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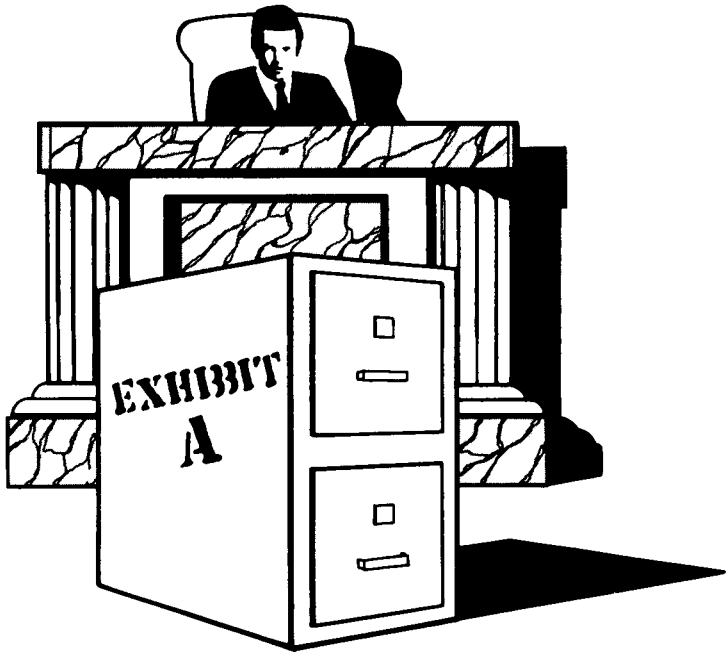

Presenting Business Records as Evidence in Federal Court

M. Thomas Arnold

A business record is admissible as evidence if the court is as justified as its maker in relying upon it.

AN ATTORNEY OFFERING BUSINESS RECORDS into evidence must have a basic understanding of the requirements for and the mechanics of admission. Conversely, the attorney seeking to prevent the acceptance of these records into evidence must be able to point out to the court any defi-

ciencies in the laying of the groundwork for admission, or any reasons why the records are untrustworthy or otherwise inadmissible.

The rules governing the use of business records in court conform with common sense and business practicalities. Businesses regularly rely on their records and accept them as accurate in making important decisions. The law as well now has come to recognize these records as generally accurate and to permit their introduction as evidence of the matters recorded in them provided certain requirements are met.

The modern theory is that business records are admissible because they are inherently reliable. *N.L.R.B. v. First Termite Control Co.,* 646 F.2d 424, 427 (9th Cir. 1981). The prerequisites for the admission of business records as evidence under the federal rules are meant to ensure that only records with a high probability of accuracy are admitted. Records will be excluded if indicia of reliability are absent.

ADMISSIBILITY • In federal practice, the admissibility of business records is governed by the Federal Rules of Evidence ("Rules")—to which all Rule references are made unless otherwise indicated. Under these Rules, business records made at or near the time of the matter recorded are not excluded by the hearsay rule if they meet certain basic requirements:

- The records were made by a regularly conducted business activity;
- They were kept in the regular course of that business;
- It was the regular practice of that business to make such records; and
- The records were made by a person with knowledge or from information transmitted by a person with knowledge. Rule 803(6); *Clark v. City of Los Angeles,* 650 F.2d 1033, 1036-7 (9th Cir. 1981), *cert. denied,* 456 U.S. 927 (1982).

Of course, if business records are not offered as evidence of the truth of the matters recorded, then they are not hearsay and need not meet the requirements of Rule 803(6). *See United States v. Rangel,* 585 F.2d 344, 346 (8th Cir. 1978) (vouchers and attachments were introduced to show deliberate act of alteration and not for purpose of establishing truth of statements in them).

Trustworthiness

"To merit judicial reliance on the contents of records, it is necessary that the proponent of particular records establish the trustworthiness of those records." *United States v. Rich,* 580 F.2d 929, 938 (9th Cir.), *cert. denied,* 439 U.S. 935 (1978). The Rnles provide that the prerequisites for business records are to be established "by the testimony of the custodian [of the records] or other qualified witness." Yet the Rules will exclude the

records if "the method or circumstances of preparation indicate lack of trustworthiness." Rule 803(6).

Relevant and Probative

In addition, the Rules do not provide that business records which meet the requirements of Rule 803(6) are necessarily admissible. These records will not be excluded by the hearsay rule, but they may be excluded for other reasons. *United States v. Cain,* 615 F.2d 380, 381 (5th Cir. 1980) ("exceptions . . . in Rules 803 and 804 are not affirmative rules of admissibility; they are couched in [terms of] cautious negation of inadmissibility"); *Forward Communications Corp. v. United States,* 608 F.2d 485, 510 (Ct. Cl. 1979). Thus, business records that are not relevant or that are substantially more prejudicial than probative may be excluded. *See* Rules 402 and 403.

