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WHITE-COLLAR CRIME

Context Matters: Emails In White-Collar Prosecutions

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Electronic mail, or "email," has been a regular means of communication in the business world since the mid-1990s. The growth of electronic communication has in turn affected white-collar criminal investigations and prosecutions. What used to be a casual conversation or obscure memorandum—evidence of which was subject to the vagaries of memory and document searches—is now frequently available in an email. As a result, prosecutors and defense lawyers spend tremendous amounts of time and money sorting and reviewing electronic communications (and other electronic documents), arguably at the expense of finding and developing "old-fashioned" testimonial evidence.

The availability of electronic communications has affected the conduct of civil and criminal enforcement agencies in various ways. In its most stark form, a single email (or small number of emails) has been disclosed by prosecutors to put a company or individual on the defensive even before charges are filed. More generally, during an investigation, offhand remarks in emails, often quickly dashed off without much thought, can take on undue importance when they are viewed, often mistakenly, to represent considered judgments and thoughtful opinions.

Electronic communications have likewise become important in criminal trials. The government has begun to rely on emails to prove a defendant's actions and, most importantly, his or her mental state, with the argument that a statement in an email is the best evidence of a defendant's contemporaneous state of mind. Defense lawyers typically make several arguments to refute that claim: for example, that the statements or emails in question are being taken out of context and mean something different from what the government alleges, or that the individual had limited information or was mistaken at the time of the email, and similar explanations. Quite often, such emails are ambiguous and of limited or no value in judging an individual's actual knowledge and intent. Nonetheless, investigations regularly give rise to emails that give the government powerful evidence and are difficult for the defense to explain.

In this article, we explore how the government has fared in several cases in which the government's case rested in important respects on emails. Judges have expressed reservations about reliably inferring a defendant's state of mind from one or a limited set of emails without adequate testimony or other documents to place the critical communications in context. Juries too may be showing some resistance to placing too much reliance on emails, perhaps because jurors themselves understand their own email habits, as suggested by an acquittal in a high-profile case in the Eastern District of New York.

The Bear Stearns Prosecution

In 2008, the government charged two former Bear Stearns hedge fund managers with fraud on the theory that in 2007 they made positive statements about mortgage-backed securities which they did not really believe—as shown by emails on personal email accounts which expressed concerns about how these securities would perform. The case drew considerable attention because it was one of the first prosecutions growing out of the global financial crisis. After a month-long trial and two days of deliberation, the jury returned verdicts of not guilty.

The prosecution sought to convince the jury that the defendants were knowingly making false statements about their portfolios largely on the basis of documentary evidence, mostly of emails. Other evidence of guilt was limited. As one commentator noted, "a case built on provocative email excerpts, bereft of context, can teeter when witnesses appear in court to provide a backdrop, for example, or the surrounding context of a seemingly damning email message excerpt is read before the jury."[1] The jury seemed receptive to defense arguments that the email excerpts on which the government relied had been taken out of context and reflected doubt and concern as the market declined, not a certain knowledge of collapse. According to the jury's forewoman, "The government never provided enough evidence to convict them. We never found anything beyond a reasonable doubt."[2]

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Whatever the exact reasons for acquittal, the Bear Stearns case has been viewed by many observers as an example of excessive reliance on emails by the government. Yet prosecutors still routinely rely on emails to prove their case. When convictions have been secured, appellate courts have scrutinized the sufficiency of evidence that consists to a large extent of emails.

'United States v. Coplan'

In late 2012, the U.S. Court of Appeals for the Second Circuit carefully considered the sufficiency of email evidence in *United States v. Coplan*, a high-profile case in which four Ernst & Young (E&Y) partners and an outside investment advisor were charged principally with tax evasion and conspiracy to defraud the government in connection with a number of tax shelters developed by the accounting firm.[3] The outside investment advisor pleaded guilty; the four E&Y partners went to trial and were found guilty on all counts. On appeal, the Second Circuit reversed all the charges against two of the partners, tax attorneys, based on insufficient evidence. The charges against the other two E&Y partners were affirmed.

According to the government, the two tax attorneys belonged to a group of E&Y employees who designed unlawful tax strategies for high net worth individuals to shelter millions of dollars of income. The group developed five separate tax shelters that were audited by the government. The government argued that the tax attorneys conspired with others to create "cover stories" to conceal the true and unlawful nature of the tax shelters, including making false and misleading statements in connection with IRS audits.

