  - Circumstantial evidence of state of mind or motive *Id.*
  - Questions, imperative commands e.g., “what time is it” or “close the door” *Id.*

- **Think Outside the Box:**
  - *United States v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000) (finding emails between defendant and witness were “non-hearsay admitted to show [Defendant’s] and [Witness’s] relationship and custom of communicating by email.”)

- review offered as evidence of “actual confusion”
- “‘[A]ffidavits and hearsay materials which would not be admissible evidence for a permanent injunction’ may be considered if the evidence is ‘appropriate given the character and objectives of the injunctive proceeding.’”
- “Additionally, the comments are not hearsay because they are not being used to prove the truth of the matter asserted in the comment. See Fed.R.Evid. 801(c)(2). Rather, Plaintiffs invoke the comments to demonstrate the consumer’s confusion, a then-existing mental state of the declarant who posted the comments See Fed.R.Evid. 803(3).”

- Plaintiff sought to admit comments from “weblog” (blog) to show actual confusion of customers and “consumers’ belief that defendants’ products ... degrade the goodwill and positive associations of [Plaintiff] and its trademarks.”
- Admissible for that purpose
- “The Court intends to be diligent in only considering the weblog evidence to prove the state of mind of the declarants.”
Is the statement excluded from the definition of hearsay by rule 801(d)?

801(d)(2): An Opposing Party’s Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party’s coconspirator during and in furtherance of the conspiracy.
801(d)(2): Opposing Party’s Statement (Admission by Party Opponent)

  - Plaintiff accused employer of retaliation for reporting sexual harassment
  - Plaintiff relied in part on text message from another officer relating that Plaintiff’s superiors stated that they were denying her ability to participate in certain training because of the lawsuit
  - Plaintiff asserted message was non-hearsay admission by party opponent
  - Circuit Court Agreed
• **Message from Sergeant White to Plaintiff:**
  
  • “I was told by [W]oodbury that [B]arnard said you had a law suit against the city and you shouldn’t [sic] train because of the suit.”

• **Analysis:**
  
  • “Lieutenant Barnard’s statement, if true, is admissible under the party-opponent exception because Lieutenant Barnard was speaking in the course of his employment. [Plaintiff] asserts-and the City does not dispute-that Woodbury and White were tasked with assigning eligible officers to particular FTO shifts. Therefore, their discussion regarding why [Plaintiff] was prohibited from training may be considered ‘a matter within the course of their agency or employment,’ rather than mere water-cooler gossip.”
If the statement is hearsay, is it **covered by one of the exceptions identified at Rules 803, 804 or 807?**

Commonly cited exceptions per *Lorraine v. Markel*:

- **Rule 803(1) Present Sense Impression**
- **Rule 803(2) Excited Utterance** (“The prevalence of electronic communication devices, and the fact that many are portable and small, means that people always have their laptops, PDAs, and cell phones with them, and available for use to send e-mails or text messages describing events as they are happening.”)
- **Rule 803(3) Then Existing State of Mind or Condition** (“Rule 803(3) is particularly useful when trying to admit e-mail, a medium of communication that seems particularly prone to candid, perhaps too-candid, statements of the declarant’s state of mind, feelings, emotions, and motives.”)
  - Logic also applies to Twitter, Text Messaging, etc.
- **803(6) Business Records**
- **803(8) Public Records**
- **803(17) Market Reports, Commercial Publications**
803(6) Business Records: CAUTION

“The business record exception is one of the hearsay exceptions most discussed by courts when ruling on the admissibility of electronic evidence. The decisions demonstrate a continuum running from cases where the court was very lenient in admitting electronic business records, without demanding analysis, to those in which the court took a very demanding approach and scrupulously analyzed every element of the exception, and excluded evidence when all were not met.” – Lorraine 241 F.R.D. at 572

• Email submitted as evidence that Plaintiff declined to move forward with deal (as opposed to Defendant).
• Author submitted affidavit (regarding multiple emails, including email at issue) that:
  • Emails were “true and correct copy of record made and/or kept … in the course of our regularly conducted business activity”
  • It was defendant’s “regular practice to make and/or keep these records” and that
  • Each document was a record of “events, acts or opinions made at or near the time by a person with knowledge or from information transmitted by person with knowledge.”
  • Also provided details regarding the telephone conversation the email described
• Court found Rule 803(6) was satisfied (business records exception)
• “The absence of more detailed information about how [Defendant] generally maintained its emails does not raise the reliability concerns present in cases involving email “chains” with multiple authors who forward communications among multiple employees.”
In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico on April 20, 2010, 87 Fed. R. Evid. Serv. 492 (E.D. La. 2012)

