When the Postman Beeps Twice: The Admissibility of Electronic Mail Under the Business Records Exception of the Federal Rules of Evidence

Anthony J. Dreyer

Recommended Citation

Available at: http://ir.lawnet.fordham.edu/flr/vol64/iss5/6
WHEN THE POSTMAN BEEPS TWICE:
THE ADMISSIBILITY OF ELECTRONIC MAIL
UNDER THE BUSINESS RECORDS EXCEPTION OF
THE FEDERAL RULES OF EVIDENCE

Anthony J. Dreyer*

INTRODUCTION

Imagine you are the plaintiff’s attorney in a copyright infringement suit. You allege that the defendant copied certain printing fonts owned by your client, and then sold them to a software manufacturer for use in their latest software package. During the discovery process, you learn that the software manufacturer routinely evaluates all the fonts it plans to use for potential copyright infringements. You also learn that most of the software manufacturer’s business records are computerized.

Accordingly, you subpoena the software manufacturer’s computer files in the hopes of finding support for your claim. In reviewing the files, you find the “smoking gun”—an internal electronic mail (“e-mail”)1 message from a manager whose job it was to review the defendant’s product and report her findings to her superior. In the message, the manager asserts that the fonts produced by the defendant are “strikingly similar” to your client’s. The e-mail, dated only two days before the software went into production, also lists a significant number of similarities between the two products.

You consider the impact of the e-mail on your case, and wonder how you may use this evidence in court. Because you wish to admit the e-mail for the truth of what it asserts—that the fonts share a number of striking similarities—you recognize that the e-mail’s admissibility will probably be challenged on the grounds that it is hearsay. Because the software manufacturer is not party to the suit, the e-mail is not admissible as an admission by a party opponent.2 You are confident, however, that you will be able to admit the e-mail under the business records exception to the hearsay bar.3 After all, the man-

---

1. As used in this Note, the term “e-mail” is broadly meant to encompass many different forms of electronically transmitted text. See infra notes 15-16 and accompanying text.
2. See Fed. R. Evid. 801(d)(2).
3. See Fed. R. Evid. 803(6). Rule 803(6) excludes from the hearsay bar: A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record,
ager's regular business duty was to review such products and report her findings to her superiors. Surprisingly, however, the judge may disagree and decline to admit the e-mail as a business record.4

E-mail use by individuals and businesses has transcended mere fad, and has become an inescapable element of modern communications. While the volume of mail delivered by the United States Post Office has risen five percent in the past seven years, business-to-business mail has dropped thirty-three percent over the same period.5 The Post Office acknowledges that much of that loss is due to e-mail and other forms of electronic communication.6 As corporate e-mail use increases, so too does the risk of liability from e-mail statements.7 The hypothetical above provides an example of the growing importance of e-mail evidence in litigation. As the illustration suggests, however, because e-mail messages are out-of-court statements, parties introducing them in court will often have to overcome the hearsay bar.8

Presently, no legislation specifically governs the admissibility of computer documents, let alone e-mail, in the United States Federal Courts.9 The Federal Rules of Evidence ("FREs") provide a general hearsay exception, however, allowing for the admission of business records.10 This exception extends to memoranda and correspondence,11 as well as to computerized records and data.12 The exception

or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Fed. R. Evid. 803(6) (emphasis added).

4. See Monotype Corp. v. International Typeface Corp., 43 F.3d 443 (9th Cir. 1994) (declining to admit e-mail messages under the business records exception to the hearsay bar). The facts of this hypothetical are loosely based on the Monotype case, which is discussed more fully in part II.A.2 below.

5. Suniel Ratan, Snail Mail Struggles to Survive, Time, Special Issue: Welcome to Cyberspace, Spring 1995, at 40.

6. Id.

7. See infra notes 29-34 and accompanying text.

8. See infra part I.D.

9. Kevin J. Kotch, Addressing the Legal Problems of International Electronic Data Interchange: The Use of Computer Records as Evidence in Different Legal Systems, 6 Temp. Int'l & Comp. L.J. 451, 459 (1993). As Kotch points out however, Congress has passed legislation making computer-based records admissible to prove electronic funds transfer transactions. Id. at 459 n.71. Under the Electronic Fund Transfer Act, "For each electronic fund transfer initiated by a consumer from an electronic terminal, the financial institution holding such consumer's account shall, ... at the time the transfer is initiated, make available to the consumer written documentation of such transfer." 15 U.S.C. § 1693d(a) (1994). Section 1693d further provides that "In any action involving a consumer, any documentation required by this section to be given to the consumer which indicates that an electronic fund transfer was made to another person shall be admissible as evidence of such transfer and shall constitute prima facie proof that such transfer was made." Id., § 1693d(f) (emphasis added).


11. See infra part II.D.

12. See infra part II.C.
ADMISSIBILITY OF ELECTRONIC MAIL

also has been applied to other forms of electronic communications, such as telex messages. Uncertainty exists, however, as to whether e-mail constitutes a business record under FRE 803(6). While some courts recognize the admissibility of e-mail under the business records exception, others have held that e-mail does not meet the requirements of FRE 803(6).

This Note examines the admissibility of e-mail under the business records exception to the hearsay bar, FRE 803(6). More specifically, this Note argues that e-mail is a hybrid of computer-based records and correspondence, both of which may be admitted under FRE 803(6). Accordingly, e-mail should be admissible under FRE 803(6) as long as the particular message satisfies the requirements of the Rule.

Part I of this Note discusses the use and characteristics of e-mail and then explores changes in the legal landscape brought on by the e-mail revolution. Part II describes the hearsay bar under FRE 802, as well as the business records exception under FRE 803(6). Part II also examines the application of FRE 803(6) to computer-based records and traditional paper memoranda, two analogues of e-mail. Part III analyzes the application of FRE 803(6) to e-mail evidence. While acknowledging that not all e-mail messages would necessarily qualify as business records under FRE 803(6), part III argues that e-mail, as it is used by many organizations, meets the explicit requirements of FRE 803(6) and satisfies the policies behind the Rule. This part urges courts analyzing e-mail under FRE 803(6) to focus on the content of the document and on the context of its preparation, and not merely on the medium used to transmit document. This Note concludes that the business records exception is broad enough to encompass e-mail communications. Because of courts' confusion about e-mail systems, however, a change in the FREs is necessary to provide a clear mandate as to the appropriate treatment of e-mail evidence, and to emphasize that the medium itself is capable of supporting systematic recordkeeping activities. Until this happens, courts will likely continue to struggle in their interpretation and application of FRE 803(6), resulting in inconsistent treatment of the admissibility of electronic communications.

I. The E-mail Revolution

While some may think of e-mail merely as a message system, e-mail has a wide range of applications in modern business practice. As businesses' use of e-mail has expanded, interesting new issues have arisen concerning e-mail and its use in the legal arena.

13. See infra part III.A.1.
A. Widespread Use of E-mail

E-mail has been defined as "[a] document created or received on an electronic mail system including brief notes, more formal or substantive narrative documents, and any attachments, such as word processing and other electronic documents, which may be transmitted with the messages." 15 An electronic-mail system is "[a] computer application used to create, receive, and transmit messages and other documents." 16

Some observers consider e-mail to be the fastest growing method of electronic communication in business today. 17 Employees of most large companies and law firms currently use e-mail as part of their daily communications routine. 18 The following statistics illustrate the magnitude of e-mail use:

In the United States today, there are close to 20 million electronic mail ("[e]-mail") users, more than half of whom went on line since 1990. It is projected that there will be more than 40 million [e]-mail users nationwide by the year 2000. These [projected] 40 million [e]-mail users will be sending an estimated 60 billion messages annually. The [e]-mail explosion has had a huge impact on business as well. Today, 90 percent of all companies with more than 1,000 employees use [e]-mail. 19

Exactly what percentage of e-mail use is "business-related," is unclear; estimates suggest, however, that the computerized workforce totals nearly forty million. 20

With the expansion of the Internet 21 and other commercial on-line providers such as Prodigy and America Online, 22 e-mail use is sure to

16. Id.
17. Laurie Thomas Lee, Watch Your E-mail! Employee E-mail Monitoring and Privacy Law in the Age of the "Electronic Sweatshop," 28 J. Marshall L. Rev. 139, 139 (1994).
21. The Internet is a global network connecting vast numbers of computer networks together. G. Burgess Allison, At the Edge of the E-Frontier—An Introduction to the Internet, Pa. Law., Sept.-Oct. 1995, at 12, 13. "It links together the massive online service bureaus, such as CompuServe, Prodigy and America On-line. It links together hundreds of thousands of universities, government agencies and corporations located in almost 100 countries around the world." Id. The number of Internet users has nearly doubled each year since the mid-1980's; as of 1995, between 30 and 40 million people had access to the Internet. Phillip Elmer-DeWitt, Welcome to Cyberspace, Time, Special Issue: Welcome to Cyberspace, Spring 1995, at 9.
22. America Online provides private e-mail accounts, as well as Internet access, for more than 4.5 million subscribers. Kelly Heyboer, Clue to Bizarre Murder May Lie Within E-mail, The Star Ledger, Jan. 31, 1996, at 1, 9.
grow exponentially. These “computer networks operate as electronic post offices . . . allow[ing] users to communicate with one another via electronic mail.”\(^2\) The growth of these networks has also created a new working environment. An estimated three million employees of United States companies “telecommute,” working from home or other remote locations via computer and modem.\(^2\) Such devices allow outside users to connect directly to a company’s e-mail network. These technological advances have created a new type of “virtual office,” where paper records have disappeared, and documents once stored in filing cabinets are now stored electronically.\(^2\)

As this information suggests, e-mail, unlike its electronic predecessor—the telex\(^2\)\(^6\)—encompasses more than simple messages between two parties.\(^2\)\(^7\) In today’s modern business setting, e-mail messages may include status reports, inventory lists, minutes of meetings, drafts of documents, business strategies, or records of important business decisions.\(^2\)\(^8\) This growth, however, is not without its disadvantages. Analysts agree that e-mail may potentially expose a party to a legal liability.\(^2\)\(^9\) Because of e-mail’s informal nature and perceived impermanence, people often use it to send messages that may be inappropriate or too candid to “put in writing.”\(^2\)\(^\text{30}\) Ideas are recorded, business


\(^{24}\) Leon Jaroff, Age of the Road Warrior, Time, Special Issue: Welcome to Cyber-space, Spring 1995, at 38. Jaroff notes that the number of telecommuters increases roughly 20% each year, and that the rate will likely accelerate with technological advances. Id.

\(^{25}\) Id.

\(^{26}\) A telex is “a communication service involving teletypewriters connected by wire through automatic exchanges.” Merriam-Webster’s Collegiate Dictionary 1212 (10th ed. 1995). Telex messages are transmitted in a fashion similar to e-mail messages. A sender uses a teletypewriter to enter the message, which is then transmitted electronically to its recipient. See Richard A. Kuehn, Cost-Effective Telecommunications 50-51 (1975).

\(^{27}\) Telex messages differ from e-mail messages in three significant ways: they normally require a telex operator to type and send the message; they are transferred messages at a slower rate because of technological limitations; and they generally must be printed out and hand delivered to their ultimate recipient. See id. at 51-52.


\(^{29}\) See Morris, supra note 19, at 574; Jaroff, supra note 24, at 38.

\(^{30}\) Heidi L. McNeil & Robert M. Kort, Discovery of E-mail and Other Computerized Information, Ariz. Att’y, Apr. 1995, at 16, 16; see also Joey Frazier, Electronic Sleuthing: John Jessen’s Evidence Discovery Enterprise, Law. FC, Aug. 15, 1993, at 1 (“In some cases, documents or memos may be stored only electronically, never printed, because of their sensitive nature.”); Goldstein, supra note 18, at 5 (“Employees and employers say things in an e-mail message that they would never dare to put in a written memorandum.”). In what may be considered an extreme example of the sensitivity of e-mail postings, members of the National Security Council were found to
decisions are made, and plans are implemented, all within the environment of electronic mail. As a result, e-mail often provides insight into "corporate knowledge and behavior." Because courts have upheld e-mail discovery requests, e-mail messages can, and have, become fodder for legal action.

