Oregon State Bar

Litigation Journal

SPRING 2015 VOLUME 34 NUMBER 1

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Email Evidence: Overcoming The So-Called "Self-Serving Hearsay" Objection

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The use of email and other electronic forms of communication are ubiquitous in our society today. However, the conveniences these modern technologies offer also carry certain risks. While email, instant messaging and texts are certainly fast, they lack many of the formalities inherent with more traditional written mediums. When read in a vacuum, a poor attempt at humor or sarcastic aside can appear to take on a much more sinister meaning. Because email has become a regular part of our daily lives, it can be a rich source of evidence when conflicts arise and those conflicts lead to trial litigation. As a wise law professor once said, never write in an email something that you would not be comfortable seeing enlarged on a video screen and read aloud in a courtroom.[1]

Attorneys for one of the world's largest law firms, DLA Piper, learned this lesson when emails surfaced in the midst of a civil dispute with a former client over more than $600,000 in past-due legal bills.[2] The former client countersued and offered internal firm emails that had been produced in discovery as evidence of a "sweeping practice of overbilling." An attorney wrote in one email, "I hear we are already 200k over our estimate—that's Team DLA Piper!" Another wrote, "[n]ow Vince has random people working full time on random research projects in standard 'churn that bill baby!' mode," adding "[t]hat bill shall know no limits."[3] In a statement from DLA Piper, the firm said that "[t]he emails were in fact an offensive and inexcusable effort at humor, but in no way reflect actual excessive billing."[4] The firm reportedly settled the matter, but these damaging emails demonstrate how the informal nature of email correspondence can lead to serious civil liability.

More recently, internal emails between former members and executives of Dewey & Leboeuf, a now bankrupt law firm formerly headquartered in New York City, provided key evidence to support an indictment charging them with dozens of counts of larceny and securities fraud.[5] The four men charged include three attorneys, and the firm's chief financial officer. In at least one of these emails, they "used the phrase 'cooking the books' to describe what they were doing to mislead the firm's lenders and creditors in setting the stage for a $150 million debt offering."[6] A handful of other former employees have since pleaded guilty in connection with the alleged accounting fraud scheme, but the four men believed to be at the center of the case continue to assert their innocence.[7] In response

to the prosecutor's claim that the men used "accounting gimmicks and fraud to cheat banks and investors," defense counsel said that they "lacked criminal intent and the necessary understanding of 'complicated accounting rules and regulations' required to be guilty."[8] Whether this case ultimately goes to trial remains to be seen; however, the defendants would almost certainly seek to admit other email evidence in their defense to put these seemingly damning emails into context and to support their claim of innocence.

The purpose for which an email is offered at trial can have a major impact on whether the court will receive it into evidence. Admission of a party opponent's email correspondence presents little difficulty.[9] For example, plaintiff's counsel could easily have an email written by a company executive, describing his efforts to obtain funding through the use of allegedly false or misleading earnings reports, admitted against the executive in a fraud case. If instead defense counsel sought to offer a follow-up email written by that same executive, suggesting his belief that the earnings reports were accurate and negating the necessary showing of intent, it would likely trigger an objection on the basis of the so-called "self-serving" hearsay rule. Though sometimes used as a catch-all objection, "self-serving" is a proper objection only to a statement that purports to come in as a declaration against penal interest.[10] Because the admission of statements under this particular exception does not extend to non-self-inculpatory statements that were made along with or collateral to self-inculpatory statements, the follow-up email described in the example above may be excluded if offered pursuant to this exception.[11] Yet, there is no independent hearsay rule that self-serving evidence is inadmissible.[12] It could be said that all evidence offered by a party is self-serving in some respect—the self-serving nature of evidence is generally deemed only a matter of weight for the fact-finder to consider.[13] Nevertheless, a party who seeks admission of his or her own email correspondence may face a difficult challenge.

This article is meant as a guide to assist practitioners in navigating the rules of evidence and identifying bases on which to successfully admit a client's own email evidence when it may be helpful to their client's case. This article highlights just a few key evidentiary provisions that may serve as means for utilizing this potential source of beneficial evidence at trial.