If a business's records meet the requirements of Rule 803(6) and are otherwise admissible, they may be introduced into evidence by any party. "There is no basis for limiting Rule 803(6)'s operation to introduction of one's *own* business records." *United States v. Consolidated Edison Co. of N.Y., Inc.*, 580 F.2d 1122, 1131, n. 18 (2nd Cir. 1978) (emphasis in original).

Errors of Admission or Exclusion

Trial court errors in the admission or exclusion of evidence will be overturned only if substantial rights of a party are affected, and the party asserting error must demonstrate that these rights were affected. *Liner v. J.B. Talley & Co., Inc.,* 618 F.2d 327, 329 (5th Cir. 1980); Fed. R. Civ. P. 61; Rule 103(a). Thus a trial court's decision to admit or exclude proferred records, even if erroneous, stands a good chance of being affirmed on appeal.

Time of the Matter Recorded

A business record will be admissible only if made at or near the time of the matter recorded. *See, e.g., United States v. Kim,* 595 F.2d 755, 760 (D.C. Cir. 1979) (record made over two years after the event did not meet the "at or near" time requirement). Rule 803(6) does allow records made "near" the time of the event to be admitted. Thus some delay in recording matters in business records will not be fatal if the record is still contemporaneous. In addition, the fact that entries are out of chronological sequenee will not prevent admission if all entries are made at or near the time of the matters recorded. *United States v. Foster,* 711 F.2d 871, 882 (9th Cir. 1983), *cert. denied,* 465 U.S. 1103 (1984).

Regularly Condncted Business Activity

The term "business," as used in Rule 803(6), is defined as including "business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." Thus "the records of such institutions and associations as hospitals, churches, and schools would be admissible. . . ." *See* Read, *The Busi-*

ness Records Exception: Something Less Than Revolutionary, 2 Litigation 25, 27 (Fall 1975). *See also Hall v. Commissioner of Internal Revenue,* 729 F.2d 632 (9th Cir. 1984) (church records admissible as business records if proper foundation laid by qualified witness); *Stone v. Morris,* 546 F.2d 730 (7th Cir. 1976) (prison is clearly a "business").

Illicit Enterprise

The Rules do not require that the business be licit. The records of an illicit enterprise may be admissible if the requirements of the rule, including regularity of the activity, are met. *See, e.g., United States v. Baxter,* 492 F.2d 150, 164 (9th Cir. 1973), *appeal dismissed,* 414 U.S. 801 (1973), *cert. denied,* 416 U.S. 940 (1974) (records "were prepared pursuant to an inherently reliable standard operating procedure" and were admissible under former Federal Business Records as Evidence Statute). *See also United States v. Foster,* 711 F.2d 871, 882-3, *cert. denied,* 465 U.S. 1103 (1984) (records of large drug transactions), and *United States v. Hedman,* 630 F.2d 1184, 1197-8 (7th Cir. 1980), *cert. denied,* 450 U.S. 965 (1981) (diary kept by employee detailing payoffs to Chicago Building Inspection Supervisors).

Personal Records

A number of cases have admitted personal records or even diaries as business records if the records were regularly maintained. *See, e.g., Keogh v. Commissioner of Internal Revenue,* 713 F.2d 496, 499-500 (9th Cir. 1983) (regularly kept diary of tip income received by casino employee). Personal business records may be found to be trustworthy because "[a] man has a direct financial interest in keeping accurate accounts in his personal business." *Sabatino v. Curtiss Nat'l Bank,* 415 F.2d 632, 636 (5th Cir. 1969), *cert. denied,* 396 U.S. 1057 (1970) (check records).

The Regular Course of Business

When records are kept in the regular course of business the person furnishing the information to be recorded has motivations to be accurate. These would include the knowledge that the employer may rely on the information in the records and the duty to give accurate information as part of a continuing employment.

Records Prepared in Anticipation of Litigation

The requirement that business records be kept in the regular course of business excludes records prepared in anticipation of litigation from admission as business records. *Clark v. City of Los Angeles,* 650 F.2d 1033, 1037 (9th Cir. 1981), *cert. denied,* 456 U.S. 927 (1982) (216-page diary begun at the suggestion of a legal aid attorney and made expressly for purpose of litigation); *Southern Pac. Com. Co. v. American Tel. & Tel. Co.,* 556 F. Supp. 825, 1041 (D.D.C. 1983), *aff'd,* 740 F.2d 980 (D.C. Cir. 1984), *cert. denied,*

If information is provided in anticipation of or in preparation for litigation, the motivation to be accurate may be lacking.