Because of e-mail's unique qualities, courts and scholars alike have debated the manner in which courts should treat e-mail evidence. Some commentators liken it to a telephone conversation, while others argue that it should be treated like written correspondence. Some fear that many judges are ill-equipped to decide e-mail issues because they lack the technical understanding of how e-mail systems work.

B. E-mail's Unique Characteristics

E-mail does indeed differ from more traditional forms of communication. Most e-mail systems can create a complete record of the communication, capturing the exact text that users send and receive. This eliminates the possibility of misperception and faded memory—problems which often plague traditional conversations—when the e-mail is recalled at a later date. Additionally, e-mail records usually store information regarding their transmission and receipt. This may include the names of the sender and recipient(s), the date and time that the messages were sent and received, and an acknowledgment that the e-mail was retrieved. This information "may be 'of tremendous ... value in demonstrating what ... personnel were involved in

have used e-mail to "relay lengthy substantive—even classified—'notes.'" Armstrong v. Executive Office of the President, 1 F.3d 1274, 1279 (D.C. Cir. 1993).


33. See infra part I.C.4.

34. See infra part I.D.

35. See, e.g., Leslie Helm, The Digital Smoking Gun: Mismanaged E-Mail Poses Serious Risks, Experts Warn, L.A. Times, June 16, 1994, at D1 ("'It's a substitute for a phone call . . . .'").

36. Miranda Ewell, E-mail: Is the Boss Peeking?, San Jose Mercury News, Apr. 18, 1994, at 12A.

37. See id.; see also Middleton, supra note 32, at 40 (noting that "judges need to become more sophisticated about electronic media").


40. Id. In the context of federal e-mail, this information would greatly aid "researchers and investigators studying the formulation and dissemination of significant policy initiatives at the highest reaches of our government." Armstrong, 1 F.3d at 1285.
making a particular policy decision and what officials knew, and when they knew it.”

Compared to paper communications, e-mail is a more permanent medium. Paper documents can be shredded or discarded, but destroying e-mail is more difficult. People mistakenly assume that e-mail can be removed from computer storage by simply pressing the “DELETE” key or some similar device. Even if a user deletes a message from her machine, however, most e-mail systems store messages on a centralized backup file for an indefinite period of time. As one commentator noted, “[I]t is relatively easy to retrieve an erased or deleted e-mail message from most computer data bases.” These mainframe backups also make archiving and retrieving e-mail records much easier than their paper counterparts. E-mail also differs from traditional paper correspondence in that it can be sent instantly via electronic networks without need for manual delivery or third-party intervention. In short, e-mail provides a more detailed, more permanent, and more complete record than traditional correspondence.

C. The Effect of E-mail on the Legal Landscape

As e-mail use has become more prevalent in business and personal use, law enforcement officials, legislators, and attorneys alike have begun to recognize its value. Consequently, new legal issues with respect to e-mail are cropping up every day.

1. Law Enforcement Use

E-mail has helped law enforcement officials collect evidence for subsequent arrests. In September of 1995, for example, FBI Agents used e-mail to aid in a nationwide child pornography sting. Agents used e-mail wiretaps and posed as prospective buyers of pornographic material, soliciting information via e-mail. The Secret Service employed similar tactics to arrest six members of an illegal cellular phone ring. In Germany, officials are closely monitoring the e-mail of Neo-Nazi groups in the hopes of uncovering illegal activity. New Jersey Police recently seized records of private e-mail from America Online

41. Id. (citation omitted).
42. See McNeil & Kort, supra note 30, at 18. While the average time that e-mail systems store data varies, these systems are capable of storing thousands, even millions of e-mail messages. See infra notes 320-21 and accompanying text.
43. Goldstein, supra note 18, at 1, 5.
44. McNeil & Kort, supra note 30, at 16.
46. Id. at A1, A8.
to be used as potential evidence in a murder case.\textsuperscript{49} Police say the suspect and his victim met in a public "chat room" on America Online and continued to communicate through private e-mail on the system.\textsuperscript{50} Officials hope to use the e-mail to establish a link between the two men.\textsuperscript{51} These examples underscore the potential for criminal liability that may arise directly or indirectly from e-mail postings.\textsuperscript{52}

2. Changes (and Near Changes) in Federal Legislation

The growth of e-mail use by businesses and individuals has led to new legislation by Congress. These changes include a ban on certain e-mail messages, as well as prohibitions on e-mail interception. While the ramifications of these changes have yet to be realized fully, e-mail and e-mail evidence will apparently play an increasing role in federal litigation.

On February 8, 1996, Congress approved the Telecommunications Act of 1996.\textsuperscript{53} Title V of the Act contains the Communications Decency Act, which prohibits the transmission of certain offensive communications.\textsuperscript{54} The Act bans users of any interactive computer service from displaying "any comment, request, suggestion, proposal, . . . or other communication that, in context, depicts or describes, in terms patently offensive . . . sexual or excretory activities."\textsuperscript{55} The Act similarly prohibits the transmission of comments or other communications which are obscene or indecent, if the recipient is known to be a minor.\textsuperscript{56} Violation of these provisions constitutes a felony.\textsuperscript{57}

Immediately after the Act was passed, the American Civil Liberties Union challenged the constitutionality of the Act.\textsuperscript{58} The Eastern District of Pennsylvania enjoined the Justice Department from enforcing the indecency provisions of the Act, but allowed enforcement of the

\textsuperscript{49} Heyboer, supra note 22, at 1.
\textsuperscript{50} \textit{Id}.
\textsuperscript{51} \textit{Id}.
\textsuperscript{52} Examples of e-mail monitoring and acquisition such as those discussed here have caused many commentators to reexamine Fourth Amendment and right to privacy issues in light of e-mail. See Lee, supra note 17; Joel R. Reidenberg & Francoise Gamet-Pol, \textit{The Fundamental Role of Privacy and Confidence in the Network}, 30 Wake Forest L. Rev. 105 (1995). These concerns have prompted legislation designed to regulate e-mail monitoring by federal and private sources. See infra notes 61-65 and accompanying text.
\textsuperscript{54} \textit{Id.} §§ 501-502.
\textsuperscript{55} \textit{Id.} § 502.
\textsuperscript{56} \textit{Id}.
"patently offensive" provisions, pending further judicial determination. While the status of the Act remains unclear, if it is allowed to stand, federal courts will undoubtedly face an increase of e-mail evidence in litigation.

E-mail has forced Congress to revisit privacy issues as well. In 1986, Congress passed the Electronic Communications Privacy Act ("ECPA"). The ECPA protects electronic communications on public networks from illegal wiretapping. While the Act does not explicitly encompass e-mail, the legislative history clarifies that the term "electronic communications" as used in the statute also includes e-mail. While the ECPA protects individuals from e-mail monitoring by federal agents, no analogous protection exists for e-mail monitoring in the private sector. In 1993, Senator Paul Simon (D-Ill.) and Representative Pat Williams (D-Mont.) sought to remedy this incongruity by introducing the Privacy for Consumers and Workers Act. Among the proposed measures of the bill was a provision that would require employers to notify employees if their e-mail was about to be monitored.

3. Mandatory Public Access to Federal E-mail

The e-mail revolution also has forced the federal government to re-examine its recordkeeping procedures. In Armstrong v. Executive Office of the President, a group of researchers and nonprofit organizations sought to prevent the deletion of e-mail records created

59. Id.
60. Some members of the Congress are already seeking to repeal parts of the Communications Decency Act. See 142 Cong. Rec. at S1180.
63. See S. Rep. No. 541, 99th Cong., 2d Sess. 14 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3568. In outlining the types of communications protected by the ECPA, the Senate noted: "[A] communication is an electronic communication protected by the federal wiretap law if it is not carried by soundwaves . . . . Communications consisting solely of data . . . are electronic communications. This term also includes electronic mail." Id.
65. See 139 Cong. Rec. at E1077. In stressing the urgent need for the proposed legislation, Senator Simon cited the case of an Epson Computer administrator who was fired for refusing to monitor employee e-mail. 139 Cong. Rec. at S6123. The bill met strong resistance from both business lobbies and the Republican Congress. See Abdon M. Pallasch, Company Policies to Monitor E-mail Licking Edge of Electronic Envelope, Chi. Law., Aug. 1995, at 4. Ultimately, Senator Simon "decided to shelve the bill indefinitely." Id.
66. 1 F.3d 1274 (D.C. Cir. 1993).
during the Reagan Administration. Plaintiffs argued that e-mail records should receive the same protection as paper-based records under the Federal Records Act ("FRA"). The D.C. Circuit agreed, holding that "substantive e-mail communications satisfy the FRA definition of 'records.'" Accordingly, the court held that e-mail records, including their transmittal information, should be stored.

4. Changes in Discovery Practices

As United States government and businesses continue to computerize their operations, electronic media discovery is playing an increasing role in nearly every type of lawsuit, from products liability and trade secret claims to personal injury cases. One electronic discovery expert notes: "Twenty to thirty percent of information stored electronically is never printed, so this information could not be found in paper discovery." The Manual for Complex Litigation advises: "At the outset of the litigation the court should inquire into the existence of computerized data and processes for its retrieval."

While the Federal Rules of Civil Procedure ("FRCPs") do not explicitly allow for discovery of e-mail, they do state more generally that electronically-stored data is discoverable. Rule 34(a) broadly subjects "data compilations" to discovery. Commentators have argued that the term data compilation applies to documentary information stored

67. Id. at 1277.
68. Id. at 1278. The FRA is codified at 44 U.S.C. §§ 2101-2188, 2501-2506, 2901-2909, 3101-3107, 3301-3324 (1988). The goal of the FRA is to ensure the "[a]ccurate and complete documentation of the policies and transactions of the Federal Government." 44 U.S.C. § 2902(1) ("If a document qualifies as a record, the FRA prohibits an agency from discarding it by fiat." Armstrong, 1 F.3d at 1278 (citation omitted)).
69. Id. at 1287.
70. Id. at 1285, 1287 ("In our view ... the practice of retaining only the amputated [absent transmittal information] paper print-outs is flatly inconsistent with Congress' evident concern with preserving a complete record of government activity for historical and other uses.").
71. Middleton, supra note 32, at 1, 40 (noting that electronic discovery is "becoming increasingly critical in almost every kind of lawsuit" and that "whether it is e-mail or another form of electronic information, electronic discovery is likely to become increasingly commonplace within the next few years").
73. Manual for Complex Litigation § 21.446 (2d ed. 1985). The rise in computerized discovery is underscored by the recently formed Electronic Evidence Discovery, Inc., a private investigation firm specializing in retrieving electronic data for litigation. See Frazier, supra note 30, at 1. EED has more than 1600 programs at its disposal for use in electronic data retrieval. Id. at 3.
on disks, recording tapes, and computer banks,\textsuperscript{75} as well as to e-mail.\textsuperscript{76} To date, at least one federal court has agreed. In \textit{In re Brand Name Prescription Drugs Antitrust Litigation,}\textsuperscript{77} the United States District Court for the Northern District of Illinois indicated that "e-mail is discoverable."\textsuperscript{78} The frequent inclusion of e-mail in discovery requests lends further support to this conclusion.\textsuperscript{79}

Under the FRCPs, federal courts have authority to enforce e-mail discovery requests.\textsuperscript{80} The district court in \textit{Prescription Drugs} upheld an e-mail discovery request even though it forced the defendant to turn over some thirty million pages of e-mail.\textsuperscript{81} At least one state court also has issued a motion to compel production of e-mail

\begin{itemize}
\item \textsuperscript{75} See, e.g., Ronald L. Plesser & Emilio W. Cividanes, \textit{Discovery and Other Problems Related to Electronically Stored Data and Privacy}, 415 PLI/Pat 277, 277 (1995), available in Westlaw ("FRCP Rule 34(a) broadly subjects words, and documentary information stored on . . . disks, recording tapes and computer banks to discovery . . .").
\item \textsuperscript{76} See Goldstein, \textit{supra} note 18, at 5 ("A number of computer savvy attorneys say e-mail is a particularly good source of discovery . . ."); Michael Traynor, \textit{E-mail Authentication is Key}, Nat'l L.J., Aug. 1, 1994, at B9 ("E-mail is a potentially attractive source of discovery . . .").
\item \textsuperscript{77} Nos. 94 C 897, MDL 997, 1995 WL 360526 (N.D. Ill. June 15, 1995) (mem.).
\item \textsuperscript{78} Id. at *1.
\item \textsuperscript{79} McNeil & Kort, \textit{supra} note 30, at 16 (stating that "[a] majority of litigants seeking discovery from a company these days will carefully frame a document request to include the production of e-mail"); Morris, \textit{supra} note 19, at 585 ("It is now commonplace for a party to demand production of [e]-mail in discovery proceedings."); Jean Marie R. Pechette, \textit{Electronic Records are Discoverable in Litigation}, Nat'l L.J., June 27, 1994, at C8 (listing e-mail in a checklist of electronic records to include in discovery requests). For an example of a typical e-mail discovery request, see Baggott v. Secretary of Dep't of Health & Human Servs., No. 90-2214V, 1992 WL 79987, at *8 (Cl. Ct. Apr. 2, 1992).
\item \textsuperscript{80} Under the Federal Rules of Civil Procedure, a party whose discovery requests are not met may seek a "Motion to Compel" discovery. Fed. R. Civ. P. 37(a). Courts may impose sanctions on parties who fail to comply with discovery orders. Fed. R. Civ. P. 37(b)(2). Permissible sanctions include fines, foreclosure of the use of certain claims or defenses, or default judgment. \textit{Id.; see also infra} notes 83-84 and accompanying text.
\item \textsuperscript{81} \textit{Prescription Drugs}, 1995 WL 360526, at *1.
\end{itemize}
records. Failure to comply with such e-mail requests could ultimately lead to sanctions or an unfavorable decision in the case.