Back to Basics

The difference between hearsay and prophecy is often one of sequence. Hearsay often turns out to have been prophecy.
– Hubert H. Humphrey

The exclusion of hearsay from admission at trial is one of the oldest and most fundamental rules of evidence. Out-of-court statements, both oral and written, are generally inadmissible if offered for their truth.[14] The reason for their exclusion is that hearsay statements are generally considered to be untrustworthy.[15] Yet, it has been said that the many exceptions essentially swallow the rule. And it is within these exceptions that practitioners must usually operate when seeking to admit a client's own beneficial or exculpatory email evidence.

First, however, it is vital to determine the purpose for which the email is being offered into evidence. Out-of-court statements offered for things other than their truth are not subject to exclusion as hearsay. For example, an email that describes matters discussed during a particular meeting or event would be admissible as circumstantial evidence that the meeting or event took place. Other non-hearsay uses may include establishing the email's effect on its recipient or merely that the email was sent or received by a particular party on a particular day.

Assuming instead that text of an email is being offered for its truth, counsel would need to identify a hearsay exception through which to admit it.[16] For emails generated in the course of operating a business, one possibility is for admission as a business record. Alternatively, an email may be offered as evidence of the declarant's state of mind. The state-of-mind exception may be particularly useful in a criminal case for challenging whether a defendant had the necessary criminal intent; however, it carries with it certain limitations. Depending on the circumstances, an email may also be admissible once opposing counsel "opens the door," as a prior consistent statement, or pursuant to the rule of completeness. Ultimately, helpful emails should be analyzed carefully and not overlooked merely because they appear to be inadmissible hearsay evidence.

Business as Usual

Information technology and business are becoming inextricably interwoven. I don't think anybody can talk meaningfully about one without talking about the other. – Bill Gates

The use of email and other digital communication has become standard practice in the business world. It would appear to be common sense that workplace email communications naturally fit within the business records exception of the hearsay rule. That assumption would, however, be incorrect. While the hearsay exception for records of a regularly conducted activity has been held to encompass business emails in certain circumstances, the exception has not been held to apply to all email correspondence made in the regular course of business.

At its core, the business records exception allows for admission of records made (1) at or near the time of the act or event described in the record by someone with personal knowledge of the act or event, (2) in the regular course of business, and (3) as a regular part of the recorded activity.[17] Routine record-keeping activities such as monthly inventory reports or daily sales logs are examples of records that fall squarely within the exception.[18] An important rationale for their admissibility is the assumption that records containing information needed for the efficient operation of a business are intrinsically accurate and trustworthy.[19] Email has not historically satisfied this test. In *Monotype Corp. PLC v. International Typeface Corp.*, the Ninth Circuit affirmed the trial court's exclusion of an email sent by an employee to his superior, which according to the proponent of the evidence was kept in the regular course of business.[20] In its opinion, the court distinguished the email from a bookkeeper's monthly inventory records and held that the use of email was not a similarly systematic business activ-

ity.[21] Moreover, the fact that an employee has the routine practice of drafting an email to memorialize regular daily activities may not be sufficient for admissibility.[22]

Of course, a lot has changed in the twenty years since the Ninth Circuit decision in *Monotype Corp. PLC*. Recognizing, however, that the practice of generating and systematically retaining email varies considerably from business to business, courts have not taken the position that all emails are admissible business records. In *Rogers v. Oregon Trail Electric Consumers Cooperative, Inc.*, an Oregon district court judge recently adopted a test articulated by the Louisiana district court in a case arising from the Deepwater Horizon oil spill.[23] Under this test, the proponent must establish, in addition to the other requirements noted above, that the email was sent or received pursuant to a policy or business duty to report or record the information within the email.[24] Applying this test, the court denied admission of emails memorializing disciplinary actions at issue in the case. The court emphasized the informal nature of email correspondence and distinguished it from more formal disciplinary memoranda which carry a stronger presumption of accuracy and reliability.[25] Yet, there has been some movement toward the admission of emails under the business records exception.[26] In *Volterra Semiconductor Corp. v. Primarion, Inc.*, for example, a California district court admitted an email, which included technical guidelines for a "flip chip technology" at issue in the case; without providing a detailed analysis, the court merely explains that the proponent of the email established the necessary foundation for admissibility at trial.[27]

