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[LETTER to a young trial lawyer]

THE SMOKING E-MAIL

Effective Examination of Witnesses Using Electronic Documents

by DAVID K. BISSINGER

Many articles talk about the new e-discovery rules, but few address how to use electronic information in examining witnesses. Just 10 years ago, a lawyer examining a witness might only have had one or two memos in a typical business case. Now, e-mails and other electronic documents give lawyers day-by-day, and often minute-by-minute, records of the ideas and actions of key witnesses.

Remember the Enron trader tapes? Enron's tapes caught a trader asking about "[a]ll the money you guys stole from those poor grandmothers in California," with his fellow trader responding, "[y]eah, grandma Millie, man," according to published transcripts. And it got a lot worse.

These materials can present lawyers with a Disneyland of damning documents or at least a detailed history of the events in the case well beyond what used to be available. But be careful. Electronic discovery has changed not just the rules of document production but also how to use these materials when questioning and preparing witnesses. Here are some ideas.

Form a chronology. The chronology allows the lawyer to see the decision-making process of her opponent as it unfolded and to begin eliminating extraneous material. Print out the e-mails and keep them in a notebook; don't use a database. This helps force you to trim the volume of documents.

Fill the gaps. Occasionally a party neglects to produce e-mails from a critical day, week or month. Identify these gaps, then fight to fill them in. As Houston trial lawyer David Berg puts it in his book "The Trial Lawyer: What It Takes to Win," "Be a bulldog about documents." Go to the court or the arbitration panel. Depose an opponent's information technology director, and study the new rules and articles on the new rules.

If all else fails, point to the gap in the record in witness examinations through impeachment by omission. Accredit a chain of e-mails an opponent has produced as showing a pattern of rapid-fire back-and-forth discussion over a related but minor issue, and then impeach the witness on the lack of e-mails on the big decision in the case. This gives rise to the inference that either the e-mails have gone missing or that the parties went out of their way to avoid e-mail on the big issue for sinister reasons. In the end, one way or another, the missing e-mails tend to show up (or your opponent makes a settlement offer that compensates for their absence).

Use electronic documents without introducing them. Lawyers can use e-mails without marking them as exhibits. Just ask the questions. Often the witness will give the answer and things will move faster. This can help manage the mountain of e-mails. Counsel doesn't need e-mails for every question, or a question for every point in the chronology. Focusing

questions allows impeachment of a witness who tries to deviate from obvious facts.

Nickname the e-mails. A storied tradition supports the nicknaming of documents. For example, in the pre-e-mail case of *Pennzoil v. Texaco*, Joe Jamail nicknamed Gordon Getty's letter to Hugh Liedke of Pennzoil as the "Dear Hugh" letter to help prove that Pennzoil had a contract with Getty, according to "Oil & Honor: The Texaco-Pennzoil Wars" by Thomas Petzinger Jr. This tradition of nicknaming has real value in helping sort through hundreds of e-mails.

Watch out for context. E-mails get cryptic. This presents dangers. A chain of e-mails might read like this:

10:55 a.m., from Bob to Mary: Lewis just tabled the proposal.

10:57 a.m., from Mary to Bob: That's great.

Be careful here. Lawyers might think that the chronology supports the idea that Lewis presented the proposal and that Mary was pleased about it. But it could mean that Lewis postponed the proposal and Mary sarcastically said "that's great" to express bitter disappointment. An opponent may try to exploit the ambiguity to mean something it didn't at the time or may surprise you with a different meaning. Try to establish a foundation using less ambiguous materials first.

Apportion emails among witnesses. Many cases have a series of e-mails that many witnesses received. If some of these e-mails appear damning, lawyers will be tempted to use them with many witnesses. That's a mistake. Use each key e-mail only once or twice. Use five or six witnesses to build the chronology in parts. Resist the temptation to prove up every e-mail through every witness. That is rarely necessary and only slows the case down.

Don't overdo it. Again, judges, juries and arbitrators grow weary of even the most electrifying evidence. New York Attorney General Eliot Spitzer suffered a major loss in a securities fraud case in 2005 in which his trial team played, over and over, tapes of the broker talking about his illegal trades. Although other reasons also supported an acquittal, defense attorney Paul Shechtman was quoted in an April 2006 article in *The National Law Journal* as saying that the prosecutors overdid the tapes. "The jury groaned every time they played it," he said. "They truly overplayed their hand, if not the tape."

Be patient. Let the story build up to that dramatic e-mail, recording or calendar entry. If it's as dramatic as you think, the jury will remember it. TTL

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