Not only is e-mail discoverable, but parties to pending litigation may be required to turn over e-mail messages relevant to the case absent any specific e-mail request. Under FRCP 26(a), parties must disclose, before discovery and within a few months of commencement of the litigation, categories of all documents and data compilations that are "relevant to disputed facts alleged with particularity in the pleadings."

D. General Use of E-Mail in Federal Courts

Although e-mail is obtainable through discovery, there is no guarantee that it will be admissible in federal court. Nonetheless, a survey of recent civil and criminal cases indicates that e-mail evidence has indeed found its way into federal courts. While not all of the cases below involve hearsay e-mail evidence, they underscore the fact that e-mail is proving as useful in the courtroom as it is in the workplace.

82. IBM v. Comdisco, Inc., C.A. No. 91-C-07-199, 1992 Del. Super. LEXIS 67, at *9 (Mar. 11, 1992). In Comdisco, the defendant sought to obtain through discovery, an e-mail message sent from an IBM manager to an IBM account representative. Id. at *1-2. IBM countered that the e-mail was covered by the attorney/client privilege since it relayed legal advice from IBM's corporate counsel. Id. The court held that portion of the e-mail was covered by the privilege and thus not discoverable. Id. at *4, 9. The court did find, however, that "[a] portion of the [e-mail] communication at issue here was clearly intended to be disclosed to persons outside the [attorney/client] confidentiality . . . and should be produced." Id. at *3-4. Accordingly, the court granted Comdisco's motion to compel production of part of the e-mail message. Id. at *4.

83. See Crown Life Ins. Co. v. Craig, 995 F.2d 1376, 1382, 1384 (7th Cir. 1993) (upholding sanctions for failure to comply with discovery order requiring production of computer data). Sanctions were also used in Armstrong v. Executive Office of the President, 821 F. Supp. 761, 773 (D.D.C. 1993). To ensure that defendants would comply with the court's order to restore backup tapes of e-mail records, the D.C. District Court threatened fines of $50,000 per day, to be doubled in subsequent weeks. Id. Fortunately for the defendants, these sanctions were later vacated by the D.C. Circuit. Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289-90 (D.C. Cir. 1993).

84. See generally Carlucci v. Piper Aircraft Co., 102 F.R.D. 472 (S.D. Fla. 1984) (entering judgment for plaintiff and imposing an attorney sanction because the defendant destroyed records), aff'd, 775 F.2d 1440, 1454 (11th Cir. 1985) (upholding sanctions, but remanding "so that the district court may create a record accounting for" the amount of the sanction).

85. FRCP 26(a)(1) provides that parties to litigation "shall, without awaiting a discovery request, provide to other parties . . . (B) a copy of, or a description by category and location of, all . . . data compilations . . . in the possession, custody or control of the party that are relevant to the disputed facts alleged with particularity in the pleadings." Fed. R. Civ. P. 26(a)(1).


87. The standard for discovery is more liberal than the admissibility standard. To be discoverable, evidence need not be admissible, so long as it is reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1).
1. Employment Law Cases

Because of e-mail's increased usage in the workplace, more and more employment law cases turn on some form of e-mail evidence. In Aviles v. McKenzie, the plaintiff, a lab technician, used an e-mail message to show that he was wrongfully discharged for his whistleblowing activities. To establish his status as a whistleblower, plaintiff introduced e-mail messages in which he reported "unsafe and illegal practices" to his superiors. In the e-mail messages, plaintiff detailed the improper calibration of certain instruments and the lack of proper supervision in other departments. The court found that the e-mail messages, coupled with other evidence, provided persuasive proof of wrongful discharge, and thus rejected defendant's summary judgment motion.

E-mail evidence also played a key role in Strauss v. Microsoft Corp., another employment law case. In Strauss, the plaintiff brought action against Microsoft for sexual discrimination in the workplace. As part of her case, plaintiff offered four separate e-mail messages sent by her supervisor, each containing sexually suggestive remarks. On two separate occasions, the Strauss court used the e-mail evidence to deny defendant's motion for summary judgment. The court noted that the e-mail messages "could lead a reasonable jury to conclude that, not only was Microsoft's reason for its [firing] pretextual, but also that it failed to promote Strauss as a result of gender discrimination."

Finally, in Boone v. Federal Express Corp., the plaintiff offered e-mail as proof that Federal Express conspired to discriminate against him by refusing to train or promote him. The e-mail messages consisted of discussions regarding plaintiff's employment and retraining. Although the content of the messages did not provide

88. See Morris, supra note 19, at 574.
90. Id. at *2-3, 10.
91. Id. at *10.
92. Id.
93. Id.
94. Id.
95. No. 91 Civ. 5928, 1995 WL 326492, at *5 (S.D.N.Y. June 1, 1995) (denying defendant's motion in limine to exclude e-mail evidence).
96. Id. at *1.
100. 59 F.3d 84 (8th Cir. 1995).
101. Id. at 87.
102. Id.
sufficient support for plaintiff's claim, the court did consider the e-mail evidence.\textsuperscript{103}

2. Criminal Trials

E-mail has found its way into criminal courts as well.\textsuperscript{104} In \textit{Allen v. State},\textsuperscript{105} the defendant was charged with the first-degree murder of his wife.\textsuperscript{106} To establish motive, the prosecutor attempted to show that the defendant had been unfaithful to his wife and that their relationship had deteriorated significantly.\textsuperscript{107} As part of that proof, the prosecutor introduced e-mail messages between the defendant and his secretary, in which the defendant discussed the "most intimate" of his marital problems.\textsuperscript{108} The trial court admitted the e-mail evidence and the defendant was found guilty of murder.\textsuperscript{110} Upon review, the Oklahoma Court of Criminal Appeals, pointing to the defendant's prior affair with his secretary, held that the e-mail messages were admissible as proof of defendant's motive for killing his wife.\textsuperscript{111}

3. Defendants' Use of Electronic Communications

Prosecutors or plaintiffs are not the only litigants to use e-mail evidence; defendants also have used e-mail and other electronically communicated messages to establish a defense. In \textit{United States v. Kim},\textsuperscript{112} the defense offered telex evidence to rebut a charge of conspiracy to defraud the United States.\textsuperscript{113} E-mail served a similarly exculpatory function in \textit{Plymouth Police Brotherhood v. Labor Relations Commission}.\textsuperscript{114} There, the Plymouth Police Department was accused of improperly suspending an officer because he was a union president.\textsuperscript{115} The defense countered that the officer was suspended for insubordination, and for conduct unbecoming a police officer.\textsuperscript{116} In support of its

---

\textsuperscript{103} Id.

\textsuperscript{104} Use of hearsay e-mail in a criminal case may run afoul of the Confrontation Clause of the Sixth Amendment, which affords a criminal defendant the right to be "confronted with the witnesses against him." U.S. Const. amend. VI. Courts, however, have held that admitting hearsay under the business records exception does not violate the Sixth Amendment if the accused has the opportunity to cross-examine the custodial witness. See United States v. Norton, 867 F.2d 1354, 1363 (11th Cir.), cert. denied, 491 U.S. 907 (1989); United States v. Peden, 556 F.2d 278, 281 (5th Cir.), cert. denied, 434 U.S. 871 (1977).


\textsuperscript{106} Id. at 489.

\textsuperscript{107} Id. at 491.

\textsuperscript{108} Id.

\textsuperscript{109} Id.

\textsuperscript{110} See id. at 491, 493.

\textsuperscript{111} Id. at 491.

\textsuperscript{112} 95 F.2d 755 (D.C. Cir. 1979).

\textsuperscript{113} Id. at 759.

\textsuperscript{114} 630 N.E.2d 599 (Mass. 1994).

\textsuperscript{115} Id. at 600.

\textsuperscript{116} Id. at 599.
claim, the defense offered an e-mail message sent by the suspended officer to fellow patrolmen. In the message, the officer referred to town officials as "pigs, cheats, [and] liars." The court found it significant that the defendant "sat at a computer terminal, and, with time to reflect on his statements, transmitted demeaning comments over the police department's computer network to fellow employees." Thus, as a direct result of the e-mail evidence, the court affirmed the dismissal of the charges against the police department.

4. Challenges to Admissibility

The cases above illustrate the impact e-mail evidence can have on a trial. As a result, opposing parties have attacked e-mail's admissibility on various grounds. In Strauss, for example, the defendant used FREs 401, 402, and 403 in an attempt to block the admission of damaging e-mail messages. Defendants argued that the messages were "irrelevant, unfairly prejudicial to Microsoft and would confuse and mislead the jury." The court disagreed, finding that the e-mail evidence offered by the plaintiff was relevant to show pretext for failing to promote the plaintiff, and that any prejudicial effect the e-mail might have did not outweigh its probative value on the issue of pretext.

Although all evidence must satisfy the requirements of FREs 402 and 403, e-mail evidence may face an additional challenge. E-mail, by definition, is an out-of-court statement; therefore, if e-mail evidence is offered for the truth of what it asserts, it is likely to face an objection on the grounds that it constitutes hearsay.

117. Id. at 599-600.
118. Id. at 600 n.2.
119. Id. at 602.
120. Id.
121. FRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.
122. Under FRE 402, "Evidence which is not relevant is not admissible." Fed. R. Evid. 402.
123. FRE 403 gives judges discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403.
125. Id.
126. Id. at *4-5.
127. Although e-mail is in written form, a "statement" under the Federal Rules of Evidence may be an "oral or written assertion." Fed. R. Evid. 801(a).
128. See Kotch, supra note 9, at 458-59 (noting that one of "the most specific barriers to the admissibility of computer records [is] the hearsay rule"); infra note 149. Note that not all proponents of e-mail evidence seek to use the content of message in a hearsay fashion. For example, in Aviles v. McKenzie, No. C-91-2013-DLJ, 1992 WL 71524 (N.D. Cal. Mar. 17, 1992), the e-mail was not introduced to prove that the
e-mail demonstrate the types of additional hurdles courts may place in the way of admitting e-mail evidence.

In Michaels v. Michaels, plaintiff sought to prove that the defendants were secretly using a broker to liquidate the assets of their fledgling company. Plaintiff’s primary evidence consisted of three telex messages between the broker and the defendants detailing the broker’s attempts to liquidate part of the company. The defendants countered that the telex messages constituted inadmissible hearsay evidence because the plaintiff offered them to prove that the defendants were attempting to liquidate the company’s assets. The court found that two of the messages were indeed hearsay; while the court ultimately admitted one under a hearsay exception, it found that the other did “not [fit] within any exception” and was thus inadmissible.

