OPD OFFICE OF THE PARENT DEFENDER

MONTHLY MEMO #6– BUSINESS RECORD HEARSAY EXCEPTION

January 2025

Scenario:

At an abuse/neglect/dependency (A/N/D) or termination of parental rights (TPR) adjudication hearing, DSS seeks to support a social worker's testimony with documents which are in its case file by invoking the business records exception to the hearsay rules. Examples might include drug testing reports from a lab, police reports, 911 call logs, cell phone logs, school records, social media posts, or a recently appointed social worker's timeline of events gathered from a review of the file.

The Problem:

These documents were not prepared by an employee of DSS, or were not prepared near the time of the events which occurred, or are not based on the personal knowledge of a testifying witness, or contain hearsay within hearsay.

Main Argument:

DSS bears the burden of proving their case by clear and convincing evidence at the A/N/D and TPR adjudication hearings. N.C.G.S. §§ 7B-805, -1109(f). The rules of evidence apply to these two types of hearings. N.C.G.S. §§ 7B-804, -1109(f).

Do not allow the other parties to introduce documents that were not created by them. This rule applies to not only the documents listed in the Scenario above but also to medical records, CMEs, substance abuse treatment records, etc.

Applicable Law:

Hearsay documents that do not meet a statutory exception are presumptively unreliable and inadmissible. *State v. Wilkerson*, 363 N.C. 382, 420 (2009). Rule 602 of the Rules of Evidence requires that a witness testify from "personal knowledge." Rule 802 of the Rules of Evidence generally prohibits the admission of hearsay. Rule 803(6) allows an exception to the inadmissibility of hearsay evidence for business records. The burden is on the offering party to justify admission under an exception. It is not on the opposing party to justify exclusion. *See In re F.S.*, 268 N.C. App. 34 (2019); *Glymph v. Glymph*, 4 N.C. App. 274, 276 (1969).

A. To be admissible under the business records exception, a document must meet the following criteria. The record must have been created:

1. ***at or near* the time of the event;**

   A document created a significant time after the event does not qualify as a business record. *See Ray D. Lowder, Inc. v. North Carolina State Highway Com.*, 26 N.C. App. 622, 650-52 (1975) (document prepared four years after the event does not qualify as a business record); *In re Quevedo*, 106 N.C. App. 574, 584 (1992) (error to admit GAL report at

adjudication). *But see In re Smith*, 56 N.C. App 142 (1982) (social worker may testify from DSS records prepared several years prior since they were prepared near the time the events occurred and in the normal course of business even if the records themselves are not introduced into evidence); *In re C.R.B.*, 245 N.C. App. 65 (2016) (same).

2. by someone with *personal knowledge* of the event, or from information transmitted by someone with personal knowledge;

If a document contains second-level hearsay, that hearsay is not admissible even if the document as a whole is admissible under the business records exception. *State v. Wilkerson*, 363 N.C. 382, 420 (2009) (hearsay contained in police report is inadmissible, even though the report itself is a business record); *Donavant v. Hudspeth*, 318 N.C. 1, 7 (1986) ("The simple fact that a record qualifies as a business record does not necessarily make everything contained in the record sufficiently reliable to justify its use as evidence at trial.").

3. in the *regular* course of business;

Documents prepared for the purpose of litigation are not prepared in the regular course of business. *See Quevedo*, *supra, Lowder, supra; accord State v. Harris*, 338 N.C. 211, 222 (1994) (statements to doctor near in time to trial were for preparing defense, not for medical treatment); *State v. Lowery*, 219 N.C. App. 151, 154 (2012) (statements to doctor "for the purpose of preparing and presenting a defense" do not qualify as medical records).

Note: Preparing a timeline is for the purpose of preparing and presenting a case, and it does not qualify as a business records exception. Object!

4. by a custodian or similarly situated individual who testifies to or verifies the *authenticity* of the record.

Unauthenticated records are not admissible under the business records exception. *State v. Lester*, 291 N.C. App. 480, 486-87 (2023) (cell phone records); *cf. In re K.H.*, 281 N.C. App. 259 (2022) (owner of hair sample collection company had sufficient knowledge to authenticate even though he did not personally handle the samples); *In re S.D.J.*, 192 N.C. App. 478 (2008) (DSS employee who personally collected drug test samples had sufficient knowledge to authenticate even though she sent them to an independent lab for testing).