It is important to note that the opponent of email evidence offered under the business records exception may still successfully prevent its admission by showing that the source of the email or the circumstances of its creation indicate a lack of trustworthiness.[28] For example, correspondence created in anticipation of litigation or containing errors or omissions revealed by reference to other admissible evidence may be deemed untrustworthy.[29] Its self-serving content is, however, not a sole basis for exclusion. Thus, the business records exception can potentially provide a means for admission of helpful email evidence. Once the proponent establishes that the email satisfies the business records exception's foundational requirements and withstands challenges to trustworthiness—it can be used at trial for any purpose.

What's on Your Mind?

In words are seen the state of mind and character and disposition of the speaker. – Plutarch

Email evidence can also be offered to establish a declarant's then-existing state of mind.[30] Admission of hearsay evidence under Rule 803(3) requires a showing that the declarant's state of mind is relevant, that the hearsay statement was made close in time to the thoughts or feelings expressed, and that there was little time for reflection.[31] Out-of-court statements describing a declarant's "intent, plan, motive, design, (or) mental feeling" are all admissible hearsay.[32] The state-of-mind exception rests in part on the notion that there is no greater authority on a person's thoughts and feelings than the person who experienced them.[33] In some cases, such evidence provides the best source of information to dispute an opponent's version of events or circumstantial evidence of a party's intent. Because jurors evaluate all evidence within the framework of a story or narrative to reach conclusions about the facts in a case and to ultimately decide "what happened," there is tremendous value in being able to present state-of-mind evidence.[34] There is a compelling argument that fair and objective outcomes are more likely when fact-finders have full access to competing narratives and can test which best fits the evidence presented.[35]

Admissibility of statements offered under Rule 803(3) is, however, restricted in several important ways. The rule expressly excludes admission of a "statement of memory or belief to prove the fact remembered or believed."[36] Thus, a statement that reflects what the declarant would have done had past circumstances been different or one that recalls the defendant's state of mind during an earlier event would be inadmissible.[37] In *Wilson v. Wilson*, for example, the court excluded a party's out-of-court statement that she would have divorced her former husband if she had known about his allegedly unauthorized transfers of assets to a revocable living trust.[38] Further, an expression of a person's state of mind that suggests forward-looking intent may be admissible to prove that the person later acted in accordance with the statement, but it would not be admissible if offered to support backwards-looking inferences about past actions or events.[39] The defendant in *United States v. Miller* came up against this limitation when he unsuccessfully tried to admit his own statement as evidence of his earlier state of mind.[40] Approximately two hours after making a confession to federal agents, he told another agent that he was uncertain whether or not he had admitted to unlawful conduct during his earlier interview. He sought to offer this later statement at trial as evidence of his fatigue and confusion from being questioned and to support an argument that his prior admission was unreliable. The court excluded the statement, holding that the passage of time was too great between his statement of confusion and his earlier admission. The gap in time gave the defendant an opportunity to fabricate his explanation, creating a risk that it misrepresented his state of mind at the time he made his earlier admission.[41]

Because statements offered to establish a party's own state of mind are intrinsically self-serving, they also carry added suspicion regarding trustworthiness. The rule itself is silent on this point, but courts have split on whether statements that otherwise fit the exception should be excluded based on concerns over the declarant's candor.[42] In *United States v. Di Maria*, the Second Circuit held that courts cannot exclude a statement that fits within the state-of-mind exception on the basis that it is self-serving. The defendant in *Di Maria* sought to admit a statement he made to law enforcement at time of his arrest to establish his belief that cigarettes in his possession were bootleg rather than stolen. The court disregarded the government's contention that the defendant's statement was "an absolutely classic false exculpatory statement," explaining that its truth or falsity was for the jury to decide. It concluded that admission of the defendant's statement was particularly important, however suspect it may be, "when the Government is relying on the presumption of guilty knowledge arising from a defendant's possession of the fruits of a crime recently after its commission."[43]

