

CHAPTER 9

Documentary Evidence

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Scope Note

This chapter addresses the introduction of documentary evidence. It begins with an overview of the subject and then reviews the treatment of common types of documentary material. Each of these topics is addressed through an introduction to the basic principles and applicable law, an outline of the elements required for an adequate foundation, and a sample examination.

§ 9.1 INTRODUCTION

Documentary evidence consists of any information that can be introduced at trial in the form of documents. While it is often thought of as information written down on paper, such as letters, a contract or a will, documentary evidence more broadly encompasses information recorded on any media on which information can be stored. Under both the Conn. Code Evid. and the Fed. R Evid., this includes information stored on computers and other media, such as e-mails, Web pages, and other data.

Documentary evidence may be offered as direct or circumstantial proof of a fact that is material to a case. For example, invoices from medical providers may be offered to prove economic damages in a personal injury case, the fact that a party was warned not to destroy evidence material to a claim may be proved with an e-mail in a spoliation case, and a contract provision and notes from its negotiation may prove that an individual is not a member of a shareholder class that was scheduled to receive distributions.

While live witness testimony may be interesting to a jury, documentary evidence can be particularly compelling. Documentary evidence is not subject to an imperfect memory, exaggeration, or vague recollections. What you see is what you get, and documentary evidence can establish a claim for damages or a party's statements regarding a material issue with a precision that witness testimony

lacks. Likewise, when used to impeach a witness who has the poor judgment to lie on the stand, documentary evidence can be very dramatic.

Documentary evidence can, however, present challenges at trial. Despite how important the evidence is to the case, its significance may not be immediately obvious to a trier of fact hearing it for the first time. Failure to make that significance clear could have a negative impact on your case, as a judge or juror may realize its import too late in the game to evaluate and connect other critical evidence.

For that reason it is important to emphasize and highlight the portions of a document that are critical to your case. Once it has been admitted into evidence, you should have the witness read the key parts to the jury. It may also be helpful to blow up excerpts of the document in a demonstrative chart or capture them on an easel pad that you fill in as the evidence is presented. You should have the witness explain the content and any terms of art that the jury may not be familiar with. You also should be sure that the witness makes the relevance and probative value of the document clear to the jury. Waiting until the jury deliberates could diminish the impact of the evidence on your case.

Finally, both the state and the federal courts have imposed duties on attorneys filing documents with the court or introducing them into evidence. Such documents must have all personal identifying information redacted. Conn. Rules of Pract. § 4-7; Conn. R. on E-Filing; Conn. Local R. 5. Personal identifying information that must be redacted in state court includes an individual's

- date of birth;
- mother's maiden name;
- motor vehicle operator's license number;
- Social Security number;
- other government issued identification number except for juris, license, permit or other business-related identification numbers that are otherwise made available to the public directly by any government agency or entity;
- health insurance identification number; or
- any financial account number, security code, or personal identification number.

In Federal court, an attorney filing documents must

- change the names of minor children to initials,
- limit financial account numbers and Social Security numbers to the last four digits,
- limit dates of birth to the year, and
- limit a home address to the city and state.

§ 9.2 FOUNDATION REQUIREMENTS

Documentary evidence must be properly authenticated and a foundation laid before it can be admitted at trial. While there are classes of documents with special requirements, laying a foundation generally requires the following steps described in detail below:

- identification and authentication,
- relevance and no undue prejudice,
- hearsay exception, and
- the best evidence rule.

It should be noted that, at trial, you should make every effort to confer with opposing counsel in advance to work out any foundation issues and agree whether copies may be used at trial. At the final pretrial conference, counsel customarily agree on whether exhibits can be marked as full exhibits or for identification only. The latter are then taken up via motions in limine before evidence begins or during trial.

§ 9.2.1 Identification and Authentication

Before any evidence, including documentary evidence, may be admitted, the proponent must make a preliminary showing, directly or indirectly, that the proffered evidence is genuine, i.e., that it is what it is claimed to be. Fed. R. Evid. 901; Conn. Code Evid., § 9-1. This is called authentication.

The authentication requirement is not particularly stringent. To authenticate a document, the party seeking to admit it must provide evidence *sufficient to support a finding* that the proffered evidence is what it is claimed to be, i.e., a prima

facie showing. Once that prima facie showing is made, the evidence may be admitted and submitted to the trier of fact, which ultimately determines its authenticity. *State v. Garcia*, 299 Conn. 39, 57–58 (2010); Conn. Code Evid., cmt. to § 9-1.

Evidence may be authenticated *directly* in a number of ways. For example, when a party admits to a document's existence and/or execution in the pleadings, responses to interrogatories, deposition testimony, stipulation or testimony at trial, that admission will be sufficient to authenticate the document. Colin C. Tait & Hon. Eliot D. Prescott, *Tait's Handbook of Connecticut Evidence*, § 9.2 (4th ed., 2008) [hereinafter *Tait's Handbook*]. Likewise, a witness with personal knowledge of the circumstances showing that the document is what it claims to be may offer testimony to authenticate a document. Conn. Code Evid., cmt. to § 9.1; Fed. R. Evid. 901(b)(1). Or a person familiar with another person's handwriting or voice may authenticate a handwritten document or a recording.

A document also may be authenticated *indirectly* by circumstantial evidence that supports its authenticity. For example, writings that use a distinct mode of speech or that reference details that no one but a specific individual would know would be authenticated as having been authored by that individual. *See, e.g., State v. John L.*, 85 Conn. App. 291, 302–202 (2004) (correspondence found on a computer hard drive that used a distinctive mode of expression and referenced specific details were considered authenticated and attributed to the author). Likewise, a person who takes action in response to an e-mail could have the e-mail authenticated as genuine and that he or she received it. *See, e.g., Internat'l Brotherhood of Elec. Workers Local 35 v. Comm'n on Civil Rights*, 140 Conn. 537, 547 (1974) (telephone conversations were authenticated through evidence of occurrence, subject matter, and conduct of parties).

Certain documents are self-authenticating—no prima facie showing of authenticity is required to be admissible. These include documents executed under seal, certified copies of public records, signed commercial paper, and ancient documents. *See* Fed. R. Evid. 902; Conn. Code Evid., cmt. to § 9-1; § 9-2. *See also Tait's Handbook*, § 9-12, for an extensive discussion on documents that are self-authenticating. For a discussion of the many ways by which a document may be authenticated, please see the Conn. Code Evid., cmt. to § 9-1 and the examples contained in Fed. R. Evid. 901.

§ 9.2.2 Relevance and No Undue Prejudice

As with all evidence, documentary evidence must be relevant to be admissible. Likewise, documentary evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or

potential to mislead the jury; if it is cumulative; or if it is otherwise excludable by virtue of the federal or state constitutions or statutes. Conn. Code Evid., §§ 4-2-4-3; Fed. R. Evid. 402-403.

§ 9.2.3 Hearsay Exception

If the contents of a document are offered for their truth, they must be brought within the exceptions to the hearsay rule contained in Conn. Code Evid., § 8.0, or Fed. R. Evid., Art. VIII. This can be complicated because the document may contain hearsay on more than one level. So, for example, a business record may be admissible under the business record exception to the hearsay rule because it was made in the regular course of business at or near the time of the event being recorded by a person under a duty to record such a document. But a conversation contained in a business record may not be admissible unless it also falls within a hearsay exception, such as being a party admission or a statement against interests. When seeking to admit documents for their truth, you must analyze all statements recorded in the document and ensure that both they *and* the document fall within a hearsay exception.

§ 9.2.4 Best Evidence Rule

Documentary evidence introduced for the truth of its contents also must comport with the best evidence rule, which will be discussed in detail in 0 of this chapter. Briefly, this means that the original document must be admitted into evidence unless the document falls within a particular exception or is otherwise excused. Fed. R. Evid. 1002-1004; Conn. Code Evid., § 10.1.