105 S. Ct. 1359 (1985) (reports routinely sent to corporate legal department pursuant to instructions from that department and prepared to support legal activities).

If information is provided in anticipation of or in preparation for litigation, the motivation to be accurate may be lacking. The typical enterprise is not in the business of litigating, and the "[a]bsence of routineness raises lack of motivation to be accurate." Advisory Committee's Notes to Rules, 56 F.R.D. 183 (1972) ("Notes"); Rule 803(6), at 310 (released 1972, effective 1973).

The mere fact that a report or record might ultimately be useful or valuable in litigation or that it is favorable to the employer should not, however, automatically warrant its exclusion. The decisive question should be the trustworthiness of the record. Thus, if an accident or injury report is made pursuant to a governmental reporting requirement or for the purpose of determining how future accidents might be avoided, a motive to be accurate would be present. *See, e.g., Lewis v. Baker,* 526 F.2d 470 (2d Cir. 1975) (interpreting former Federal Business Records Act and holding that personal injury report and inspection report were admissible).

Investigative Reports

In addition, investigative reports are not per se inadmissible as business records. For example, the report of a law officer investigating an accident may be admissible. The accident report may be a routine part of the law officer's employment; the officer has a motive to be accurate. *See* Notes to Rule 803(6), at 310-11.

Several cases have held, however, that investigative reports that are inadmissible as public records under Rule 803(8) are also inadmissible as business records under Rule 803(6). *See, e.g., United States v. Cain,* 615 F.2d 380, 382 (5th Cir. 1980) (business records exception does not open a back door for evidence excluded by public records exception); *United States v. Oates,* 560 F.2d 45 (2d Cir. 1977). This approach would deny admission of investigative reports by law enforcement personnel against the defendant in a criminal case. These reports might still be admissible in civil cases or against the government in criminal cases.

Records Required by Law

Records that businesses are required by law to keep or reports businesses are required by law to file may be admissible as business records. Business records are not inherently

untrustworthy solely because they are required by law to be kept. A business may have incentives to keep these records or file these reports accurately. One incentive may be the desire to comply with the law. *See Pacific Service Stations Co. v. Mobil Oil Corp.*, 689 F.2d 1055, 1061 (Temp. Emerg. Ct. of App. 1982) (monthly reports required by Department of Energy, subject to possible audit); *United States v. Veytia-Bravo*, 603 F.2d 1187, 1191 (5th Cir. 1979), *cert. denied*, 444 U.S. 1024 (1980) (records of sales of firearms and ammunition kept pursuant to federal regulations; business that made records had incentive to keep records with precision to show it had not made unlawful sales).

A record made pursuant to a special request or made for something other than a regular business purpose is likely to be excluded. *See e.g., Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 560 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981) (memorandum drafted in most optimistic light to prevent another from breaching a contract); *United States v. Kim*, 595 F.2d 755, 761-2 (D.C. Cir. 1979) (telex prepared by foreign bank in response to a governmental subpoena); *Johnson & Johnson v. W.L. Gore & Assocs., Inc.*, 436 F. Supp. 704, 714 (D. Del. 1977) (memo prepared in response to specific request for the writer's version of the events in question). Such a record is, simply, not kept in the regular course of the business.

Regular Practice of Recordkeeping

If it is not the regular practice of the business to make records of the type sought to be admitted, then the records should be excluded. Evidence of a standardized method of recordkeeping can strengthen the case for admission of business records. Evidence of haphazard recordkeeping can be fatal.

Indicia of Reliability

Systematic checking of business records and habits of precision produced by regularity of recordkeeping are reasons that business records are considered to be generally trustworthy. When these indicia of reliability are not present, the records are not trustworthy and it is less likely that the business itself will rely on the records. The justification for admitting those records has dissipated. *Cf. State v. Perniciaro*, 374 So. 2d 1244, 1247 (La. 1979) (records of job descriptions were not within common law business records exception since they "were not kept and checked with a degree of habit, system, regularity and continuity which would prevent casual inaccuracies and counteract the possible temptation to misstatements.").

On the other hand, "[t]he fact that a regular practice is occasionally broken is not enough to avoid application of the business records rule; otherwise, the rule would be swallowed up by an exception for less-than-

perfect business practices." *United States v. Patterson,* 644 F.2d 890, 901 (1st Cir. 1981).

One can argue that the requirement of regular recordkeeping should be given a liberal construction. If so, a record of a single meeting or other important item might satisfy the requirement if the business involved regularly recorded other important meetings or matters. *See In re Japanese Elec. Prods. Antitrust Litigation,* 723 F.2d 238, 289 (3rd Cir. 1983), *rev'd on other grounds,* 106 S. Ct. 1348 (1986).

