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## Admission of Business Records into Evidence: Using the Business Records Exception and Other Techniques

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## Admission of Business Records into Evidence: Using the Business Records Exception and Other Techniques

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### INTRODUCTION

The bulk of the evidence in commercial litigation is often contained within various documents produced in the course of a commercial enterprise. In general, the "hearsay rule" would prevent relevant information contained within such commercial documents from being admitted into evidence.<sup>1</sup> On the other hand, obtaining

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1. Under Federal Rule of Evidence 801, hearsay is an oral or written "statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." See note 16. Federal Rule 802 prohibits the admission of hearsay into evidence except as provided by other rules. For a further discussion of what constitutes hearsay, see Ralph Adam Fine, *A Guide through the Hearsay Thicket*, 11 Okla City U L Rev 83 (1986).

testimony from witnesses as to the information contained within such documents would usually be extremely difficult, if not impossible. As such, Congress provided the "Business Records Exception" in Rule 803(6) of the Federal Rules of Evidence (hereinafter "Rule 803(6)"), which allows many commercial documents to be admitted into evidence without a witness testifying about the information contained therein.<sup>2</sup> In addition, the Federal Rules of Evidence contain hearsay exclusions and other exceptions which may also be used to enter a commercial document into evidence.

In the course of a large commercial litigation case, the authors of this article encountered many documentary evidence issues. This article is a product of the research conducted with regard to such issues. The article provides a practical discussion of the application of many of the rules of evidence encountered in litigation that depends upon information contained in commercial documents. In addition, the article suggests certain methods of having such documents admitted into evidence. The article analyzes issues primarily with respect to the Federal Rules of Evidence, but does provide some common law and state law analysis.

This article is divided into five sections. Section one is a general discussion of Rule 803(6) and its usual application, including the necessary foundation. Section two discusses the problem of lay opinion testimony contained within business records. The third section covers multiple levels of hearsay in business records including the difficulties encountered when records prepared by one entity are integrated into those of another entity. Section four discusses the following exclusions from and exceptions to the hearsay rule: (1) the public records exception, (2) admissions of a party, (3) past recollection recorded, and (4) the "catch-all" exception. Finally, the fifth section will discuss an issue germane to all documentary evidence: authentication.

## I. GENERAL DISCUSSION OF RULE 803(6)

Throughout the history of our modern legal system, courts have considered documents maintained in the regular course of a business to be sufficiently reliable to be admitted into evidence for the truth of the matter recorded.<sup>3</sup> The common law exception to the

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2. FRE 803(6). See note 15 and accompanying text.

3. See Edward W. Cleary, ed, *McCormick on Evidence* § 306 at 872 (West, 3d ed 1984); John Henry Wigmore, 5 *Wigmore, Evidence* § 1518 at 426-30, as revised by James H. Chadbourne (Little Brown and Co., 1974); *Radtke v Taylor*, 105 Or 559, 210 P 863 (1922),

hearsay rule for regularly kept business records evolved from a more restrictive approach. This approach required that the party using the records not have a clerk and file a "supplemental oath" as to the justness of the information; that the records "look" honest; and that witnesses *testify* that the records look honest.<sup>4</sup>

Eventually these requirements evolved into a broader standard:

The common law [business records] exception had four elements: (a) the entries must be original entries made in the routine of a business, (b) the entries must have been made upon the personal knowledge of the recorder or of someone reporting to him, (c) the entries must have been made at or near the time of the transaction recorded, and (d) the recorder and his informant must be shown to be unavailable.<sup>5</sup>

The elements of this exception were not without criticism. For example, the limitation to "business records" was thought too restrictive.<sup>6</sup> In addition, there was confusion as to what witnesses were necessary to lay a proper foundation.<sup>7</sup> The criticism and confusion created by the common law business records exception led to intractable disagreement among the courts, and legislation became necessary to resolve the differences.<sup>8</sup>

Two statutes were enacted to untangle the various approaches used for documentary evidence, the Commonwealth Fund Act<sup>9</sup> and the Uniform Business Records as Evidence Act (hereinafter "the Uniform Act").<sup>10</sup> The Commonwealth Fund Act provided that:

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 said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall

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questioned in *Simon v City of San Francisco*, 79 Cal 2d 590, 180 P2d 393, 394 (1947); 30 Am Jur 2d Evidence §§ 918-926 (1967).

4. Cleary, ed, *McCormick on Evidence* § 305 at 871 (cited in note 3).

5. Id, § 306 at 872. See also Charles V. Laughlin, *Business Entries and the Like*, 46 Iowa L Rev 276, 282 (1961).

6. Cleary, ed, *McCormick on Evidence* § 306 at 872 (cited in note 3).

7. Id.

8. Id.

9. Id, § 306 at 873 n 3.

10. Id.

include business, profession, occupation and calling of every kind.<sup>11</sup>

The Uniform Act provided the following basis for admission of documentary evidence:

§ 1. Definition. The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

§ 2. Business Record. A record of an act, condition or event, shall, in so far as being relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.<sup>12</sup>

In 1975, Congress codified the business records exception in the Federal Rules of Evidence as Rule 803(6).<sup>13</sup> This new Rule attempted to incorporate and preserve the advantages of the common law, the Commonwealth Fund Act, and the Uniform Act.<sup>14</sup>

#### A. Rule 803(6)

Federal Rule of Evidence 803(6) provides:

The following are not excluded by the hearsay rule: . . . (6) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.<sup>15</sup>

This hearsay exception for regularly kept business records is justified on grounds analogous to those underlying other exceptions to the hearsay rule.<sup>16</sup> Such grounds are that the hearsay statement

11. Edmund Morris Morgan, *The Law of Evidence, Some Proposals for Its Reform* 63 (Yale Univ. Press, 1927); Cleary, ed, *McCormick on Evidence* § 306 at 873 n 3 (cited in note 3) ("Several states and the Congress adopted this Act. For federal courts it has been superseded by Federal Rule 803(6)").

12. Cleary, ed, *McCormick on Evidence* § 306 at 873 n 3 (cited in note 3), citing 9A ULA 506 (1965) ("After wide adoption, the Uniform Act was superseded by Original Uniform Rule 63(13), which in turn has been superseded by Revised Uniform Rule (1974) 803(6). The Federal Rule and the Revised Uniform Rule are identical").

13. FRE 803(6), amended by Pub L No 94-149, § 1(11), 89 Stat 805 (1975).

14. FRE 803(6) advisory committee's note.

15. FRE 803(6).

16. "Hearsay" is defined in Federal Rule of Evidence 801, which provides:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) non-verbal

may possess circumstantial guarantees of trustworthiness sufficient to justify non-production of the declarant in person at trial, even though the declarant may be available. The reason for the unusual reliability of business records is invariably said "to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate report as part of a continuing job or occupation."<sup>17</sup> As such, the principal precondition to admission of documents as business records is that the records have sufficient indicia of trustworthiness to be considered reliable.<sup>18</sup>

Two major difficulties face counsel seeking to use the business records exception. The first is "understanding the interplay between personal knowledge and the business duty to record in defining the scope of the exception in any given context."<sup>19</sup> The other difficulty is presented when multiple levels of hearsay exist within a business record offered for its truth.<sup>20</sup> "The fundamental principle of the business records exception [is] that the business record begins at the point where there is a coalescence in one person of personal knowledge of the relevant facts and a business duty to either record those facts or report them to another for recording."<sup>21</sup> Only after this point is the rationale of the business records exception valid since perception, memory and sincerity problems underlying the hearsay rule are then sufficiently diminished to justify the exception.<sup>22</sup>

Not all records that are regularly maintained in the course of business are admissible under the business records exception. As

conduct of a person, if it is intended by him as an assertion. (b) Declarant. A "declarant" is a person who makes a statement. (c) Hearsay. "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.