In United States v. Kim, a telex message contained a bank employee’s statement regarding the bank’s records of a deposit. The court found that the message was an out-of-court statement, which was being offered to prove the truth of what it asserted—that the defendant made the deposit, and that bank records confirmed the transaction. Similarly in Monotype Corp. v. International Typeface Corp., the Ninth Circuit affirmed the trial court’s refusal to admit an e-mail message on hearsay grounds.

Michaels, Kim, and Monotype demonstrate that if electronic communications evidence is to be offered at trial for the truth of what it asserts, proponents of such evidence must overcome a hearsay challenge; failure to do so will likely result in the loss of valuable evidence. If the e-mail is sent by a party opponent, it may be exempt from the hearsay bar under FRE 801(d)(2). If, however, the e-mail is sent by working conditions were unsafe, but rather to show that the employee had made a report alleging unsafe working conditions. Id. at *10.

129. 767 F.2d 1185 (7th Cir. 1985), cert. denied, 474 U.S. 1057 (1986).
130. Id. at 1201.
131. Id. at 1201-02.
132. Id.
133. Id. Because plaintiff established that the first hearsay message was a present sense impression, it was admitted under FRE 803(1). Id. at 1201. The court ruled that the third message was not offered for the truth of the matter asserted, and therefore was not hearsay. Id.
134. 595 F.2d 755 (D.C. Cir. 1979).
135. Id. at 759.
136. Id.
137. 43 F.3d 443 (9th Cir. 1994).
138. Id. at 450. For a more detailed discussion of the Monotype case, see infra part III.A.2.
139. FRE 801(d)(2) exempts certain statements by party-opponents. Under FRE 801(d)(2), a statement is not hearsay if:

The statement is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concern-
nnonparties, or if it is the proponent's own e-mail, FRE 801(d)(2) probably would not apply. Proponents of hearsay e-mail messages therefore will need another way to overcome the hearsay bar to introduce these e-mail messages. For proponents of traditional computer-based documents, the most commonly used method of overcoming hearsay objections is the business records exception. As the cases cited above suggest, a significant number of e-mail postings are sent through message systems used by business organizations. Accordingly, this Note focuses on one possible way of overcoming a hearsay objection to e-mail evidence—the business records exception of FRE 803(6). To evaluate the admissibility of e-mail as a business record, however, a preliminary examination of the hearsay rule and its exceptions is necessary.

II. HEARSAY, BUSINESS RECORDS, AND THE FEDERAL RULES OF EVIDENCE

In 1975, Congress promulgated the Federal Rules of Evidence. The FREs apply to criminal and civil cases in federal courts, regardless of whether federal or state law supplies the rule of decision. Over thirty states have adopted codes that closely track the FREs.

140. Such e-mail would not be considered a statement by a party-opponent, and would thus fail to qualify under FRE 801(d)(2).


142. See supra notes 17-19 and accompanying text.


144. See In re Air Crash Disaster, 701 F.2d 1189, 1193 (7th Cir.) (citing “many cases holding that the [FREs] govern the admissibility of evidence in diversity cases”), cert. denied, 464 U.S. 866 (1983).

Even in states that have not adopted the FREs, opinions often cite them and apply their underlying principles.\(^\text{146}\)

Under the FREs, only evidence proven "relevant" to the case is admissible.\(^\text{147}\) In practice, the relevance standard is not difficult to satisfy.\(^\text{148}\) A significantly more imposing obstacle to proponents of evidence is the bar against hearsay evidence.

**A. The Hearsay Bar**

FRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."\(^\text{149}\) FRE 801(a) notes that a statement can be "an oral or written assertion."\(^\text{150}\) Additionally, FRE 802 states: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."\(^\text{151}\)

The FREs disfavor hearsay because it avoids three fundamental devices which maximize the accuracy of testimony before the trier of fact: cross-examination of witnesses who testify at trial, the oath administered to witnesses before they testify, and the opportunity for the trier of fact to observe the demeanor of the testifying witnesses.\(^\text{152}\) Cross-examination has been called the "'greatest legal engine ever invented for the discovery of truth.'"\(^\text{153}\) Unlike statements made in court, hearsay statements are not immediately susceptible to cross-examination. As the Supreme Court noted:

> "The main danger in substituting subsequent for timely cross-examination seems to lie in the possibility that the witness' 'false testi-

---


\(^\text{147}\) See Fed. R. Evid. 401, 402.

\(^\text{148}\) See Glen Weissenberger, Weissenberger's Federal Evidence § 401.3 (2d ed. 1995). To be considered relevant, evidence need only make the existence of the fact to be proved "more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.


\(^\text{150}\) Fed. R. Evid. 801(a).

\(^\text{151}\) Fed. R. Evid. 802.


\(^\text{153}\) Green, 399 U.S. at 158 (citing 5 Wigmore, Evidence § 1367).
mony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.\textsuperscript{154}

Additionally, out-of-court statements are not usually made under oath; hearsay declarants thus escape the threat of perjury, a measure used to ensure accurate and honest testimony.\textsuperscript{155} Finally, out-of-court statements are made outside the presence of the trier of fact, thereby eliminating any possibility for the trier of fact to gauge the declarant's demeanor.\textsuperscript{156}

Most hearsay statements involve two people: the hearsay declarant who made the actual statement, and the individual who is relaying the statement to the court.\textsuperscript{157} Because the hearsay declarant does not normally relay hearsay statements to the court, and often significant time has passed since the statements were made, hearsay poses additional risks of faulty perception, faulty memory, faulty narration, and insincerity on the part of the declarant.\textsuperscript{158} With traditional testimony, cross-examination can, and sometimes does, reveal insincerity and narration problems, and may expose faulty perception and memory on the part of the witness.\textsuperscript{159} With hearsay testimony, however, cross-examination of the hearsay declarant is limited, if at all possible, and the hearsay dangers\textsuperscript{160} thus persist.

Despite the bar against hearsay under the FREs, out-of-court statements may still be admissible.\textsuperscript{161} Under FRE 803, Congress has listed twenty-four hearsay exceptions which "are not excluded by the hearsay rule."\textsuperscript{162} Thus, a proponent of hearsay evidence has many alternative theories of admissibility from which to choose. This Note focuses

\textsuperscript{154}. Id. at 159 (quoting State v. Saporen, 285 N.W. 898, 901 (1939)); see also Pointer v. Texas, 380 U.S. 400, 404 (1965) (noting that "no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case").

\textsuperscript{155}. Bridges v. Wixon, 326 U.S. 135, 153 (1945) ("Statements made under [oath] would have an important safeguard—the fear of prosecution for perjury.").

\textsuperscript{156}. Mattox v. United States, 156 U.S. 237, 242-43 (1895) (extolling the value of "compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief").


\textsuperscript{158}. See Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 185-88 (1948).

\textsuperscript{159}. Id. at 188.

\textsuperscript{160}. See supra note 152 and accompanying text.

\textsuperscript{161}. If the statement is not offered for the truth of what it asserts, it is not hearsay. Examples include statements that are offered for their effect on the listener, statements that have an independent legal significance, and statements offered for their impeachment value only. See Christopher B. Mueller & Laird C. Kirkpatrick, 4 Federal Evidence §§ 385-390 (1994).

\textsuperscript{162}. See Fed. R. Evid. 803. The Federal Rules also exclude from the hearsay definition certain prior statements by witnesses, and certain admissions by party opponents. See Fed. R. Evid. 801(d). Additionally, FRE 804(b) provides five other hearsay ex-
upon only those instances where other exceptions to the hearsay bar are not applicable, and where the most viable means for the admission of e-mail evidence is to characterize it as a business record.

B. The Business Records Exception Under FRE 803(6)

Under the FREs, business records that are hearsay may nonetheless be admissible if they satisfy the requirements detailed in FRE 803(6), commonly known as the "business records exception."\(^\text{163}\)

1. Policies Behind the Exception

The business records exception is derived from the common law doctrine of the "shop book rule."\(^\text{164}\) The rule allowed courts to admit into evidence journal entries made by tradesmen and craftsmen as proof of debts for goods or services rendered.\(^\text{165}\) By the nineteenth century, the rule was firmly rooted, and courts extended the rule to include entries made by all persons, since deceased, provided that they were made in the ordinary course of business.\(^\text{166}\) In 1936, Congress enacted a version of the rule for the federal courts.\(^\text{167}\) The rule remained in effect until 1975, when it was repealed by the FREs.\(^\text{168}\)

The business records exception rests on two policies: necessity and trustworthiness.\(^\text{169}\) The necessity for the exception arises from the complexity of modern business. Most business records are often "composite[s] of information gleaned from many sources."\(^\text{170}\) By creating a hearsay exception, Congress obviated the need for courts to take testimony from multiple witnesses, each of whom would add only narrow points on the matters asserted within the hearsay document.\(^\text{171}\) The trustworthiness factor stems from businesses' reliance on their own records. "[M]arket pressure,” “individual responsibility for job performance,” and the “regularity of business and recordmaking,” combine to “assure a kind of expertise and reduce risks of mistake” in business records.\(^\text{172}\) As one commentator noted, evidence under FRE

\(^{163}\) See Fed. R. Evid. 803(6).
\(^{164}\) See McCormick, supra note 157, § 285.
\(^{165}\) See id.
\(^{166}\) Id.
\(^{169}\) Mueller & Kirkpatrick, supra note 161, § 444, at 486.
\(^{170}\) Id.
\(^{171}\) Id.
\(^{172}\) Id.; see also Fed. R. Evid. 803(6) advisory committee's note ("The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, [or] by actual experience of businesses in relying upon them . . ."); Weissenberger, supra note
803(6) is considered "presumptively reliable." Although critics of the business records exception may argue that self-interest often affects the preparation of business documents, as one judge countered, "there is hardly a grocer's account book which could not be excluded on that basis." As an added precaution against such self-interest, however, Congress allowed judges to exclude business records if their origins "indicate [a] lack of trustworthiness."

2. Requirements of 803(6)

As the Rule suggests, not all business records qualify under FRE 803(6). The requirements of the business records exception consist of five elements: (1) the record must be kept in the course of a regularly conducted business activity; (2) the particular record at issue must be one that is regularly kept; (3) the record must be made by, or from information transmitted by, a person with knowledge of the source; (4) the record must be made contemporaneously; (5) the record must be accompanied by foundation testimony. These requirements are discussed below.