§ 9.3 SAMPLE EXAMINATION

In defense of an action for breach of an agreement not to provide information concerning a former employee other than his or her dates of employment and job title in response to inquiries by prospective employers, your client, XYZ, Inc., relies in part upon a written release signed by the former employee and given to ABC, Inc., a prospective employer. This sample examination demonstrates the introduction of that release.

ATTORNEY: Please identify yourself, stating your occupation and place of employment.

WITNESS: My name is John Brown, and I am the personnel director of ABC, Inc.

ATTORNEY: How long have you held that position?

WITNESS: Since December nineteen ninety-nine.

ATTORNEY: Are you acquainted with the plaintiff, Thomas Smith?

WITNESS: Yes.

ATTORNEY: When did you first meet Mr. Smith?

WITNESS: I first met Mr. Smith in early April two thousand five, when he applied for a job as a security officer with ABC, Inc.

ATTORNEY: Please describe the manner in which applications for employment are processed by ABC's personnel department.

WITNESS: Each applicant for a position with ABC must come in person to ABC's place of business in Hartford, where he or she must complete and sign an application form and then be interviewed by one of the five members of the personnel department. Following the interview, each applicant's form is reviewed, and his or her references and prior employers are contacted for additional information by the responsible personnel officer, who then makes a recommendation to me. I make the final decision based upon that recommendation and upon my own review of the application, interview notes, and references.

ATTORNEY: At the time of the initial interview, does ABC, Inc., require the applicant to sign any documents other than the application form?

WITNESS: Yes, one other document.

ATTORNEY: Please describe that document.

WITNESS: It is a document in which the applicant authorizes ABC, Inc., to contact the people listed on his or her application form as references and former employers to obtain information concerning the applicant, and it also authorizes the references and former employers to provide such information to ABC, Inc.

ATTORNEY: Who was the personnel officer who interviewed Thomas Smith?

WITNESS: I was.

ATTORNEY: Mr. Brown, I hand you a document that has been marked Defendant's Exhibit 1 for identification. Do you recognize it?

WITNESS: Yes.

ATTORNEY: What is it?

WITNESS: This is the authorization form that Mr. Smith signed during his interview with me on April seventh, two thousand five.

ATTORNEY: Did you see Mr. Smith sign this document?

WITNESS: Yes, I did.

ATTORNEY: What happened to the document after Thomas Smith signed it?

WITNESS: I took it from Mr. Smith and placed it with Mr. Smith's application form in his personnel folder.

ATTORNEY: Did you have any occasion to remove the document from Mr. Smith's personnel folder after April seventh, two thousand five?

WITNESS: Yes, twice.

ATTORNEY: When did you remove the document from Mr. Smith's folder?

WITNESS: The first time was on April seventh, two thousand five, immediately after the interview, when I had photocopies of the documents made to give to the people named on Mr. Smith's application form as references and former employers. The second time was today, when I gave it to you.

ATTORNEY: Does the document appear to you to be in the same condition as it was on April seventh, two thousand five?

WITNESS: Yes.

ATTORNEY: I move that the authorization form signed by Thomas Smith be admitted in evidence as Defendant's Exhibit One.

OPPOSING
COUNSEL: No objection.

JUDGE: It may be admitted.

The attorney will then have the witness read the authorization form to the jury or will do so himself or herself. Thereafter, the witness may be asked to testify regarding his communications with XYZ, Inc., one of the employers identified on Mr. Smith's application form.

§ 9.4 BEST EVIDENCE RULE

The so-called best evidence rule is often misunderstood, probably because of the lofty and expansive nature of its name. Despite its name, the rule has nothing to do with the objective quality of a piece of evidence. It simply means that, when you are trying to prove a material fact by offering the contents of a document (in this case, a writing, a photograph, or a recording), you must produce the original document unless there is some good reason not to, such as a code provision, a statute, or otherwise. Fed. R. Evid. 1002; Conn. Code Evid., § 10-1.

The purpose behind the rule is to ensure that the trier of fact has the actual language contained in a document to the trier of fact whenever that language (the content of the document) is at issue. When the content of the document is at issue, neither a witness's description nor a copy that may have been altered are considered as reliable as the original document. "Originals" include the first copy of a document, as well as duplicate "originals," such as a contract executed in duplicate, both of which are considered "originals."

As a corollary to the requirement to produce the original document, the rule also prohibits a witness from testifying from memory as to the language contained in a document. This can be stated "the document speaks for itself," and, therefore, the witness's recollection is not the best evidence. Production of the original document, rather than allowing testimony on the document's contents, helps reduce the risk of inaccurate recollection of the document's language and guards against fraud or selective copying. *See Tait's Handbook*, § 10.1.

Applying the rule can be tricky. Just because a writing exists does not always mean that you must produce it or that witness testimony is prohibited. You must focus on whether you are trying to prove what the specific language contained in a document means or whether you are trying to prove a fact about a document. For example, when the language of a document is at issue—a contract provision, a defamatory statement, or the contents of a will—the rule clearly applies, and you must produce the original document. Witness testimony about the language of the document would also be prohibited. Michael R. Fontham, *Trial Technique & Evidence*, 407 (2d ed., 2002).

Other times, you may be using a writing to prove specific facts—that a contract was written, a deed was delivered, or a conversation took place—that could also

be proved by a witness who observed those events taking place. The witness's testimony in that case would not be prohibited just because a writing memorialized those facts. *State v. Moynahan*, 164 Conn. 560, 583 (1973) (“[w]here one testifies to what he has seen or heard, such testimony is primary evidence regardless of whether such facts are reduced to writing”); *see also* Conn. Code Evid., cmt. to § 10-1. So, it is important to understand the purpose behind introducing a writing to determine whether the best evidence rule applies.

In both state and federal courts, the rule is considered one of preference, rather than exclusion. Conn. Code Evid., cmt. to § 10-3. This means that, if there is a good reason that you cannot produce an original document, you may produce “secondary” evidence (copies) instead. There are a number of practices and exceptions that have been considered good reasons justifying the use of copies.

First, under both the Connecticut code and the federal rules of evidence, copies of a writing, a recording, or a photograph are admissible to the same extent as the original unless there is either a genuine question about the authenticity of the copy or there is some reason that it would be unfair to admit the copy over the original. Conn. Code Evid., § 10-2; Fed. R. Evid. 1003. “[W]here the terms of a document are not in actual dispute, it is inconvenient and pedantic to insist on the production of the instrument itself.” *Farr v. Zoning Bd. of Appeals of the Town of Manchester*, 139 Conn. 577, 582 (1953). Consequently, copies may be admitted into evidence as long as there is no dispute about the contents of the document. As a matter of practice, though, counsel should confer before trial to agree on any documents that may be admitted through copies.

Additionally, copies of certain documents may be deemed admissible by statute. For example, Conn. Gen. Stat. § 52-180 provides that copies of business records may be admissible as evidence, provided that they are properly authenticated. See the discussion in § 9.7 of this chapter.

The Conn. Code Evid. also provides a set of exceptions to the best evidence rule that closely mirrors the exceptions under the Fed. R. Evid. Conn. Code Evid., § 10-3; Fed. R. Evid. 1004. Under these exceptions, secondary evidence may be offered to prove the contents of a document rather than requiring originals. These exceptions are the following:

- *The originals have been lost or destroyed.* Secondary evidence may be admissible to prove the contents of a document if the party can demonstrate that the original has been lost or destroyed. *Woicicky v. Anderson*, 95 Conn. 534 (1920). *Accord Conn. Bank & Trust Co. v. Wilcox*, 201 Conn. 570, 573 (1986) (proponent must demonstrate that document once existed and that it is currently unavailable). This can be done by establishing a diligent but

unsuccessful search for the document, see *State v. Castelli*, 92 Conn. 58, 69-70 (1917), or by producing a witness with personal knowledge of the destruction of the document. *Richter v. Drenckhahn*, 147 Conn. 496, 501 (1960). If, however, a party has destroyed or otherwise concealed original documents for the purpose of evading the requirement to produce them, he or she is precluded from using secondary evidence at trial. Thus, a party wishing to use copies under this exception must show that there was no bad-faith purpose behind the loss or destruction of the documents. See *Mahoney v. Hartford Inv. Corp.*, 82 Conn. 280 (1909).

