Getting Non-party Business Records Into Evidence

by Gianfranco A. Pietrafesa

Statements made out of court that are offered at trial to prove the truth of the matter asserted are considered hearsay.[1] Documents often contain hearsay and are not admissible in evidence unless they fall within certain exceptions set forth in the rules of evidence.[2] One such exception concerns business records. The subject of this article concerns the business records of non-parties and how to get them into evidence.

Consider, for example, a lawsuit between two siblings concerning certain financial accounts of their deceased father. The business records in issue are the account statements issued to their father by various non-party financial institutions. How may these non-party business records be admitted into evidence?

The admission of business records into evidence is governed by New Jersey Rule of Evidence 803(c)(6), which provides:

> A statement contained in a writing or other records of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, 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.

Thus, in order for a business record to be admitted into evidence, the following elements must be satisfied:

1. The document must be "made at or near the time of observation." In other words, the document must be made within a reasonable time after the act or event referred to therein.[3]
2. The document must be "made by a person with actual knowledge" of the statement or from "information supplied by such a person."
3. The document must be "made in the regular course of business."
4. It was the regular practice of the business to make or prepare the document.[4]

If the foregoing elements are satisfied, then the document will constitute a business record that will be admissible in evidence "unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy."[5] For example, if the document was prepared in anticipation of litigation, then it may not be trustworthy.[6]

This article will focus on the various ways to prove that a document may be admitted into evidence as a business record. As noted, the focal point of the article is on the business records of non-parties.

By Stipulation

The first way to get a non-party's business records into evidence is also the fastest, easiest and least expensive — your adversary can simply stipulate that the documents are admissible into evidence as business records.[7] Experience shows that parties do not often make such stipulations and, when they do, they are often made late in the litigation. Therefore, you should try to get a stipulation from your adversary as soon as possible. If your case depends on non-party business records, then you cannot afford to wait or take your chances that your

adversary will stipulate to the admission of the documents in evidence. Instead, you should try another means to make sure that the documents will be admitted into evidence.

Request for Admissions

You can send a request for admissions to your adversary asking for an admission as to the genuineness of non-party business records. Rule 4:22-1 provides that "[a] party may serve upon any other party a written request for the admission ... [of] the genuineness of *any* documents ..." (emphasis added). Thus, by the plain language of the rule, the request is not limited to the documents of the parties. Instead, it may request an admission to the genuineness of any documents, including a non-party's business records.

In response to the request, your adversary must admit, deny or set forth in detail the reasons why he or she cannot truthfully admit or deny.[8] However, he or she cannot merely use lack of information or knowledge as a reason for failing to admit or deny. He or she must make a reasonable inquiry before stating that the information known or *readily obtainable* is insufficient to allow him or her to make an admission or denial.[9] In this regard, the comment to the rule provides that "[i]t is clear that this provision is intended to place upon the answering party the burden of making reasonable inquiry, at least to the extent to which he would make investigation for trial purposes."[10]

Your adversary may argue that he or she has insufficient knowledge or information to admit or deny the genuineness of non-party business records. However, he or she must make a reasonable inquiry before doing so. Under our hypothetical fact pattern, a reasonable inquiry may well include contacting the financial institution, which may provide the knowledge or information sufficient to admit (or deny) the genuineness of the non-party business records.

New Jersey Rule of Evidence (N.J.R.E.) 803(c)(6) does not require the testimony of the custodian of records or some other qualified witness as a condition of the admissibility of a business record.

Testimony of Non-party Witness at Trial

You can subpoena (or otherwise persuade) a representative of the non-party to testify at trial about the preparation of the business records in order to get the documents admitted into evidence.[11] However, as noted below, it is not always possible to present such testimony at trial.