Information Given by a Person with Knowledge

If a business record is prepared by one employee from information provided by another employee, the lack of personal knowledge on the part of the person preparing the business record does not affect its admissibility. However, if the observer, or person supplying the information, is not acting in the regular course of the business activity, then the observer's statement must fall within another hearsay exception to be admissible. The nonemployee is not acting under the duty of accuracy to which an employee would be subject, and the presumption of accuracy accorded to statements made during the regular course of the businces would not pertain. *United States v. Baker,* 693 F.2d 183, 188 (D.C. Cir. 1982); *City of Cleveland v. Cleveland Elec. Illuminating Co.,* 538 F. Supp. 1257, 1269-71 (N.D. Ohio 1980) (reports of reasons given by customers for decision to terminate electrical power service).

A number of cases have limited the requirement that the person making the statement be acting in the regular course of the business if the records of those statements are integrated into a company's records and relied upon in its day-to-day operations. *See Matter of Ollag Const. Equip. Corp.,* 665 F.2d 43 (2d Cir. 1981) (financial statements prepared by customers of a bank at bank's request, on bank's form, and regularly relied upon by the bank in deciding whether to extend credit are admissible to show that bankrupt was insolvent and that bank should have been aware of it); *United States v. Ullrich,* 580 F.2d 765, 772 (5th Cir. 1978) (records prepared and transmitted by person with knowledge in one business and then used in the regular course of another business).

If counsel is seeking admission of records made by one business and used by another, testimony establishing the reliability of those records should show, if possible:

- The method of preparation of the record;
- That the record was prepared in the regular course of the first business;
- That the first business had a motive to be accurate;
- That the second business verified the aecuracy of these records; and

• That the second business relied on the records in the conduct of its business. *See, e.g., United States v. Pfeiffer,* 539 F.2d 668, 671 (8th Cir. 1976), in which a persuasive case was made that the records at issue were reliable.

Although the recordmaker's lack of personal knowledge of an item in the record or, as discussed below, similar ignorance of the witness laying the foundation for admission of the record will not prevent admission of the record into evidence, lack of evidence as to the source of the information can. Thus a statement in a hospital record regarding the severance of a nerve was not admissible when the information related to something that had occurred six months earlier at another hospital, and there was no evidence as to whether the notation was the opinion or diagnosis of the doctor recording it or merely part of the medical history provided to the recorder by the patient or his spouse. *See Petrocelli v. Gallison,* 679 F.2d 286, 289-91 (1st Cir. 1982) (The "district court could reasonably conclude that the notations were simply too inscrutable to be admitted . . . ."). *See also Meder v. Everest & Jennings, Inc.,* 637 F.2d 1182, 1186-7 (8th Cir. 1981) (statement in police report regarding cause of accident inadmissible since source of statement was unknown; the evidence was considered inherently untrustworthy).

In many cases the souree of the information can be established by testimony showing that it was the regular practice of the business to make records of the type in question from information transmitted by an employee with knowledge.

MECHANICS OF ADMISSION AND AUTHENTICATION • For business records to be accepted into evidence the proponent of admission must both:

• Establish that the prerequisites for admission as business records are met; and

• Authenticate the records.

The prerequisites for the admission of business records must bc established through the testimony of the custodian of the records or another qualified witness. The witness laying the foundation need not be the person who made the record nor even be aware of who made it. *United States v. Jones,* 554 F.2d 251, 252 (5th Cir.), *cert. denied,* 434 U.S. 866 (1977); *United States v. Page,* 544 F.2d 982, 987 (8th Cir. 1976) ("The absence or extent of personal knowledge regarding preparation of a business record affects the weight rather than the admissibility of the evidence."). Moreover, the witness need not have bcen employed by the business at the time the record was made, nor need he be employed by the business at the time that he testifies. *United States v. Evans,* 572 F.2d 455, 490 (5th Cir.), *cert. denied,* 439 U.S. 870 (1978).

Familiarity with the Recordkeeping Process

What is crucial is that the witness be familiar with the manner in which the records are made and kept. *Capital Marine Supply, Inc. v. M/V Roland Thomas, II,* 719 F.2d 104, 105-6 (5th Cir. 1983); *N.L.R.B. v. First Termite Control Co., Inc.,* 646 F.2d 424, 427-428 (9th Cir. 1981). Such a witness should be able to establish that the records were made in the regular course of business and to explain the steps taken to insure the accuracy of the records. The witness need not, however, be able to attest to the actual accuracy of the information contained in the records. *Rosenberg v. Collins,* 624 F.2d 659, 665 (5th Cir. 1980). Lack of personal knowledge of the information in the record goes to the weight and not the admissibility of the evidence. *See Meder v. Everest & Jennings, Inc.,* 637 F.2d 1182, 1187 n. 6 (8th Cir. 1981) (dicta); *United States v. Morton,* 483 F.2d 573, 577 (8th Cir. 1973).