- The originals are not obtainable. When a document is in the hands of another party outside the jurisdiction of the court and there is no way to obtain jurisdiction for the purpose of a subpoena duces tecum or other process, a party may prove the contents of the document through secondary evidence. *Shepard v. Giddings*, 22 Conn. 282 (1853). Under these circumstances, a party is not required to provide notice to his opponent to produce the document.
- The originals are in the possession of the opponent. A party opponent who refuses to provide originals for use at trial cannot be allowed to thwart the judicial process. To fall within this exception, a party must show that he or she has given reasonable notice to the opponent to produce the document (informally or via a subpoena duces tecum). If the opponent fails to produce the document, the party may use secondary evidence without further foundation. *Richter v. Drenckhahn*, 147 Conn. at 501.
- The document concerns a collateral matter. If the document relates to something other than the main issues in the case, the original need not be produced. For example, an appellant in a zoning case need not produce a deed proving that he is a property owner and may appeal. *Misisco v. La Maita*, 150 Conn. 680, 685 (1963). See the discussion in *Tait's Handbook*, p. 652.

Finally, although the best evidence rule requires an original document to be produced when proving its contents, both the Conn. Code Evid. and the Fed. Rules Evid. permit a party to introduce summaries of voluminous documents that cannot be conveniently examined in court but are, themselves, admissible. Conn. Code Evid., § 10-5; Fed. R. Evid. 1006. The party wishing to introduce summaries must make the original documents (or copies) available to his opponent at a reasonable time and place, and the summaries must fairly represent the underlying documents. See *Brookfield v. Candlewood Shores Estates, Inc.*, 201 Conn. 1,

12–13 (1986); *McCann v. Gould*, 71 Conn. 629, 632 (1899); *see also* discussion at *Fagiola v. Nat'l Gypsum Co. AC & S., Inc.*, 906 F.2d 53, 57–59 (2d Cir. 1990).

§ 9.5 FOUNDATION REQUIREMENTS

Laying a proper foundation for the introduction of a document begins with a threshold determination of whether the best evidence rule applies. When determining whether the rule is applicable, remember to consider whether you are trying to prove something within the specific language of the document itself (e.g., the allegedly defamatory statement at issue in the case) or whether you are trying to prove a fact related to a document (e.g., that your client learned of the statement when he or she read it published in the newspaper). Additionally, consider whether a copy of a document is admissible by statute or via an exception. As a matter of practice, you should review exhibits with opposing counsel in advance of trial to agree on any documents that may be produced via copy rather than in the original.

If you have determined that the best evidence rule applies and no other statute or exception permits you to use secondary evidence, you must lay the proper foundation for the admissibility of the documents. If you have the original document, you identify and authenticate it in the same manner as you would any other similar document.

If you do not have the original document, however, you must be prepared to explain to the court why you fall within one of the statutes or exceptions described above and why you should be permitted to use secondary evidence under these circumstances.

- If the original document has been lost or destroyed, you must show that the document once existed but that a diligent search has failed to locate it. You also can use the testimony of a witness who personally witnessed its destruction. In either case, you must show that your client did not purposefully lose or destroy the documents to avoid having to produce them. For example, if your client scanned documents into a backup system and then destroyed the originals pursuant to a document control policy, testimony that this was done in good faith and not to avoid production should enable you to use the backup copies.
- If the original document is located outside the jurisdiction, you must show why you could not use alternate methods to obtain the documents pursuant to a commission and deposition in the other

jurisdiction. If you have tried and failed to do so, you should be able to use secondary evidence.

- If the original document is in the hand of your opponent, you must demonstrate that your opponent has custody of the original document and that you gave reasonable notice to your opponent to produce the document at trial. This notice may be given by the pleadings, if they show that the document will be required at trial, or via ordinary discovery requests or subpoena duces tecum. If the document remains unavailable at trial, you may use secondary evidence.
- If the situation concerns a collateral matter, the best evidence rule does not apply, and you do not need to produce the original.

Finally, if the documents are too voluminous to be examined conveniently in court and you wish to use summaries, you must show that the underlying documents on which the summaries are based are admissible, that you have provided your opponent with the opportunity to examine and/or copy the underlying documents, and that the summaries fairly represent the contents of the underlying documents.

§ 9.6 SAMPLE EXAMINATION

In the course of an action for breach of warranty, one of the principal issues raised at trial is the timeliness of the notice that the buyer gave to the seller of defective merchandise. You represent the buyer, ABC Corporation, and are attempting to prove timely notice through its controller, John Smith. The timeliness of notice was not raised by the pleadings; it became an issue only shortly before trial, when the defendant asserted in its answers to interrogatories that ABC's notice was untimely.

ATTORNEY: Directing your attention to the summer of two thousand five, Mr. Smith, did you have any occasion to communicate with XYZ Company?

WITNESS: Yes.

ATTORNEY: When did you first have any occasion to communicate with XYZ?

WITNESS: On July sixteenth, two thousand five.

ATTORNEY: What was the nature of that communication?

WITNESS: I wrote a letter to Bill Jones of XYZ.

ATTORNEY: I show you a document that has been marked Plaintiff's Exhibit C for identification. Can you identify this document?

WITNESS: This is ABC's file copy of the letter that I sent to Mr. Jones on July sixteenth, two thousand five.

ATTORNEY: Your Honor, I offer this letter into evidence as Plaintiff's Exhibit One.

OPPOSING
COUNSEL: Objection. Best evidence.

JUDGE (*to
attorney*): Is the original letter available?

ATTORNEY: I don't know, Your Honor. If it is, it would be in the hands of XYZ, to whom it was sent by my client.

JUDGE: Did you serve XYZ with a notice to produce the original at trial?

ATTORNEY: No, Your Honor.

JUDGE: In that event, counsel, I will sustain the objection. The letter will be excluded and Mr. Smith will not be permitted to testify to its contents.

In such a situation, there may be alternative means to get the July 16, 2005, letter (or its contents) into evidence:

If the case will take an additional day or more to present, you might immediately serve a notice to produce and then attempt to introduce the original (or ABC's copy if XYZ fails to produce the original) through some other witness or Mr. Smith called on rebuttal.

You might subpoena Mr. Jones and attempt to get him to admit having received the original letter and admit that ABC's file copy correctly sets forth the substance of ABC's notice.

If you are certain that XYZ will call Mr. Jones as a witness and you are not concerned about the possibility of a directed verdict, you might wait until your cross-examination of him to have the letter admitted in evidence.

§ 9.7 BUSINESS RECORDS

While the first part of this chapter dealt with issues common to documentary evidence generally, the remainder of the chapter deals with specific types of evidence and their introduction. This section deals with business records.

Business records are a very common form of documentary evidence introduced at trial. In general, these are documents generated or received by a person or a corporation in the course of conducting commercial activities. They are admissible under the Conn. Code of Evid., § 8-4, which mirrors Conn. Gen. Stat. § 52-180, and under the Fed. Rules Evid. 803(6) as an exception to the hearsay rule.

The business record exception to the hearsay rule was created to recognize the inherent trustworthiness of records created and maintained in the course of doing business. *Calcano v. Calcano*, 257 Conn. 230, 241 (2001); *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 632 (2d Cir. 1994). Records on which businesses rely to conduct their affairs are presumed to be reliable. *State v. Kirsch*, 263 Conn. 390, 400 (2003); *State v. Hayes*, 127 Conn. 543 (1941). Consequently, business records are not viewed with concern for their accuracy.

