EVIDENTIARY ADMISSIBILITY AND RELIABILITY OF PRODUCTS GENERATED FROM COMPUTERS

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Examples where court room acceptance of computer generated products might be critical:

° breach of contract
° negligence
° civil / criminal violations by governmental officials
° etc.

Are computer-generated records treated any differently by the courts than traditional forms of evidence?

Federal Rules of Evidence
http://www.law.cornell.edu/rules/fre/overview.html

Hearsay rule almost always applies to files stored in computers and the printouts generated from those files.

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
To be admissible, computer generated products must typically qualify under one of the hearsay exceptions.

**Hearsay Exceptions**

a. **Business Records Exception** (exception 6)

Requirements:

- record or data compilation in any form (i.e. including electronic)
- made at or near the time by a person with knowledge
- if kept in the ordinary course of a regularly conducted business activity
- and if it was the regular practice of that business to make the record or data compilation
- all as shown by the testimony of the custodian or by a certification that complies with Rule 902(11) or (12)
- unless circumstances indicate lack of trustworthiness

PLUS record or data compilation must be **AUTHENTIC**

1. Most jurisdictions.

- showing input procedures to the computer
- showing tests used to assure accuracy & reliability of the computer operations and the information supplied to it and
- record generated and relied upon in the ordinary course of business
2. A few jurisdictions.
   • custodian testifies computer-generated records kept in the ordinary course of business
3. Some judges.
   • judicial notice of some off-the-shelf programs

b. **Public Records Exception** (exception 8)
   Requirements:
   • record or data compilation
   • in any form
   • maintained by a public office or agency
   • as a public record
   • setting forth
     (A) activities of the office or agency, or
     (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report …, or
     (C) … factual findings resulting from an investigation made pursuant to authority granted by law…
   • unless the sources of information or other circumstances indicate lack of trustworthiness
Additional Means of Admitting Computer Generated Evidence

a. Demonstrative Evidence - used for explanatory evidence

b. Evidence relied on by an expert (for limited purposes in some jurisdictions)

Problem of “trash science”
- Frye v. United States (1923) - req’d “general acceptance” in science community, conflicted with intent of fed rules - novel testimony should not be summarily dismissed

U.S. Supreme Court attempts to fix:
- Daubert v. Merrell Dow Pharmaceuticals (1993)
- Kumho Tire Co. v. Carmichael (1999)

See for instance, Scientific Experts and the Courts
http://www.aaas.org/spp/dsp/final/ntsc.rm#cover

Federal Rules Revised (Dec 2000) - emphasis on judicial gate keeping, several conditions specified for judges to consider to ensure reliability

CONCLUSIONS
Evidentiary differences between digital files of data and conventional record evidence:

1) Hearsay rule almost always applied to electronic data files and the products generated from them.

2) Authentication as a condition precedent to admissibility tends to be more complex and difficult.

3) Reliability and believability of computer printouts may be more difficult to convey to a jury and the general public.