FRE 801.

17. FRE 803(6) advisory committee's note, citing Cleary, ed, *McCormick on Evidence* §§ 281, 286, 287 at 828, 833-34 (cited in note 3); Laughlin, 46 Iowa L Rev at 276 (cited in note 5).

18. *Coates v Johnson & Johnson*, 756 F2d 524 (7th Cir 1985), disagreed with by multiple cases as stated in *Latinos Unidos de Chelsea En Accion v Secretary of Housing & Urban Dev.*, 799 F2d 774, 786 (1st Cir 1986).

19. Paul R. Rice, *Evidence: Common Law & Federal Rules of Evidence* 633 (Matthew Bender & Co., 2d ed 1990).

20. Rice, *Evidence: Common Law & Federal Rules of Evidence* at 633 (cited in note 19). See also notes 62-72 and accompanying text.

21. Rice, *Evidence: Common Law & Federal Rules of Evidence* at 638 (cited in note 19).

22. *Id.*

previously indicated, there is an overriding limitation on the business records exception. Such limitation is that the records be prepared in a manner which lends trustworthiness to the records. If conditions indicate the records lack such trustworthiness, courts should exclude the records from evidence.<sup>23</sup>

Most notably, the courts do not generally consider documents prepared with an eye toward litigation to be sufficiently trustworthy under the business records exception to the hearsay rule.<sup>24</sup> It should be further noted that Rule 803(6) merely provides that the documents described therein are not to be excluded by the hearsay rule. Nothing in Rule 803(6) says that a business record may not be excluded by some other rule. For example, under Federal Rule of Evidence 403, a business record can be excluded if the opponent has demonstrated that the record's value is substantially outweighed by the danger of unfair prejudice because of the opponent's inability to test the record.<sup>25</sup> A court can also exclude a document if it is too confusing or voluminous.<sup>26</sup>

### B. *Use of Rule 803(6)*

Regularly kept records may be offered into evidence in many different situations, although in almost all situations a proponent will offer the record as evidence of the truth of its terms. In such a case, the evidence is clearly hearsay and some exception to the hearsay rule must be invoked if the court is to admit the record. Often, a proponent will not use the business records exception because the record comes within the terms of an exclusion or another exception to the hearsay rule. For example, if the record was made by a party-opponent, it may be admissible against such party as an admission.<sup>27</sup> If the entrant is produced as a witness, the record may be used to refresh his memory<sup>28</sup> or may be read into evidence

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23. *Id.* at 640; *United States v Patterson*, 644 F2d 890, 900-01 (1st Cir 1981).

24. *Rice*, *Evidence: Common Law & Federal Rules of Evidence* at 640 (cited in note 19), citing *Palmer v Hoffman*, 318 US 109 (1943). See also *AMPAT/Midwest, Inc. v Illinois Tool Works Inc.*, 896 F2d 1035, 1045 (7th Cir 1990) (documents produced in the course of litigation are "dripping with motivations to misrepresent"), citing *Hoffman v Palmer*, 129 F2d 976, 991 (2d Cir 1942), *aff'd*, *Palmer v Hoffman*, 318 US 109 (1943).

25. See note 87 and accompanying text.

26. See note 139 and accompanying text.

27. See FRE 801(d)(2). See also notes 212-16 and accompanying text.

28. See FRE 612. When a witness suffers from a failed memory the interrogating counsel may use a writing or other item to induce recollection. It is important to note, however, that the writing "serves only to refresh the witness' recollection and not as an independent source of evidence." Graham C. Lilly, *An Introduction to the Law of Evidence* 80



pursuant to the past recollection recorded exception.<sup>29</sup> Sometimes, a record may be admissible as a declaration against interest.<sup>30</sup>

As the previous discussion illustrates, more than one exception or combination of exceptions and exclusions may apply to a record at the same time. In such a case, counsel must make a tactical decision as to which exception to use. For records of public offices or agencies though, there is authority that such records are governed exclusively by Federal Rule 803(8) and not by Rule 803(6).<sup>31</sup> Certain considerations in determining which hearsay exclusion or exception to use are discussed in section IV of this article.

Rule 803(6) requires testimony by a qualified witness for admission of a business record into evidence. Admission is proper under Rule 803(6) even if the foundation is established by a witness who is not an employee of the entity that owns and prepares the documents.<sup>32</sup> Usually, however, the testimony of the custodian or other qualified witness who can explain the recordkeeping of an organization is essential for the admission of documents under Rule 803(6).<sup>33</sup> The phrase "other qualified witness" should be given the broadest interpretation; the witness need not be an employee of the entity so long as the witness understands the system.<sup>34</sup> "A foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court, particularly in the case of bank and similar statements."<sup>35</sup> "Alternatively, the parties may stipulate that the records were filed and prepared in the regular course of business, or an admission of a party may establish that the records were ones of regularly conducted activity, or the records may be admis-

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(West, 1978).

29. See FRE 803(5). See also notes 222-23 and accompanying text.

30. See FRE 804(b)(3). Declarations against interest must be adverse to the interest of the declarant at the time of the declaration and the declarant must be unavailable. The exception has its most frequent application where the declarant is not a party. Lilly, *An Introduction to the Law of Evidence* at 260 (cited in note 28).

31. Lilly, *An Introduction to the Law of Evidence* at 242 (cited in note 28).

32. *Saks Int'l, Inc. v M/V "Export Champion,"* 817 F2d 1011, 1013 (2d Cir 1987); *United States v Hathaway,* 798 F2d 902, 906 (6th Cir 1986); *NLRB v First Termite Control Co.,* 646 F2d 424, 426 (9th Cir 1981).

33. See, for example, *First Termite Control Co.,* 646 F2d at 427, citing Jack B. Weinstein & Margaret A. Berger, 4 *Weinstein's Evidence* ¶ 803(6)[02] at 151-52 (Matthew Bender & Co., 1981).

34. See *United States v Phillips,* 515 F Supp 758, 763 (E D Ky 1981). See also *In re Beverage Transport, Inc.,* 2 Bankr 367, 369 (Bankr W D N Y 1980), citing Weinstein & Berger, 4 *Weinstein's Evidence* at ¶ 803(6)[02] (cited in note 33).