Note: Objecting to a document or record produced via a subpoena and properly authenticated, is not covered by this Memo. However, you may want to consider whether you need to: 1) motion for the redaction of inadmissible hearsay from those records, or 2) subpoena the witness to testify.

B. DSS argues that the documents were already introduced at the non-secure custody hearing (or review or permanency planning hearing).

In *In re L.N.H.*, 382 N.C. 536 (2022), our Supreme Court held that failing to object to admission of medical records from non-secure hearing at adjudication waived appellate review. The Supreme Court reasoned that because no case had ever addressed this issue before, failure to object to their introduction was not ineffective assistance of counsel.

Since we now have an opinion about this, trial counsel must object to any statements by DSS and/or GAL that medical records were already introduced at another hearing that bears a different rule about evidence.

C. Even at non-secure custody, review and permanency planning hearings, the rules of evidence are relaxed, not inapplicable.

While there is no specific statute section that states that the Rules of Evidence apply at hearings other than adjudication (A/N/D or TPR), the statute does give some guidance on what the trial court should consider:

1. At non-secure custody hearing.

The court shall not be bound by the usual rules of evidence at such hearings. N.C.G.S. § 7B-506(b).

The findings of fact shall include the evidence relied upon in reaching the decision and purposes which continued custody is to achieve. N.C.G.S. § 7B-506(d).

2. At review and permanency planning hearings.

The court may consider any evidence, including hearsay evidence as defined in N.C.G.S. § 8C-1, Rule 801, or testimony or evidence from any person that is not a party, that the court finds to be **relevant, reliable, and necessary** to determine the needs of the juvenile and the most appropriate disposition. N.C.G.S. § 7B-906.1(c).

3. Consider whether to object to the business record sought to be introduced.

Does the document include only **relevant, reliable, and necessary** information? Through a motion *in limine* or oral motion on the record, ask that any statement contained in the business record that is not relevant, reliable, and necessary be stricken or redacted.

D. DSS and/or GAL argue that the business record is being introduced for nonsubstantive purposes.

The party seeking to introduce the document says that they are not introducing it for the truth of the matter asserted within the document but to explain why they undertook the next steps.

Object. If a document is being introduced for nonsubstantive purposes, it does not need to be introduced. Offer to stipulate to a finding instead such as "based on DSS receiving a medical record, DSS undertook the following action …"

Action Steps:

- ❖ Ask DSS for a list of documentary exhibits and for time to review them. Weigh the cost of exclusion against the benefit that might be obtained if they contain information favorable to your client. *Smith*, *supra*.
- ❖ File a motion *in limine* to exclude inadmissible documents or parts of documents.
  - ➢ The party offering hearsay has the burden of showing it falls within a hearsay objection. *Glymph*, *supra*.
- ❖ Object at the hearing. A motion *in limine* does not preserve the issue if objection is not made during the hearing.
- ❖ Ask the worker who prepared the document when the document was prepared, and the purpose for which it was prepared.
- ❖ Ask the worker which parts of the document she has personal knowledge of.
- ❖ Take note of instances where information is attributed to collaterals and ask the court to redact that information.

Trial Court Script (objection):

Your Honor, I object to the introduction of the child's school records through the social worker. The records do not meet one of the exceptions to the hearsay rule about business records. Just because a social worker obtained these records (from the school, Labcorp, etc) as part of their duties, does not mean that they are THIS worker's business records. They are therefore inadmissible.

What to Do if You're Unsuccessful:

If the trial judge overrules your objection, you can still preserve some issues on behalf of your client by:

- Renewing your objection whenever hearsay is raised again throughout the hearing;
- Making sure that the evidentiary issue is addressed in the written order.

Conclusion:

Not every line of every document in DSS' files meets the business record exception for hearsay. Vet documents carefully and hold the department to their burden of clear and convincing evidence under the Rules of Evidence.

Attorney Tools:

- ➢ AND/TPR Manual, p. 11-41 to 11-45.
- ➢ Business Records: Posts, Chats, and Texts-North Carolina Criminal Law
- ➢ Motion *in Limine*