- Declining to find emails categorically excepted from hearsay by business records exception
- Regarding “Regularly Conducted Activity Requirements”:
  - First, it must have been the business’s regular practice to make the record at issue—the email that the declarant/defendant’s employee sends or receives. FED.R.EVID. 803(6)(B). Therefore, the sending or receiving employee must have been under an obligation imposed by his employer to send or receive the email at issue … Essentially, there must be a showing that the email at issue was not sent or received casually, nor was its creation a mere isolated incident.
  - Second, the email itself must have been created as part of the regularly conducted activity of a business. . . . The key, though, is that the email, as a “record” within the meaning of Rule 803(6), must pertain to a “regularly conducted” business activity. Thus, if the information within an email pertains to a transaction or report of an isolated, sporadic nature that is not within the scope of what the email sender or recipient regularly does to engage in business, the exception does not apply.
In re Oil Spill by the Oil Rig “Deepwater Horizon”

• First of all, the email must have been sent or received at or near the time of the event(s) recorded in the email. Thus, one must look at each email’s content to determine whether the email was created contemporaneously with the sender’s acquisition of the information within the email.

• Second, the email must have been sent by someone with knowledge of the event(s) documented in the email. This requires a particularized inquiry as to whether the declarant—the composer of the email—possessed personal knowledge of the information in the email.

• Third, the email must have been sent or received in the course of a regular business activity, which requires a case-by-case analysis of whether the producing defendant had a policy or imposed a business duty on its employee to report or record the information within the email.

• Fourth, it must be the producing defendant’s regular practice to send or receive emails that record the type of event(s) documented in the email. This would require proof of a policy of the producing defendant to use email to make certain types of reports or to send certain sorts of communications; it is not enough to say that as a general business matter, most companies receive and send emails as part of their business model.

• Fifth, a custodian or qualified witness must attest that these conditions have been fulfilled—which certainly requires an email-by-email inquiry.

• Lastly, the objecting defendant is permitted under the rule to argue that the particular email should be excluded due to concerns of lack of trustworthiness, based on the information source underlying the email content or the circumstances under which the email was sent and received.
Exceptions to Hearsay:

- **Present Sense Impression:** *Canatxx Gas Storage Ltd. v. Silverhawk Capital Partners*, LLC., 76 Fed. R. Evid. Serv. 500 (S.D. Tex. 2008)
  - Email stated: “Guys- Rob Blackmon just called …”
  - Supporting affidavit stated email was sent “[a]s soon as” conversation was finished
  - Email found admissible as present-sense impression

- **Excited Utterance:**
    - Defendant accused of rape, “primary issue” at trial was question of consent
    - Victim sent text message approximately ten minutes after rape stating that she had just been raped by the defendant
    - Admitted at trial as excited utterance
    - Teenager present when fight broke out texted mother stating that the defendant stabbed the victim
    - Teenager was allowed to testify regarding the text message and its content under the excited utterance exception
Exceptions to Hearsay:

- **State of Mind:**
  - *D.J.M. v Hannibal Pub. School Dist. #60,* 647 F.3d 754 (8th Cir. 2011)
    - Following internet chat in which student expressed potential for violence at school, participant in chat and adult aware of chat emailed principal regarding their concerns
    - District court concluded that statements were relevant to whether reactions were those of reasonable persons and admissible under “state of mind” exception
    - Audio recording of voicemail messages left by defendant convicted of arson admissible because they were “probative of motive” and “relevant to show [Defendant’s] state of mind:”
      - “In your house b*tch, what are you going do now? … B*tch, that’s why your house is down there burning.”
    - Also admissible as an admission
Jean-Philippe v. State, ---So.3d.---, 2013 WL 2631159 (Fla. June 13, 2013)

