

TECHNICAL ADVISORY

INDEPENDENT INSURANCE AGENTS OF LOUISIANA

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SUBJECT: E&O AND THE ADMISSIBILITY OF AUTOMATED RECORDS

BACKGROUND: Documentation is one of the most crucial elements of a good E&O defense. As the use of automation has become so widespread in today's insurance agency operations, it is important to understand the conditions under which automated records are legally admissible in E&O cases.

MAIN POINTS: Research done by E&O experts has found that courts generally regard automated records to be as reliable, and as admissible, as paper records. In fact, courts often view computerized records as more reliable than handwritten records, given how difficult it is to alter most computer-generated information, which is automatically date-stamped internally by the system, in most cases. However, while certain computer records can sometimes be altered with less evidence of tampering than paper records, most courts have not demonstrated a great concern about security, unless the opposing side has produced evidence of improper data manipulation.

The admissibility of computer records is allowed by courts as an exception to the "hearsay rule" for business records. The widespread acceptance of computer records in court proceedings around the country in recent years grew out of four sources: the Federal Rule of Evidence 803(6), Uniform Business Records as Evidence Act (Uniform Act), Federal Business Records Act (Federal Act), and the common law "shop-book" rule (permitting the introduction in evidence of books of original entry made in the usual course of business).

The Louisiana Code of Evidence contains an exception to the "hearsay rule" for business records that closely follows the Federal Rule of Evidence. Here is the relevant portion:

"Art. 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of regularly conducted business activity. A

memorandum, report, record, or data compilation, in any form, including but not limited to that which is stored by the use of an optical disk imaging system, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if made and kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make and to keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. This exception is inapplicable unless the recorded information was furnished to the business either by a person who was routinely acting for the business in reporting the information or in circumstances under which the statement would not be excluded by the hearsay rule. The term "business" as use in this Paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

To actually be introduced into court, information stored in a computer must usually be printed out on paper. The Louisiana Code of Evidence addresses that issue, as follows:

"Art. 1001. Definitions.

(3) Original. *An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."*

In most jurisdictions, computer printouts are admissible if the witness presenting them can attest to the following requirements:

1. The recorded information was input into the computer in the ordinary course of business, for business purposes, at or near the time of the event recorded.
2. The business (i.e., the agency) relied on the records' accuracy.
3. The information recorded was input into the computer by a competent person who had a business duty to input the information accurately.

4. The person inputting the information had personal knowledge of the event recorded, or obtained the information from someone who had such knowledge.
5. The systems and procedures for recording and retrieving the recorded information were reliable, including:
 - a. The input procedures used to record the information and the methods for verifying the accuracy of the input data are subject to a standard procedure of verification or audit.
 - b. The procedures used to maintain and retrieve the inputted information and the methods for verifying the accuracy of the processing systems are standardized throughout the entire office.

The key to meeting these requirements is to establish that the agency has standard procedures for entering, processing, retrieving, and testing the accuracy of data stored in the computer. This means written procedures and policies that can be used as contemporaneous evidence of the accuracy and reliability of the computer records, in the event of litigation. Since effective use of computer systems requires such standardization procedures in any event, it should not be difficult for agencies to meet the requirements for admissibility of computerized records.

**NECESSARY
ACTION:**

Agency managers should review in detail the guidelines for the admissibility of computer records in the event of an E&O suit. The necessity for standardized procedures should be stressed with all agency staff who input data into the system.