Trial Court Determination

The admissibility of business records is decided by the trial court, which is not bound by the rules of evidence other than privilege in making its determination. Rule 104(a). The trial court has wide discretion in determining whether a proper foundation has been established for the introduction of business records into evidence. *Pacific Service Stations Co. v. Mobil Oil Corp.,* 689 F.2d 1055, 1061 (Temp. Emerg. Ct. of App. 1982); *Rosenberg v. Collins,* 624 F.2d 659 (5th Cir. 1980); *United States v. Evans,* 572 F.2d 455, 490 (5th Cir.), *cert. denied,* 439 U.S. 870 (1978). The trial court, however, must require some minimal foundation for admission of the records. *Cf. United States v. Blake,* 488 F.2d 101 (5th Cir. 1973) (witness was not an employee of the company whose records were at issue, and had no knowledge as to the preparation of these records). Testimony that merely establishes that the document or record was found in the files of a business during discovery will not suffice. *Coughlin v. Capitol Cement Co.,* 571 F.2d 290, 307 (5th Cir. 1978) (testimony of plaintiff's attorney that the document was found in files of the association was insufficient).

Anthentication

In addition to showing that the requirements for admission have been met, the proponent of admission is required to authenticate business records by showing that they are what the proponent claims. Rule 901(a). Generally business records can be identified as in fact being the records of a particular business through the testimony of the same witness whose testimony is used to show that the requirements of Rule 803(6) are met. *See* Rule 903(b)(1) (authentication by testimony of witness with knowledge). In other cases it might be possible to authenticate records through the use of circumstantial evidence. *See, e.g., In re Japanese Elec. Prods.*

Antitrust Litigation, 723 F.2d 238, 286 (3d Cir. 1983), *rev'd on other grounds,* 106 S. Ct. 1348 (1986) (prima facie case of authenticity was established by fact that minutes had the appearance, content, and substance of typical minutes, were produced pursuant to discovery order, and came from a source that was likely to keep such minutes).

PHOTOCOPIES AND COMPUTER RECORDS • The best evidence rule generally does not prevent the admission of photocopies of business records into evidence. Photocopies are "duplicates" that are usually admissible to the same extent as the "originals." Rule 1003; *Wright v. Farmers Co-op of Arkansas and Oklahoma,* 681 F.2d 549, 553 n. 5 (8th Cir. 1982). The Rules recognize that "the best evidence rule is of little practical value, at least where there is no serious issue as to the accuracy or authenticity of a duplicate." *Edwards v. Sears, Roebuck & Co.,* 512 F.2d 276, 294 (5th Cir. 1975).

If a genuine doubt is raised as to the authenticity of the original or in the circumstances it would be unfair to admit the duplicate in lieu of the original, then the original may be required. Rule 1003. "(R)easons for requiring the original may be present when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party." Notes to Rule 1003, at 343.

Computer records can be business records under Rule 803(6) and are admissible, subject to the same prerequisites as other records. *Capital Marine Supply, Inc. v. M/V Roland Thomas, II,* 719 F.2d 104, 106 (5th Cir. 1983); *Rosenberg v. Collins,* 624 F.2d 659, 665 (5th Cir. 1980). *See generally* Comment, *Admitting Computer Generated Records: A Presumption of Reliability,* 18 J. Mar. L. Rev. 115 (1984); Annot., *Admissibility of Computerized Private Business Records,* 7 A.L.R. 4th 8 (1981).

If data is stored in a computer, any printout from the computer that is shown to reflect aecurately the data is considered an "original" under Rule 1001(3). Computer printout records can be authenticated by testimony describing the process used to produce the printout and establishing that the printout is an accurate reflection of the data stored in the computer. *See* Rule 901(b)(9).