To qualify under FRE 803(6), the record must be made in the course of a "regularly conducted business activity." This requirement helps ensure the trustworthiness of the record, which is the premise upon which the business records exception is based. The Federal Rules Committee believed that records made outside the course of regular business activities lacked sufficient guarantees of trustworthiness. "If... the supplier of the information does not act..."
in the regular course, an essential link is broken."\textsuperscript{181} Accordingly, records that are of a personal nature do not fall within the exception.\textsuperscript{182}

Secondly, FRE 803(6) states that the business must make the record as part of its "regular practice."\textsuperscript{183} The rationale for this requirement is similar to the "regular course" requirement; a record that is made on a regular basis is likely to be more accurate, and hence, more trustworthy.\textsuperscript{184} Of course, the term "regular practice" is not defined in the FREs, and is thus open to interpretation. For example, the First Circuit has held that a catalog, printed only once a year, satisfied the regularity requirement under FRE 803(6).\textsuperscript{185} The Eleventh Circuit has taken an equally liberal view of the regularity requirement, noting that the language of FRE 803(6) was worded to avoid "'a tendency unduly to emphasize a requirement of routineness and repetitiveness.'"\textsuperscript{186}

A third requirement is that the record must have been made by a "person with knowledge" of the information contained in it\textsuperscript{187}—"[t]hat is, the information recorded must have originated with someone who had first-hand knowledge thereof."\textsuperscript{188} Many courts have broadly construed this requirement. For example, the person who physically makes the record need not have first-hand knowledge of the information contained within the record.\textsuperscript{189} Even if the person whose first-hand knowledge was the basis for the record cannot be identified, the record may qualify under FRE 803(6).\textsuperscript{190} Moreover, the requirement of personal knowledge may be met even where the record was prepared by someone not acting under a business duty,

\textsuperscript{181} Fed. R. Evid. 803(6) advisory committee's note.
\textsuperscript{182} Mueller & Kirkpatrick, supra note 161, § 445, at 491.
\textsuperscript{183} Fed. R. Evid. 803(6).
\textsuperscript{184} McCormick, supra note 157, § 286.
\textsuperscript{185} United States v. Grossman, 614 F.2d 295, 297 (1st Cir. 1980).
\textsuperscript{187} Fed. R. Evid. 803(6).
\textsuperscript{189} See, e.g., United States v. Ahrens, 530 F.2d 781, 784 n.6 (8th Cir. 1976) (noting that FRE 803(6) "does not require personal knowledge of the maker of the record as a condition precedent to its admission into evidence"). See generally Lewis v. Baker, 526 F.2d 470, 474 (2d Cir. 1975) (applying the Federal Business Records Act).
\textsuperscript{190} See United States v. Ullrich, 580 F.2d 765, 771-72 (5th Cir. 1978). In the Senate Report accompanying the FRE, it was noted that: "It is the understanding of the committee that the use of the phrase 'person with knowledge' is not intended to imply that the party seeking to introduce the [evidence] must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the [evidence] was based." S. Rep. No. 1277, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7063.
provided that the record was verified by someone who was acting under a business duty.\(^{191}\)

Additionally, the record must be made "at or near the time" the information was obtained, although this too is subject to somewhat liberal interpretation. No bright-line rule governs what is considered timely, and courts are free to exercise discretion in evaluating the facts of each case.\(^{192}\) In one recent case the Seventh Circuit upheld the admissibility of a record made eleven days after the events which it reported had transpired.\(^{193}\) By contrast, courts have rejected records made more than one or two months after the information was obtained.\(^{194}\)

3. Foundation and Authentication Issues under 803(6)

FRE 803(6) requires the testimony of the "custodian" of the information, or some "other qualified witness," before the document may be admitted under the Rule.\(^ {195}\) The purpose of the custodian witness is to lay the foundation for the business records exception by detailing the recordkeeping practices of the business. "Such testimony establishes the regular practices and procedures surrounding the creation of the records, the very elements that are necessary for a finding of trustworthiness."\(^ {196}\) The witness supplying this "foundation" testimony need not be the person who made the record and need not have firsthand knowledge about the document's content.\(^ {197}\) Accordingly, any witness with general knowledge about the organization's recordkeeping process may testify that the record satisfies the other requirements of FRE 803(6).\(^ {198}\) In fact, the witness need not have been in the company's employment at the time the record was made, so long as she

---

\(^{191}\) See, e.g., United States v. Zapata, 871 F.2d 616, 625-26 (7th Cir. 1989) (allowing admission of hotel registration prepared by guest where hotel employee was required to verify record).

\(^{192}\) See Missouri Pac. R.R. v. Austin, 292 F.2d 415, 423 (5th Cir. 1961) ("[Timeliness] is not to be judged, then, by arbitrary or artificial time limits, measured by hours or days or even weeks." (applying the Federal Business Records Act)).

\(^{193}\) See Wheeler v. Sims, 951 F.2d 796, 804 (7th Cir.), cert. denied, 506 U.S. 914 (1992). But see Hiram Ricker & Sons v. Students Int'l Meditation Soc'y, 501 F.2d 550, 554 (1st Cir. 1974) (excluding records made one week after the information contained therein was first reported).

\(^{194}\) See Willco Kuwait Trading S.A.K. v. deSavary, 843 F.2d 618, 628 (1st Cir. 1988) (rejecting a record made approximately three months after the event); Missouri Pac., 292 F.2d at 423 (rejecting a record made 14 months after the information was obtained).

\(^{195}\) Fed. R. Evid. 803(6).

\(^{196}\) United States v. Wables, 731 F.2d 440, 449 (7th Cir. 1984) (citation omitted).

\(^{197}\) See, e.g., FDIC v. Staudinger, 797 F.2d 908, 910 (10th Cir. 1986) (noting that "there is no requirement that the party offering a business record produce the author of the item"); Wables, 731 F.2d at 449 ("The business records exception to the hearsay rule clearly does not require that the witness have personal knowledge of the entries in the records.").

\(^{198}\) Wables, 731 F.2d at 449 ("The witness need only have knowledge of the procedures under which the records were created.").
can establish the recordkeeping practices employed during the record’s creation. Moreover, if a document is not admitted under FRE 803(6) for want of a “foundation witness” the document may still qualify under FRE 803(24).

4. Types of Records Covered by FRE 803(6)

Because of the Rule’s derivation from the “shop book” exception, the term “business records” conjures up images of accounting ledgers, inventory lists, and sales receipts. In practice, FRE 803(6) has a much wider scope, and courts have applied it to a variety of records, including certificates of insurance, annual corporate reports, radio telegrams sent to a cargo ship, and scrapbooks of newspaper articles. To date, no federal court has explicitly extended the exception to e-mail. Courts have, however, held that FRE 803(6) applies to two types of records with which e-mail is commonly associated—computer documents and letters or general memoranda.

C. Computer-Based Records Under the Business Records Exception

FRE 803(6) explicitly encompasses “data compilation[s],” and records in “any form.” The advisory committee’s note to FRE 803(6) points out that “[t]he expression ‘data compilation’ is used as broadly descriptive of any means of storing information other than conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage.” The Senate Committee’s report on the FRE also implicitly recognized that computer-based records fall under the Rule.

199. See United States v. Evans, 572 F.2d 455, 490 (5th Cir.), cert. denied, 439 U.S. 870 (1978); United States v. Rose, 562 F.2d 409, 410 (7th Cir. 1977).
200. See United States v. Blackburn, 992 F.2d 666, 670-72 (7th Cir.), cert. denied, 114 S. Ct. 393 (1993); United States v. Hitsman, 604 F.2d 443, 447 (5th Cir. 1979). FRE 803(24) provides a catchall exception for evidence “not specifically covered by any of the [hearsay] exceptions but having equivalent circumstantial guarantees of trustworthiness.” Fed. R. Evid. 803(24). In addition to the foundation requirement of 803(6), FRE 901 requires that all documents be authenticated before they can be admitted. See Fed. R. Evid. 901. The purpose of FRE 901 is to establish the “connection between the evidence offered and the relevant facts of the case.” Weissenberger, supra note 148, § 901.1, at 613.
201. See United States v. Albert, 773 F.2d 386, 388-89 (1st Cir. 1985).
204. United States v. Reese, 568 F.2d 1246, 1252 (6th Cir. 1977).
205. See infra part III.
206. See infra part II.C.
207. See infra part II.D.
209. Id.
211. See infra note 227 and accompanying text.
Because of Congress' clear mandate, a wealth of case law exists allowing computer-based records into court under the business records exception. In fact, nearly every federal circuit court has admitted computer-based records under FRE 803(6). Even courts applying the pre-FREs Federal Business Records Act have recognized that a computer document could qualify as a business record. Federal courts have applied FRE 803(6) to a wide variety of computer-based information, including computerized copies of phone bills indicating outgoing calls, records of banking transactions, and Lotus spreadsheets.

Courts analyzing computer-based evidence under FRE 803(6) have generally held that, although a computerized recordkeeping medium is used, the standard requirements of FRE 803(6) are prerequisites for admissibility. The Ninth Circuit stressed this point in United States v. Catabran, a case in which computer-generated ledgers, inventory, and payroll records were admitted under the business records exception. In its analysis, the court noted that "it is immaterial that the business record is maintained in a computer rather than in company books," provided that the proponent of the evidence lays a proper foundation. The Fifth Circuit adopted a similar stance in Rosenberg v. Collins, stating: "Under Rule 803(6), computer data compila-


214. See United States v. Vela, 673 F.2d 86, 89-90 (5th Cir. 1982).


217. 836 F.2d 453, 457-58 (9th Cir. 1988).

218. Id. at 456-58.

219. Id. at 457 (citation omitted).

220. 624 F.2d 659 (5th Cir. 1980).
tions... should be treated as any other record of regularly conducted activity." In admitting computer-based records of cash transfers, the court applied the requirements of FRE 803(6) without modification.

Although computerized information is subject to the same requirements as all other business records, unique issues arise, and "[s]ome accommodation is required because of differences between the conventional account book and the electronic medium of the computer." Offering proof of computer-based records poses one such wrinkle; whereas traditional records exist on paper and are easily offered in court, computer-based records generally exist on electronic-storage media, such as hard drives, mainframes, or tape backups. To facilitate admissibility, courts have held that hardcopy printouts of computer-based records are admissible, even if the printouts themselves were prepared solely for litigation purposes.

Whether computer-based records satisfy the timeliness requirements of FRE 803(6) may also prove to be problematic. Questions may arise as to whether the computer record needs to be created "at or near the time" the underlying information was obtained, or if it is sufficient that the underlying information itself was memorialized in a timely fashion. At least one court has held that the timeliness requirement of FRE 803(6) is satisfied if the proponent of the evidence can show that the original information was recorded near the time of the event, even if it was entered into the computer much later.

Additionally, computer-based records may raise unique issues regarding foundation testimony and exactly who may qualify as a foundation witness. The legislative history of FRE 803(6) indicates that "[a] sufficient foundation for the introduction of such evidence will be laid... in the case of a computer printout, upon a report from the company's computer programmer or one who has knowledge of the particular record system." Accordingly, courts have held that the

---

221. *Id.* at 665 (citation omitted).
222. *Id.*
224. FRE 1001(3) notes: "If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.' " Fed. R. Evid. 1001(3).
225. See United States v. Hernandez, 913 F.2d 1506, 1512-13 (10th Cir. 1990), cert. denied, 499 U.S. 908 (1991); United States v. Briscoe, 896 F.2d 1476, 1494 n.13 (7th Cir.), cert. denied, 498 U.S. 863 (1990); United States v. Hutson, 821 F.2d 1015, 1019-20 (5th Cir. 1987). Note that the exception may not apply if the record itself was prepared solely in anticipation of litigation. *See supra* note 175 and accompanying text.
226. See United States v. Sanders, 749 F.2d 195, 197-99 (5th Cir. 1984) (allowing admission of computerized records of Medicaid claim forms where the data contained in the forms was recorded in a timely fashion).
proponent need not call to the stand the programmer responsible for
the computer software. As with traditional documents, the maker
of the record need not testify as the foundation witness.

Invariably, in the age of computer hackers, data security issues are
also likely to be raised as an obstacle to the admission of computer
evidence. Nonetheless, according to the Eleventh Circuit, "The exist-
ence of an air-tight security system is not . . . a prerequisite to the
admissibility of computer printouts. If such a prerequisite did exist, it
would become virtually impossible to admit computer generated
records." Such issues will go to the weight of the evidence, rather
than its admissibility. Moreover, if the requirements of the FRE
806(3) have been satisfied, a rebuttable presumption of the docu-
ment's accuracy results.

D. Memoranda and Correspondence Under the Business
Records Exception

In addition to encompassing computer-based records, FRE 803(6)
also applies to a "memorandum." While the term lacks explicit def-
inition in the advisory committee's notes, courts have admitted vari-
ous types of correspondence under FRE 803(6).