Out-of-State Deposition Used at Trial

Often, the non-party business entity is located out-of-state, and you therefore cannot subpoena the witness to testify at trial. In such cases, you can take an out-of-state deposition of the witness to be used at trial.[12] At the deposition, you can ask the witness about the preparation of the business records. You can then use the deposition testimony at trial to lay a foundation for the admission of the business records into evidence if the non-party witness is not available to testify (because he or she is located out-of-state and cannot be subpoenaed or persuaded to testify at trial).[13]

Affidavit or Certification

If your client cannot bear the expense of taking an out-of-state deposition, then you can try to obtain an affidavit or certification from the non-party business entity establishing that the documents were prepared in the ordinary course of business. In this regard, it should be noted that New Jersey Rule of Evidence (N.J.R.E.) 803(c)(6) does not require the testimony of the custodian of records or some other qualified witness as a condition of the admissibility of a business record.[14] Such an affidavit will normally be sufficient to establish a foundation to admit the non-party business records into evidence under N.J.R.E. 803(c)(6).[15] Custodians of records frequently provide such affidavits when producing documents during discovery, especially if an affidavit is requested and it will obviate the need to testify at a deposition or trial.

N.J.R.E. 803(c)(6) generally follows Federal Rule of Evidence 803(6).[16] It should be noted that Federal Rule of Evidence 803(6) has recently been amended to allow the admission of business records into evidence by certification rather than by the testimony of the custodian or other qualified witness. The advisory committee note to the amendment provides that "the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses."[17]

The certification must comply with Federal Rule of Evidence Rule 902(11), which is titled "Self-Authentication of Certified Domestic Records of Regularly Conducted Activity," and provides:

> The original or duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.[18]

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It remains to be seen whether the New Jersey Rules of Evidence will be amended in a similar fashion. Although an amendment would clarify the evidentiary requirements and provide further guidance to trial lawyers, an argument can be made that such an amendment is not necessary in light of existing case law.

Testimony by a Person with Knowledge of the Non-Party's Business

If you cannot obtain an affidavit or certification, then perhaps you can present the testimony at trial of a person knowledgeable about the business records of a non-party business entity.

New Jersey's former business records statute, the Uniform Business Records As Evidence Act,[19] required the custodian of records or some other qualified witness to testify about the preparation of the document. By contrast, N.J.R.E. 803(c)(6) does not specify the specific type of witness needed to authenticate a business record.

One commentator on the evidence rules has noted that the absence of a custodian provision in N.J.R.E. 803(c)(6) does not mean that there has been an intentional effort to relax the requirement of qualifying a business record before it is admitted into evidence. Rather, it means that the foundation witness is not required to be the custodian of records, or even to have personal knowledge of the facts set forth in the document.[20]

Likewise, another commentator has noted:

> The present rule is silent as to the witness who is needed to authenticate the document. Presumably, one familiar with the business and its practices is sufficient to authenticate the record. It would appear that it is no longer necessary to bring in the actual custodian or the person who made the entries. Since documents can be authenticated by certification or affidavit, it would appear that some third-party business records could be admitted into evidence without having the custodian testify at trial.[21]

In *Hahnemann University Hospital v. Dudnick*,[22] the Appellate Division noted the similarities between N.J.R.E. 803(c)(6) and Federal Rule of Evidence 803(6) and held:

> Under Federal Rule of Evidence 803(6) documents may properly be admitted "as business records even though they are the records of a business entity other than one of the parties, and even though the foundation for their receipt is laid by a witness who is not an employee of the entity that owns and prepared them." Moreover, this rule does not require the testifying witness to have personally participated in the creation of the document or know who actually recorded the information.
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> Thus, under both the New Jersey and Federal Rules of Evidence, the foundation witness generally is not required to have personal knowledge of the facts contained in the record.[23]

Therefore, you may be able to get the documents of a non-party business entity admitted into evidence as business records through the testimony of a witness knowledgeable about the documents. For example, the witness may be a former employee of the non-party business entity, or an employee of another business that integrates the documents into its business, or even a party to the litigation. The witness needs to be familiar with the general business and record keeping of the non-party business entity.

Judicial Notice

You may be able to persuade the court to admit certain business records into evidence by judicial notice.[24] "In some cases, very little foundation testimony may be needed. Indeed, 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.'"[25]

Business Records as Declarations or Statements Against Interest

Finally, you can argue that the non-party business records should be admitted into evidence as declarations or

statements against interest. Business records very often contain declarations against interest. For example, in our hypothetical fact pattern, the account statements setting forth account balances may constitute declarations against the interests of the financial institutions and, therefore, may be admitted into evidence.