LACK OF TRUSTWORTHINESS • The trial judge has broad discrction to exclude business records if there are reasons to doubt the trustworthiness of the records. Doubt as to the trustworthiness of records can arise from many sources. These would include:

- Evidence that the records were kept in a haphazard fashion;
- Lack of evidence as to the source of the information—no reason to be-

lieve that the informant was an employee of the business with knowledge of the information recorded;

- Evidence that the records were prepared in anticipation of litigation;
- Evidence that the records were not prepared at or near the time of the act, event, condition, opinion, or diagnosis reported, *cf. Gilmour v. Strescon Indus. Inc.*, 66 F.R.D. 146, 150 (E.D. Pa.), *aff'd mem.*, 521 F.2d 1398 (3rd Cir. 1975) (report of employee made months after an accident and after suit was filed was not admissible as a business record);
- Evidence that the record had been altered after leaving the control of the person preparing or having custody of the record; or
- The records contain the opinion of an expert whose qualifications are subject to serious challenge. *United States v. Licavoli,* 604 F.2d 613, 622-23 (9th Cir. 1979), *cert. denied,* 446 U.S. 935 (1980).

In some cases the grounds for untrustworthiness will prevent the proponent of the records from laying an adequate foundation for the admission of the reeords. In other cases, however, the admission of otherwise qualified records may be denied because of lack of trustworthiness. The burden of showing the untrustworthiness of otherwise admissible records is on the party opposing admission of the records. *In re Japanese Elec. Prods. Antitrust Litigation,* 723 F.2d 238, 288 (3d Cir. 1983), *rev'd on other grounds,* 106 S. Ct. 1348 (1986); *Cf. Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 618 (8th Cir. 1983) (interpreting identical language in the public records exception to the hearsay rule).

The admissibility of business records is not always an all-or-nothing proposition. If there are valid reasons for doing so, a court can exclude portions of a business's records. Thus in one ease a court excluded handwritten notations on the report of a committee meeting when no testimony was presented about the identity of the author and it was not shown that the notations were made in the regular course of the business and that it was a regular practice of the business to make these notations. *Juneau Square Corp. v. First Wisconsin Nat'l Bank of Milwaukee,* 475 F. Supp. 451, 463 (E.D. Wis. 1979).

Sometimes the prejudicial or inflammatory nature of business records outweighs their probative value. In such a ease the trial court can either exclude the records or excise the prejudicial portion. *See* Rule 403; *Uitts v. General Motors Corp.,* 411 F. Supp. 1380, 1382-3 (E.D. Pa. 1974), *aff'd mem.,* 513 F.2d 626 (3rd Cir. 1975) (involving highly inflammatory lctters of car owners and poliee reports dealing with prior accidents) (alternate holding).

ABSENCE OF ENTRY AS EVIDENCE

- The Rules permit evidence of

the absence of a record of a matter that would ordinarily be recorded in a business's record to be introduced as proof of nonoccurrence or nonexistence of the matter. Rule 803(7). Often this will be the only method of proving a negative fact. *United States v. 34.60 Acres of Land, More or Less, in the County of Camden,* 642 F.2d 788, 790 (5th Cir.), *cert. denied,* 454 U.S. 830 (1981). Again, the trial judge has discretion to exclude the evidence if there are indications that the evidence lacks trustworthiness. *Id.*

Rule 803(7), unlike Rule 803(6), does not expressly require the testimony of the custodian of the records or other qualified witness. It only permits, however, the inference of nonoccurrence of nonexistence of a matter from records that are kept in accordance with Rule 803(6). Thus it appears that the foundation for the admission of evidence of absence of an entry in business records is the same as for the admission of the records themselves. It must be shown that the records searched would qualify as business records under Rule 803(6).

Lack of trustworthiness under Rule 803(7) can arise from a number of the same sources as under Rule 803(6). For example, if the records were kept in a haphazard fashion or were not made at or near the time of the matters recorded, then absence of a record of a matter should not give rise to an inference of nonexistence or nonoccurrence.

In addition, even though Rule 803(7), unlike Rule 803(10) (dealing with the absence of entries in a public record), does not expressly require a "diligent search," evidence that the search was merely casual or partial would call into question the trustworthiness of the evidence. *Cf. United States v. Robinson,* 544 F.2d 110 (2nd Cir. 1976), *cert. denied,* 434 U.S. 1050 (1978) (testimony regarding absence of entry in public agency's records; records were incomplete; no testimony concerning the manner in which search was made; testimony inadmissible under Rule 803(10) as proof of nonoccurrence).

SUMMARIES OF BUSINESS RECORDS • The Rules permit the contents of voluminous documents that cannot be examined conveniently in court to be presented in the form of a chart, a summary, or a calculation. For a summary to be admissible, the originals or duplicates thereof must be made available for examination or copying or both by the other parties. Rule 1006.