35. Weinstein & Berger, 4 *Weinstein's Evidence* ¶ 803(6)[02] at 178 (1990) (cited in note 33).

sible pursuant to the residual hearsay exception of Rule 803(24).<sup>36</sup>

The custodian or other qualified witness who testifies on behalf of documents under Rule 803(6) need not have "personal knowledge" of the actual creation of the document.<sup>37</sup> It suffices that such person states that it is a business practice to prepare the document with data supplied by someone with personal knowledge of the act or event recorded.<sup>38</sup> Nor is there any requirement under Rule 803(6) that the records be prepared by the party who has custody of the documents and seeks to introduce them into evidence.<sup>39</sup>

It is important to note that the determination of whether, in all circumstances, the records have sufficient reliability to warrant their receipt into evidence is left to the sound discretion of the trial judge.<sup>40</sup> Many courts take a generous view of Rule 803(6) and construe it to favor admission of a document into evidence rather than exclusion if the document has any probative value at all.<sup>41</sup> The trier of fact can usually identify self-serving or untrustworthy records and discount the weight of the evidence accordingly.<sup>42</sup>

### C. *Elements of Rule 803(6)*

The primary elements that must be satisfied for a document to be admissible as a business record under Rule 803(6) are:

- (1) made as a regularly conducted business activity;
- (2) contemporaneity;
- (3) made by a person with knowledge, or from information transmitted by a person with knowledge; and
- (4) person records acts, events, conditions, opinions or diagnoses.<sup>43</sup>

#### 1. *Regularly Conducted Business Activity*

In the past, numerous courts required that business records be

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36. Id at 178-79. For a discussion of Rule 803(24) see notes 164-65 and accompanying text.

37. See *United States v Rose*, 562 F2d 409, 410 (7th Cir 1977).

38. Lilly, *An Introduction to the Law of Evidence* at 237 (cited in note 28).

39. *United States v Hutson*, 821 F2d 1015, 1020 (5th Cir 1987), citing *Mississippi River Grain Elevator, Inc. v Bartlett & Co.*, 659 F2d 1314, 1319 (5th Cir 1981).

40. *Wallace Motor Sales, Inc. v American Motor Sales Corp.*, 780 F2d 1049, 1060 (1st Cir 1985), questioned in *Stamps v Ford Motor Co.*, 650 F Supp 390 (N D Ga 1986); *United States v Lavin*, 480 F2d 657, 662 (2d Cir 1973). See also *Coates*, 756 F2d at 549 (district court has broad discretion in deciding whether to admit evidence pursuant to Rule 803(6)).

41. *United States v Freidin*, 849 F2d 716, 722 (2nd Cir 1988).

42. Lilly, *An Introduction to the Law of Evidence* at 241 (cited in note 28).

43. FRE 803(6).

made in a regular practice of a business activity.<sup>44</sup> However, under Rule 803(6), records are customarily admitted if made in the course of business without regard to whether the particular type of record is routinely made except where the court is concerned with the trustworthiness of the record.<sup>45</sup> Rule 803(6) should be interpreted so that the absence of routineness without more is not sufficiently significant to require exclusion of the record.<sup>46</sup> Non-routine records made in the course of a regularly conducted business should be admissible if they meet the other requirements of Rule 803(6) unless the source of information or other circumstances indicate a lack of trustworthiness.<sup>47</sup>

For example, informal notebooks kept by employees to aid in their work or notes made in the course of negotiations for a business opportunity satisfied Rule 803(6) despite their irregular nature since there was no showing that the documents were inaccurate or untrustworthy.<sup>48</sup> Even personal records kept for business reasons may be able to qualify under Rule 803(6). Such personal records were at issue in *United States v Hedman*,<sup>49</sup> where the court ruled that a diary kept by a contractor's employer recording every payoff he had made to a city building inspector was properly admitted into evidence because it related to a regularly conducted business activity rather than a personal matter.<sup>50</sup>

In certain circumstances, however, courts have interpreted Rule 806(3) literally, and required that a document be made as a "regular practice" of the business activity for admissibility. In *United*

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44. See, for example, *Johnson v Lutz*, 253 NY 124, 170 NE 517, 518 (Ct App 1930).

45. Weinstein & Berger, 4 *Weinstein's Evidence* ¶ 803(6)[02] at 181-82 (cited in note 33).

46. *Id.* at 182. But see David W. Loisel & Christopher B Mueller, 4 *Federal Evidence* 657 n 97 (Law Co-op, 1980)(arguing that Congress could not have intended to allow a document to be introduced absent the element of routineness); notes 48-54 and accompanying text.

47. Weinstein & Berger, 4 *Weinstein's Evidence* ¶ 803(6)[03] at 182 (cited in note 33).

48. *United States v Prevatt*, 526 F2d 400, 403 (5th Cir 1976), disagreed with by *United States v Smyth*, 556 F2d 1179 (5th Cir 1977); *Magnus Petroleum Co. v Skelly Oil Co.*, 446 F Supp 874, 883 (E D Wis 1978), rev'd on other grounds, 599 F2d 196 (7th Cir 1979).

49. 630 F2d 1184 (7th Cir 1980), questioned in *United States v Nelson*, 672 F Supp 812, 816 (D NJ 1987).

50. *Hedman*, 630 F2d at 1197. Objections by the defense that the diary was inadmissible because the employer did not require that the diary be kept or that other employees did not rely on it were dismissed by the court since they went "to the weight rather than the admissibility" of the diary. *Id.*

*States v Freidin*,<sup>51</sup> the court said that the principal precondition to admission of a document is trustworthiness, but it is not the only precondition.<sup>52</sup> The court held that a memorandum not shown to have been made pursuant to a regular business practice was inadmissible.<sup>53</sup> As such, if a record is an "isolated document" (*i.e.*, not made as a regular business practice) certain courts may exclude the record from evidence.<sup>54</sup>

## 2. Contemporaneity

Rule 803(6) requires the record to be made at or near the time of the events recorded. In the usual case, the time of the event and the time of the entry should be self-evident from the face of the record.<sup>55</sup> The purpose of the contemporaneity requirement is to increase the probability of accuracy.<sup>56</sup> What is sufficiently contemporaneous will depend on the "nature of the information recorded, the immutable reliability of the sources from which drawn and similar factors."<sup>57</sup> The contemporaneity element should be satisfied if the record is prepared within a reasonable time after the occurrence of significant events.<sup>58</sup> An industry standard may be used to show a time frame considered reasonable.<sup>59</sup>

## 3. Knowledge

Sources of information usually present no substantial problem with ordinary business records.<sup>60</sup> Each participant in the chain producing the record, from the observer-informant to the final entrant, are usually acting in the course of a regularly conducted business.<sup>61</sup> This implies a duty of accuracy since the employer is rely-

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51. 849 F2d 716 (2d Cir 1988).

52. *Freidin*, 849 F2d at 722.

53. *Id* at 723.

54. In *United States v Ramsey*, 785 F2d 184 (7th Cir 1986), the court said that "miscellaneous jottings" in the form of desk calendar notes should not be admitted under Rule 803(6) just because they have some connection with a regular business. *Ramsey*, 785 F2d at 192.

55. Most business records will contain a date somewhere.

56. Cleary, ed, *McCormick on Evidence* § 309 at 878 (cited in note 3).

57. *Missouri P. R. Co. v Austin*, 292 F2d 415 (5th Cir 1961).

58. *Williams v Humble Oil & Refining Co.*, 53 FRD 694, 698 (E D La 1971).

59. *Williams*, 53 FRD at 698.

60. See generally Cleary, ed, *McCormick on Evidence* § 310 at 878 (cited in note 3); Wigmore, 5 *Evidence* §§ 1530, 1555 at 449-62, 478-80 (cited in note 3); 30 Am Jur 2d *Evidence* §§ 951-53 at 78-82 (1967); 32 CJS *Evidence* §§ 692-93 at 930-42 (1964).