What constitutes a “business” for the purpose of the business record exception has been broadly construed, and such records are not limited to those maintained by commercial businesses. In Connecticut, “business” is defined “to include business, profession, occupation and calling of every kind.” Conn. Gen. Stat. § 52-180(d); Conn. Code Evid., § 8-4. Consequently, in addition to private business records, courts have held that

- bank records, *State v. Lawler*, 30 Conn. App. 827, 832 (1993);
- medical records, *Gil v. Gil*, 94 Conn. App. 306, 321 (2006);
- police records, *Paquette v. Hadley*, 45 Conn. App. 577, 581 (1997);
and
- reports of various professionals, *see State v. William C.*, 267 Conn. 686, 701 (2004) (reports of social workers admissible as business records),

all fall within the business record exception to the hearsay rule. Although the courts have not had occasion to decide, *Tait's Handbook* observes that the definition of “business” would seem to exclude records of activities that are not conducted for commercial or public purposes, such as private memoranda compiled for personal reasons or as part of a hobby. *Tait's Handbook*, p. 544.

Under Conn. Gen. Stat. § 52-180, photocopies of business records may be admitted in state court to the same extent as original documents. The federal code also permits photocopies of business records to be admitted. 28 U.S.C. § 1732. Thus, a party wishing to offer business records into evidence does not need to worry about the best evidence rule.

§ 9.7.1 Admissibility

To be admissible under the business record exception, the party seeking to admit the evidence must establish three conditions in accordance with Conn. Gen. Stat. § 52-180 (or Fed. R. Evid. 803(6)):

- that the record was made in the regular course of business,
- that it was the regular course of such business to make such a record, and
- that the record was made at the time of the act described in the record or within a reasonable time thereafter.

Conn. Light & Power Co. v. Gilmore, 289 Conn. 88, 116 (2008). Evidence supporting these conditions should be interpreted liberally, but each condition must be met. See, e.g., *Hartford Div., Emhart Indus., Inc. v. Amalgamated Local Union 376, U.A.W.*, 190 Conn. 371, 389 (1983) (failure to recall exact time report was made did not render it inadmissible).

This foundational requirement often requires live witness testimony for admission. However, the Fed. Rules Evid. 902(11) expressly allows business records to be admissible if accompanied by a certification by the appropriate custodian of records if it certifies the above requirements. Under the rule, a party wishing to admit the record must give notice to the other party and an opportunity to review both the certification and the underlying record. This is often done by disclosing the document in discovery and identifying it on your proposed list of exhibits. However, you may also send a letter notifying opposing council of your intent to use the document.

The fact that the record may be admitted under the business record exception does not mean that the record is generally admissible or even that everything

contained in the record must be admitted. *River Dock & Pile, Inc. v. O & G Indus., Inc.*, 219 Conn. 787, 794 (1991). For example, the information in the record still must be relevant, and its probative value must outweigh any undue prejudice. *River Dock & Pile, Inc. v. O & G Indus., Inc.*, 219 Conn. Additionally, “the information contained in the report must be based on the entrant’s own observation or on information of others whose business duty it was to transmit it to the entrant. . . . If the information does not have such a basis, it adds another level of hearsay to the report which necessitates a separate exception to the hearsay rule in order to justify its admission.” *River Dock & Pile, Inc. v. O & G Indus., Inc.*, 219 Conn.

§ 9.7.2 Hearsay

If an otherwise admissible business record contains out-of-court statements, those statements must be brought within a hearsay exception for them to be admitted for their truth. Such exceptions include whether the statement is a party admission or whether the statement was made by an individual under a duty to report to the business for which he is making the record.

The case of *State v. George J.*, 280 Conn. 551, 594 (2006) provides a good example of the levels of hearsay within an otherwise qualified business record that must be evaluated to be admissible. In that case, a child sexual abuse victim reported the names of witnesses who could corroborate the defendant’s sexual abuse of the victim to an unnamed “staff member.” The staff member worked at an institution for troubled youths and was under a business duty to report statements by the youths. The staff member recorded the information in a report regarding the victim, which satisfied the three conditions to admit a business record.

The trial court nevertheless excluded the victim’s statement identifying those corroborating witnesses because the victim was under no duty to make statements to the staff member. *State v. George J.*, 280 Conn. So, even though the record was admissible as a business record, and even though the staff member had a duty to report information on the record, the fact that the reported information came from another individual not required to report rendered it hearsay and, thus excludible under the hearsay rule.

In contrast, the court in *State v. William C.*, 267 Conn. 701, held that a social worker’s report of an investigation into child abuse allegations was deemed admissible. The key difference there was that the social worker was under a duty to investigate and report the findings of that investigation. Moreover, the report contained nothing other than the social worker’s personal obligations. Presumably, if there had been statements of third-parties, the court would have held that

those statements were inadmissible if they did not fall into another hearsay exception.

§ 9.7.3 Opinion

Another issue that may arise within a business record is an opinion memorialized in the record. Such opinions are admissible only if the speaker would be qualified to give the opinion in oral testimony. *State v. Wright*, 76 Conn. App. 91 (2003). Thus, an opinion in an accident report concerning what caused a lid on a dumpster to fall was excluded from evidence because the individual making the statement never saw the lid fall and was not qualified as a lay witness to opine on why it fell. *Pickel v. Automated Waste Disposal, Inc.*, 65 Conn. App. 176 (2001).

§ 9.8 FOUNDATION

When seeking to admit business records, you must lay the appropriate foundation for the business record to be admitted. This means that you must establish that

- the document was made in the regular course of business;
- it was the regular course of business to make such a record; and
- the record was made when the act, transaction, or event occurred or shortly thereafter.

These foundational requirements may be established by witness testimony. It is not necessary for the witness to have prepared the documents him- or herself or even to have been employed at the business when they were prepared. *State v. Polanco*, 69 Conn. App. 169, 184 (2002). All that is required is that the witness have sufficient knowledge to testify that it was the regular business practice to create the record in the course of business within a reasonable time after the occurrence of the event in question. *Calcano v. Calcano*, 257 Conn. 230.

In federal court, a copy certified by the custodian of records may be admitted without live testimony. The certification must attest that the document was made at or near that time of the transaction by a person with firsthand knowledge of the events recorded, that it was kept in the regular course of business, and that it was the regular practice of the business to make that type of document. *See* Fed. R. Evid. 902 (11); 28 U.S.C. § 1746.

Once the document has met the threshold requirements of admissibility as a business record, it is still subject to other evidentiary requirements. *State v. Berger*,

249 Conn. 218 (1999). Thus, you must follow the general foundation requirements as set forth in § 9.2 of this chapter. In addition to being identified and authenticated, the document must

- be shown to be relevant to an issue in the case,
- have its probative value not outweighed by prejudice, and
- be examined to see if it contains any statements that can be considered hearsay.

If the record contains any statements by a third party, remember to determine whether those statements fall within an appropriate hearsay exception. Consider whether the statement was made by an individual with a duty to report statements and whether the individual recording the statement was under a duty to record such statements. For opinion-based statements, also consider whether the individual making the statement was qualified to provide opinion testimony

§ 9.9 SAMPLE EXAMINATION

In the course of the trial of a commercial dispute, you might wish to introduce the results of tests performed on products that were sold and delivered by your client to its adversary. This exercise demonstrates the introduction of the test results.

ATTORNEY: Please identify yourself, stating your occupation and place of employment.

WITNESS: My name is John Brown, and I am the director of quality control for ABC, Inc.

ATTORNEY: How long have you held that position?

WITNESS: Since December two thousand.

ATTORNEY: Did you bring with you certain records at my request?

WITNESS: I did.

ATTORNEY: What are those records?

WITNESS: They are the quality control forms that record our testing of widgets during the month of April two thousand five.

ATTORNEY: Do you have personal knowledge of the manner in which widgets are tested?