In Gibbs v. State Farm Mutual Insurance Co., the Ninth Circuit
held that FRE 803(6) applied to an interoffice memo regarding the
status of an insurance claim. In admitting the evidence, the court
found it sufficient that "State Farm's 'regular practice' [included] pre-
paring memoranda relating to a claim and . . . circulating them among
its departments." In Brown v. ASD Computing Center, the court
held FRE 803(6) applicable to a warning letter from a supervisor to an
employee. The letter included concerns over the employee's per-

228. See United States v. Miller, 771 F.2d 1219, 1237 (9th Cir. 1985) ("It is not
necessary that the computer programmer testify in order to authenticate computer-
generated records."); United States v. Young Bros., Inc., 728 F.2d 682, 693-94 (5th
Cir.) (rejecting claim that computer programmer is required to lay foundation for
computer evidence before it may be admitted), cert. denied, 469 U.S. 881 (1984). In
practice, courts minimally require the testimony of someone familiar with the busi-
ness' computerized recordkeeping practices. See Miller, 771 F.2d at 1237.
229. See United States v. Fendley, 522 F.2d 181, 185 (5th Cir. 1975).
230. United States v. Glasser, 773 F.2d 1553, 1559 (11th Cir. 1985) (allowing admis-
sion of computerized bank records despite the fact that teller numbers used to access
the system were not kept confidential).
231. United States v. Scholle, 553 F.2d 1109, 1125 (8th Cir.), cert. denied, 434 U.S.
940 (1977).
232. See United States v. Casoni, 950 F.2d 893, 909 (3d Cir. 1991); United States v.
Snyder, 787 F.2d 1429, 1433-34 (10th Cir.), cert. denied, 479 U.S. 836 (1986).
234. 544 F.2d 423 (9th Cir. 1976).
235. Id. at 428.
236. Id.
238. Id. at 1105 n.2.
formance, and gave her sixty days to improve. The court considered the letter hearsay proof that the employee was deficient in the areas listed, or that she was later fired for failing to correct those deficiencies. The court admitted the letter under FRE 803(6) for purposes of summary judgment, but conditioned admission on subsequent authentication. Nevertheless, the court remarked on the relative "ease with which [the] Defendant should be able to comply with Fed. R. Evid. 803(6)."

While Gibbs and Brown reflect a judicial acceptance of letters and interoffice correspondence under the business records exception, the requirements of FRE 803(6) must still be satisfied before the admission of such evidence under the Rule. As with computer-based records, recurring issues arise in the application of FRE 803(6) to interoffice memos and correspondence.

Memoranda and correspondence often are more informal and more sporadically generated than the "account books" for which the exception was first established. As a result, these types of records will often have difficulty meeting the "regularly conducted business activity" and the "regularly kept record" requirements of FRE 803(6).

For example, the D.C. Circuit refused to apply the exception to a memo sent to an employee from the head of her division. Although the memo concerned the employee's work arrangements, the court held that the "memorandum was not a record of a regularly conducted business activity." In Broadcast Music, Inc. v. Xanthas, Inc., the Fifth Circuit similarly held that a questionnaire letter sent to a client did not satisfy the "regularly conducted business activity" requirement. The court found it dispositive that the client's regular business practice did not include the completion of the questionnaire. The "regularly conducted" requirement also served as an obstacle to

---

239. Id. at 1103.
240. Id.
241. Id. at 1098.
242. Id.
243. See id.
246. Id. at 1060. Note that in requiring the memo to be "a record of a regularly conducted business activity" instead of one "kept in course of a regularly conducted business activity," the court applies a test that is somewhat different than that required by FRE 803(6). See supra notes 178-82 and accompanying text. Unfortunately, the court offered no explanation for the distinction, nor why the record itself failed to qualify.
247. 855 F.2d 233 (5th Cir. 1988).
248. Id. at 238.
249. Id.
admission in *Attorney General v. Irish People, Inc.*250 There, the D.C. District Court considered two letters which alluded to the group’s relationship with the Irish Northern Aid Committee, which allegedly had ties to the Irish Republican Army.251 The court held that the maker was under no business duty to report the information, and therefore the letters were not admissible under FRE 803(6).252 Finally, if the memo is “drafted in response to unusual or ‘isolated’ events,”253 courts may be reluctant to find that it was made in the course of a regular business activity.254

Nonetheless, as the Seventh Circuit noted, “Although interoffice memoranda are sometimes excluded where they are not created in the course of regularly conducted business activity . . . they are, not surprisingly, admissible where they are created in the regular course of business.”255 Accordingly, a diverse range of business-related correspondence has been admitted under FRE 803(6) in nearly all circuit courts, including the Second,256 Fourth,257 Fifth,258 Sixth,259 Seventh,260 Ninth,261 and Eleventh Circuits.262

Moreover, some courts have taken a more expansive view of the regularity requirements, admitting memoranda under FRE 803(6) even where the company keeping the records did not create the document. The Ninth Circuit held that FRE 803(6) applied to correspondence received by a business from a client, as it was “received by [the

---


251. *Id.* at 116, 119-20.

252. *Id.* at 120. The court did, however, admit the letters under FRE 803(24). *Id.*


254. *Id.*


261. *See supra* notes 234-36 and accompanying text.

262. *See Haygood v. Auto-Owners Ins. Co.*, 995 F.2d 1512, 1517 (11th Cir. 1993) (finding that correspondence from attorney to client informing him of an impending foreclosure action was erroneously excluded).
insurance company] in the ordinary course of business"\(^{263}\) The Seventh Circuit applied similar reasoning in admitting several interdepartmental memos, along with a letter between two businesses, pursuant to FRE 803(6).\(^{264}\) In discussing the regularity requirements, the court stated: "Letters created by another business but regularly received, maintained and relied upon . . . as was demonstrated here, may also constitute admissible business records . . . ."\(^{265}\)

III. Electronic Correspondence Under the Business Records Exception

Despite the fact that FRE 803(6) has been extended to include both interoffice memos and computer-based data, the Rule has not yet been extended to e-mail. As two noted commentators have observed, "There is neither a formal nor principled reason why e-mail messages could not satisfy the exception."\(^{266}\) Professors Mueller and Kirkpatrick share the view of some courts, however, that e-mail "in its most common use seems close to the telephone in [its] casual and spontaneous informality, and far removed from systematic and permanent recordkeeping."\(^{267}\) Unless e-mail were adapted to "permanent and more systematic recordkeeping purposes," Professors Mueller and Kirkpatrick add, e-mail messages will "fail to satisfy the 'regular practice' requirement of the exception and the casual nature of such messages surely raises trustworthiness concerns under FRE 803(6)."\(^{268}\)

This part argues that under modern business practice, e-mail has become a permanent and systematic recordkeeping function in many organizations, including the federal government. While trustworthiness is a concern in determining the admissibility of any business document, many types of e-mail messages can satisfy the explicit requirements of FRE 803(6), as well as the policies behind the Rule.

A. Judicial Reluctance to Accept E-mail As a Business Record Under FRE 803(6)

E-mail evidence in many federal cases, such as those cited in part I.C above, has either not been challenged on hearsay grounds, or has been admitted under some other hearsay exception.\(^{269}\) To date, no federal court has applied the business records exception to e-mail messages. One federal circuit court has gone so far as to reject e-mail

\(^{263}\) See Deland v. Old Republic Life Ins., 758 F.2d 1331, 1338 (9th Cir. 1985).
\(^{265}\) Id. at 694 (emphasis added).
\(^{266}\) Mueller & Kirkpatrick, supra note 161, § 446, at 45 (Supp. 1995).
\(^{267}\) Id.
\(^{268}\) Id.
\(^{269}\) See supra notes 124-26 and accompanying text; supra note 128.
as a recordkeeping medium entirely. While e-mail's admissibility under FRE 803(6) is a relatively new issue, the admissibility of electronic messages under FRE 803(6) has been litigated in the context of telex messages, the technological predecessor to e-mail.

1. Telex Cases

One of the earliest cases to consider the telex issue was United States v. Kim. Kim involved a hearsay challenge to a bank telex message offered by the defense. The defense asserted that the telex fell under FRE 803(6) and should be admitted. The court refused to admit the telex under FRE 803(6) for three reasons. First, the telex failed the "timeliness" requirement, in that it was prepared over two years after the act it reported. Second, the telex failed the "regular activity" requirement, in that the transaction underlying the telex was the first kind in the bank's history. Finally, the telex was not "trustworthy," because it was inconsistent with other evidence. In short, the court held that FRE 803(6) was inapplicable to the telex because of the content of the message, and the because of the untrustworthy circumstances surrounding its preparation.

Other federal courts have followed the D.C. Circuit's lead in refusing to admit telex messages under FRE 803(6). By contrast, the Third and Eighth Circuits have extended FRE 803(6) to include telex messages. In United States v. Gregg, the Eighth Circuit held that telex messages between an exporter and his clients satisfied the requirements of FRE 803(6). In admitting the records, the court noted "[t]he status of the telexes as records 'kept in the course of a regularly conducted business activity.'" Similarly, in United States v. Reilly, the Third Circuit held that telex messages to a cargo ship qualified as business records under FRE 803(6). At trial, the district court rejected the admission of

---

270. See infra part III.A.2.
271. See supra notes 26-27.
273. Id. at 759.
274. Id. at 760.
275. Id.
276. Id. at 761.
277. Id. at 762-63.
278. See, e.g., Wilco Kuwait Trading S.A.K. v. deSavary, 843 F.2d 618, 628 (1st Cir. 1988) (rejecting admission of telex under FRE 803(6) partly because of trustworthiness concerns); Central Oil Co. v. M/V Lamma-Forest, 821 F.2d 48, 51 (1st Cir. 1987) (upholding district court's rejection of telex under FRE 803(6)); United States v. Nixon, 779 F.2d 126, 134 (2d Cir. 1985) (rejecting telex from DEA agent because "telexes of this sort are not business records and contain many inaccuracies").
280. Id. at 1433, 1440.
281. Id. at 1440 (quoting Fed. R. Evid. 803(6)).
282. 33 F.3d 1396 (3d Cir. 1994).
283. Id. at 1413-14.
telex messages because they lacked trustworthiness. The Third Circuit, reversing the decision, focused less on the fact that the messages were telexes and more on the content of the messages and the context in which the messages were made. In its analysis, the court found persuasive the custodial witness who "demonstrate[d] that the records . . . [of the radiotelegrams] were made contemporaneously with the act the documents purport[ed] to record by someone with knowledge of the subject matter, that they were made in the regular course of business, and that such records were regularly kept by the business." As further support, the foundation witness detailed the procedures by which the messages were transmitted, received, documented, and stored. Based on this information, the Third Circuit held the messages to be admissible. While telex messages have been rejected under FRE 803(6) just as frequently as they have been admitted, these cases demonstrate that electronically communicated messages are capable of meeting the requirements of FRE 803(6).

2. Rejection of E-mail As a Business Record

One of the first federal cases to analyze e-mail evidence under FRE 803(6) was Rick v. Toyota Industrial Equipment Co. In Rick, the court considered the admissibility of an e-mail inventory list under FRE 803(6). The court rejected the record because it was prepared in anticipation of litigation, and was neither made in a timely fashion, nor by someone with knowledge. In applying the test of FRE 803(6), however, the court implicitly acknowledged that e-mail could qualify as a record under the business records exception if the requirements of the Rule were satisfied.

Although the door to admitting e-mail under FRE 803(6) was left open by Rick, it was effectively slammed shut by the Ninth Circuit in Monotype Corp. v. International Typeface Corp. Monotype involved charges that Monotype Corp., a typeface designer, illegally copied ten printing fonts which were owned by International Typeface Corporation ("ITC"). ITC alleged that Monotype intended to sell the fonts to Microsoft for use in Microsoft's software. Part of ITC's proof was an interoffice e-mail message between employees of

---

284. Id. at 1431 (Garth, J. dissenting).
285. Id. at 1413-14.
286. Id. at 1414 (citation omitted).
287. Id.
288. Id.
290. Id. at *6, 7 n.4.
291. Id. at *6.
292. 43 F.3d 443 (9th Cir. 1994).
293. Id. at 447-48.
294. Id. at 448.
Microsoft, who was not party to the suit. The message acknowledged that some of the fonts "are not legitimate versions." The e-mail further noted that Microsoft should proceed with caution. ITC sought to use this e-mail as proof that Monotype improperly used its designs.

Monotype countered that the message was hearsay, and thus inadmissible. To overcome the hearsay objection, ITC argued that the e-mail was admissible as a business record under FRE 803(6). ITC pointed out that the e-mail was merely a project report to a superior, a regularly conducted business activity at Microsoft. ITC also argued that it was the regular practice of Microsoft employees to make such records in e-mail form. Finally, ITC showed that the employee making the record had personal knowledge about the Microsoft-Monotype transaction, and that the message was made in a timely fashion. In further support of its position, ITC cited United States v. Catabran, a Ninth Circuit case admitting computer-based records under FRE 803(6).