61. See Wigmore, 5 *Evidence* § 1530 at 449 (cited in note 3).

ing on the result.<sup>62</sup>

As previously discussed, a business record cannot begin until there is a coalescence in a single person of personal knowledge of relevant information and a business duty to record or report to another for recordation of that information.<sup>63</sup> This is because Rule 602 requires that witnesses testify from personal knowledge.<sup>64</sup> The coalescence of personal knowledge satisfies Rule 602 and the business duty to record or report assures that the written account is a reliable substitute for the testimony of that person.

However, an essential link is often broken because the supplier of the data is not acting within the course of a regular business.<sup>65</sup> In such a case, the assurance of accuracy does not extend to the information itself and the fact that it may be recorded with scrupulous accuracy is of no consequence.<sup>66</sup> Rule 803(6) requires testimony of an informant with knowledge, acting in the course of regularly conducted activity, in order for the information to be admitted into evidence.<sup>67</sup> As such, courts have generally insisted on the additional reliability present when all participants in the making of a record are under a business duty.<sup>68</sup> This judicial requirement confirms that courts are the primary arbiters of admissibility and not the business community.<sup>69</sup>

The crux of the problem is, of course, double hearsay. While the business records exception may serve to justify admitting the out-of-court declarations of the maker of the record as to what he said from his own personal knowledge, it does not follow that this justifies admitting the declaration of someone else simply because the

62. FRE 803(6) advisory committee note.

63. Rice, *Evidence: Common Law & Federal Rules of Evidence* at 638 (cited in note 19).

64. FRE 602 provides:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

FRE 602.

65. *White Indus., Inc. v Cessna Aircraft Co.*, 611 F Supp 1049, 1060 (W D Mo 1985), aff'd, 845 F2d 1497 (8th Cir 1988).

66. *United States v Lieberman*, 637 F2d 95, 101 (2d Cir 1980).

67. See, for example, *Belber v Lipson*, 905 F2d 549, 552 (1st Cir 1990) (records of another doctor not automatically incorporated with the witness' records simply by his gaining custody of them).

68. Lilly, *An Introduction to the Law of Evidence* at 238 (cited in note 28). See also notes 143-48 and accompanying text.

69. Lilly, *An Introduction to the Law of Evidence* at 239 (cited in note 28).

maker of the record testifies to it. Thus, a business record containing an assertion by someone other than the maker should be admitted to prove the truth of that assertion only if the assertion itself comes within an exception to or exclusion from the hearsay rule.<sup>70</sup> For example, where the communication of a non-business declarant qualifies as a spontaneous declaration or a party admission, the applicable exception could be "linked" with the business records exception to render the statements admissible.<sup>71</sup>

The "linkage principle" was codified in Federal Rule of Evidence 805. Rule 805 authorizes the admission of hearsay within hearsay if both statements conform to the requirements of an exception to the hearsay rule.<sup>72</sup> As under the linkage principle, if the informant's statement qualifies as an admission or excited utterance or as a statement for purposes of medical diagnosis or treatment, the record embodying the statement is admissible under Rule 805 if it was made in the course of a regularly conducted activity.<sup>73</sup> In *United States v Keane*, the court held that a statement recorded in a business record was admissible since it met the state of mind hearsay exception.<sup>74</sup>

*White Industries v Cessna Aircraft Co.*<sup>75</sup> provides that the general indicia of trustworthiness required under Rule 803(6) can be found in some situations where the reporting duty arises by way of a continuing business relationship between two independent business entities.<sup>76</sup> However, the interest of two business entities, even though a contractual or other business relationship exists between them, may not coincide or may do so only to a limited degree.<sup>77</sup> The *White Industries* court concluded that where there is a binding, continuing contractual requirement for the business relationship and where the circumstances in that respect as well as the more general circumstances surrounding the entities' relationship do not suggest a lack of trustworthiness, an independent business

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70. *Grogg v Missouri Pac. R.R. Co.*, 841 F2d 210, 213 (8th Cir 1988). See also Lilly, *An Introduction to the Law of Evidence* at 239 (cited in note 28).

71. Lilly, *An Introduction to the Law of Evidence* at 239 (cited in note 28).

72. FRE 805 provides: "Hearsay Within Hearsay. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." FRE 805.

73. Weinstein & Berger, 4 *Weinstein's Evidence* ¶ 803(6)[04] at 191 (cited in note 33).

74. *United States v Keane*, 522 F2d 534, 558 (7th Cir 1975), aff'd, 852 F2d 199 (7th Cir 1988). The state of mind hearsay exception is contained in FRE 803(3).

75. 611 F Supp 1049 (W D Mo 1985), aff'd, 845 F2d 1497 (8th Cir 1988).

76. *White Indus., Inc.*, 611 F Supp at 1049.

77. *Id.*

entity which supplies information to another may, in fact, be deemed to be acting under a business duty for purposes of Rule 803(6).<sup>78</sup>

#### 4. *Matters Recorded*

Rule 803(6) departs considerably from the previous practice in its treatment of what matters may be recorded.<sup>79</sup> In particular, Rule 803(6) allows the admission of opinions recorded in business records.<sup>80</sup> Entries in the form of opinions are not encountered in traditional business records because items usually recorded are of a purely factual nature.<sup>81</sup> However, Rule 803(6) explicitly makes opinion evidence admissible under the business records exception. It is unclear, though, whether the requirements of Federal Rule of Evidence 701 are overridden by Rule 803(6) with regard to opinions of lay witnesses.<sup>82</sup> Under Rule 701, opinions of lay witnesses must be rationally based on perception and helpful to a clear understanding of their testimony or the determination of a fact in issue.<sup>83</sup>

Apparently Rule 803(6) overrides Rule 701 to a certain extent, "but this does not mean that the requirements of Rule 701 are ignored."<sup>84</sup> For example, firsthand or personal knowledge of the recorder or his informant is still required for a business record to be admissible. Such requirement generally approximates the "rationally based on perception" requirement of Rule 701. "The most significant change that the inclusion of opinions in the business records exception appears to have brought about is the practical consequence of a shift in the burden of persuasion to the opponent to show a basis for excluding an opinion once a proponent has satisfied the elements of Rule 803(6)."<sup>85</sup> It should be noted, however, that if the opinions in a record are totally subjective evaluations, a

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78. *Id.* at 1053.

79. See Rice, *Evidence: Common Law & Federal Rules of Evidence* at 650 (cited in note 19).

80. See notes 79-130 and accompanying text.

81. See *Forward Communications Corp. v United States*, 608 F2d 485, 510 (Ct Cl 1979).

82. See generally Rice, *Evidence: Common Law & Federal Rules of Evidence* at 659 (cited in note 19) (concluding that such situations should be decided by applying Rule 403). See also notes 84-86 and accompanying text.

83. FRE 701.

84. Rice, *Evidence: Common Law & Federal Rules of Evidence* at 660 (cited in note 19).

85. See *United States v Licavoli*, 604 F2d 613 (9th Cir 1979).

court is more likely to exclude the record because of the danger of unfair prejudice due to an increased need to cross-examine the one who formed the opinions.<sup>86</sup>

Opinions commonly appear in letters and reports offered as business records. Such opinions are frequently very damaging to an adversary's case. As such, the issue of the admissibility of an opinion contained in a business record is often significant. Such issue is the focus of Section II of this article.

