

INTRODUCING CHAIN EMAILS & TEXT MESSAGES INTO EVIDENCE

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Recently, I deposed a child therapist who was treating the divorcing parents' child. Prior to taking therapist's deposition, I subpoenaed her entire file, which included many long chain emails.

Upon receiving subpoenaed information (as well as discovery responses), our office procedure is to bates stamp all documents. Thus, as usual, we bates stamped the therapist's long chain emails and other materials.

When I took the therapist's deposition, introducing the bates stamped email chains became cumbersome. Long email chains are duplicative and the emails are in reverse order (newest to oldest). This further complicated the question and answer process and made the deposition much longer than necessary.

Not long afterward as I prepared for trial, I dreaded the moment I would have to introduce the long email chains into evidence. The awkward, tedious process would likely upset the judge and losing control of the witness might occur. Authentication was also a concern because I did not want to "clean up" the emails by copying and pasting them into a Word document and reorganizing them oldest to newest because I would be manipulating the emails. If the other attorney was paying attention and objection on an authentication ground, the judge might deny my request to introduce them as evidence.

I decided to brainstorm with another close family law colleague who handled many family law trials. We came up with some great ideas, and when I used our "system" at trial, it worked beautifully so I wanted to share our ideas with you.

To introduce long email chains into evidence, do the following:

1. As opposed to bates stamping all the emails from 000001 – 002000 as we do when sending or receiving discovery, for trial evidence we grouped chain emails by topic, including every email in the chain in the group. Then, we numbered the group starting with page one through the last email in the chain.

2. When I questioned my client about the group, she identified the documents. She explained that they were a group of emails in a long chain. She identified the email addresses and explained she knew the senders and she was a recipient. She also identified the dates and times of the emails.
3. I marked the group as Plaintiff's Exhibit 1 for identification. Then, since chain emails are in reverse order, I asked her to turn to the last page of the group, for example page 4, of Plaintiff's Exhibit 1 for identification and ask her to explain the significance of this email, and the next email on page 3 and then, page 2 and page 1.
4. The system worked very well. My client's testimony was smooth and easy for the judge and the opposing party to follow. When I moved to introduce the evidence, the opposing party did not object.

My colleague and I also discussed the challenges of introducing text messages into evidence. Introducing screen shots of texts messages is not exactly the best method because screen shots rarely show the date the text was sent, the sender's name, the receiver's name and sometimes the time is indicated either. Thus, unless the context of the text revealed this information, authenticating texts is a challenge. Then, even if I could overcome that challenge, deciphering the texts later is difficult for the Court when making their ruling.

The solution to introduce text messages efficiently was solved with an app for Mac computers called PhoneView. This app costs approximately \$30. You connect an iPhone to a Mac Computer that has this program installed. When the program is running and the phone is connected, you can download text messages from a particular phone number and the program organizes the texts by the phone number (or name), in chronological order and the date, time the text was sent and time it was received are noted by the program. Reading the texts becomes easy and it is clear who is the sender and the receiver as well as the date and time of the texts.

To authenticate texts using this software do the following:

Have your witness describe the app, PhoneView, how she used it, why she picked the particular phone number and whether or not she manipulated any of the texts. For example, get the witness to testify as follows:

1. I purchased the program, PhoneView, and downloaded it to my Mac computer. I connected my iPhone to my Mac computer and "turned on" the app, PhoneView. I then selected Messages (text messages) and I downloaded the texts from the phone number 999.000.1234, which belongs to Mr. Smith. The texts regarding this number were texts between Mr. Smith and me.

2. I downloaded all texts for the period January 1, 2017 through March 31, 2017, and I did not delete any texts during the time period. (You must decide whether to print *all* or just some of the text messages. Making this determination is important. I learned that choosing texts by time period is best even if they contain some irrelevant texts because for authentication purposes, it is clear no texts between Mr. Smith and the witness during a particular period of time were deleted.)
3. Next, the witness explains that she copies the text grouping and pastes it into a Word document and numbered each page.
4. At Trial:
 - a. Hand the witness the text grouping and ask the witness to identify the documents.
 - b. Once the witness explains the context of the text group, ask the witness how the group was created.
 - c. Get the witness to explain how she utilized the PhoneView app to download and organize the texts.
 - d. Since these texts were no longer in the original format, asked the witness why she utilized this App.
 - e. Have the witness explain that the App was used for Demonstrative purposes to organize the texts clearly by date, time, sender and receiver.
 - f. Make sure you have the witness testify that the app created a fair and accurate representation of the texts and this format would assist the Court in understanding the chronology, dates, times, sender and receiver of the texts. Consider having the witness explain why this method is much better and more accurate than using screen shots.
 - g. When asking about specific texts, for example, Plaintiff's Exhibit 2 for Identification beginning on page 1, have the witness turn to page 1, get her to explain the relevance of the texts on that page as well as the important texts on subsequent pages. Make sure the witness also testifies that she not manipulate, delete or rewrite any of the texts.
 - h. If the opposing attorney objects to your introduction of the texts in this format, argue:

- i. PhoneView organizes the texts chronologically by date and time; it identifies when texts were sent and received. The format is demonstrative evidence offered under the Summaries rule from the Rules of Evidence, and the format will assist the Court by clearly identifying dates, times, sender and receiver. (You may also want to clarify why the Best Evidence Rule is not necessarily the best method to introduce this evidence, because screen shots, for example often fail to identify the date and time the text was sent.)

Another tip: If you have time to organize either the chain email groups or text message groups ahead of time, attach them to a Request to Admit and ask the opposing party to admit to their authenticity. This could make the process of admitting the evidence much easier.

If you are worried the opposing counsel will fight you at every turn, especially the text messages, print all between the sender and receiver and send them to the OC as you would a deposition. Then, identify the pages you plan to introduce before trial like you would introduce portions of a deposition and get the materials authenticated this way.

Hopefully, these suggestions and tips will assist you the next time you are in trial and need an efficient and effective way to introduce these types of evidence.