WITNESS: Yes. I am the person responsible for all such testing.

ATTORNEY: Please describe the manner in which widgets were tested by ABC, Inc., in April two thousand five.

WITNESS: After the widgets have been manufactured and assembled, they are brought by conveyor belt to the quality control department. One employee in our department notes on a quality control form the model number and serial number of each widget and then places both the widget and the quality control form on one of the shelves that are labeled "widgets." Other employees then test the widgets by visually inspecting them for cosmetic or observable defects and by plugging them into an electrical outlet and running them for 24 hours. At the end of the period, the employees note on the quality control form whether the widget has passed or failed the visual inspection and the performance test and also note the date of the inspection. All widgets that have passed the inspection are then sent to the packaging and shipping department, and all widgets that have failed are returned to the production department for repair or destruction.

ATTORNEY: Are the quality control forms used in the regular course of ABC's business?

WITNESS: Yes.

ATTORNEY: Is it the regular course of the business of your department to fill out these quality control forms?

WITNESS: Yes. We are required to complete one form for every widget that we inspect.

ATTORNEY: Are the quality control forms filled out in good faith?

WITNESS: Yes.

ATTORNEY: What happens to the forms once the inspection has been completed?

WITNESS: The quality control form is made up of two identical copies, a white copy and a blue copy. Once a widget has been inspected,

the white copy is removed and placed in a file drawer in my office.

ATTORNEY: What happens to the blue copy of the quality control form?

WITNESS: It goes with the inspected widget either to the packing and shipping department or back to the production department. When a widget is shipped to a customer, an employee in the packing and shipping department enters the date of shipment and the name and address of the customer on the blue copy and sends it back to our department, where it is stapled to the white copy for the same widget.

ATTORNEY: Is it the regular course of the business of the packing and shipping department to make these notations and to return the blue copies to your department?

WITNESS: Yes. That department is required to complete a form for every widget it ships and to return the form to us.

ATTORNEY: Is it the regular course of the business of the quality control department to keep these records?

WITNESS: Yes. I keep all of the quality control forms in files organized by month. After three years, I send them to our storage warehouse.

ATTORNEY: Would you look at the quality control forms for April two thousand five and pull out any that relate to widgets shipped to XYZ, Inc.?

WITNESS: All right. I've pulled them out.

ATTORNEY: Would you tell us how many forms you have pulled?

WITNESS: There are twenty-five.

ATTORNEY: Your Honor, I offer these twenty-five quality control forms into evidence as Plaintiff's Exhibits One-A through One-Y.

OPPOSING COUNSEL: Objection. Hearsay.

JUDGE: Objection overruled. The documents may be admitted as business records within the scope of General Statutes Section fifty-two dash one hundred eighty.

The attorney will then have the witness explain to the jury that the exhibits show that all twenty-five widgets were tested during the period of April 10–12, 2005; that all of them passed both the visual and the performance tests; and that all of them were shipped to XYZ, Inc. on April 15, 2005.

§ 9.10 MEDICAL BILLS AND RECORDS

Medical bills and records are frequently needed at trial to prove damages for personal injuries or wrongful death. They may also be needed in family actions to assist the court in making custodial determinations and may be needed in other civil actions. To be admissible as business records, a live witness would be necessary to provide the foundation testimony discussed in the prior section. This could have the effect of disrupting medical care across a large number of medical offices and hospitals and could increase expenses significantly. Fortunately, in both state and federal court, there is another way.

§ 9.10.1 State Court Admissibility

General Statutes § 52-174(b) allows *signed* medical records and bills of *treating* medical providers to be admitted into evidence without a live witness in all civil actions pending on or commenced after October 1, 2001. This applies to both resident and nonresident treating medical providers, even if they are beyond subpoena power. Hospital records are also admissible under Conn. Gen. Stat. § 4-104 as long as they are not otherwise inadmissible and were made in the regular course of business by an entity that made such records in the regular course of business.

Under § 52-174(b), signed medical records and bills are admissible as business records and it “shall be presumed” that the signature is of the medical practitioner and that the medical record and bill were made in the ordinary course of business. An opposing party may still challenge the admission of the records as genuine by calling the treating medical provider as a witness. The burden is on the objecting party to do so.

Once admitted, the medical bill or record is treated as a business record. Thus, portions of the record that are not related to medical “business,” i.e., the patient’s medical treatment, or that are otherwise inadmissible hearsay should be excluded from evidence. For example, in *Kelly v. Sheehan*, 158 Conn. 281, 285 (1969), the Connecticut Supreme Court excluded portions of a hospital record that identified the driver who struck the patient, concluding that such information was not related to the patient’s medical treatment. See also *Aspiazu v. Orgera*, 205 Conn. 623, 628 (1987) (reaching similar result with respect to physician’s report and

stating “[o]nce the report is ruled admissible under the statute, any information that is not relevant to medical treatment is subject to redaction by the trial court.”).

§ 9.10.2 Federal Court Admissibility

Medical records and bills are also admissible as business records in federal court. Fed. R. Evid. 803(6); *Pace v. Nat’l R.R. Passenger Corp.*, 291 F. Supp. 2d 93, 102 (D. Conn. 2003). Such records are admissible without witness testimony if the custodian of records or another qualified person certifies that the copies are true and accurate copies of the original and that they are business records that were made in the regular course of business by a person with firsthand knowledge of the information recorded. Fed. R. Evid. 902. Under the rules, the party seeking to admit such records must give his opponent reasonable written notice of the intent to offer the record and must make the record and certification available for inspection to the opponent. Fed. R. Evid. 902. In practice, this should be done no later than the final pretrial conference to mark exhibits as full or for identification only. Counsel may also wish to send a letter during the discovery process with the certification to notify opposing counsel that the record may be used as evidence at trial.

As in state court, the record is admitted as a business record. Thus, any statements not relating to medical treatment must be brought within an exception to the hearsay rule or they will be excluded.

§ 9.11 FOUNDATION

Medical bills and records are subject to relevancy and other evidentiary rules. Assuming that you can establish relevancy, medical bills and records of a treating provider may be admitted in state court without any foundational witness testimony as long as they are signed. Conn. Gen. Stat. § 52-174(b). Any information in the record related to medical treatment is also admissible under this section. Information not related to medical treatment must be brought within an appropriate hearsay exception or it will be excluded.

In federal court, you may introduce medical records that are accompanied by a certification by the custodian of records that the records are a true and accurate copy of the original and were made in the regular course of business. To introduce such records, you must give notice to your opponent that you intend to introduce the records and provide the opponent with the opportunity to examine both the certification and the records to be introduced.

When seeking to admit medical records, you should review the records to ensure that any statements fall within an exception to the hearsay rule. Likewise, statements expressing opinions must meet the requirements for opinion testimony. Any statement that does not fall within a hearsay exception is likely to be excluded.

§ 9.12 SAMPLE EXAMINATION

The plaintiff is testifying in federal court on direct examination in a motor vehicle accident jury trial.

PLAINTIFF’S ATTORNEY: Your Honor, at this time I would like to offer in evidence as Exhibits Nine, Ten, Eleven, and Twelve certified copies of bills and medical reports of plaintiff’s medical treatment by Dr. Michael Jones and Dr. Nathaniel Smith. I have given to defendant’s counsel written notice of certified copies. These bills and reports have previously been marked as Exhibits Nine, Ten, Eleven, and Twelve for identification.

JUDGE (to defendant’s attorney): Any objections?

DEFENSE ATTORNEY: May I be heard at the sidebar?

JUDGE: Yes.

At sidebar:

DEFENSE ATTORNEY: Your Honor, I filed a motion in limine in relation to these records. As you know, you told me that you would rule on the motion at this time.

JUDGE: What is the specific basis for your motion in limine?