#### D. *Rule 403 Considerations*

As previously discussed, a court may exclude a document pursuant to Rule 403 even if it meets the requirements of the business records or any other hearsay exception. Application of Rule 403 is a necessary step in any evidentiary analysis. Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Advisory Committee Notes to Rule 403 state that "unfair prejudice within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

One state court has suggested a four-step process for the application of Rule 403. "First the trial judge should assess the proponent's need for the . . . evidence."<sup>87</sup> Second, the judge should "determine how prejudicial the evidence is."<sup>88</sup> That is, how distracting (from the true issues in the case) the evidence will be to the jury.<sup>89</sup> Third, the judge should balance the proponent's need for the evidence against the countervailing danger of unfair prejudice.<sup>90</sup> The last step is for the judge to make a ruling either to admit the evidence, exclude the evidence, or admit the evidence in part.<sup>91</sup>

The court in *Bethlehem Steel Corp. v Chicago Eastern Corp.*<sup>92</sup> applied such an analysis. The issue in *Bethlehem Steel* involved

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86. See *Della Publishing Co. v Whedon*, 577 F Supp 1459, 1464 n 5 (S D NY 1984).

87. *State v Mayfield*, 302 Or 631, 733 P2d 438, 447 (1987) (although state law applied, the Oregon Rule of Evidence 403 is the same as Federal Rule 403).

88. *Mayfield*, 733 P2d at 447.

89. *Id.*

90. *Id.*

91. *Id.*, citing Edward J. Imwinkelreid, *Uncharged Misconduct* §§ 8.01-8.03 (Callaghan, 1984).

92. 863 F2d 508 (7th Cir 1988).



fractures in steel components.<sup>93</sup> The steel was provided by the defendant, while the components were designed by the plaintiff.<sup>94</sup> The defendant wished to enter into evidence an internal memorandum with a damaging statement.<sup>95</sup> The trial court only allowed the evidence to be used to refresh the witness' memory, but the plaintiff claimed the testimony should be kept out on Rule 403 grounds.<sup>96</sup> The Seventh Circuit held that the memorandum was properly used because (1) it was important evidence with regard to a fraud claim of the plaintiff, and (2) the court could not say the trial court abused its discretion in finding that the probative value outweighed any prejudicial effect because the testimony was limited in the scope of its admission.<sup>97</sup>

## II. LAY OPINION TESTIMONY WITHIN A BUSINESS RECORD

Business records often contain statements which are an opinion of an informant or of the recorder. These opinions can sometimes be extremely relevant and helpful to a proponent seeking to prove a proposition. Unfortunately, even if the document meets the requirements of the business records exception, there is still the risk that the relevant statement is inadmissible because it is in the form of an opinion. The rules of evidence, however, allow courts to properly admit opinions of both experts and lay witnesses contained within a business record.

### A. *Introduction to Lay Opinion Testimony*

At common law, American courts excluded all non-factual testimony of a lay witness.<sup>98</sup> This meant that any non-expert witness could not testify as to his or her inferences, conclusions, or opinions.<sup>99</sup> The rationale for this basic rule was that permitting lay witnesses to express an opinion or a conclusion would usurp the jury's function, that of drawing a conclusion based on the facts

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93. *Bethlehem Steel Corp.*, 863 F2d at 517.

94. *Id.*

95. *Id.*

96. *Id.* The internal memorandum read (and the witness testified):

Armco [a testing agency] is planning to assist Chicago Eastern Corporation in finding if our present material could become overstressed due to our present designs. Armco does not feel that the basic problem is a material problem, but a design problem. *Id.*

97. *Id.*

98. For the purposes of this article, the term "lay witness" shall refer to any witness who has not been qualified as an expert witness.

99. Cleary, ed, *McCormick on Evidence* § 11 at 26 (cited in note 3).

presented.<sup>100</sup>

Other considerations, however, ultimately led to the adoption of Rule 701 of the Federal Rules of Evidence (hereinafter "Rule 701"). Rule 701 reads:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Rule 701 eliminates the presumption that lay opinion testimony is inadmissible.<sup>101</sup> To be admissible, the opinion testimony need only be "helpful" to the finder of facts.<sup>102</sup>

Many courts at common law required that even if an opinion was admissible, the underlying facts must be testified to as well, so that the jury could see what the opinion was based upon.<sup>103</sup> This was known as the "primary facts doctrine."<sup>104</sup> Whether or not the primary facts doctrine is carried through to Rule 701 is unclear. For example, it could be argued that the jury cannot meaningfully evaluate the witness' opinion and come to an independent decision unless the witness discloses the underlying facts.<sup>105</sup> "On the other hand, one could argue that the requirement is impractical because most of the instances in which lay opinions are necessary or appropriate are such that a meaningful delineation of the underlying facts is difficult, if not impossible."<sup>106</sup> It appears that the Seventh Circuit has adopted the latter position.<sup>107</sup>

While Rule 701 reflects the common law concern of lay witnesses usurping the function of a jury, it is also concerned with putting the trier of fact in possession of an accurate reproduction of the

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100. *Id.* See, for example, *Gerler v Cooley*, 41 Ill App 2d 233, 190 NE2d 488 (1963).

101. Rice, *Evidence: Common Law & Federal Rules of Evidence* at 1031 (cited in note 19).

102. *Id.* See also *Hurst v United States*, 882 F2d 306, 312 (8th Cir 1989) (lay witness may give opinion only if it is rationally based on the perception of the witness and would help the fact finder determine a matter in issue).

103. See, for example, *Baltimore & Ohio R.R. Co. v Schultz*, 43 Ohio 270, 1 NE 324, 331 (1885).

104. Rice, *Evidence: Common Law & Federal Rules of Evidence* at 1031 (cited in note 19).

105. *Id.*

106. *Id.*

107. See *United States v Jackson*, 688 F2d 1121 (7th Cir 1982) (opinion testimony of a lay witness allowed where the witness could not adequately communicate to the jury the facts upon which his or her opinion was based).

event.<sup>108</sup> The underlying basis is that as a witness translates his or her observations into testimony, a substantial amount of information is lost.<sup>109</sup> For example, the statement "Jones looked very worried" conveys a more complete message than a statement of facts on which that opinion is based. If the courts required testimony as to the facts alone, the witness might testify that Jones was sweating, tapping his pencil, stuttering, or similar factual observations. But these facts can simply be summarized in the statement "Jones looked very worried." Situations like this led to the relaxation of the common law rule.

One leading author indicates that there are five considerations a court will use when determining whether to allow opinion testimony of a lay witness:

- 1.) The degree to which the testimony touches upon an ultimate issue in the case (the closer the testimony is to the ultimate issues, the greater the degree of factual specificity required);
- 2.) the availability of alternative ways in which the parties could present the evidence to the jury;
- 3.) the need for the evidence;
- 4.) the inherent reliability of the kind of opinion involved; and
- 5.) common sense and convenience.<sup>110</sup>

Thus, opinions of a lay witness should be admissible where the nature of the event perceived precludes factual description, or the witness' conclusions are at least as, if not more, valuable than the sum of the opinion's factual components.<sup>111</sup>

A good example of this is where the witness is testifying as to identity. While a physical description could be given, it would not alone be sufficient to establish that the witness is identifying the person. Therefore, a court would allow the witness to express his or her opinion as to the identity of the person. Courts have also admitted some opinions on the basis of judicial efficiency, justifying these admissions by emphasizing a witness' demonstrated ability to render certain opinions with accuracy.<sup>112</sup>

The previously discussed considerations for admissibility of lay opinions were applied in *United States v Jackson*.<sup>113</sup> In *Jackson*,

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108. See FRE 701 advisory committee's note.

