Section of Litigation Business Torts & Unfair Competition

The Relationship Between Hearsay and Business Records

By Zachary G. Newman – March 11, 2015

One of the most commonly invoked hearsay exceptions relied on in business tort and commercial cases is the business records exception. As trials and evidentiary hearings in such cases become increasingly less frequent due to, among other things, growing court dockets and delays in discovery, trial lawyers tend to become a bit rusty with the rules of evidence. Many times a simple business record is the critical piece of evidence for the case, and a hiccup in the admissibility of that record can have a material impact on the court proceeding and its outcome.

Trial courts have "broad discretion in ruling on the admissibility of evidence," and rulings "on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." *Urich v. Fish*, 804 A.2d 795 (Conn. 2002). Accordingly, it is absolutely critical for trial attorneys to be adequately prepared to address hearsay concerns in business records.

The Business Records Exception

A business record can take many forms, from memoranda, reports, and records, to data compilation, so long as it describes acts, events, conditions, opinion, or diagnoses that were made at or near the time by, or from information transmitted by, a person with knowledge. These records are typically created out of court prior to the trial or evidentiary hearing; thus, they are prototypical examples of hearsay. Hearsay is any "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." Fed. R. Evid. 801(c). Hearsay is inadmissible unless it falls within a recognized exception. Fed. R. Evid. 802.

The rationale for the business records exception is based on the inherent reliability of business records, which is supplied by "systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.'" Fed. R. Evid. 803(6) advisory committee's note. Too often litigators gloss over the importance of satisfying each of the rule's elements and fail to lay a proper foundation for each element to ensure admissibility at the proper time. Each business record must be carefully analyzed to ensure compliance with the rules, and a plan must be devised to authenticate the record and provide accurate and complete testimony to satisfy each element of the rule.

To have a business record admitted, the proponent must show (1) that the record was made at or near the time of the event; (2) that the record was made by or from information transmitted by a person with knowledge; (3) that the record was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record. All these conditions can be met through the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a corollary state statute permitting self-authentication or certification.

Business records can be admitted regardless of the personal knowledge of the affiant. *See Giddens v. Appeal Bd. of Mich. Emp't Sec. Comm'n*, 4 Mich. App. 526, 533, 145 N.W.2d 294 (Mich. Ct. App. 1966) (circumstances surrounding a record, including the entrant's lack of personal knowledge of the contents of the record, only affect the weight, not the admissibility, of the evidence); *Dalton v. FDIC*, 987 F.2d 1216, 1223 (5th Cir. 1993) ("[A]n affidavit of an FDIC account officer is not defective solely because the officer did not have personal knowledge of the loan transaction when it occurred, and only learned about the loan after the bank went into receivership.").

The rule generally requires the preparer of the document—as opposed to the testifying party or the records custodian—to have had the requisite knowledge. This element of the rule is "broadly interpreted to require only that the witness understand the record-keeping system." *United States v. Childs*, 5 F.3d 1328, 1334 (9th Cir. 1993). A witness can testify, for example, that he or she understands the record-keeping system and performed a diligent search of the company's records to satisfy the elements of Federal Rule of Evidence 803(6). *Walsh v. Microsoft Corp.*, No. C14-424 MJP, 2014 WL 5365450, at *2 (W.D. Wash. Oct. 21, 2014).

Many disputes over business records revolve around the regularly conducted activity requirement. If the record keeping is not established as a regularly conducted activity of

the business, the proponent of the evidence likely will have a difficult time admitting the record into evidence. By way of example, in *Hook v. Regents of University of California*, 394 F. App'x 522, 530–31 (10th Cir. 2010), the court found that interview notes from a whistleblower investigation were not admissible under the business records exception because the recording of such interviews was not a regularly conducted activity.

Regularly conducted activities are subjective, and there can be wide variances between jurisdictions. *See Greco v. Velvet Cactus, LLC*, No. 13-3514, 2014 WL 2943598, at *7 (E.D. La. June 27, 2014) (admitting plaintiff's employment termination notice as a business record); *Rogers v. Or. Trail Elec. Consumers Co-op., Inc.*, No. 3:10CV1337, 2012 WL 1635127 (D. Or. May 8, 2012) ("formal memoranda issued in conjunction with disciplinary action and performance reviews pertaining to one individual" fell within the business records exception); *Timberlake Constr. Co., v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 341 –342 (10th Cir. 1995) (letters addressing the dispute that was the subject of litigation were written in anticipation of litigation and therefore did not fall under business records exception because "[i]t is well-established that one who prepares a document in anticipation of litigation is not acting in the regular course of business").

