

## **Electronic Evidence: The Fishy Case of the Missing Document**

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Shelly Mortega was in a pickle, perhaps even in pickled fish. She had to prove that a document was created and existed 10 long years ago. She had the data—the evidence—no problem. But, the data was on a computer, stored electronically, and in raw form. What she lacked was both the original document, a copy of the document produced by the same impression as the original, and the ability to reprint the document from the same impression as the original.

Shelly was also aware that electronic evidence is a different kettle of fish, perhaps even pickled fish. It is more easily modified, altered, or destroyed. It is also treated variously and sometimes perhaps incorrectly as testimony rather than physical evidence. She also knew in her heart of hearts that some people just wouldn't trust the computer and its data, no matter what. And she knew that the data was primarily accounting data—boring!!!

What could she do? she asked her boss, Debra Ann Rao.

Debra Ann told her about to earlier case she tackled. In that one, the data, again business records containing accounting data, were also stored electronically. Here, her opponents first attacked the data as hearsay--inadmissible second-hand evidence. Would she have to find the person who originally prepared the data to testify to have the information admitted?

No. Debra Ann found out about the business record exception to the rule against hearsay. A record made at or near the time by or from information transmitted by someone with knowledge and record was kept in the course of a regularly conducted activity of a business making the record was a regular practice of that activity could be exempt from the rules against hearsay. She also found out that a business record may include data stored electronically and later printed out so long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice.

Debra Ann smiled at the thought of the earlier case. She had Chuck Del Rio out the electronically stored data that was originally prepared in accordance with regular business practice. Problem solved! Or so she thought.

Her opponents came after her again. It seems that the data were not stored as printed but rather in codes that were translated to human readable form when Chuck created the printout. And Chuck was not there at the time the codes were originally entered. Did that make the data inadmissible? Fortunately, since knowledgeable personnel was there when the codes were entered, and all Chuck did was translate them through the computer, it was a business record, and admissible.

Debra Ann told Shelly, perhaps there is something similar you can do with your electronic data that will enable it to pass muster!

Shelly thought: I do have the data in an AccessData base. Let me print that out. I know it is not a copy. I know it is not even a duplicate. But, it is a reprint. And, it will prove that that the data necessary to create the document existed at the time we want to prove the document did in fact

exist. Perhaps this data along with other evidence will enable the powers that be to accept the fact that the document in question did in fact exist and said what we know it said, even if we don't have the document or a duplicate.

And it did. By using data stored in an AccessData base, data that was not the original or even purport to be the original, Shelly was able to help prove the absent document existed.

Boy, thought Shelly, this electronic evidence is interesting. It is volatile, changeable, and easily destroyed. I need to learn how to obtain and analyze it. And I need to know how to validate it so that it can be accepted by third parties. After all, here the data was not deleted or hidden or destroyed, and here we had other evidence to validate it. What am I going to do if the data were deleted or hidden and what am I going to do if there no external way to validate it?

So, Shelly made it her mission to learn about computer forensics, digital analysis, and fraud examination.

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This case study is prepared for discussion only. It does not constitute legal, financial, tax or accounting advice. This case study is based on Gregory v. IRS T.C. Memo 2018-18 (Nov. 20, 2018), and U.S. v. D'Agostino, 2016-1 U.S.T.C. ¶150,144, U.S. Court of Appeals, Second Circuit, (Jan. 13, 2016). Copyright © 2019 Andrew Blair Staley. Used by permission.