109. Rice, *Evidence: Common Law and Federal Rules of Evidence* at 1023 (cited in note 19).

110. *Id.* at 1029.

111. *Id.* at 1030. See also *Horn v State*, 12 Wyo 80, 73 P 705 (1903).

112. Rice, *Evidence: Common Law & Federal Rules of Evidence* at 1030 (cited in note 19).

113. 688 F2d 1121 (7th Cir 1982).

the court held that, "Opinion testimony by a lay witness should be admitted under Rule 701 whenever the witness cannot adequately communicate to the jury the facts upon which his or her opinion is based."<sup>114</sup> Thus, a lay witness whose testimony consists of an opinion must base the testimony on personal observation and recollection of concrete facts, but must be unable to describe those facts in sufficient detail to convey the substance of the testimony to the jury.<sup>115</sup>

In other words, if testifying to the specific facts would leave the same impression on the minds of the jurors as testimony as to the witness' conclusions or opinions, the court will require testimony as to only the facts. But if the conclusion or opinion results in something more, courts should allow the conclusion or opinion into evidence. Such admission is based on the court employing a "whole is greater than the sum of its parts" analysis.

The discussion above is illustrated by *Bohannon v Pegelow*,<sup>116</sup> where the plaintiff sued a police officer who allegedly violated the plaintiff's civil rights. The trial court allowed the testimony of a lay witness which took the form of an opinion.<sup>117</sup> The witness' testimony was that the plaintiff's arrest (from which the cause of action arose) was racially motivated.<sup>118</sup> On appeal, the defendant-appellant argued that this was error.<sup>119</sup> The Seventh Circuit disagreed, however, holding that under Rule 701, the testimony must merely be "helpful to a clear understanding of [the witness'] testimony or the determination of a fact in issue."<sup>120</sup> The court went on to find that this determination is "within the sound discretion of the trial judge and the issues involved are peculiarly suited to his determination."<sup>121</sup> In this case, there was no clear abuse of discretion and the trial court's decision to admit the opinion testimony was not overturned.<sup>122</sup>

An alternative version of the above rules was set forth in *United States v Skeet*,<sup>123</sup> which was cited in *Bohannon*. In *Skeet*, the

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114. *Jackson*, 688 F2d at 1124, citing *United States v Skeet*, 665 F2d 983, 985 (9th Cir 1982).

115. *Jackson*, 688 F2d at 1124.

116. 652 F2d 729 (7th Cir 1981).

117. *Bohannon*, 652 F2d at 731.

118. *Id.*

119. *Id.*

120. *Id.* at 732.

121. *Id.*

122. *Id.* at 733.

123. 665 F2d 983 (9th Cir 1982).

court held that opinion evidence would not be helpful to a jury "[i]f the jury can be put into a position of equal vantage with the witness for drawing the opinion. . . ." <sup>124</sup> This is basically the same as the holding in *Jackson*, that the opinion be allowed only if the facts would not adequately convey the substance of the testimony. <sup>125</sup> If the opinion will help the jury understand the substance of the testimony, it is admissible. If the jury is capable of grasping the substance by hearing the mere facts upon which the opinion is based, the opinion should be excluded.

Thus, to be successful in admitting lay opinion testimony in general, proponents should take the following steps:

- (1) Establish personal firsthand knowledge or observation. Otherwise, some hearsay exception must apply.
- (2) Show that the evidence will be "helpful" to the finder of facts.
- (3) Be prepared to demonstrate that without the opinion, the testimony as to the facts alone is either impossible, or insufficient to convey the substance of the testimony to the jury.

## B. *Relationship of Lay Opinion Testimony to the Business Records Exception*

Rule 803(6) explicitly makes opinions in business records admissible as an exception to the hearsay rule. <sup>126</sup>

### 1. *The Theory of Opinions in Business Records*

The Advisory Committee Note to Rule 803(6) indicates that while some courts at common law were wary of the admissibility of opinions contained in business records, most federal as well as state courts favored admissibility. <sup>127</sup> As previously discussed, Rule'

124. *Skeet*, 665 F2d at 985.

125. *Jackson*, 688 F2d at 1124. See also Wigmore, 7 *Evidence* § 1917.8 at 10 (cited in note 3).

126. See notes 137-42 and accompanying text.

127. "The limited phrasing of the Commonwealth Fund Act, 28 USC § 1732 (the precursor to the Federal Rules of Evidence), may account for the reluctance of some federal decisions to admit [opinions in records]." FRE 803(6) advisory committee note, citing *New York Life Ins. Co. v Taylor*, 147 F2d 297 (DC Cir 1945); *Lyles v United States*, 254 F2d 725 (DC Cir 1957); *England v United States*, 174 F2d 466 (5th Cir 1949); *Skogen v Dow Chemical Co.*, 375 F2d 692 (8th Cir 1967), superseded by statute as stated in *Manko v United States*, 636 F Supp 1419 (W D Mo 1986), *aff'd in part and remanded*, 830 F2d 831 (8th Cir 1987). See also, for example, *Reed v Order of United Commercial Travelers*, 123 F2d 252 (2d Cir 1941); *Buckminster's Estate v Commissioner*, 147 F2d 331 (2d Cir 1944); *Medina v Erickson*, 226 F2d 475 (9th Cir 1955); *Thomas v Hogan*, 308 F2d 355 (4th Cir 1962); *Glawe v Rulon*, 284 F2d 495 (8th Cir 1960); *Borucki v MacKenzie Bros. Co.*, 125 Conn 92, 3 A2d 224 (1938); *Allen v St. Louis Public Serv. Co.*, 365 Mo 677, 285 SW2d 663 (1956); *People v*

701 requires that the opinion of a lay witness be "rationally based on perception and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."<sup>128</sup> It was also indicated that although Rule 803(6) overrides the rules on opinions, the requirements of such rules are to an extent incorporated in Rule 803(6).<sup>129</sup> The recorder or his informant under Rule 803(6) must still have firsthand or personal knowledge, which "generally approximates" the requirement of "rationally based on perception" found in Rule 701.<sup>130</sup>

## 2. *The Shifting Burden*

As previously discussed, "[T]he inclusion of opinions in the business records exception appears to have brought about . . . a shift in the burden of persuasion to the opponent to show a basis for excluding an opinion once the proponent has satisfied the elements of Rule 803(6)."<sup>131</sup> Thus, if the proponent has established that the record itself is trustworthy because it was kept in the course of a regularly conducted business activity, a presumption of reliability for the opinion would be established. The opponent would then be required to demonstrate a lack of trustworthiness for the opinion.

Practitioners should be aware that at least one court, the Ninth Circuit, has held that opinions in business records must be given by an expert. In *Clark v Los Angeles*,<sup>132</sup> the court held that "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."<sup>133</sup> However, this holding should be limited to the Ninth Circuit.<sup>134</sup>

The Ninth Circuit's reliance in *Clark* upon *Standard Oil v Moore*<sup>135</sup> appears misplaced. The *Standard Oil* decision reflected the common law rule that laymen should not be allowed to render

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*Kohlmeyer*, 284 NY 366, 31 NE2d 490 (1940); *Weis v Weis*, 147 Ohio St 416, 72 NE2d 245 (1947).

