ELECTRONICALLY STORED BUSINESS RECORDS: FAVORABLE PRESUMPTIONS AND MOTION PRACTICE

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Despite the ubiquity and routine usage of computers and electronic storage methods for everyday business activities, there remains a certain degree of inherent mistrust by both trial courts and opposing counsel when electronically stored business records are produced in discovery or are sought to be used at trial. The question remains: Why? As defense counsel, practitioners are often presented with sophisticated clients, both large and small, that rely on electronic systems to record, store, and compile thousands of everyday transactions stored not in the file rooms of old, but instead in databases, servers and various intangible folders. More and more, defense counsel present data of these everyday transactions in court or produce these in discovery. However, whether at the insistence of plaintiff's counsel, crying "unreliable," or "untrustworthy," or the court's reticence, there remains often times an uphill battle in admitting, without issue, a client's electronically stored business records. This is in spite of fifty years of precedent with a *presumption* in favor of reliability. It remains counsel's duty to remind all parties of the many years of precedent, and shore up the defenses for the client.

The business records exemption to the rule against hearsay is well known. N.J.R.E. 803(c)(6) provides that "[a] statement contained in a writing or other records of acts, events, conditions . . . made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy," is admissible as evidence as an exception to the prohibition against hearsay. As early as 1976, prior to the adoption of our modern rules of evidence and admission, our courts have held "as long as proper foundation is laid, a computer printout is admissible on the same basis as any other business record." Sears, Roebuck & Co. v. Merla, 142 N.J. Super. 205, 207 (App. Div. 1976) (emphasis added). Roughly forty-seven years later, it "is settled that there are no longer any special evidentiary requirements for computer-generated business records." Biunno, Weissbard & Zegas, New Jersey Rules of Evidence, cmt. 2 to N.J.R.E. 803(c)(6)(2). This proposition has been reiterated by our own Appellate Division on several occasions. See Carmona v. Resorts Intern. Hotel, 189 N.J. 354, 380 (App. Div. 2007) ("business records maintained in a computer system are not treated differently from hard copies merely because they are stored electronically."); Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11, 15 (App. Div. 1996) (supporting same). Recognizing the express provisions of N.J.R.E. 803(c)(6), that the records be made "at or near the time of observation," contemporaneous, or near contemporaneous recording has been noted as imperative for admissibility. See State v. Vogt, 130 N.J. Super. 465 (App. Div. 1974).

Having established that there is the ability to clear the initial hurdle of qualifying as business records, concerns are often raised by litigants as to whether the records being admitted need a specific kind of expertise to be admitted at time of trial and with the appropriate foundational knowledge to satisfy N.J.R.E. 901. Our Appellate Division has determined the individual seeking to admit the computer business records does not require "personal knowledge" of the creation of the record. Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11, 16 (App. Div. 1996) ("personal knowledge likewise would not be required when computer records were sought to be introduced."). Instead, the Appellate Division noted that a "witness is competent to lay the foundation for systematically prepared computer records if the witness (1) can demonstrate that the computer record is what the proponent claims and (2) is sufficiently familiar with the record system used and (3) can establish that it was the regular practice of that business to make the record." Id. at 18. Specifically, with respect to the lack of necessity of personal knowledge, the Court stated "[e]xpert testimony as to the reliability of the programs a computer uses or other technical aspects of its operation is unnecessary to find computer-generated records circumstantially reliable." Ibid.

Thus far, we have established computer records made at or near the time of "observation" qualify as business records, and that the records merely need the same foundation under N.J.R.E. 901, as other business records (i.e. broad knowledge of how the record keeping system works, establishment that the record is part of regular business, and someone who knows what the record is). The final twist, here, can serve to be a boon to defense counsel.

Biunno, Weissbard, and Zegas have observed that once cleared for admission, computer printouts of business records are "presumed to be reliable . . . ." Biunno, Weissbard & Zegas, New Jersey Rules of Evidence, cmt. 2 to N.J.R.E. 803(c)(6)(2). This is reflected in the verbiage of N.J.R.E. 803(c)(6), which permits admission of records "unless the sources of information or the *method, purpose or circumstances of preparation indicate* that it is not trustworthy." (emphasis added.) The proof, or even the specter of unreliability or lack of trustworthiness, to be established by the opponent of the proffered evidence is not a light burden. These records are *presumed* reliable. These oft-cited scholars go further than a mere presumption, and opine "[p]resumably the quantum of evidence required to be produced *is significantly greater for the opponent to a computer record* . . . ." Biunno, Weissbard & Zegas, New Jersey Rules of Evidence, cmt. 2 to N.J.R.E. 803(c)(6)(2) (emphasis added).

Although not explicitly established in any published precedent, the ultimate conclusion here, is that the opponent of a presumptively reliable business record, absent testimony of nefarious conduct or suspicious circumstances (more than a self-serving statement), must provide some form of expert testimony to overcome the presumed reliability. The validity of this assertion is found scattered in prior precedent. As explained in Hahnemann, "[w]ith the advent of computers has come an implicit trust in their dependability, owing primarily to the results they achieve. The mechanical (or electronic) explanation of computer workings would likely have been beyond the grasp of most jury members and would not have proved helpful in establishing the reliability of the records. . . . An explanation of the internal workings of a massive computer system belies common sense and judicial efficiency. Computer usage permeates every strata of society and is customary in modern life." Hahnemann, 292 N.J. Super. at 16 (quoting State v. Swed, 255 N.J. Super. 228 (App. Div. 1992)).

"There is no reason to believe that a computerized business record is not trustworthy unless the opposing party comes forward with some evidence to question its reliability." Id. at 18; See New Century Financial Servs. Inc., v. Oughla, 437 N.J. Super. 299, 329-30 (App. Div. 2014) ("Defendants express significant concern over admitting electronically-transmitted credit card account statements for accounts that have been assigned several times, but they have not pointed to anything in the record to suggest that the statements proffered by plaintiffs are not trustworthy. It is not lost on us that plaintiffs filed their complaints and summary judgment motions electronically in the Special Civil Part, and that the judges entered their orders granting the motions in the Judiciary Electronic Filing and Imaging System (JEFIS), where they are maintained in electronic case jackets. Like the litigants that appear in our courts, our courts are increasingly reliant on electronically filed and transmitted information").

The short of the matter is this: If counsel can produce electronically stored records, produce an individual with sufficient record keeping knowledge, and establish the records were stored/created at or near the time of occurrence, counsel has acquired a *presumptively reliable* statement. Once established, plaintiff needs to do more than argue that the records must be wrong. They must either produce an expert to show the unreliability of the data storage and recording, or must show strong proof of circumstantial unreliability. The result of the foregoing can be a wealth of *in limine* motions precluding the opposing party from providing testimony or evidence contrary to a presumptively reliable record. As mentioned above, the testimony otherwise could constitute inadmissible lay testimony. Hahneman, 292 N.J. Super. at 16. From payment statements, telemetric data, to work orders and more, the utility of these arguments and motions leading up to trial is only growing as businesses become more and more sophisticated. As defense counsel, our job is to not only keep up with our clients, but to ensure the time and energy they invest into creating sophisticated record keeping technology is rewarded and protected come the time of trial.