The business record does not necessarily have to be complete and accurate in order to satisfy the rule. Those issues typically will go to the weight of the evidence. For instance, in *Ada Liss Group (2003) Ltd. v. Sara Lee Corp.*, No. 1:06CV610, 2014 WL 4370660, at *4 (M.D.N.C. Aug. 28, 2014), the court admitted various invoices and packing slips as business records even though voir dire revealed that the quantities in the records were not always accurate. However, the court excluded the pricing information on the grounds that the testimony revealed that the pricing information did not correlate with the actual pricing charged to the customers. Because many business records can be voluminous, many courts will admit summaries of the records "so long as the summary is authenticated by the party who prepared it and the presenting party complies with the [requisite] notice requirements." *McKown v. State*, 46 So. 3d 174, 175 (Fla. 4th Dist. Ct. App. 2010).

Are Emails Business Records?

The informality and overabundance of email discussions raise interesting and unique concerns over what constitutes a business record for evidence admissibility. Many courts have determined that emails "created within a business entity do[] not, for that reason alone, satisfy the business records exception of the hearsay rule." *Kloeckner v. Perez*, No. 4:09CV00804 ERW, 2014 WL 4912129, at *13 (E.D. Mo. Sept. 30, 2014) (citing *United States v. Cone*, 714 F.3d 197, 221 (4th Cir. 2013)).

Ordinarily, a proponent of email business records must show that the employer imposed a business duty to make and maintain such a record. *See Cantaxx Gas Storage Ltd. v. Silverhawk Capital Partners, LLC*, No. H-06-1330, 2008 WL 1999234, at *12 (S.D. Tex. May 8, 2008). In one case, the Sixth Circuit noted that information supplied to a business by an outsider and captured in a business record is admissible for its truth pursuant to Rule 803(6) only if the outsider, himself or herself, acting pursuant to a business duty. *Guardian Ins. & Annuity Co. v. White*, No. 1:13-CV-360, 2014 WL 4426185, at *3 (S.D. Ohio Sept. 9, 2014)

Some courts do not necessarily require that the actual employees be under a duty to make and maintain those communications in order to admit email documents as business records. *Atrium Cos., Inc. v. ESR Assocs., Inc.*, No. H-11-1288, 2012 WL 5355754, at *6 (S.D. Tex. Oct. 29, 2012). Thus, the email could satisfy the admissibility test simply with testimony that the email was written in the course of the preparer's regularly conducted duties and that writing emails was a regular practice in the preparer's duties. Given that sending and receiving emails is so pervasive in today's business world, counsel must take the time to lay the proper foundation through proper testimony and to explain the necessity of communicating by email or that preparing the email is a regularly conducted business activity.

Because of email strings (emails within emails), email documents that contain responses and replies may contain embedded hearsay. To this point, conversations in emails that are not part of regular business communications likely will be excluded from evidence. In *American Home Assurance Co. v. Greater Omaha Packing Co.*, 2014 U.S. Dist. LEXIS 51287 (D. Neb. Apr. 14, 2014), for example, the court refused to admit crucial statements in emails because they were not regular conversations and thus could not meet the business records exception. The same result will happen when the emails reference earlier time periods, running afoul of the contemporaneous requirement of the exception. *See Ira Green, Inc. v. Military Sales & Serv. Co.*, No. 14-1178, 2014 WL 7234962, at *5 (1st Cir. Dec. 19, 2014) (emails describing what occurred years earlier not admissible as a business record).

Self-Authentication

The evidentiary rules do permit self-authentication for business records. For example, under Federal Rule of Evidence 902(11), "the original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court" requires no extrinsic evidence of authenticity to be admitted. However, to take advantage of this rule, "[b]efore the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them."

Care must be taken to exercise strict compliance with the rule to avoid unnecessary and distracting evidentiary challenges. "While the rule does not establish what constitutes a fair amount of time, the time must be of such a duration so that the 'affidavit can be vetted for objection or impeachment in advance.'" *United States v. Olguin*, 643 F.3d 384 (5th Cir. 2011) (quoting *United States v. Brown*, 553 F.3d 768, 793 (5th Cir. 2008)). *See, e.g.*, *United States v. Daniels*, 723 F.3d 562, 579–81 (5th Cir. 2013) (rule objective is to provide adverse party adequate time to investigate and challenge the adequacy of the underlying records). Courts have excused strict compliance when there was sufficient evidence that the defense was on notice of the intention to introduce the documents as self-authenticating business records. *United States v. Komasa*, 767 F.3d 151 (2d Cir. 2014).