128. See note 102.

129. Rice, *Evidence: Common Law & Federal Rules of Evidence* at 660 (cited in note 19).

130. *Id.*

131. *Id.*

132. 650 F2d 1033 (9th Cir 1981), disagreed with by *Palmer v Chicago*, 806 F2d 1316 (7th Cir 1986).

133. *Clark*, 650 F2d at 1037, citing *Standard Oil Co. v Moore*, 251 F2d 188 (9th Cir 1957).

134. No cases have been found in other jurisdictions which exclude lay opinions as a general matter.

135. 251 F2d 188 (9th Cir 1957).

opinions because that was the province of the jury.<sup>136</sup> However, the passage of the Rule 701 displaced the common law rule and greatly broadened the admissible testimony of lay witnesses. Strangely, the *Clark* court does not attempt to reconcile its decision with the Federal Rules of Evidence. If the opinion at issue in *Clark* had been expressed by the witness in courtroom testimony, the opinion would have been admissible under Rule 701. Under Rule 801, however, the statement is considered hearsay because the witness did not testify in person. Ultimately, if an opinion from a live witness were admissible under Rule 701, there is no reason to exclude such an opinion when it is contained in a document which falls within the Rule 803(6) hearsay exception.<sup>137</sup>

In fact, other courts have not required admissible opinions expressed in business records to be rendered by experts. For example, in *MCI Telecommunications Corp. v American Tel. & Tel. Co.*,<sup>138</sup> the Seventh Circuit affirmed the trial court judge's refusal to admit a memorandum which was prepared by a party and contained an opinion. Although the memorandum was kept out of evidence, the decision was based on the rationale that the memorandum was merely cumulative, and not that opinions in records must be the opinions of an expert.<sup>139</sup> Six other witnesses had testified to the same opinion, and thus, although the Seventh Circuit felt that the trial court judge may have erred in excluding the memorandum (on grounds that it was not a business record), the error was harmless.<sup>140</sup> The court did not attempt any analysis of whether or not it was important that the document be representative of an "expert" opinion.

Prior to the adoption of the Federal Rules of Evidence, the Northern District of Illinois held in *Manos v Trans World Airlines, Inc.*<sup>141</sup> that opinions of officials of the Boeing Corporation contained within certain documents were admissible because they were business records under 28 USC § 1732 (superseded by the Federal Rules of Evidence). The court noted, however, in making

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136. See Rice, *Evidence: Common Law and Federal Rules of Evidence* at 1023 (cited in note 19).

137. This is roughly analogous to the situation of hearsay within a document, covered by Federal Rule of Evidence 805, which allows hearsay within hearsay to be admitted if a foundation for an exception is laid for both instances of hearsay.

138. 708 F2d 1081 (7th Cir 1983).

139. *MCI Communications Corp.*, 708 F2d at 1142-43. See note 87 and accompanying text discussing FRE 403.

140. *MCI Communications Corp.*, 708 F2d at 1143.

141. 324 F Supp 470 (N D Ill 1971).

its ruling, that the objections went primarily to the weight of the evidence, and did not explicitly discuss the fact that the documents contained opinions.<sup>142</sup>

### III. MULTIPLE LEVELS OF HEARSAY WITHIN BUSINESS RECORDS

Multiple levels of hearsay contained in business documents present proponents with one of the most difficult problems in using the business records exception. This difficulty is often encountered by proponents because many documents record the statements of informers. One of the most important aspects of the multiple levels of hearsay problem is the integration of a business record of one company into the records of another.

#### A. *Multiple Levels of Hearsay in General*

Certain business records may contain statements which have been repeated to the recorder by another person or through a chain of persons. In such circumstances, the proponent of such a document is confronted with multiple levels of hearsay which must be overcome in order to have the statement admitted into evidence. The proponent of a document containing multiple levels of hearsay can employ certain techniques to gain admission of the document into evidence.

##### 1. *Rule 803(6)*

In *Johnson v Lutz*,<sup>143</sup> the court held that a business records exception statute required an informant or one imparting information recorded in a document to be acting under a business duty. Most authorities have agreed with this decision.<sup>144</sup> Rule 803(6) follows this lead in requiring an informant with knowledge acting in the course of a regularly conducted activity (i.e., a "business duty").<sup>145</sup> As such, it is essential under Rule 803(6) that both the informer (who supplies information from personal knowledge) and the entrant-recorder (who makes the written entry) act in the regular course of business (i.e., pursuant to a "business duty").<sup>146</sup>

The rationale of the "business duty" requirement under Rule 803(6) is consistent with the rationale of the business records ex-

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142. *Manos*, 324 F Supp 470.

143. 253 NY 124, 170 NE 517 (1930).

144. FRE 803(6) advisory committee note.

145. *Id.*

146. *Lilly*, *An Introduction to the Law of Evidence* at 237 (cited in note 28).



ception itself. "[I]t draws upon the reliability which presumably attends to the dutiful conduct of those engaged in business."<sup>147</sup> If an informant does not act within the regular course of business, the assurance of accuracy does not extend to the information regardless of whether it was recorded with scrupulous accuracy.<sup>148</sup> "There is a 'multiple hearsay' aspect to all business records which involve input from more than one person and it is only the fact that all participants are acting within the course of a regular activity which justifies the receipt of multiple hearsay."<sup>149</sup>

Theoretically, then, a document containing multiple levels of hearsay can be admissible pursuant solely to Rule 803(6).<sup>150</sup> "If the included statement is by a person acting in the routine of business, the regularly kept records exception takes care of the matter and no further exception need be invoked."<sup>151</sup> Therefore, if a proponent can establish that a "business duty" exists for all participants in a business record, the record should be admitted pursuant to 803(6).

At this point, the question becomes: when does a business duty exist? In *United States v Baker*,<sup>152</sup> the court held that while "double hearsay exists when a business record is prepared by one employee from information supplied by another employee," this would be excused if they were each acting in the regular course of business.<sup>153</sup> Many courts have recognized that a business duty clearly exists between an employee or an agent of the business activity in question.<sup>154</sup> As such, the clearest example of the existence of a business duty is in the context of one employee reporting to another employee of the same entity.

The court in *White Industries, Inc. v Cessna Aircraft Co.*<sup>155</sup> also found that a business duty may exist under Rule 803(6) where

147. Id at 238.

148. FRE 803(6) advisory committee note.

149. Louisell & Mueller, 4 *Federal Evidence* at 657 (cited in note 46).

150. See notes 180-82 and accompanying text, discussing the "one step" technique.

151. Cleary, ed, *McCormick on Evidence* § 324.3 at 911-12 (cited in note 3).

152. 693 F2d 183 (DC Cir 1982).

153. *Baker*, 693 F2d at 188.

154. *United States v Passint*, 703 F2d 420, 424 (9th Cir 1983); *Baker*, 693 F2d 183, 187-88 (DC Cir 1982); *United States v Davis*, 571 F2d 568, 572 (10th Cir 1977); *Florida Canal Indus., Inc. v Ramba*, 537 F2d 200, 200-03 (5th Cir 1976); *United States v Beasley*, 513 F2d 309, 314 (5th Cir 1975) (decided under the Federal Business Records Act); *United States v American Radiator & Standard Sanitation Corp.*, 433 F2d 174, 197 (3d Cir 1970) (decided under the Federal Business Records Act); *City of Cleveland v Cleveland Elec. Illuminating Co.*, 538 F Supp 1257, 1269-71 (N D Ohio 1980).