• Defendant convicted of First Degree Murder for killing his wife
• At trial, text messages from Defendant were admitted
• Supreme Court reasoned the messages were not hearsay and were admitted to “show the course of appellant’s conduct and were relevant to appellant’s motive for killing his wife.”
• Other text messages were also were admissible as “[a] statement that is offered against a party and is … [t]he party’s own statement”
State of Mind: “The Officer Who Posted Too Much on MySpace” – NY TIMES, 3/10/09

- MySpace Mood on Day Before Trial: “Devious”
- Facebook Status a Few Weeks Before Trial: “Vaughan is watching ‘Training Day’ to brush up on proper police procedure.”
- Comments about video clips of arrests:
  - “If he wanted to tune him up, he should have delayed cuffing him.”
  - “If you were going to hit a cuffed suspect, at least get your money’s worth ‘cause now he’s going to get disciplined’ for a relatively light punch.”
Alibi: “Facebook status update provides alibi” - CNN.COM 11/12/09

• 11:49 PM at Father’s home: 19-year-old Rodney Bradford updates Facebook Status

• 11:50 PM 12 miles away: Two men mugged at gunpoint

• Bradford is picked out of lineup, charged with robbery in first degree, sent to Rikers Island

• Evidence of Facebook update presented as alibi evidence

• DA subpoenaed Facebook for documentation which confirmed the alibi

• After two weeks in jail, case dismissed

- Plaintiff’s Deposition Testimony: “I’m a Christian and I strive really hard to be a moral person. So for someone to start thinking of me as someone who has orgy parties at my house while my son is home, that’s severely humiliating to me.”

- Plaintiff’s Facebook:
  - Discussing desire for a female friend to join her “naked in the hot tub”
  - Discussing “naked twister”
  - Discussing “female orgies involving plaintiff, Cassie Bridges, and others, to be filmed by plaintiff’s husband.”

- Defendant was arrested during Occupy Wall Street protests for marching onto Brooklyn Bridge (with others)
- D.A. subpoenaed Twitter records, including content
- D.A. argued tweets could reveal whether Defendant was aware that police had ordered demonstrators not to march across the bridge
Food for thought ...

“Odin Lloyd Texts Key Evidence in Aaron Hernandez Murder Charge” – The Washington Times
06/27/13

Lloyd: “Did you see who I was with?”
Sister: “Who?”
Lloyd: “NFL”
Lloyd: “Just so you know.”

- Exceptions to hearsay? (Note: Massachusetts currently does not recognize present sense impression)
- Other reasons to introduce the evidence?

- Allegations of Trademark & Trade Dress infringement

- Plaintiff sought sanctions for removal of photos from Facebook showing infringing trade dress

- Court ordered Defendant to repost pictures to allow Defendant to print those it thought relevant
No Sanctions for Routine Deletion of Text Messages “so as not to unduly encumber” Cell Phones

Posted on July 17, 2013 by K&L Gates

Plaintiff sued its former employees after they opened a competing sports training facility. In the course of litigation, Plaintiff sought sanctions for Defendants’ alleged spoliation of evidence, including text messages. The trial court found that “the level of importance and complexity of the issues did not weigh in favor of imposing sanctions and that the deleted material was not relevant or important to its decision” and dismissed the claim for sanctions. On appeal, the appellate court found no abuse of discretion and affirmed the order.

Da Silva Moore: Plaintiffs Petition for Writ of Certiorari on Question of Recusal

Posted on July 11, 2013 by K&L Gates

It was reported this week that the Plaintiffs in this case have filed a Petition for a Writ of Certiorari with the United States Supreme Court seeking an answer to the question: “Should a court of appeals review a judge’s denial of a motion to recuse de novo or for an abuse of discretion?” For those who don’t recall, the plaintiffs in this case sought Magistrate Judge Peck’s recusal following his approval of Defendant’s predictive coding protocol. That motion was denied, and the denial was later affirmed by both the District Court and the Second Circuit Court of Appeals. Now, Plaintiffs argue that the standard of review applied by the Second Circuit was too deferential and that the issue should have been reviewed “de novo.”

For more information on this interesting development, click here to read Victor Li’s article “Da Silva Moore Goes to Washington,” published yesterday by Law Technology News. Although too numerous to list, more postings regarding this case can be accessed on this blog by searching “Da Silva Moore” in the search box (on the left of your screen).