In addition to self-authentication, documents can be authenticated as proper business records by judicial notice. Accordingly, "[a] foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court, particularly in the case of bank and similar statements." *Skyline Potato Co. v. Hi-Land Potato Co., Inc.*, No. CIV 10-0698 JB/RHS, 2013 WL 311846, at *18 (D.N.M. Jan. 18, 2013) (citing *Fed. Deposit Ins. Corp. v. Staudinger*, 797 F.2d 908, 910 (10th Cir. 1986)).

Foreclosure Proceedings
Disputes over hearsay objections and the business records exception have flourished in the context of mortgage foreclosure actions, with borrowers and guarantors attempting to seize upon documentation issues or failures. Many of these disputes surround the foreclosing party's evidence of nonpayment or calculation of indebtedness.

In any mortgage foreclosure proceeding, it is crucial that the party seeking foreclosure demonstrate that it has standing to foreclose. To establish standing, the plaintiff must show it held or owned the note at the time the complaint was filed. *McClean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170, 173 (Fla. 4th Dist. Ct. App. 2012). "A plaintiff may prove that it has standing to foreclose 'through evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer.'" *Stone v. BankUnited*, 115 So. 3d 411, 413 (Fla. 2d Dist. Ct. App. 2013) (quoting *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean–Jacques*, 28 So. 3d 936, 939 (Fla. 2d Dist. Ct. App. 2010)).

"While it is not necessary to call the individual who prepared the document, the witness through whom a document is being offered must be able to show each of the requirements for establishing a proper foundation." *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570 (Fla. 1st Dist. Ct. App. 2014). *See also Weisenberg v. Deutsche Bank Nat'l Trust Co.*, 89 So. 3d 1111, 1112–13 (Fla. 4th Dist. Ct. App. 2012) (finding business records exception satisfied where bank's witness was a supervisor at bank's servicing agent who had personal knowledge of bank's internal process for applying loan payments and calculating balances, was familiar with bank's record-keeping system, and knew how payment data were uploaded from bank's computer system to servicing agent's system).

Internal bank documents also can be admitted as business records. Thus, loan payment history printouts, if properly authenticated, can be admitted as business records. *See, e.g.*, *WAMCO XXVIII, Ltd. v. Integrated Elec. Env'ts, Inc.*, 903 So. 2d 230, 233 (Fla. 2d Dist. Ct. App. 2005) (affirming the admission of loan payment history as a business record). Even drafts of documents can be admissible business records. *United States v. Freeman*, 585 F. App'x 516, 517 (9th Cir. 2014) (draft minutes of a meeting admitted under the business records hearsay exception notwithstanding the "possibility that the draft minutes contained inaccuracies [did] not affect their admissibility"). On the other hand, statements of borrowers and consumers in the bank's files may not be admitted as business records for the truth of the matter asserted because they do not meet any exception.

Using Business Records in Summary Judgment Motions
These same evidentiary concerns surrounding business records that must be addressed at trial and in evidentiary hearings apply to summary judgment motions. Typically, hearsay documents may be used as evidence in opposition to summary judgment "provided some showing is made (or it is obvious) that they can be replaced by proper evidence at trial." *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997).

Federal Rule of Evidence 103 provides that a party preserves its objections to admit or exclude evidence, provided that party, among other things, timely objects or moves to strike. Some courts permit parties to object to hearsay evidence at trial even though objections may not have been raised previously in the proceeding. For instance, one federal court in California found that there was no bar to a party raising a previously unasserted evidentiary objection to hearsay at trial. *See, e.g.*, *Yeager v. Bowlin*, 2010 WL 952242, at *2 n.3 (E.D. Cal. Jan. 6, 2010) (unpublished) ("To this court's knowledge, failure to object to evidence presented in connection with a summary judgment motion does not waive any objection to that evidence at trial."). Nevertheless, the best practice is to timely and clearly assert evidentiary objections in the summary judgment papers, and consider whether a motion to strike the evidence is appropriate or timely.

Conclusion
The particular evidentiary concerns and nuances of the multitude of business records requires counsel to pay close attention to the evidence rules and recent decisions to be fully prepared in court or when briefing dispositive motions.

Keywords: litigation, business torts, hearsay, business records, authentication, foreclosure, summary judgment

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