The Second Circuit's reasoning in *Di Maria* has not been universally adopted. In *United States v. Cianci*, for example, the First Circuit affirmed exclusion of the defendant's taped statements offered pursuant to Rule 803(3) based in part on an apparent lack of trustworthiness.[44] The defendant, former Mayor of Providence, Rhode Island, had been charged with more than three dozen counts related to an alleged public corruption scandal. During the course of the investigation, the defendant spoke to an undercover agent posing as a businessman who had contacted him to request a city contract. Referring the agent to another person in his administration, the defendant stated that "[n]o one will ask you for a thing" and "[if] anybody does . . . I'll . . . have him arrested."[45] The defendant argued that his statements, made during the period of time the charged conduct allegedly took place, reflected his state of mind and were admissible to prove his intolerance for corruption and his lack of criminal intent. The trial court excluded the statements, concluding that they applied at least in part to past acts of the defendant's administration and were "to a large extent 'self-serving' attempts to cover tracks already made."[46] The court's finding that the statements were not wholly contemporaneous with the conduct at issue was central to its determination that the statements were unreliable and should be excluded. In affirming the decision, the appellate court notes that "[s]uch observations are well-established grounds for non-admission."[47]

Because email is such a prevalent form of communication in our world today, it can be a great resource for establishing an individual's intent or for challenging circumstantial evidence of a culpable state of mind. Even with the limitations imposed on admissibility pursuant to Rule 803(3), email correspondence may offer a means for explaining a client's actions and for helping jurors construct a narrative that supports a more favorable theory of the case.

Point Counterpoint

Every truth has two sides; it is as well to look at both, before we commit ourselves to either. – Aesop

The exceptions described above allow for the affirmative presentation of email evidence, but evidence entered by an opposing party can also provide a trigger for admission of otherwise inadmissible hearsay. A party may, for example, introduce prior consistent statements to rebut cross examination that suggests the witness is providing false or misleading testimony.[48] Alternatively, admission of a written or recorded statement by one party may allow for introduction by an opposing party of another part of the same statement or another written or recorded statement "that in fairness ought to be considered at the same time."[49] When damaging email evidence is offered by an adverse party, these rules can provide effective means for giving the fact-finder a fuller picture and putting harmful evidence into context.

The first of these is Rule 801(d)(1)(B), which allows for admission of prior consistent statements. It applies when a witness is impeached on cross examination, raising questions about the credibility of their testimony. Counsel can then offer evidence regarding out-of-court statements made prior to the time that the supposed motive to lie arose to corroborate the witness's in-court testimony.[50] Importantly, the foundational requirements that the witness is first impeached by an express or implied charge of recent fabrication or improper motive and that the prior statement was made before the existence of the motive to fabricate are strictly applied.[51] When these situations do arise, emails can provide powerful documentary evidence that not only restores a key witness's credibility but also puts before the fact-finder evidence that may not otherwise be admissible.

Beneficial email evidence may also be admitted pursuant to the "opened door" rationale.[52] Though often confused with Rule 801(d)(1)(B), it is a separate but related doctrine that allows a party to introduce an entire out-of-court statement once an adversary introduces only a portion for purpose of impeachment.[53] This doctrine applies to both written and oral out-of-court statements offered as evidence at trial. Thus, for a witness impeached with a prior inconsistent statement, it is sufficient that the reminder of the document or statement from which the impeachment evidence was drawn has "significant probative force bearing on credibility apart from mere repetition" and "place[s] the inconsistencies . . . in a broader context, demonstrating that the inconsistencies were a minor part of an otherwise consistent account."[54] Unlike Rule 801(d)(1)(B), however, the witness need not be impeached "by an express or implied charge of recent fabrication or improper motive."[55] Thus, an entire email chain may be admissible if an opposing party uses only a portion for an impeachment purpose, thereby creating a misimpression regarding its significance.[56] An "opposing party may not pick and choose among prior statements to create an appearance of conflict and then object when this appearance is rebutted by means of a fuller version of the same prior statements."[57] Of course, only the remaining portion of the statement that clarifies or provides necessary context for the portion used for impeachment is admissible pursuant to the opened door rationale. Any other portion would only be admissible if it fit within another exception or if relevant for a purpose other than to prove the matter asserted.[58]