The government's evidence against the two men consisted largely of emails. The government pointed to a February 2002 email sent by one of the two, Martin Nissenbaum, to the other attorney (and another defendant) which asked for comments on a document that could be used as a template by E&Y clients who had invested in E&Y's "PICO" shelter and wanted to seek amnesty under the IRS's voluntary disclosure program for tax shelters. The document contained false and misleading descriptions of the PICO shelter.

The government argued that Nissenbaum's sending of the email was circumstantial evidence of his participation in the conspiracy. However, trial testimony revealed that Nissenbaum did not draft the template and did no more than make nonsubstantive comments, such as "take out the bold" and "correct[] a typo."[4]

In another instance, the government relied on a March 2000 email sent by the defendant Coplan to Nissenbaum and the other tax attorney with a draft amnesty template for another of the tax shelters, the "Add-On" shelter, requesting that they look it over "to avoid unnecessary facts or to make it easier to complete accurately." Twenty minutes after the email was sent, Nissenbaum replied, "[t]he disclosure looks fine to me except that I don't believe that its [sic] necessary to put the specifics of each option trade in the letter. If we do it here, presumably we'd have to include the hundreds of trades that are done in [the] PICO [shelter]." The government pointed to Nissenbaum's three-line response as evidence of his participation in the conspiracy to cover up the true purpose of the Add-On and other shelters.

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The Second Circuit held that the government's proof against Nissenbaum was insufficient, holding that the record lacked evidence that Nissenbaum's response to the March 2000 email "evinced a knowing 'stamp of approval' for the consolidation cover story in the Add-On amnesty template." Further, the court noted that the record lacked evidence that Nissenbaum participated in telephone conferences of meetings related to the development of the Add-On shelter. His occasional receipt of copies of email correspondence related to Add-On, and his sole response to such emails—the three-line comment cited above—was "simply not enough" to demonstrate that Nissenbaum had the requisite criminal intent.[5]

Sufficiency claims usually fail on appeal. In a given year, the number of convictions dismissed on sufficiency grounds in the Second Circuit can typically be counted on one hand. If prosecutors and defense counsel can draw a conclusion from the *Coplan* decision, it is that the Second Circuit may be inclined to scrutinize sufficiency claims with particular care when a conviction relies on a limited number of emails, especially if the evidence corroborating the government's interpretation of the emails is scant or equivocal.

Other Appellate Decisions

Other appellate courts have looked carefully at email evidence when judging sufficiency. The facts in those cases have led to varied results.

In *United States v. Hoffman*, the defendant, vice president of a company awarded a contract by the U.S. Army Corps of Engineers, was convicted at trial of giving a gratuity to William Schwening, an employee of the Army Corps, who was responsible for filing a rating of Hoffman's company after the completion of the contract.[6] The gratuity, which included two golf outings, a computer and golf clubs, was given to Schwening in 2003, after the contract ended in April 2002. The rating was important to Hoffman because it would help his company get more contracts from the Army Corps.

The government's proof included emails between Hoffman and Schwening in which they discussed the rating to be filed, and Hoffman thanked Schwening for his assistance on a number of occasions. In one email Hoffman wrote that he "owed one" to Schwening. A Sept. 22, 2003, email had "small talk" about golf and an individual who formerly worked in the Army Corps. Schwening responded that he knew the individual, then wrote, "no clubs yet??" The following day, Hoffman ordered golf clubs on his company credit card to be sent to Schwening. Upon delivery, Schwening emailed Hoffman saying "hey buddy, do you need ANYTHING…I hit the titleist last night straight outta the box awesome."

Thirteen months later, on Nov. 10, 2004, Hoffman emailed Schwening about the still unfiled rating document. Hoffman, noting that he would like to have the rating put into the system so that he could procure other contracts, concluded by writing, "Oh, by the way, how is your golf game since you got those new woods?" Ultimately, Schwening did not file the rating for Hoffman's company. But Hoffman and Schwening were respectively charged

with giving and receiving a gratuity. Hoffman's defense at trial was that he had given the golf clubs out of friendship. He was convicted.

On appeal Hoffman argued that the evidence was insufficient to prove that he gave the golf clubs as an illegal gratuity. The U.S. Court of Appeals for the Eighth Circuit rejected Hoffman's argument, holding that a reasonable juror could conclude from the emails that Hoffman had given the clubs to Schwening with the intent to reward future performance, namely Schwening's favorable rating submission.