N.J.R.E. 803(c)(25) provides in pertinent part that "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary [or] proprietary ... interest ... that a reasonable person in declarant's position would not have made the statement unless the person believed it to be true. ..." Declarations or statements against interest are another exception to the hearsay rule and the person making the declaration or statement, known as the declarant, does not have to be a party in order for the statement to be admissible into evidence.[26]

The Supreme Court has noted the rationale of the exception as follows:

> The statement-against-interest exception is based on the theory that, by human nature, individuals will neither assert, concede, nor admit to facts that would affect them unfavorably. Consequently, statements that so disservice the declarant are deemed inherently trustworthy and reliable.[27]

The declaration against interest exception to the hearsay rule may be explained by reviewing the Appellate Division's decision in *Portner v. Portner.*[28] For our purposes, it suffices to say that the case involved the issue of whether a townhouse was subject to equitable distribution. The plaintiff wife alleged that the townhouse was owned by the defendant husband. The husband alleged that the townhouse was owned by his brother, and that he was merely renting it from his sibling.[29]

The wife sought to present the testimony of an investigator who spoke with the husband's brother. The investigator would testify that the brother told him that the townhouse actually belonged to the husband.[30] The trial court ruled that the investigator's testimony was inadmissible hearsay.[31]

The Appellate Division held that the trial court erred, noting that "[c]learly, a statement by a person who has title to valuable property that the property belongs to someone else must normally be considered 'so far contrary to the declarant's pecuniary or proprietary interest' that he would not have made the statement unless he believed it to be true."[32] Specifically, the Appellate Division found that the brother's "statement diminished [his] interest in valuable property, and his statement could be used against him if he were to dispute defendant's claim to the property one day."[33]

Portner involved a declaration against proprietary interest; that is, a statement that the declarant does not own certain property.[34] A declaration may also be against a declarant's pecuniary interest, which may be explained as follows:

> The clearest example of declaration against pecuniary interest is an acknowledgement that the declarant is indebted. Here the declaration, standing alone, is against interest on the theory that to owe debt is against one's financial interest. This theory is routinely followed even though it may not be applicable in particular circumstances. Less obviously an acknowledgement of receipt of money in payment of a debt owing to the declarant is also traditionally classed as against interest. Here the fact of payment itself is advantageous to the receiver, but the acknowledgment of it is regarded as against interest because it is evidence of the reduction or extinguishment of the debt. Of course, a receipt for money which the receiver is to hold for another is an acknowledgment of a debt.[35]

As noted, business records may contain declarations against interest. For example, the account statements setting forth account balances are against the financial interests of the financial institutions. They would not have made the statements in the documents — the account balances — unless they believed them to be true. Therefore, the business records of these non-parties may be admitted into evidence as declarations against interest.[36]

Conclusion

There are many ways to get non-party business records admitted into evidence. If the documents are important to your case, then you should carefully consider each of these methods to assure that the documents will be admitted into evidence.

Endnotes

1. N.J.R.E. 801(c). *See also State v. White,* 158 N.J. 230, 238 (1999).
2. *See* N.J.R.E. 802.
3. *See also State v. Swed,* 255 N.J. Super. 228, 237 (App. Div. 1992).
4. It should be noted that this requirement was not contained in the 1967 Rule (N.J. Evid. R. 63(13)); instead, it was set forth in the case law. *See Sas v. Strelecki,* 110 N.J. Super. 14, 19-22 (App. Div. 1970), cited in 1991 Supreme Court Committee Comment. The 1991 Supreme Court Committee Comment notes that N.J.R.E. 803(c)(6) follows Federal Evidence Rule 803(6) in now explicitly including this requirement in the New Jersey Evidence Rules.
5. N.J.R.E. 803(c)(6).
6. *See* 1991 Supreme Court Committee Comment to N.J.R.E. 803(c)(6).
7. *See, e.g.,* Rule 4:25-1(b)(2) (pretrial order shall include stipulations of the parties); Rule 4:25-1(b)(13) (pretrial order shall include other matters agreed upon by the parties to expedite the case).
8. Rule 4:22-1.
9. *Id.*