One final method for responding to an opponent who enters only a portion of an email into evidence is through the principle of completeness.[59] Admissibility pursuant to the principle of completeness is based on the "misleading impression created by taking matters out of context [and] the inadequacy of repair work when delayed to a point later in the trial."[60] "When one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is ipso facto relevant . . . ."[61] This rule functions similarly to the opened door rationale but differs in a few important ways. First, it is not limited to evidence offered for purposes of impeachment. Second, it can only be used for admission of written or recorded statements—a difference that does not affect admissibility of email evidence. Finally, courts will not generally admit evidence pursuant to the principle of completeness if it is otherwise inadmissible hearsay.[62] However, there is some authority to suggest that this limitation should not be strictly applied.[63] As the court in *United States v. Sutton* explains, "[the principle of completeness] can adequately fulfill its function only by permitting the admission of some other-

wise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously."[64]

Only through careful analysis of an opponent's exhibits, and a deep understanding of how they fit into the case as a whole, can counsel take full advantage of these exceptions to the hearsay rule. It is not enough to prepare only one's own presentation of evidence and witnesses. Counsel must also know what to expect from the opposition. By fully preparing, counsel can avoid missing an opportunity for getting helpful and otherwise inadmissible email evidence into jurors' hands and putting what may be construed as harmful evidence into a favorable context.

Conclusion

Because of the steady rise in the use of email and other electronic correspondence in our society, email evidence is becoming increasingly prevalent in the world of litigation. Trial counsel must devote considerable time and resources reviewing this data and analyzing its potential uses at trial. Getting an early start on what can be a monumental amount of information is essential, and identifying key email evidence is only the first step. When faced with a client's embarrassing or harmful emails, it can be particularly important to analyze and understand how the client's helpful email evidence may be admissible to place it into context. A firm grasp of the rules that apply to email evidence is vital for preparing a successful case and overcoming the so-called "self-serving" hearsay objection.

Endnotes

1 Credit to Toni Berres-Paul, Professor of Legal Analysis and Writing, at Lewis & Clark Law School.

2 Sharon D. Nelson & John W. Simek, *Churn That Bill, Baby! Overbilling in Law Firms*, Law Practice Magazine, September/October 2013.

3 *Id*.

4 Molly McDonough, DLA Piper: '*Churn that bill' email was 'inexcusable effort at humor*', ABA Journal, Mar. 27, 2013, http://www.abajournal.com/news/article/dla_piper_churn_that_bill_email_was_inexcusable_effort_at_humor.

5 Matthew Goldstein, *4 Accused in Law Firm Fraud Ignored a Maxim: Don't Email*, The New York Times, Mar. 6, 2014, http://dealbook.nytimes.com/2014/03/06/former-top-leaders-of-dewey-leboeuf-are-indicted.

6 *Id*.

7 Bernard Vaughan, *Former Dewey Law Firm Leaders Ask Judge to Dismiss Criminal Case*, Insurance Journal, July 15, 2014, http://www.insurancejournal.com/news/east/2014/07/15/334582.htm.

8 *Id*.

9 *See* Fed. R. Evid. 801(d)(2). Parallel citations in the Oregon Rules of Evidence to the Federal Rules of Evidence cited in this article can be found at ORS 40.010 et seq.

10 *See* Fed. R. Evid. 804(b)(3).

11 *See Williamson v. United States,* 512 U.S. 594 (1994).