Despite ITC's showing that the e-mail satisfied the requirements of FRE 803(6), the court refused to admit the e-mail evidence. The court distinguished Catabran, noting that "[e]-mail is far less of a systematic business activity than a monthly inventory printout." The court added that "[e]-mail is an ongoing electronic message and retrieval system whereas an electronic inventory recording system is a regular, systematic function of a bookkeeper prepared in the course of business.

The Monotype decision is troubling for several reasons. First, it rejects the application of FRE 803(6) in perfunctory fashion; the opinion spends only two sentences analyzing the merits of the e-mail message as a business record. More importantly, the Monotype court focused nearly exclusively on the medium used to create the record—e-mail—at the expense of two crucial elements of the business records exception: the content of the record and the business context in which

295. Id. at 450.
296. Id.
297. Id.
298. Id.
299. Id.
300. Id.
301. Id.
302. Id.
303. 836 F.2d 453, 457-58 (9th Cir. 1988).
304. See Monotype, 43 F.3d at 450. For a more detailed discussion of Catabran, see supra notes 217-19 and accompanying text.
305. Monotype, 43 F.3d at 450.
306. Id.
307. Id.
308. Id.
The court's assertion that the report was not a "regular, systematic function" was inconsistent with the evidence ITC offered, which showed that these type of reports were a regular activity for Microsoft employees. In effect, the court evaluated e-mail in the abstract, rather than in the context of Microsoft's business practices, as FRE 803(6) requires. By offering a blanket rejection of all e-mail under FRE 803(6), regardless of the manner in which it is used in an organization, the Monotype court created an unjustified categorical rule.

B. E-mail As a Regularly Kept Record, Made in the Course of a Regularly Conducted Business Activity

The rejection of e-mail as a business record by the Monotype court centered on two notions: (1) e-mail is not a regularly kept record, and (2) the e-mail record was not made as part of a regularly conducted activity. Such analysis invariably turns on the practices of the particular organization. Nonetheless, an analysis of modern business practices strongly suggests that in at least some organizations, e-mail would qualify under FRE 803(6). This part argues that in the context of many modern business practices, e-mail, like other forms of computer storage, is a medium capable of providing regular, systematic recordkeeping, as required by FRE 803(6). This part further argues that analysis of the content of many e-mail messages reveals that e-mail also frequently contains information "kept in the course of a regularly conducted business activity."

1. E-mail Systems are Capable of Systematic Recordkeeping

The rapid expansion of e-mail has completely reshaped how corporations "regularly" conduct business and keep records. A recent survey of Fortune 100 companies shows that nearly nine out of ten

309. See id.
310. See id.
311. See supra note 196 and accompanying text. By contrast, the Kim court provided a detailed analysis of the telex, applying the requirements of FRE 803(6) to creation of the telex and the business practices of the bank involved. United States v. Kim, 595 F.2d 755, 760-63 (D.C. Cir. 1979).
312. See Mueller & Kirkpatrick, supra note 161, § 446, at 45 (Supp. 1995) ("In a case of first impression, a panel of the Ninth Circuit concluded that [e]-mail messages do not fit the business records exception."); E-mail Meets F.R.E. 803(6), Fed. Lit., June 1995, at 122 (interpreting Monotype as disregarding all e-mail under FRE 803(6)).
313. See supra note 307 and accompanying text.
314. See supra note 306 and accompanying text.
315. See supra note 196 and accompanying text.
317. See Jim Carroll, Internet Expected to be Backbone of Global Business, Computing Canada, Jan. 18, 1995, at 27 ("[I]t is a fact that a lot of inter-organizational communications already occur through Internet e-mail, and hence are already changing business as we know it."); Albert J. Enzweiler, Improving the Financial Reporting
“currently use e-mail for person-to-person communications, [and] about two-thirds use e-mail for publication dissemination.” E-mail has not only changed the way businesses communicate, it has also affected the way they keep records. The staggering volume of corporate e-mail was highlighted during Intuit Inc.’s recent merger with Microsoft. When Intuit sought to comply with the Justice Department’s electronic data request, the company found some 80,000 e-mail records archived on system databases. Faced with a similar discovery request, CIBA-Geigy had at least thirty million pages of e-mail stored on back-up tapes.

E-mail use is also becoming more regulated and more systematic in modern business practice. Companies that regularly use e-mail in place of paper reports, and that make daily business decisions on the basis of such reports, have policies to regulate when and how the e-mail messages are made and stored. In April 1994, the San Jose Mercury News conducted an informal survey of e-mail policies at nearly twenty corporations, including Intel, Hewlett-Packard, and Consolidated Freightways. All but four had either written policies or formal guidelines covering e-mail usage, storage, and retrieval. These policies cover issues ranging from how long e-mail should be stored, to when it should be used. Additionally, many commentators are urging attorneys to advise their clients to institute e-mail recordkeeping and retention policies.

The federal government, recognizing the emergence of e-mail as a recordkeeping device, has accordingly changed its recordkeeping practices. The fact that organizations which rely on e-mail have also begun to regulate its usage and storage demonstrates that e-mail is indeed used as a regular recordkeeping tool in modern business practice.

Process, Mgmt. Acct., Feb. 1995, at 40, 41 (“E-mail changed how managers and employees communicate.”).

319. See supra note 25 and accompanying text.
322. Ewell, supra note 36, at 12A.
323. Id.
324. See id.; see also Himelstein, supra note 320, at 105 (“Toyota Motor Sales USA Inc. hopes to have a new policy concerning its computer information in place by the end of the year. And Univar Corp. recently underwent an electronic-data audit of sorts.”).
326. See infra notes 335-47 and accompanying text.
Of course, the fact that e-mail can be used as a recordkeeping device is not the sole criterion for satisfying FRE 803(6). To focus exclusively on the medium used to create the record while ignoring the content of the record in the context of the business practice, would violate the language and purpose of FRE 803(6).

2. The Content of E-mail Often Constitutes a Record of a Regularly Conducted Business Activity

As noted earlier, courts have applied FRE 803(6) to various types of interoffice correspondence and memoranda. A common concern in many of these cases is whether the content of the document reflects a regularly conducted business activity. In modern practice, e-mail often serves as a replacement for paper memoranda. Although e-mail is not always used as part of a systematic business activity, e-mail is often used to file status reports, to circulate drafts of documents, and to record a host of other business-related activities; reports, summaries, and client information all get transmitted and stored on e-mail. Even if the e-mail message consists of an opinion, as it did in Monotype, it may nonetheless qualify as a business record. As the advisory committee's note states, "[T]he [R]ule specifically includes . . . opinions . . . as proper subjects of admissible entries.

By disallowing an e-mail business report under FRE 803(6), the Ninth Circuit disregarded the content of the e-mail message and the business context within which it was created. This approach was inconsistent with its earlier jurisprudence in Gibbs and Catabran. The adoption of this approach also leads to the incongruous result of a business report or memorandum being barred simply because it is transmitted and stored electronically, when it would otherwise be admissible if recorded on paper.

327. See supra part II.D.
328. Id.
329. See Russell Kay, Distributed and Secure, Byte, June 1994, at 165 (noting that "electronic document interchange is replacing paper documents," and that "[e]-mail is now being used in place of . . . memos").
331. See supra note 28 and accompanying text.
333. See supra notes 234-36 and accompanying text. As discussed in Gibbs, the Ninth Circuit admitted an interoffice memo based on foundation testimony that this type of memo was often circulated in the course of the business' operations.
334. See supra notes 217-19 and accompanying text. In Catabran, the Ninth Circuit stressed that the medium of the record was immaterial if the content otherwise satisfied the requirements of FRE 803(6).
3. Changes in Federal Recordkeeping Practices Provide Further Support for Treating E-mail As a Business Record

Recently, the National Archives Records Administration ("NARA") released new guidelines for the archiving and preparation of federal e-mail messages. The changes were enacted in response to a D.C. Circuit opinion which held that substantive federal e-mail messages constitute records under the Federal Records Act ("FRA"). In the opinion, the D.C. Circuit acknowledged the wealth of substantive information accumulated by the Reagan Administration in the form of e-mail.

The opinion highlighted a reality of modern federal recordkeeping—that "nearly all [federal] agencies now use e-mail to transact Government business." In a recent survey conducted by the NARA, a majority of federal agencies stated that they were using their e-mail systems to create federal records. As a result, the agencies adopted policies to ensure the proper maintenance of federal e-mail records. Additionally, the NARA plans to amend its Managing Electronic Records handbook to include further guidance on the identification and recordkeeping requirements for federal e-mail records.

The guidelines require the retention of e-mail "used to transact [federal] agency business," and will only allow deletion after departmental review. While these guidelines are only binding on the public sector, "it is likely that such pronouncements will be used as

336. See supra notes 66-70 and accompanying text.
337. Armstrong v. Executive Office of the President, 1 F.3d 1274, 1283 n.7 (D.C. Cir. 1993). As the court noted:
"The substantive importance of these documents is demonstrated by the frequency with which they have been used in recent years. They were used by the Tower Commission, congressional investigators and the Independent Counsel looking into the Iran-Contra affair; by the Department of Justice in connection with its prosecution of Manuel Noriega; and by the NSC's legal advisor in relation to the confirmation of Robert Gates as Director of the CIA.

Id.
339. Id. at 44,636.
340. Id. at 44,641 (to be codified at 36 C.F.R. § 1234.24(b)(1)(i)-(vi)).
341. The Managing Electronic Records handbook is a supplement to the NARA's guidelines, and is designed to provide further information to federal agencies on how to comport with the FRA. See National Archives and Records Administration, 55 Fed. Reg. 19,216 (1990).
342. 60 Fed. Reg. at 44,635.
343. Id.
344. Id.
345. See id. at 44,634 (noting that federal government agencies "will be affected more immediately by the rule").
guides by courts and other regulatory bodies when resolving legal issues, such as those regarding . . . evidentiary issues.”

The Armstrong decision and the NARA’s subsequent changes may have an unintended, direct impact on the admissibility of e-mail records in federal courts. Similar to the business records exception of FRE 803(6), FRE 803(8) provides a hearsay exception for public records. By classifying e-mail as a federal record under the FRA, and by regulating its use as such, the NARA has opened the door to e-mail’s admissibility under FRE 803(8). Although the requirements of FRE 803(6) and FRE 803(8) are somewhat different, admitting e-mail as a record if made by the federal government, but excluding the same record if made by private businesses, leads to an incongruous result. Consistency demands that courts admit public and private business records even-handedly if both are equally trustworthy.

4. Admitting E-Mail Under FRE 803(6) is Consistent With the Policies Behind the Business Records Exception

Admitting e-mail as a business record accords with the policies of necessity and trustworthiness upon which the business records exception is founded. Moreover, admitting this evidence is consistent with many courts’ approach of liberally construing FRE 803(6) to admit probative evidence that is otherwise proven reliable.

As discussed in part II.B above, business records are admitted under policies of necessity and trustworthiness. As with other business records, getting to the true source of the information contained in an e-mail record would likely require testimony of multiple parties, each of whom may offer only a small piece of the puzzle. Admitting e-mail under FRE 803(6) avoids the tedium of calling multiple witnesses to ascertain the matters asserted within the business record.

The larger concern with e-mail records appears to be trustworthiness. Courts are willing to admit business records because organizations rely on their contents for important decisions and because they are kept in a systematic fashion. The requirements of FRE 803(6) aim to ensure the reliability and trustworthiness of a record before it

347. In fact, § 1234.24 of the C.F.R. states that “Electronic records may be admitted in evidence to [f]ederal courts for use in court proceedings [under] Federal Rules of Evidence 803(8).” 36 C.F.R. § 1234.24 (1995). With the changes to the NARA’s standards to include e-mail as an electronic record, this section was redesigned as § 1234.26, but was otherwise left intact. See National Archives and Records Administration, 60 Fed. Reg. 44,634, 44,641 (1995).
349. See supra notes 169-75 and accompanying text.
350. See supra part II.B.
is admissible.\textsuperscript{351} As discussed above, business and federal organizations are relying on e-mail in much the same way they have relied on paper documents in the past. Additionally, policies regarding retention and deletion are becoming more commonplace; many of these organizations are taking steps to insure that their e-mail documents are properly maintained by requiring that messages be printed and electronically archived.\textsuperscript{352}

E-mail may also offer additional indicia of trustworthiness that other computer-based documents might not. E-mail messages are usually accompanied by transmittal information which contains the names of the sender and receiver, as well as the time and date the record was created.\textsuperscript{353} The time and date information provides a valuable tool for judges in determining whether the record was made in a timely fashion, as required by FRE 803(6). The name of the sender helps establish that the record was made by someone "with knowledge," a further requirement of FRE 803(6). Such a feature also makes the recordmaker accountable for the information contained within the record, which in turn assures e-mail's trustworthiness.\textsuperscript{354} E-mail's unique features also serve to avoid the problems of misperception that cause hearsay documents to be disfavored.\textsuperscript{355} With e-mail, the substance of the record, as well as its transmittal information, is electronically memorialized. While these factors alone may not be dispositive in establishing e-mail as a record under FRE 803(6), they may serve as added assurances of the document's accuracy.