DEFENSE ATTORNEY: Your Honor, I object to the introduction in evidence of one particular quote by the plaintiff in a report. It is contained on page three of the report of Dr. Jones, Exhibit Ten for identification. The plaintiff is quoted as saying, “I was in an automobile accident. A man in a big Cadillac speeded right through a red light and rammed my car.” I ask that the sentence “A man in a big Cadillac speeded right through a red light and rammed my car” be excised from the report before it is entered as an exhibit

since it has a direct bearing on liability and is not essential in any way to the plaintiff's treatment and medical history.

JUDGE (*to plaintiff's attorney*): Would you like to be heard?

PLAINTIFF'S ATTORNEY: Well, Your Honor, I believe that this sentence helps explain the reason for the plaintiff's serious injuries and that it should not be deleted from Dr. Smith's report.

JUDGE (*to plaintiff's attorney*): I disagree. It only bears on the liability issue. The defendant's motion in limine is allowed.

I'll admit the bills and medical reports as they now appear, but do not show them to the jury for now and do not read that sentence to the jury. During the next break, defendant's counsel should get together with the clerk and make sure that the sentence is excised to her satisfaction. Let's get on with the case for now.

Sidebar conference ends.

JUDGE: The bills and medical reports of Dr. Jones and Dr. Smith may be marked as trial exhibits.

Court reporter marks exhibits.

PLAINTIFF'S ATTORNEY: Your Honor, at this time I would like to read to the jury portions of Exhibits Ten and Twelve, the medical reports of Dr. Jones and Dr. Smith, respectively.

JUDGE: You may read them.

Plaintiff's attorney reads portions of the reports to the jury.

§ 9.13 PUBLIC RECORDS

Public records are documents that are maintained by government officials in the course of the exercise of their official duties. These may include birth and marriage records, tax records, land records, corporate certificates filed with the secretary of state, and a host of other official documents.

As in the case of medical records, both federal and state courts classify public records as self-authenticating. In other words, they are admissible without foundation testimony from a live witness, provided that they are accompanied by a certification from the appropriate custodian of the record.

Public records are subject to concerns over embedded hearsay statements in the same way that medical records are. Portions of a public record may be excluded from evidence if it can be shown that the information contained in the public record came from someone who did not have the duty to report such information. For example, the court in *Baughman v. Collins*, 56 Conn. App. 34, 38 (1999) excluded a police report that contained statements from three witnesses to an accident. The court held that, because the three witnesses had no duty to report their observations, their statements were inadmissible. *Baughman v. Collins*, 56 Conn. App. In contrast, the court noted, if the report had contained information solely from three other investigating officers, it would have been admissible because those officers were under a duty to report.

Additionally, public records may be challenged if they do not bear sufficient indicia of trustworthiness. In excluding a state investigator's preliminary investigative report, the District Court identified several factors to consider: "(1) the timeliness of the investigation; (2) the special skill or experience of the official; (3) whether a hearing was held and the level at which conducted; [and] (4) [any] motive of the investigator inconsistent with accuracy." *Barlow v. Connecticut*, 319 F. Supp. 2d 250, 258 (D. Conn. 2004) *aff'd sub nom. Barlow v. Dep't of Pub. Health, Connecticut*, 148 F. App'x 31 (2d Cir. 2005). In that case, the investigator's report had been based on multiple hearsay statements and had not been finalized. These negative factors were sufficient to overcome the presumption of reliability afforded to public records.

§ 9.14 FOUNDATION

In state court, public records are self-authenticating under the Conn. Code Evid., § 9-3, which provides:

The requirement of authentication as a condition precedent to admitting into evidence a record, report, statement or data compilation, in any form, is satisfied by evidence that (A) the record, report, statement or data compilation authorized by law to be recorded or filed in a public office has been recorded or filed in that public office, or (B) the record, report, statement or data compilation, purporting to be a public record,

report, statement or data compilation, is from the public office where items of this nature are maintained.

Similarly, in federal court, public records are self-authenticating under Fed. R. Evid. 902(1) and (2), which provide that the following documents do not need live testimony to be admissible:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal--or its equivalent--that the signer has the official capacity and that the signature is genuine.

Rule 902(3) contains a similar provision for foreign public documents, while Rule 902(5) permits the use of certified copies of public documents bearing the appropriate seal or signature.

To admit a public record into evidence, be sure to obtain a certification from the appropriate public official that the documents are true and accurate copies of a public record and have the documents signed or sealed by the appropriate public official or stamp.

As stated previously, the document is admitted only to the extent that any business record would be admitted. Thus, you should carefully examine the document to determine if any portion of it was based on a hearsay statement or other

information from a person not under a duty to report. Additionally, be prepared for a challenge if the record lacks indicia of trustworthiness, such as containing statements not within the official duties of the public office, not being recorded timely, or not being finalized.

§ 9.15 SAMPLE EXAMINATION

In this example, in the course of shareholder derivative suit, counsel wishes to introduce several documents that ABC, Inc., has filed with the secretary of state. The following exchange can take place either at sidebar or in open court.

ATTORNEY: Your Honor, I wish to offer in evidence certified copies of the articles of organization of ABC, Inc., and of three certificates of change of directors or officers. Each of these documents has been certified by the secretary of state as a true and accurate copy of the documents that were filed by ABC, Inc., and each of the original documents was required by statute to be filed with the secretary.

OPPOSING
COUNSEL: No objection.

JUDGE: The documents may be admitted.

§ 9.16 ELECTRONIC EVIDENCE

Electronic evidence is increasingly common in modern litigation. It may include computer-generated evidence, electronic mail, Web pages, and/or metadata. Both the Connecticut and the federal rules of evidence have provided guidance to litigants with respect to discovery of such evidence. *See* Fed. R. Civ. P. 16(b), 26, and 34; Conn. R. of Pract., §§ 13-9, 13-14. It now is routine to provide and receive potentially vast quantities of electronic information during the course of litigation. This chapter discusses issues surrounding several forms of electronic evidence.

§ 9.16.1 Computer-Generated Evidence

Computer-generated evidence—evidence *created* from computer data rather than evidence that merely *presents* other evidence through copies or otherwise (*see State v. Melendez*, 291 Conn. 693, (2009))—is admissible under the business record exception to the hearsay rule in federal court and pursuant to Conn.

Gen. Stat. § 52-180 in state court. Over the years, however, both state and federal courts have expressed concern that computer-generated records may not possess sufficient indicia of reliability to be admissible. “Business records that are generated by computers present structural questions of reliability that transcend the reliability of the underlying information that is entered into the computer. Computer machinery may make errors because of malfunctioning of the ‘hardware’ . . . [or] defects in the ‘software.’” *Am. Oil Co. v. Valenti*, 179 Conn. 349, 358–59 (1979).

[R]eliability problems may arise through or in: (1) the underlying information itself; (2) entering the information into the computer; (3) the computer hardware; (4) the computer software (the programs or instructions that tell the computer what to do); (5) the execution of the instructions, which transforms the information in some way—for example, by calculating numbers, sorting names, or storing information and retrieving it later; (6) the output (the information as produced by the computer in *a useful form, such as a printout of tax return information, a transcript of a recorded conversation, or an animated graphics simulation); (7) the security system that is used to control access to the computer; and (8) user errors, which may arise at any stage.

State v. Swinton, 268 Conn. 781, 813 (2004).

Thus, a party seeking to admit computer-generated information in state court must demonstrate the basic reliability of the computer system and process involved in creating the evidence. *State v. Swinton*, 268 Conn.; *F.D.I.C. v. Carabetta*, 55 Conn. App. 369, 376 (1999). This requires “testimony by a person with some degree of computer expertise, who has sufficient knowledge to be examined and cross-examined about the functioning of the computer.” *American Oil Co. v. Valenti*, 179 Conn. at 359.