10. Sylvia Pressler, New Jersey Court Rules, Comment to Rule 4:22-1 (Gann).
11. *See* Rules 1:9-1 & 1:9-2 (subpoena for attendance of witness and for production of documentary evidence).
12. *See* Rule 4:11-5 (depositions outside the state for use in an action in state).
13. *See* Rule 4:16-1(c).
14. *See Gunter v. Fischer Scientific American,* 193 N.J. Super. 688, 691-92 (App. Div. 1984), *cited* in 1991 Supreme Court Committee Comment to N.J.R.E. 803(c)(6).
15. *See* Richard J. Biunno, *New Jersey Rules of Evidence,* Comment 4 to N.J.R.E. 104 (Gann).
16. *See* 1991 Supreme Court Committee Comment to N.J.R.E. 803(c)(6).
17. Advisory Committee Note to 2000 Amendment to F.R.E. 803(6).
18. F.R.E. 902(11). An identical rule is provided for foreign records. *See* F.R.E. 902(12).
19. N.J.S.A. 2A:82-34, *et seq.*
20. *See* Richard J. Biunno, *New Jersey Rules of Evidence,* Comment 1 to N.J.R.E. Rule 803(c)(6) (Gann) (*citing Hahnemann University Hospital v. Dudnick,* 292 N.J. Super. 11, 17-18 (App. Div. 1996)).
21. John H. Klock, *New Jersey Practice: Court Rules Annotated — Evidence Rules,* Comment 2 to N.J.R.E. 803(c)(6) (West) (citation omitted). *See also* John W. Strong, General Editor, *McCormick on Evidence 5th,* §292 at 262 (West 1999) ("Any witness with the necessary knowledge about the particular record keeping process could testify.").
22. 292 N.J. Super. 11 (App. Div. 1996).
23. *Id.* at 17-18 (citations omitted). *See also United States v. Curcio,* 13 F. 3d 641, 657 (3d Cir. 1993) (the witness is required only to have knowledge about the record keeping process); John W. Strong, General Editor, *McCormick on Evidence 5th,* §292 at 262-63 (West 1999) (and cases cited in notes 6-8) ("when the business offering the records of another has made an independent check of the records, has integrated them into their own business operation, or can establish accuracy by other means, the necessary foundation may be established.").
24. *See* N.J.R.E. 201.
25. Jeffrey Cole, "The Continuing Riddle of the Federal Hearsay Rule," Vol. 25, No. 3 *Litigation* 15, 20 (Spring 1999) (*citing,* among others, *United States v. Sokolow,* 91 F.3d 396 (3d Cir. 1996); *United States v. Hines,* 564 F.2d 925, 928 (10th Cir. 1977), but also *citing United States v. Pellulo,* 964 F.2d 193 (3d Cir. 1992) (the court found that the foundation for business records was not established because witness was not familiar enough with bank procedures)).
26. *See* Richard J. Biunno, *New Jersey Rules of Evidence,* Comment to N.J.R.E. 803(c)(25) (Gann) (*citing State v. West,* 145 N.J. Super. 226 (App. Div. 1976); *Speaks v. Jersey City Housing Authority,* 193 N.J. Super. 405, 412-13 (App. Div. 1984)).
27. *State v. White,* 158 N.J. 230, 238 (1999). *See also* Richard J. Buinno, *New Jersey Rules of Evidence,* Comment to N.J.R.E. 803(c)(25) (and cases cited therein).
28. 186 N.J. Super. 410 (App. Div. 1982).
29. *Id.* at 415.
30. *Id.* at 416.
31. *Id.*
32. *Id.* at 417.
33. *Id.*
34. *See* John W. Strong, General Editor, *McCormick on Evidence 5th,* Chapter 33, §317 (West 1999).
35. *Id.* (and cases cited therein).
36. *See, e.g.,* James W. McElhaney, "A Document That's Inadmissible One Way Can Still Get In," 84 *ABA Journal* 66 (February 1998).

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