12 *See Wright v. Swan,* 261 Or. 440, 447–48 (1972).

13 *Id*. at 451.

14 Fed. R. Evid. 802.

15 *See Chambers v. Mississippi,* 410 U.S. 284, 298 (1973).

16 For purposes of this article, it is assumed that the proponent of the email evidence is able to first authenticate it. Federal Rule of Evidence 901(a) requires only "evidence sufficient to support a finding that the item is what the proponent claims it is." An email may be authenticated by reference to its "appearance, contents, substance, internal patterns, or other distinctive characteristics." Fed. R. Evid. 901(b)(4).

17 Fed. R. Evid. 803(6).

The Oregon *Litigation Journal* is published three times per year by the Litigation Section of the Oregon State Bar, with offices located at 16037 S.W. Upper Boones Ferry Road, Tigard, Oregon 97224; mailing address: Post Office Box 231935, Tigard, Oregon 97281; 503-620-0222.

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18 *See Monotype Corp. PLC v. Int'l Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994).
19 *United States v. Miller,* 830 F.2d 1073, 1077 (9th Cir. 1987).
20 *Monotype Corp. PLC,* 43 F.3d at 450.
21 *Id*.
22 *See* 4 Christopher B Mueller & Laird C. Kirkpatrick, Federal Evidence § 8:79 (4th ed. 2014) (*citing Monotype Corp. PLC* for its conclusion that emails not "adapted to permanent and more systematic recordkeeping purposes" do not satisfy the "regular practice" requirement of the rule).
23 *Rogers v. Oregon Trail Electric Consumers Cooperative, Inc.,* 2012 U.S. Dist. LEXIS 65883, *24–27 (D. Or. May 8, 2012) (citing *In re Oil Rig "Deepwater Horizon"*, 2012 U.S. Dist. LEXIS 3406 (E.D. La. Jan. 11, 2012)).
24 *Id*.
25 *Id*. at *27–28.
26 *Id*. at *23–24 (citing cases in the Oregon and California district courts).
27 *Volterra Semiconductor Corp. v. Primarion, Inc.*, 2011 U.S. Dist. LEXIS 102295, *22 (N.D. Cal. Sept. 12, 2011).
28 Fed. R. Evid. 803(6)(E).
29 *See e.g., United States v. Olano,* 62 F.3d 1180, 1205–06 (9th Cir. 1995).
30 Fed. R. Evid. 803(3); *see also Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.,* 452 F. Supp. 2d 772 (W.D. Mich. 2006) (admitting email evidence to establish the declarant's confusion).
31 *United States v. Ponticelli,* 622 F.2d 985, 991 (9th Cir. 1980) *overruled on other grounds by United States v. Bright,* 730 F.3d 1255 (1984); *United States v. Emmert,* 829 F.2d 805 (9th Cir. 1987).
32 *Ponticelli,* 622 F.2d at 991.
33 *See id.* (noting that a declarant "presumably knows what his thoughts and emotions are at the time of his declarations").
34 S*ee Eleanor Swift, Narrative Theory, FRE 803(3),and Criminal Defendants' Post-Crime State of Mind Hearsay,* 38 Seton Hall L. Rev. 975, 980 (2008).
35 *Id*. at 983–84 (citing Justice Souter's opinion in *Old Chief v. United States*, 519 U.S. 172 (1997)). In *Old Chief,* the Court discusses the trial court's role in making evidentiary rulings and the importance of "an appreciation of the offering party's need for evidentiary richness and narrative integrity in presenting a case." 519 U.S. at 183.
36 Fed. R. Evid. 803(6)(E) (exception for statements that relate "to the validity or terms" of a declarant's will); *United States v. Sayakhom,* 186 F.3d 928, 937 (9th Cir. 1999) (holding defendant's "attempt to introduce statements of her belief (that she was not violating the law) to prove the fact believed (that she was acting in good-faith) is improper").
37 *See e.g., Wilson v. Wilson,* 224 Or. App. 360, 365–66 (2008).
38 *Id.*
39 *Shepard v. United States*, 290 U.S. 96, 104–06 (1933); *United States v. Miller,* 874 F.2d 1255, 1263–65 (9th Cir. 1989).
40 *Miller*, 874 F.2d at 1264.
41 *Id*.
42 *Compare United States v. Di Maria,* 727 F.2d 265 (2d Cir. 1984) (noting that only the business records and catch-all exceptions expressly include express language regarding trustworthiness) with *United States v. Cianci,* 378 F.3d 71 (1st Cir. 2004) and *United States v. Naiden,* 424 F.3d 718 (8th Cir. 2005).
43 *Di Maria,* 727 F.2d at 270–72.
44 *Cianci,* 378 F.3d at 105–07.
45 *Id*. at 105.
46 *Id*. at 106.
47 *Id*. at 106–07.
48 Fed. R. Evid. 801(d)(1)(B).
49 Fed. R. Evid. 106.
50 *United States v. Collicott,* 92 F.3d 973, 979 (9th Cir. 1996).
51 *Id*. (citing *Tome v. United States*, 513 U.S. 150 (1995)).
52 *Id*. at 979–80; see also *United States v. Payne*, 944 F.3d 1458, 1471, n. 12 (9th Cir. 1991).
53 *Collicott*, 92 F.3d at 980, n. 3.
54 *Payne*, 944 F.3d at 1471 (internal quotation omitted).
55 *Collicott*, 92 F.3d at 980, n. 5 (listing five main forms of impeachment: (1) prior inconsistent statements; (2) bias; (3) attacking witness's character for truthfulness; (4) attacking witness's perception or memory; and (5) contradicting witness's testimony).
56 Counsel should be mindful that email chains often contain hearsay within hearsay. Each layer of hearsay must independently fit within a hearsay exception to be admissible. Fed. R. Evid. 805.
57 *See Collicott,* 92 F.3d at 980–81 (quoting *United States v. Tarantino*, 846 F.2d 1384, 1411 (D.C. Cir. 1988)).
58 *Id*. at 981, n.8.
59 Fed. R. Evid. 106.
60 *Id*., Advisory Committee Notes.
61 *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153 (1988).
62 *Collicott*, 92 F.3d at 983.
63 *Id*. (citing *United States v. Sutton*, 801 F.2d 1346 (D.C. Cir. 1986)).
64 *Sutton*, 801 F.2d at 1368.