The qualification of the foundation witness depends on the type of computer-generated record that is being presented. Notably, the foundation witness does not need to be a computer programmer or the person who entered the data into the system. *American Oil Co. v. Valenti*, 179 Conn. at 377. Instead, the witness must be familiar with the method used to create the evidence and the technology supporting it and must be able to be cross-examined by opposing counsel on those methods. *State v. Swinton*, 268 Conn. at 813. To lay an adequate foundation, a witness must establish that

(1) the computer equipment is accepted in the field as standard and competent and was in good working order, (2) qualified computer operators were employed, (3) proper procedures were followed in connection with the input and output of information, (4) a reliable software program was utilized, (5) the equipment was programmed and operated correctly, and (6) the exhibit is properly identified as the output in question.

State v. Swinton, 268 Conn. at 811-12.

Applying this standard, the Connecticut Supreme Court upheld the admission of digitally enhanced images of bite marks on a murder victim that revealed detail not visible to the naked eye, as well as bite mark images with superimposed images of the defendant's teeth. *State v. Swinton*, 268 Conn. at 814. The foundation witness provided testimony on the program and process used to create the images, the qualifications of the persons involved, the means by which the images were output, and the data upon which they relied, all of which was sufficient to establish the reliability of the images. *See also State v. Polanco*, 69 Conn. App. 169, 184 (2002) (computer-generated maps admissible with testimony from technician who verified process and accuracy of program); *Duplissie v. Devino*, 96 Conn. App. 673, 697 (2006) (job cost details for a construction project admissible with testimony from construction professional familiar with process and data); and *F.D.I.C. v. Carabetta*, 55 Conn. App. at 376 (summary of mortgage-related information for series of foreclosures admissible with testimony from bank manager who prepared information). Additionally, a business's day-to-day reliance on computerized records may be sufficient to establish the reliability of such records. *State v. Swinton*, 268 Conn. at 807 (2004).

In federal court, computer-generated information is subject only to the foundation requirements of noncomputerized business records in Fed. R. Evid. 803(6); *see Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 632 (2d Cir. 1994). Nevertheless, federal courts have excluded computer-generated information when it has determined that the computer-related method of preparation was untrustworthy or unreliable. *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d. For example, in *Potamkin*, the court upheld the exclusion of an accounting history prepared from a computer system because it had been compiled from data that contained numerous uncorrected errors. *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d. In contrast, the court in *Health Alliance Network, Inc. v. Cont'l Cas. Co.*, 245 F.R.D. 121, 130 (S.D.N.Y. 2007), *aff'd*, 294 F. App'x 680 (2d Cir. 2008), admitted a computerized list extracted from a database used in the ordinary course of business when a witness testified to reliable methods of collecting and maintaining the database.

Significantly, trustworthiness considerations in both state and federal court are sufficient to render any business record, not just computer-generated ones, inadmissible. The issue when dealing with computer-generated records, however, is that opposing counsel may be able to attack the reliability of the underlying data because the collection and maintenance of computer data may be unfamiliar to the court.

§ 9.16.2 Electronic Messages

Electronic mail, social networking messages, and cell phone texts (“e-messages”) are increasingly common forms of private writing that pose various authentication issues. The need for authentication arises because electronic communications may be generated by someone other than the named sender. People often leave their e-mail or social networking accounts or cell phones logged in and accessible to others who may send e-messages through that account or device. At other times, passwords or Web sites may be compromised by hackers. Consequently, proving only that an e-message came from a particular account, without more, is inadequate to lay the foundation that the e-message was sent from a particular individual. *State v. Eleck*, 130 Conn. App. 632, 639, (2011).

In 2011, the Connecticut Appellate Court extensively analyzed methods of authentication for e-messages from around the country and held that an e-message that had been shown to be from a Facebook account lacked sufficient foundation to attribute it to a particular individual. *State v. Eleck*, 130 Conn. App. at 642-43. While recognizing the impact of e-messages and, in particular, the emergence of social media, with respect to communicating, the court concluded that “[a]n electronic document may continue to be authenticated by traditional means such as the direct testimony of the purported author or circumstantial evidence of ‘distinctive characteristics’ in the document that identify the author.” *State v. Eleck*, 130 Conn. App. at 640; *see* Conn. Code Evid., cmt. to § 9-1(a). The court held that proving that a message had been sent from a particular account was not sufficient to establish that it had been sent by a particular individual; additional circumstantial evidence was required to attribute the message to the individual. *State v. Eleck*, 130 Conn. App. at 642.

While the court did not set forth any particular standard by which to authenticate e-messages, it did cite to a variety of cases in which e-messages had been authenticated with more-specific identifying characteristics, including the following:

- Letters on a computer hard drive were authenticated by “the mode of expression of the writing, detailed references to the defendant’s finances and circumstantial evidence linking the defendant’s presence

at home with the time the letters were created on his home computer.” *State v. Eleck*, 130 Conn. App. at 641, citing *State v. John L.*, 85 Conn. App. 291, 298–302, cert. denied, 272 Conn. 903 (2004).

- E-mails were authenticated not only by the defendant’s e-mail address but also by inclusion of specific factual data known to the defendants. *State v. Eleck*, 130 Conn. App. at 643, citing *United States v. Siddiqui*, 235 F.3d 1318, 1322–23 (11th Cir. 2000).
- Chat room message attributed to the author when he showed up at a meeting arranged in chat. *United States v. Tan*, 200 F.3d 627, 630–31 (9th Cir. 2000).
- E-mails were authenticated by their distinctive content, including a discussion of various identifiable personal and professional matters. *State v. Eleck*, 130 Conn. App., citing *United States v. Safavian*, 435 F. Supp.2d 36, 40 (D. D.C. 2006).
- Text messages to the victim were authenticated when sent from the defendant’s cell phone with details known by only a few people. *State v. Eleck*, 130 Conn. App., citing *Dickens v. State*, 175 Md. App. 231, 237–41 (2007).

Note that each of these cases employed a traditional doctrine for authentication, such as the content doctrine, which provides that a writing can be authenticated by showing that only the author was aware of specific details, or an action being consistent with a message, which provides that a writing can be attributed to an individual who takes an action consistent with the message, such as attending a prearranged meeting. The common thread is, as with any private writing, that each e-message contained distinctive characteristics sufficient to tie the messages back to the original sender, beyond simply having been sent from the individual’s account or cell phone.

In federal court, the Second Circuit upheld the admission of e-mails and a transcript of a chat room conversation when a participant in the e-mail string and the chat testified that the exhibits were accurate records of the defendant’s conversation. *United States v. Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007). The court first noted that the standard for authentication is simply one of “reasonable likelihood” and is “minimal.” *United States v. Gagliardi*, 506 F.3d. Because a witness who had been a party to the conversation testified as to the accuracy of the e-mails and chat transcripts, that was sufficient to authenticate the documents. *United States v. Gagliardi*, 506 F.3d. See also *U.S. Info. Sys., Inc. v. Int’l Broth. of Elec. Workers Local Union No. 3*, No. 00 CIV. 4763 RMB JCF, 2006 WL

2136249 (S.D.N.Y. Aug. 1, 2006) adhered to on reconsideration, 00 CIV.4763 RMB JCF, 2006 WL 2556339 (S.D.N.Y. Sept. 5, 2006) (admitting e-mail chain produced pursuant to subpoena and containing details about various meetings); *but see Bell v. Rochester Gas & Elec. Corp.*, 329 F. App'x 304, 306 (2d Cir. 2009) (excluding racially offensive e-mail purportedly sent by supervisor when no evidence that e-mail had been sent through business e-mail server).

Finally, note that e-messages offered for the truth of their contents will need to be brought within a hearsay exception to be admissible, even if properly authenticated.

§ 9.16.3 Web Pages

Printouts of Web pages may also be admissible. They are generally authenticated in the same manner as any other document. Some courts may accept authentication by way of an affidavit by the person who downloaded and printed the Web page and can attest that the Web page is what it purports to be. *See, e.g., Petra Const. Co. v. Sacred Heart Univ.*, No. X03HHDCV096013738S, 2011 WL 2536196 (Conn. Super. Ct. May 26, 2011). As with any other documentary evidence, when Web pages are offered for their truth, they must be brought within a hearsay exception.