Further, many courts have taken a less formalistic approach to the business records exception. As the Second Circuit recently stated: "Rule 803(6) 'favor[s] the admission of evidence rather than its exclusion if it has any probative value at all.' "\textsuperscript{356} FRE 803(6) does require a record to carry a "sufficient indicia of trustworthiness to be considered reliable."\textsuperscript{357} Still, courts have been criticized, even reversed, for imposing requirements of careful checking, habits of precision, and regularity in maintaining business records as a precursor for admissibility under FRE 803(6).\textsuperscript{358} Such requirements impose too severe a

\begin{itemize}
\item \textsuperscript{351} See supra notes 180-84 and accompanying text.
\item \textsuperscript{352} See supra note 325 and accompanying text.
\item \textsuperscript{353} See supra notes 39-40 and accompanying text.
\item \textsuperscript{354} Market pressure on job performance has been cited as one of the factors supporting a business record's trustworthiness. See supra note 172 and accompanying text.
\item \textsuperscript{355} See supra notes 157-58 and accompanying text.
\item \textsuperscript{356} Phoenix Assocs. III v. Stone, 60 F.3d 95, 101 (2d Cir. 1995) (citing \textit{In re Ollag Constr. Equip. Corp.}, 665 F.2d 43, 46 (2d Cir. 1981)). The court's reasoning appears to be derived from the view that the FREs themselves favor the admission of probative evidence. See Young v. Illinois Cent. Gulf R.R., 618 F.2d 332, 337 (5th Cir. 1980); United States v. Carranco, 551 F.2d 1197, 1200 (10th Cir. 1977).
\item \textsuperscript{357} Phoenix, 60 F.3d at 101 (citation omitted).
\end{itemize}
burden on parties seeking to establish the regularity of a practice.\textsuperscript{359} As the Third Circuit noted, "Even the pre-rules caselaw does not uniformly support so stringent a standard."\textsuperscript{360}

Moreover, the advisory committee itself has espoused a policy of admissibility over exclusion when dealing with novel recordkeeping dilemmas. As the advisory committee noted, "The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence [FRE 803(6)] assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present."\textsuperscript{361}

C. Admission of E-mail Under FRE 803(6) as a Record of Communication

Thus far, this Note has argued that e-mail created in the course of a regularly conducted business activity should be admitted under FRE 803(6). While the business records exception may admit a variety of corporate e-mail messages, FRE 803(6) cannot apply to the content of all corporate e-mail. The content of personal messages, even if sent through a corporate e-mail system, will almost certainly be excluded, as they are under the NARA Guidelines.\textsuperscript{362} Courts will have a difficult time accepting the argument that e-mail messages like those in Strauss and Allen were part of regular business activity.\textsuperscript{363} Additionally, FRE 803(6) would probably not apply to the content of personal e-mail sent through commercial on-line services or the Internet\textsuperscript{364} unless the proponent of such evidence could prove that the e-mail was being transmitted as part of a regularly conducted business activity.

\textsuperscript{359} See Zenith, 723 F.2d at 288-89.
\textsuperscript{360} Id. at 289. In what may be the most liberal approach to the regularity requirement, one treatise has argued that even if the record was not routinely made, it may still be admissible. See 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence § 803(6)[03], at 803-205 (1995). Weinstein and Berger note:

Since Congress did not intend to make the business record exception more restrictive than it had previously been, Rule 803(6) has been correctly interpreted so that the absence of "routineness" without more is not sufficiently significant to require exclusion of the record. Nonroutine records made in the course of a regularly conducted "business" are generally admissible if they meet the other requirements of Rule 803(6), unless "the sources of information or other circumstances indicate [a] lack of trustworthiness."

\textit{Id.} This approach was adopted in United States v. Freidin, No. 86 CR. 788 (JFK), 1987 WL 9442, at *2 (S.D.N.Y. Apr. 9, 1987), but was later criticized by the Second Circuit upon review. See United States v. Freidin, 849 F.2d 716, 721-23 (2d Cir. 1988).

\textsuperscript{361} Fed. R. Evid. 803(8) advisory committee's note (emphasis added).
\textsuperscript{362} See National Archives and Records Administration, 60 Fed. Reg. 44,634, 44,643 (1995)

\textsuperscript{363} See supra notes 95-99 and accompanying text. In Allen, the messages were personal disclosures of marital difficulties. See supra notes 105-10 and accompanying text. The employees in question were probably not under a business duty to send those messages.

\textsuperscript{364} See supra notes 21-22.
Another situation exists, however, in which FRE 803(6) could apply to these types of e-mail messages. A proponent of personal e-mail may seek to establish the time, date, and parties involved in the transmittal. For example, in *Strauss*, the plaintiff might seek to use the e-mail transmittal evidence to show that the messages were sent from a manager to his employee. In this context, the e-mail would be offered for the truth of what it asserts, and would thus likely face a hearsay challenge. Nonetheless, the e-mail might be admitted as a business record.

As a number of other courts have held, records of a communication, if kept in the regular course of a business activity, can be admitted as proof of the underlying conversation. 365 United States v. Vela, 366 a Fifth Circuit case, illustrates this point. In *Vela*, the defendant was charged with conspiracy to commit a drug-related offense. 367 Part of the prosecutor’s proof included testimony from the defendant’s drug buyers. 368 To support the link between the defendant and the two buyers, the prosecutor introduced copies of phone bills which indicated calls were made between the men. 369 Despite the defendant’s hearsay objections to the phone records, the court admitted the evidence under FRE 803(6) as a regularly kept record of the phone company. 370

Accordingly, if a proponent of this type of e-mail evidence could establish that commercial on-line providers such as America Online or Prodigy kept such information in the regular course of business, 371 little difference would exist between e-mail records and phone company records; the e-mail transmittal information should be equally admissible. Personal e-mail sent through a corporate e-mail system may also fall under this rubric. With companies such as CIBA-Geigy and Intuit, Inc. archiving records of employee e-mail transmissions, 372 a proponent of transmittal evidence might successfully establish that these were records kept in the regular course of business, and are thus admissible under FRE 803(6). 373

---


366. 673 F.2d 86 (5th Cir. 1982).

367. Id. at 87.

368. Id.

369. Id. at 89.

370. Id. at 89-90. The court did require an employee of Southwestern Bell to testify as to how the records were created. *Id.*

371. America Online presently maintains a complete record of every e-mail message sent through its system for a period of five days after the message is read by its recipient; a record of unread e-mail is stored for a full 25 days. See Heyboer, *supra* note 22, at 9.

372. See *supra* notes 320-21 and accompanying text.

373. Unfortunately, the proponent of the evidence may still likely be unable to use FRE 803(6) to admit the content of the e-mail message.
D. Toward a Uniform Approach in Evaluating E-mail Evidence Under FRE 803(6)

While FRE 803(6) may be useful in admitting e-mail transmittal information, the exception has a far greater value if it can be used to admit the content of e-mail messages. Both the language of FRE 803(6), and the relevant case law contain room for the admissibility of the content of e-mail as a business record. This Note urges that e-mail, as a recordkeeping system, is a "data compilation" no different from other forms of computer storage which have been accepted under FRE 803(6). Additionally, the content of most e-mail messages is often merely an electronic form of handwritten correspondence or memoranda, both of which can and have qualified under FRE 803(6). Congress, however, has issued no clear mandate as to how e-mail evidence should be treated. An amendment expressly including electronic communications in the language of FRE 803(6) would serve to clarify the issue.

By acknowledging that an e-mail system, as an electronic storage medium, is capable of systematic recordkeeping, Congress would enable courts to focus on the more crucial elements of FRE 803(6)—the content of the message and the business context within which it was made. By enacting changes to FRE 803(6), Congress would also avoid the incongruous result of having an otherwise admissible record ruled inadmissible simply because it was made and stored in an e-mail system. An amendment would further ensure that traditionally reliable evidence could be considered by the trier of fact in civil or criminal cases.

Until such a change takes place, courts faced with the issue of e-mail's admissibility under FRE 803(6) need a framework within which to evaluate e-mail evidence. Judges asked to apply FRE 803(6) to e-mail should adopt a less formalistic approach to e-mail evidence. Courts dealing with new recordkeeping methods and technologies such as computer-based records or telex messages have repeatedly stressed that to evaluate a business record properly, the content and preparation of the record should be the integral focus of the inquiry. As the D.C. Circuit stated: "The critical factor in determining whether [a] document satisfie[s] the 'business purpose' requirement lies in the reason that the message was prepared and sent, not the means by which it was transmitted." Such an approach is consistent with the advisory committee's position on evaluating evidence under the Rule. Otherwise, the result will be "a tendency unduly to emphasize a requirement of routineness and repetitiveness

374. See supra notes 217-21, 279-87 and accompanying text.
376. See supra note 361 and accompanying text.
and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records." 

This is perhaps best illustrated in the context of the opening hypothetical. In evaluating the admissibility of the software company's e-mail message, the court should first look to see if the manager acted under a business duty in preparing the underlying report. Since his job was to evaluate outside purchases, this requirement of FRE 803(6) would likely be met. The e-mail proponent would then need to show that these evaluations were regularly kept by the software company. This too could easily be done by showing that the manager routinely made a record of such findings. If the court is hesitant about the recordkeeping nature of the e-mail system, the e-mail proponent should seek to establish that the e-mail system has storage and retrieval capabilities—as most e-mail systems do. That no paper copy of the record exists would help demonstrate that the e-mail system is being used for recordkeeping purposes. As this analysis suggests, courts evaluating e-mail evidence must take an approach no different than their evaluation of traditional correspondence.

Finally, the proponent of the e-mail evidence may face foundational issues similar to those arising in the case of other computer-based records. The custodial witness may also be asked to demonstrate the security measures used on the e-mail system. Courts should not require, however, that elaborate security measures be in place as a prerequisite to admitting the e-mail evidence.

**Conclusion**

E-mail has become a permanent fixture in modern business activity and recordkeeping. As a result, litigators have begun to utilize e-mail evidence at trial. If used to prove the truth of what it asserts, however, e-mail evidence must overcome a hearsay challenge. Where the e-mail evidence was made or kept by a business, proponents of the evidence may seek to admit the evidence under FRE 803(6), the business records hearsay exception, or under similar state rules of evidence. While both the NARA and the D.C. Circuit appear to have recognized e-mail as a recordkeeping medium, at least one circuit has

---


378. See supra note 42 and accompanying text.


381. See Traynor, supra note 76, at B10.

382. See supra notes 230-31 and accompanying text.
taken a different view. Thus, a strong possibility remains that an otherwise admissible business report or memorandum may be excluded from evidence simply because it was transmitted and stored electronically.

This Note demonstrates that e-mail is capable of satisfying the requirements of FRE 803(6). While the admissibility of evidence is a fact-sensitive issue, this Note argues that the language of FRE 803(6) is broad enough to include e-mail. Accordingly, courts evaluating e-mail evidence under FRE 803(6) should focus not on the medium used to make the record, but on the content of the message and the business context within which the record was made. Failure to do so may result in inconsistent treatment of e-mail evidence, and a derogation of the policies behind the business records exception, which favors the admissibility of trustworthy, probative evidence.