COMMENTS FROM THE EDITOR

"Winning Their Hearts"

Dennis P. Rawlinson, Miller Nash Graham & Dunn LLP


Dennis Rawlinson

Many believe that Cicero was one of the finest trial lawyers who ever lived. Cicero published six principles of persuasion, the first and foremost of which recognized the need to "move the mind and the heart" of the person or of the audience that you are trying to persuade. In other words, in order to persuade, you need to provide not only logic (appealing to the mind) but also emotion (appealing to the heart). Your call to action should be both reasonable and emotionally compelling.

So how does one move the hearts of judges? Of a panel of arbiters? Of 14 jurors, including 2 alternates?

1. Verbal Analogy

We know as trial lawyers that one of our objectives is to boil down our case into a simple theme and to be able to explain our case in a single sentence. This is a skill that requires practice, energy, and thoughtfulness. For example, Michael Tigar (who defended Terry Nichols in the federally prosecuted Oklahoma bombing case) summed up his defense of Nichols in a single sentence:

"Terry Nichols was building a life, not a bomb."

Tigar's skill in creating a simple theme that was easy to remember may have had a lot to do with Terry Nichols's receiving a life sentence rather than death like his coconspirator, Timothy McVey.

The masters, however, encourage us not only to reduce our case into a simple theme and explain our client's position in a single sentence but to reduce it to a verbal analogy. A verbal analogy is simply explaining our case using a simple, everyday occurrence that everyone can understand. The masters not only make the verbal analogy understandable but often enhance it with an "emotional anchor." This can be done by using poetry or an excerpt from literature, history, or the Bible.