In the case of private companies, testimony that a printout is an accurate depiction of the Web page in question is usually sufficient to authenticate the Web page. Printouts of government Web sites, however, are self-authenticating as official documents pursuant to Fed. R. Evid. 902(5). *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 397 (D. Conn. 2008) *aff'd*, 587 F.3d 132 (2d Cir. 2009).

In an interesting case, copies of historical printouts—depicting a Web site as it had been some time in the past—of a business's Web site were upheld as admissible by the Third Circuit in *United States v. Bansal*, 663 F.3d 634, 667–668 (3d Cir. 2011). That case involved the use of an archiving service called the Internet Archive, which runs a Web site called the Wayback Machine. *United States v. Bansal*, 663 F.3d at 668. The Wayback Machine maintains a catalogue of virtually all Web sites on the Internet and has a database of Web sites spanning more than a decade. *United States v. Bansal*, 663 F.3d. To authenticate the archived printouts, a witness was called to testify as to how the Wayback Machine works and how reliable its contents are. The witness also compared the archived shots with authenticated images of the Web site in question and concluded that the archived printouts were what they purported to be. On appeal, the Third Circuit affirmed, concluding that this evidence was sufficient to support a finding that the archived printouts were authentic. *United States v. Bansal*, 663 F.3d.

§ 9.17 FOUNDATION

Foundation requirements vary depending on the type of document being admitted. Additionally, if the document is offered for its truth, you must consider whether it can be brought within a hearsay exception. Relevance and prejudice also apply.

In the case of computer-generated evidence, a witness with sufficient competency must establish that

- the computer equipment is accepted in the field as standard and competent and was in good working order,
- qualified computer operators were employed,
- proper procedures were followed in connection with the input and output of information,
- a reliable software program was utilized,
- the equipment was programmed and operated correctly, and
- the exhibit is properly identified as the output in question.

To admit the evidence for its truth, a witness must establish the requirements for a business record:

- the evidence is a business record that was created or maintained by a person who had personal knowledge of the events recorded (or from information from a person with a duty to report such information) in the regular course of business;
- the information was recorded at or near the time of the event or transaction; and
- it is the regular practice of the business to make and keep such information.

For an e-message admitted against an individual, the proponent must establish authenticity via direct or circumstantial evidence, including

- the account from which it was sent,
- sufficient content information or details to establish that the party was the author, and

- evidence that the recipient took action based on the contents of the e-message

For a Web page, a witness must testify that he or she downloaded and printed the Web page. If using an archiving service, such as the Wayback Machine, a witness must provide the appropriate foundation to support the process and method by which the service functions and the reliability of the data produced.

§ 9.18 SAMPLE EXAMINATION

In the course of a breach of contract suit, the attorney wishes to introduce a computer printout that sets forth the dates, amounts, payees, and purpose of all checks issued by ABC, Inc., during 2004 in order to show that ABC, Inc., made certain payments to XYZ, Inc. This sample dialog demonstrates the introduction of that printout and assumes that counsel will be required to show the reliability of the process that produced the printout.

ATTORNEY: Please identify yourself, stating your occupation and place of employment.

WITNESS: My name is John Brown, and I am the director of management and information services for ABC.

ATTORNEY: How long have you held that position?

WITNESS: Since January two thousand two.

ATTORNEY: What are your responsibilities as the director of management and information services?

WITNESS: I am responsible for the collection, organization, maintenance, and dissemination of all data used by ABC in the regular course of its business.

ATTORNEY: Does ABC, Inc., make use of computers in the processing of such data?

WITNESS: Yes. Since July two thousand three, ABC has used computers instead of storing hard copies of invoices.

ATTORNEY: Are you personally familiar with the computer hardware and software used by ABC?

WITNESS: Yes. I was responsible for our acquisition of an IBM system in June two thousand three, and I have participated in the design of all software programs currently in use by ABC.

The witness then describes, in answer to a series of questions, the IBM system and its capabilities, as well as the particular software program used to replace ABC's cash disbursement journal.

ATTORNEY: Are the IBM system and the software program you have just described used in the regular course of ABC's business?

WITNESS: Yes.

ATTORNEY: Is it the regular course of business of ABC to scan invoices into the system and store the data on CD-ROMs instead of in filing cabinets in storage?

WITNESS: Yes.

ATTORNEY: Who at ABC, Inc., is responsible for entering into the computer data regarding these invoices?

WITNESS: Bill Smith, ABC's controller, and his two assistants, Marge Davis and Tom Jones.

ATTORNEY: Are you familiar with the manner in which such data is entered into the system?

WITNESS: Yes.

ATTORNEY: Please describe the way in which it is done.

WITNESS: When invoices are received at headquarters, they are paid and then scanned into the system by my department.

ATTORNEY: How is information retrieved?

WITNESS: After the invoices are scanned, there are staff members who code all the information such as date of invoice, date paid, amount, vendor name, and description.

ATTORNEY: When is all this information entered into the system?

WITNESS: After the invoice is paid. My department has people scanning and coding daily.

ATTORNEY: What happens to the original invoice?

WITNESS: A hard copy is retained until it is paid and then destroyed.

The witness then describes the system's safeguards for correcting errors.

ATTORNEY: For how long is the data stored in the computer?

WITNESS: The data is stored on the network for six months and then remains indefinitely on CD-ROMs.

ATTORNEY: How is information regarding the invoices retrieved from the computer?

WITNESS: Queries can be executed on the system to retrieve the invoice by any of the coded fields. Furthermore, any of the invoices can be printed.

ATTORNEY: Does ABC use computer printouts of invoices in the regular course of its business?

WITNESS: Yes.

ATTORNEY: How?

WITNESS: When there are disputes with vendors, when we are negotiating relationships with vendors, and for accounting purposes.

ATTORNEY: Have you brought with you any of the invoices?

WITNESS: Yes.

ATTORNEY: Was this printout generated in the manner you have just described?

WITNESS: Yes.

ATTORNEY: Was it generated by ABC in the regular course of its business?

WITNESS: Yes.

ATTORNEY: Is it the regular course of ABC's business to generate printouts of the invoices?

WITNESS: Yes.

ATTORNEY: Your Honor, I offer the computer printout into evidence as Plaintiff's Exhibit One.

OPPOSING
COUNSEL: Objection.

JUDGE: Objection overruled. The printout may be admitted as a business record.

The attorney will then have the witness explain to the jury the relevant information set forth in the printout.

In the course of the same suit, the attorney for XYZ, Inc., wishes to introduce printouts of ABC, Inc.'s, Web page, as it appeared in 2004, to prove that ABC was selling XYZ's products long after a license agreement had expired.

ATTORNEY: Please identify yourself, stating your occupation and place of employment.

WITNESS: My name is Lucy Smith, and I am a manager of archive services at the Internet Archive Company.

ATTORNEY: What are your responsibilities as manager of archive services?

WITNESS: I supervise the computer and storage systems by which we routinely download and preserve Web sites.

The witness describes the method by which the Internet Archive Company downloads and preserves Web pages as they existed on certain dates.

ATTORNEY: At my request, did you search the archives and locate the Web page registered to ABC, Inc., as it existed on November first, two thousand four?

WITNESS: Yes.

ATTORNEY: Did you print out that Web page?

WITNESS: Yes.

ATTORNEY: Have you brought the printout with you today?

WITNESS: Yes.

ATTORNEY: Your Honor, I offer the printout into evidence as Defendant's Exhibit Two.

OPPOSING
COUNSEL: Objection.

JUDGE: Objection overruled. The Web page is an admission of a party-opponent, and furthermore, the defendant has made a sufficient showing that the printout is authentic.