Discretion in Admitting Summaries

The trial judge, again, has broad discretion to determine whether or not summaries should be admitted. *Needham v. White Laboratories, Inc.,* 639 F.2d 394, 403 (7th Cir.), *cert. denied,* 454 U.S. 927 (1981). Before permitting the introduction of summaries of business records, the trial judge should determine that the underlying

documents are admissible under Rule 803(6), that they are voluminous, and that they are available for inspection. *United States v. Johnson,* 594 F.2d 1253, 1254-7 (9th Cir.), *cert. denied,* 444 U.S. 964 (1979). If the summaries are not based entirely on admissible evidence, then the trial court should exclude the summary. *Ford Motor Co. v. Auto Supply Co., Inc.,* 661 F.2d 1171, 1175 (8th Cir. 1981). *See also Paddack v. Dave Christensen, Inc.,* 745 F.2d 1254, 1260 (9th Cir. 1984) ("The proponent of the summary of both admissible and inadmissible hearsay is entitled to admission of only those portions that he can demonstrate are entirely admissible."). If the underlying records are admissible, they need not be so voluminous that it is impossible to examine them in court. It is enough that in-court examination of the records would not be convenient. *United States v. Scales,* 594 F.2d 558, 562 (6th Cir.), *cert. denied,* 441 U.S. 946 (1979).

Danger of Summaries

While the use of summaries of voluminous business records can be helpful, it also presents certain dangers. *See United States v. Lemire,* 720 F.2d 1327 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1226 (1984). The greatest dangers in the use of summaries are that:

- The summarizing witness will invade the province of the jury;
- The jury will treat the summary as substantive evidence; and
- The summary is unfair to one of the parties.

A "guarding instruction" may be very important in these cases. The jury can be instructed that the summary is used as a matter of convenience only and is to be disregarded if it conflicts with the evidence the jury has heard in the case. *See, e.g., Lemire,* 720 F.2d at 1348 n. 32.

In addition, in appropriate cases a voir dire examination of the summary witness outside of the presence of the jury can minimize the danger that the witness' testimony will be too conclusory, thus invading the function of the jury, or will be unfair to one of the parties. *Id.* at 1348. In general, trial courts should be careful that unfair summaries are not presented to the jury. *United States v. Scales,* 594 F.2d 558, 564 (6th Cir.), *cert. denied,* 441 U.S. 946 (1979).

OTHER CONSIDERATIONS • If business records are properly authenticated and the proper foundation is laid, they can be introduced as evidence of the truth of the matters recorded in them. This may be true even in criminal cases or of opinions contained in the records. Use of oral testimony to prove matters that could be proven by introduction of business records is also generally permissible, as is the use of business records that conflict with other evidence.

Criminal Cases

First, business records are generally admissible in criminal as well as civil cases. The constitutional right to confront witnesses is not necessarily abridged by the use of these records without affording the defendant an opportunity to cross-examine all participants in the recordmaking process or demonstrating their unavailability. *United States v. Leal,* 509 F.2d 122, 127 (9th Cir. 1975). Since business records are inherently reliable, the utility of cross-examination of the person who actually made the record tends to be minimal. *United States v. Keplinger,* 572 F. Supp. 1068, 1071 (N.D. Ill. 1983), *aff'd,* 776 F.2d 678 (7th Cir. 1985). *See also Ohio v. Roberts,* 448 U.S. 56, 65 n. 7 (1980) (government need not produce declarant or demonstrate unavailability if "the utility of trial confrontation is remote").

The admission of business records is generally not crucial to the government's case or, in other words, "devastating" to the defendant. In addition, business records are not usually "against" the defendant, or accusatory in nature. *Keplinger,* 572 F. Supp. at 1071. If the business records sought to be introduced in a criminal case are crucial to the government's case or are accusatory in nature, a court might find that the confrontation clause of the United States Constitution is applicable and require production of the declarant or a demonstration of his unavailability. Sec *Dutton v. Evans,* 400 U.S. 74, 87-89 (1970); *United States v. Keplinger,* 572 F. Supp. 1068, at 1071 n. 2, *aff'd,* 776 F.2d 678 (7th Cir. 1985).

Opinions and Diagnoses

Second, opinions and diagnoses within business records may be admissible. The admission of opinions and diagnoses is, in the first instance, within the discretion of the trial judge. *Miller v. New York Produce Exch.,* 550 F.2d 762, 769 (2d Cir.), *cert. denied,* 434 U.S. 823 (1977).

The admissibility of opinions or conclusions in business records may be the most difficult issue involving business records. The answer in a given case might depend on whether the court adopts a narrow or a broad view on the question. Several cases have expressed a narrow view on the admissibility of opinions contained in business records. In one case involving nonexpert opinion the court stated: "Expressions of opinion or conclusions in a business record are admissible only if the subject matter calls for an expert or professional opinion and is given by one with the required competence." *Clark v. City of Los Angeles,* 650 F.2d 1033, 1037 (9th Cir. 1981), *cert. denied,* 456 U.S. 927 (1982). This seems inconsistent with Rule 701, which would permit lay opinion testimony based on firsthand knowledge or observation if it is helpful in resolving a fact issue.

