



IN DEFENSE OF RULE 808, FEDERAL RULES OF EVIDENCE

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RELATIVELY LITTLE ATTENTION has been paid to Rule 808, Fed. R. Evid., since its adoption sometime in the early 2000s. This is not entirely surprising. Evidentiary rules are primarily used in working courtrooms, venues seldom visited by those who write legal articles.

In an effort to remedy this situation, I discuss the Rule, comment on its application, and briefly examine its effect.

Rule 808 is straightforward:

Rule 808. Admission of Corporate Email Communications

Notwithstanding any other evidentiary rule, if the subject document is a corporate email, the document is admissible.

No litigant may object to introduction of any document, hereunder.

The Rule is interestingly placed in the 800 series. Its placement is primarily a matter of convenience, as its scope extends beyond hearsay, classically understood. As a partial remedy, the Committee notes emphasize the Rule's generality.

Rule 808 consistently trumps Rule 403 (relevance), Rule 602 (witness's personal knowledge), Rule 902 (authentication), and net-

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blesome questions inherent in Rules 803 and 804 (declarant's availability or unavailability). Rule 808 also modifies 801(a)(1)'s definition of "Statement," formerly defined as "an oral or written assertion." Under Rule 808's mandatory admission rule, emailed communications are no longer considered 801(c) "written assertions." Rule 803(6) (records of regularly conducted activity) has been negated. Finally, the Rule's placement, after the Rule 807 "residual exception," clarifies Rule 808's elimination of any possibility that an email might be hearsay. In fine, if it's an email, it may be admitted.

Historically, the law was troubled by issues of the adoptive admission. Whether and how to attribute an employee's comments to the employer put counsel and the judges before whom they appeared in a quandary. The law considered that businesses' agents were typically employed to perform a defined task. This task seldom included acting as the employer's spokesperson. But what if an agent made a declaration? Might that declaration be attributed to the employer? The law resolved this question by allowing the employee's statement to be attributed to the employer as an "admission," but only if made within the agent's duties, and on a subject related to them.

The Federal Rules of Evidence adopted this solution as Rule 801(d)(2)(C) and (D), saying:

A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter with the scope of the agency or employment, made during the existence of the relationship

Such a statement is an admission of the party.

Enter now, however, the modern corporate world. An employer often has thousands of employees, each armed with a computer. These employees send and receive emails to and from fellow-employees, friends, or acquaintances. Computer memories steadfastly retain every comment, thought, and email entering their collective maw. There are also devices which can – and do – word

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and/or concept search the business's computerized memory. The result is a system where there is frequently some employee who has said, received, or transmitted something on almost any known subject. Thus, a witch's brew of potential adoptive admissions.

Perhaps the ultimate expression in this area is the email sent to a corporate employee (whether sent within or without the company is, of course, irrelevant), attaching an article or witticism. Such an email may be forwarded to countless others, some of whom may offer their own comments on the subject item. Voila: the email "chain," releasing a nearly infinite potential series of declarations, by an even larger number of declarants.¹

Here Rule 808 shines. Using 808, one need not examine whether the declarant (or any recipient or sender) was actually authorized to make a particular statement. Similarly, one need not ask whether the declarant is an agent acting within the scope of his/her employment while actually in that capacity. Rule 808 means the declarant might actually be concerned about the issue, or perhaps only "shooting the breeze" with a co-worker or out-of-the-office friend – who cares? The document is simply admitted, and introduced as the employer's admission. The Rule, of course, is not limited to employers. After all, under Rule 808, if it's an email, it's just admitted.²

It is surprisingly easy, if not always economical, to select search terms or "concept searches" using computer forensic tools. In an employment case, for example, one might search for email communications about one or more of the plaintiffs, or comments made about either the plaintiff or another "similarly situated" person. In a patent case, a search may reveal any number of emails concerning a particular product, the prior art, or the individuals engaged in product development. Amidst the thousands of employee docu-

¹ More perspicacious readers will also discern the elimination of vexing issues raised by Rule 805's regulation of "Hearsay Within Hearsay." This innovation has been widely acclaimed, as so few dared wade into this thicket.

² It is facile to argue emails are 803 business records (an ancient term for "regularly conducted activity"), unless one also argues that storing admissions against the company's interest is a part of its business strategy.

ments seined from the agglomerated computer memories, the possibilities are almost endless. With chatrooms, Twitter, Facebook, and personal emails, the way is cleared for universal admission.w

An analysis of Rule 808 leads ineluctably to the conclusion that the Rules Committee has opted for authenticity over reliability when email communications are considered; the mere existence of the message becomes the *sine qua non*. Forensic computer analysis assures the email actually resides within the computer's memory. Once recovered and reproduced in electronic discovery, the Rule's threshold is met, and the document is in evidence for all purposes, as described above.

There appears to be no dissent from this Rule; under Rule 808 no objections to its application are possible. The only minor cavils have come from a few aging jurists, sitting *nisi*, who refuse to release their grasp of antiquated common law straws. Happily, absent any objections, no Rule 808 rulings have issued from Courts of Appeals. Under these conditions, any minor concerns about Rule 808 will doubtless dissolve.

Developments in electronics and e-discovery continue: voice mail being the likely new frontier. There are already systems to capture voice mail and mechanisms by which it can be searched. Courts await enactment of pending-Rule 809, allowing admission of this material, too.

