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FOCUS ON COMMERCIAL LITIGATIONS

Emails and the Hearsay and Foundational Objections They Bring

By James M. Wicks and Aaron E. Zerykier

The Justices of the Commercial Division are faced more and more with evidentiary issues brought about by the proliferation of the use of emails in business. As a consequence, it is now common for litigators to utilize emails in support and opposition to motions. However, often overlooked is that emails, like any other correspondence, are hearsay and foundational rules apply as well.

When presented with emails attached to motion papers, diligent counsel will review the emails to determine whether or not the emails constitute hearsay evidence (*i.e.* whether they are submitted for the truth of the matter asserted) and if so, whether the emails fall under one of the exceptions to the hearsay rule.

> **"Diligent counsel will review the email to determine whether it constitutes hearsay evidence."**

The Statutory Framework

Perhaps the most hearsay exception to business emails is the "business record exception." CPLR § 4518(a) codifies the business record exception, providing that "[a]ny writing or record . . . made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter."

CPLR § 4518 (a) was updated in 2002 to provide for the admissibility of "electronic records" which is defined in section 302 of the State Technology Law, as "information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities."

The 2002 amendment to CPLR § 4518(a) added that "[a]n electronic record, . . . used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record." And that in determining whether or not to allow the admission of an electronic record "[t]he court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. . ." Therefore, while the CPLR now allows the admission of paper copies of "electronic records," like emails, the other factors applicable to the "business record exception" still must be analyzed and applied before the email can be considered competent evidence.

Simplified, the four elements of CPLR § 4518(a) that must be satisfied in order for an email to be admitted in support of the truth of its contents is that: the record was made in the regular course of business; the

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it was the regular course of such business to make such record; the record must have been made at the time of the act or occurrence recorded, or within a reasonable time thereafter; and the person who made the record must have had actual knowledge of the event recorded or must have received his or her information from someone within the business who had actual knowledge and was under a "business duty" to report the event to the maker of the record.

The party offering the email must establish each of the elements to the court's satisfaction. This can be done through the affidavit from someone within the particular business organization, such as a records custodian, or other employee, who can attest to the record keeping practices of the business. This witness need not be familiar with the facts actually asserted in the emails at issue, but rather it is sufficient if the witness knows the habits and customary practices and procedures for the making of such records.

This issue was directly addressed in *Dan Medical, P.C., v. New York Mutual Fire Ins. Co.*, 14 Misc.3d 44, 829 N.Y.S.2d 404 (App. Term 2nd and 11th Judicial Dist. 2006). In support of a motion for summary judgment the plaintiff placed before the court an affirmation of its counsel, an affidavit by a "corporate officer" as well as various documents. In opposition to the motion, the de-

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fendant argued that the plaintiff failed to demonstrate a prima facie case because it failed to lay a proper foundation for the admission of the documents it submitted to the court. *Id*. The trial court's grant of summary judgment to the plaintiff was reversed on appeal because the "corporate officer" did not demonstrate that he professed sufficient personal knowledge of the plaintiff's offices practices to lay a proper foundation to establish that the documents submitted by plaintiff were admissible pursuant to the business records exception to the hearsay rule.

Commercial Division rulings on the use of email evidence

The admissibility of emails was raised and addressed recently by Justice Elizabeth Hazlitt Emerson in a decision in *Broadway Neon Sign Corp. v. Swift*, Index No. 20336-09 (Sup. Ct. Suffolk County, Sept. 9, 2009). In *Broadway Neon*, plaintiff sought to enforce a restrictive covenant against a former employee. Plaintiff was granted a temporary restraining order against defendant which, *inter alia*, enjoined the former employee from contacting or soliciting the plaintiff's customers pending the return date of the plaintiff's motion for a preliminary injunction (which motion was ultimately denied).

Prior to the issuance of the decision denying plaintiff's application for a preliminary injunction, plaintiff brought a second application to hold defendant-former employee in contempt for allegedly violating the temporary restraining order's requirement that the former employee not contact or solicit any of plaintiff's customers. Justice Emerson denied plaintiff's contempt application, because, *inter alia*, the "hearsay emails" submitted by plaintiff were "not in affidavit form. Such evidence may not be used as the foundation for a contempt proceeding."

In *Zuccarini v. Ziff-Davis Media Inc. and Ziff-Davis Publishing, Inc*., Index No. 014997-01 (Sup. Ct. Nassau County, Nov. 8, 2004), a former employee brought suit against two publishers for allegedly violating an agreement to pay the employee pursuant to an "Equity Plan." Defendant brought counterclaims against the former employee, sounding in breaches of fiduciary duty of loyalty, alleging that the former employee diverted corporate (advertising) opportunities from one of defendants' other magazines to the magazine the former employee was responsible for developing.

In opposition to plaintiff's motion for summary judgment dismissing the counterclaims, defendants submitted affidavits from various employees to which emails were attached. Justice Ira B. Warshawsky found that defendants failed to meet their evidentiary burden of raising a triable issue of fact on their counterclaims, and granted plaintiff summary judgment dismissing the counterclaims, in part, because the testimony of the witnesses who signed the affidavits was based upon hearsay statements from third parties and because "emails, like any other unsworn letters, are not competent evidence." Therefore, defendants' opposition to plaintiff's motion "completely lack[ed] probative value."

The decisions cited are stark reminders to us all that when emails, or other unsworn documentary evidence, are used in motion practice, an affidavit must be submitted from an individual who can authenticate the documents in accordance with the business records exception to the hearsay rule or otherwise be subject to a finding that the evidence presented was not in admissible form, and therefore could not be considered by the court.

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