In a case involving expert testimony, another court held that "unless Rule 803(6) is deemed to override the

opinion rules, it should not be construed to allow the introduction of expert opinions without opportunity to ascertain the qualifications of the maker, the extent of his study or for other reasons to cross-examine him." *Forward Communications Corp. v. United States,* 608 F.2d 485, 510 (Ct. Cl. 1979) (appraisal of newspaper's tangible assets by appraisal company inadmissible as business record). One author has opined that at least part of this court's holding is clearly wrong. He states: "The court's requirement that the declarant be made available for cross-examination has the effect of eliminating expert opinions from the scope of the business records exception to the hearsay rule, a result obviously inconsistent with congressional intent." Pierce, *Admission of Expert Testimony in Hearsay Form: Federal Rules of Evidence 803(6), 803(8)(c), and 803(18),* 17 Forum 500, 506 (1981).

Other cases exhibit a more generous view on the admissibility of opinion testimony. In one case involving expert testimony the court stated: "We see no reason to adopt an inflexible rule that every case requires the proponent of a business record containing expert opinion to affirmatively establish the qualifications of the person forming the opinion." The court noted that the trial judge could have excluded the opinion if indications of untrustworthiness were present, and that the reliance of the company on the opinion was affirmative evidence of its reliability. *United States v. Licavoli,* 604 F.2d 613, 622-23 (9th Cir. 1979), *cert. denied,* 446 U.S. 935 (1980). *See also Sabol v. Snyder,* 524 F.2d 1009, 1011-12 (10th Cir. 1975) (upholding trial court decision to admit, as evidence of the success of a workshop, evaluations containing the opinions of participants).

Distinguishing Fact from Opinion

The difficulty of distinguishing fact from opinion can lend support, in some cases, to the argument that the trial judge should exercise his discretion to admit records with conclusory statements. *Cf. Miller v. New York Produce Exch.,* 550 F.2d 762, 769 (2d Cir.), *cert. denied,* 434 U.S. 823 (1977) (it was not error for trial court to admit records containing statements concerning a commodity squeeze; "It is often difficult to distinguish between what is fact and what is opinion.").

Best Evidence

Third, the best evidence rule is generally not violated by oral testimony regarding a matter that has been recorded in a business's records. The best evidence rule only bars attempts to use oral testimony to prove the contents of a document if the original is available. *See* Rules 1002 and 1004. Thus earnings may be proved through parol testimony without producing the books of account in which the earnings are recorded. *See Sayen v. Rydzewski,* 387 F.2d 815, 819 (7th Cir. 1967) (trial court did not err in permit-

ting witness to testify as to his income; "Courts do not bar oral proof of a matter merely because it is also provable by a writing."). But if the books of aecount are to be used to prove earnings, the best evidence rule would apply. The original must be produced if it is available. *See* Notes to Rule 1002, at 342. As discussed previously, generally the Rules will permit a photocopy to qualify as an original. Rule 1003.

Finally, the fact that business records are contradicted by either parol testimony or other documentary evidence will not necessarily justify their exclusion. In most cases this would simply raise a question of fact to be resolved by the trier of fact. *See, e.g., Ascher v. Gutierrez,* 533 F.2d 1235, 1237 (D.C. Cir. 1976) (conflict between records and other evidence on question of whether doctor was in operating room).

CONCLUSION • An understanding of the rules governing the admissibility and use of business records can be valuable to both the proponent and the opponent of admission. In general, the approach adopted by the Rules is both reasonable and workable. If shown to be reliable, business records will be admitted; if indications of unreliability are present, they will be excluded.

For Further Study

ALI-ABA Books

Resource Materials: Civil Practice and Litigation in Federal and State Courts (3d ed. 1985).

Trial Advocacy: A Systematic Approach, by Leonard Packel and Dolores B. Spina (1984).

Conrse of Study Transcript: Trial Guide for the Geueral Practitiouer, Leonard Packel, Editor (1981).

Civil Trial Mannal 2, by Ralph C. McCullough II and James L. Underwood, Reporters, (2d ed. 1980 & 1984 Supp.).

The Practical Lawyer's Manual of Trial and Appellate Practice No. 2 (1979).

Basic Prohlems of State and Federal Evideuce, by Edmund B. Morgan and Jack B. Weinstein (5th ed. 1976).

The Practical Lawyer's Manual of Trial aud Appellate Practice No. 1 (1973).