MATRIMONIAL/FAMILY LAW

Mind Your Own Business (Records): The Business Records Rule And Police Reports at Trial

By Vesselin Mitev

Uttered almost like a talismanic incantation, the "business records" rule is invoked countless times across New York courtrooms to attempt to introduce into evidence what would otherwise be flagrant hearsay. Drilled into law students' heads from their 1L classes, it's often synopsized as eliciting, through a witness, that a) records of a transaction or event exist; b) it was in the regular course of the business to make said records; c) the records were made in the regular course of the business; d) at or near to the time that the transaction/event that the record memorialized occurred.

CPLR 4518 (a) provides in relevant part: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter…"

The rationale behind the rule is that it is unlikely that a business (or any other entity) would keep day-to-day false or fake records on which it presumably has to rely upon in order to operate successfully and thus there is inherent reliability in such records. But the rule's misuse has been the subject of legion appellate case law. Frequently, parties in divorce or custody cases try to introduce police reports into evidence by claiming the police report falls under the exception to the business record rule. Police reports are often highly prejudicial since they appear to bear the imprimatur of a neutral body whose sole purpose is to uphold the law — the police — yet often contain absurdly false, self-serving, or prejudicial statements that have no business coloring the perception of the trier of fact.

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As a general rule, the police report is inadmissible[i] (even though attorneys often include police report in underlying motion papers and try to back-door it in at trial). Keeping the police report out should be done as follows. Opposing counsel has her client on the stand and inquired as to whether there was a domestic disturbance incident on the night of July 1 at the marital residence:

"Q: Mrs. Doe, were the police called?

A: Yes, they were. I called the police.

Q: And did they arrive and take a police report?

A: Yes, they did.

Q: And did they make that report by asking you questions about the incident?

A: Yes.

Q: I show you now a copy of the report. Is that the copy you signed?

A: Yes.

Q: And the statements you gave the officer, did he record them at the time you gave them to him in the police report I just showed you?

A: Yes as far as I could tell, he was writing it all down.

Q: And the officer was on duty when he took the report, correct?

A: As far as I could tell, yes.

Counsel: I offer it under the business records rule."

This is flatly wrong. The officer may have been under a duty to record the information when the witness gave it to him, but the officer's report is not the witness' document, even if the witness signed it. In other words, the witness on the stand is not in the business of regularly giving statements to officers (meaning the first prong of the rule is not satisfied); she did not give the statement in her regular course of business (the second prong fails). Thus, opposing counsel must call the police officer to even attempt to lay a foundation for introducing the report, as the well-settled law is that even the filing of the business records of another entity does not transmute them into the records of the recipient[ii]; in short, the purported business records must be the records of the witness on the stand.

Apprised of her misstep, opposing counsel adjourns for the day and calls the police officer on the next trial date. Having committed the officer to the testimony that he arrived at the home, investigated the disturbance, and spoke to the parties, who gave to him the information that he wrote in his report, opposing counsel offers the report again. You rise to voir dire:

"Q: Officer, you did not witness the alleged incident, correct?

A: No.

Q: All your information came from the statements of these two people, correct?

A: That's fair.

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Q: Other than speaking with these two folks, you did no other separate investigation, correct?
A: That's correct.
Q: And Mrs. Doe, whose counsel called you today, does she work for the police department to your knowledge?
A: No, not that I know of."

You've now shown that the maker of the record (the officer) was not a witness and therefore his knowledge was derivative; and that the person who told the officer their version of events was under no business duty to do so. Under the prevailing Court of Appeals case law[iii], and the rules of evidence, the report should not be admitted because it is not only the entrant of the record who must be under a business duty to do make the record (as is unquestionably the role of a responding officer) but the person giving the information must be under a reciprocal duty to report the occurrence as well.[iv] It is beyond cavil that Mrs. Doe was under no business duty to report anything to the police.

You should also be able to keep out the statements in the police report if offered as admissions on Mrs. Doe's direct case, as bolstering and self-serving (and thus can only be attempted to be offered to rebut a claim of recent fabrication). But there is no prohibition to using these (if they contain or omit key facts) as fodder for cross-examination since they are a) party admissions and b) (possibly) prior inconsistent statements.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 percent devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.

[1] *Gagliano v Vaccaro*, 97 AD2d 430, 431 [2d Dept 1983]
[2] *Lodato v. Greyhawk North America LLC*, 39 AD3d 494 [2d Dept. 2007]
[3] *Johnson v. Lutz*, 253 NY 124, 128; *Toll v. State of New York*, 32 AD2d 47, 50
[4] Prince, Richardson, Evidence [10th Ed. Section 299]