The ruling elicited a vigorous dissent. The dissent emphasized that the email exchanges between Hoffman and Schwening needed to be viewed against the backdrop of extensive testimony at trial about the genuine friendship between Hoffman and Schwening and their mutual love of golf. In the dissent's view, the totality of the evidence amply supported an innocent explanation for the gifts: "[i]t cannot be said…[that] adjacent comments about golf and an…evaluation in a single email dispatched thirteen months after-the-fact infer guilt any more strongly than innocence. As a consequence, I am of the firm belief we have a duty and obligation to direct an acquittal herein."[7]

In *United States v. Brown*, arising from the collapse of Enron, the U.S. Court of Appeals for the Fifth Circuit reviewed the conspiracy and wire fraud convictions of employees of Merrill Lynch in connection with an agreement for the purchase of three power-generating barges which lifted Enron's revenue and profits in a given reporting period.[8] Enron proposed that Merrill Lynch purchase the barges with a guarantee that the barges would be bought back by Enron or sold to a third party within six months at an amount at least 15 percent above Merrill Lynch's original investment.

The government's evidence showed that whereas original drafts of the agreement between Enron and Merrill Lynch memorialized the buyback guarantee, the final agreement pursuant to which Merrill purchased the barges did not reflect a guarantee. The government alleged that the parties knew the oral buyback agreement could not be written because it would prevent Enron from achieving the accounting treatment it sought.

At trial, six defendants were convicted of conspiracy and wire fraud. The Fifth Circuit vacated the convictions of each of the defendants on the ground that the government's theory of deprivation of honest services was flawed.[9]

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As to one of the defendants, William Fuhs, a Merrill Lynch vice president, the Fifth Circuit separately held that the evidence was insufficient. The proof consisted chiefly of emails on which Fuhs was copied. Fuhs did not write the emails, nor was he the primary recipient. The Fifth Circuit held that, while the emails adequately showed Fuhs' knowledge that Merrill sought a buyback agreement with Enron, the emails did not sufficiently support the inference that Fuhs had knowledge of a secret oral agreement to keep the buyback agreement out of the written contract with Enron. The court wrote, "if we begin with the assumption that Fuhs is guilty, the documents can be read to support that assumption. But if we begin with the proper presumption that Fuhs is not guilty until proven guilty beyond a reasonable doubt, we must conclude that the evidence is insufficient."[10]

Conclusion

For the foreseeable future emails and other means of electronic communication will be ubiquitous. Seeing the damage of hastily written or inaccurate emails, companies have sought to regulate how they are used by employees and thereby limit collateral legal consequences.

Notwithstanding these efforts, we can expect emails to remain central to white-collar investigations and to continue to contain statements that present challenges to defense lawyers. Thus far a number of appellate judges have shown sensitivity to how emails can lead to questionable conclusions if viewed in isolation or taken out of context. Given the importance of electronic communications to white-collar investigations, vigilance will be required to be sure that the evidentiary limitations of such communications continue to be recognized.

1. Dan Slater, "In Bear Trial, Prosecution Seems to Falter," The New York Times (Oct. 23, 2009).

2. Grant McCool and Michael Erman, "Ex-Bear Stearns Hedge Fund Managers Acquitted," Reuters (Nov. 10, 2009).

3. 703 F.3d 46 (2d. Cir. 2012). The authors' firm represented one of the defendants at trial and on appeal in this matter.

4. Id. at 68-69.

5. Id. at 71. As to the second tax attorney, the government relied on the emails described above along with additional evidence chiefly consisting of other emails regarding the marketing of the shelters and additional evidence regarding his participation in conference calls and meetings during which the shelters were discussed. The court wrote that some of the government's proof against him was consistent with his role as "'technician' tasked with making sure the transactions were structured in compliance with tax law." Ultimately, the court held that the evidence regarding his specific intent to violate the law by joining the conspiracy was "at best, in equipoise," requiring reversal. Id. (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). See *United States v. Huezo*, 546 F.3d 174, 193 (2d Cir. 2008) ("If the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain reasonable doubt").

6. 556 F.3d 871, 879 (8th Cir. 2009).

7. Id. at 879.

8. 459 F.3d 509 (5th Cir. 2006), cert. denied, 550 U.S. 933 (2007).

9. Id. at 523.

10. Id. at 525.