155. 611 F Supp 1049, 1053 (W D Mo 1985).

there is a binding, continuing contractual relationship between independent entities and circumstances do not suggest a lack of trustworthiness. Further, the *White Industries* court said that a contractual relationship is not the only basis on which to find that a business duty exists.<sup>156</sup> The *White Industries* court recognized that the "same general indicia of trustworthiness" that underpins the rationale for the business records exception could also "be found in *some* situations where the reporting duty arises by way of a continuing business relationship between two independent business entities."<sup>157</sup>

The *White Industries* court discussed the following as general indicia of trustworthiness: (1) a business entity's interest in receiving and relying on information; (2) the element of compulsion and potential sanction as concerns the reporting entity; and (3) the degree of overlap of the interests of the entities.<sup>158</sup> Nevertheless, the court seemed more wary about a situation in which there is no contractual duty to report.

The mere fact that recordation of third party statements is routine, taken apart from the source of the information recorded, imports no guaranty of the truth of the statements themselves. There is no reason for supposing an intention to make admissible hearsay of this sort. So to construe these statements would make of them almost limitless dragnets for the introduction of random, irresponsible testimony beyond the reach of the usual tests for accuracy.<sup>159</sup>

Of particular interest in the area of business duty is *Osterneck v Barwick Indus.*,<sup>160</sup> because documents from public accountants often play a role in commercial litigation. In *Osterneck*, the plaintiffs laid a proper foundation regarding the engagement of a public accounting firm by a committee of a company's Board of Directors. The court recognized that public accountants had a business duty to their accounting firm and the committee of the Board of Directors which hired the accounting firm to prepare reports and summaries of financial information.

Unfortunately, as recognized in dicta in *White Industries*, the test of when a "business duty" exists is the source of substantial controversy in case law. Existing case law provides little real ana-

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156. *White Indus.*, 611 F Supp at 1061.

157. *Id.*

158. *Id.* at 1060-61.

159. *White Indus.*, 611 F Supp at 1061 n 3, quoting Note, *Revised Business Entry Statutes: Theory and Practice*, 48 Colum L Rev 920, 927 (1948).

160. 106 FRD 327 (N D Ga 1984).

lytical guidance on this issue beyond the examples discussed above. As such, whether a statement in a document is admissible pursuant to a business duty under Rule 803(6) will probably hinge on establishing the presence of certain circumstantial guarantees of trustworthiness. The concept of such guarantees underpins all the hearsay exceptions.<sup>161</sup>

The lack of case law regarding the "business duty" requirement also leaves unclear the number of levels of hearsay which may be permissible under Rule 803(6). Logic dictates that the greater the number of participants, the greater the chance that the information contained in a document may be untrustworthy. As such, a court may consider factors such as the length of a business relationship, ethical duties of the reporting entity and the nature of the statements reported when determining how many levels of hearsay are admissible. It should be noted that no authority was found which limited the number of levels of hearsay which can be admitted.

## 2. Rule 805

Of course, a proponent need not rely on Rule 803(6) alone when trying to get a document admitted into evidence. Rule 805 authorizes the admission of hearsay within hearsay if both statements conform to the requirements of an exception to the hearsay rule. Therefore, pursuant to Rule 805, another hearsay exception may be employed to allow the admission of a hearsay statement within the context of a business record.<sup>162</sup>

Once the document is admitted pursuant to Rule 803(6) (or some other exception), the document becomes the "witness" and anything it says is considered to be firsthand testimony except testimony of a third party. Where a document testifies as to a statement by a third party, another foundation can be laid for a second hearsay exception for such statement to be admitted as evidence. For example, where a job interviewer makes a report on what an interviewee says, the report should qualify as a business record and the interviewee's statements should qualify under the state of mind exception.<sup>163</sup>

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161. See FRE 803.

162. Courts have taken the view that the business records exception "actually involves in itself multiple hearsay, namely a primary stage consisting of the record and an included stage consisting of what was reported to the recorder." McCormick, *Evidence* § 324.3 at 911-12 (cited in note 3).

163. See *Zippo Mfg. Co. v Rodgers Imports, Inc.*, 216 F Supp 670 (S D NY 1963);

### 3. Rule 803(24)

Another hearsay exception that often comes into play where double hearsay exists is Federal Rule of Evidence 803(24). Rule 803(24) is often referred to as the “residual exception” or the “catch-all exception.” It is useful where hearsay evidence should be admissible, but none of the other hearsay exceptions seem to apply. The Advisory Committee knew that the exceptions they had explicitly created would be insufficient to provide guidance under every circumstance, so Rule 803(24) was included to give the judge some extra discretion in the admission of hearsay.<sup>164</sup> Still, Rule 803(24) does “not contemplate an unfettered exercise of judicial discretion, but [does] provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions.”<sup>165</sup>

“In applying the residual exception, the central focus is upon the question whether the situation before the court offers ‘equivalent circumstantial guarantees of trustworthiness,’ i.e., equivalent to those offered by the various specific hearsay exceptions. . . .”<sup>166</sup> What constitutes an “equivalent circumstantial guarantee of trustworthiness” has been determined by looking at various factors, which are discussed in Section IV.

The residual hearsay exception of Rule 803(24) can be of assistance with problems of multiple hearsay in business records when it is used in conjunction with Rule 805 (see above)—in such cases the document itself is the primary hearsay problem. If an adequate foundation for the business exception has been laid and the document itself is admissible, the secondary problem is the admissibility of the recorded statement of the third party. If the proponent cannot establish a business duty for the informer to make the statement, then Rule 805 may be invoked, which allows the proponent to lay a second foundation for another exception to admit the statement. Assuming either that no other hearsay exception applies to the statement, the proponent should try to establish “equivalent circumstantial guarantees of trustworthiness” under Rule 803(24).

“The more traditional approach in judging the trustworthiness

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*Bradley v Booz, Allen & Hamilton, Inc.*, 67 Ill App 3d 156, 384 NE2d 746 (1978).

164. See FRE 803(24). The requirements for use of Rule 803(24) are discussed in Section IV of this article.

165. *Id.*

166. McCormick, *Evidence* § 324.1 at 907-09 (cited in note 3).

standard for the admission of hearsay is to examine the credibility of the extra-judicial declarant and not that of the witness."<sup>167</sup> Thus, it would seem logical that the linking principle of Rule 805 should apply to situations where business records contain third party statements. If the document is the "witness" by virtue of meeting the requirements of one of the hearsay exceptions, then Rule 803(24) serves to judge the trustworthiness of the extra-judicial declarant, and if the circumstantial guarantees of trustworthiness are present, then the statement should be admitted as evidence.

### B. *The Integration of the Records of One Business Entity into Another*

Proponents face one of the most challenging aspects of the multiple levels of hearsay problem when the records of one company are integrated into the records of another company.

The following example outlines a typical integration of business records problem. The Chief Financial Officer of Company A sends a letter to the President of Company B containing damaging information regarding the financial condition of Company A. The President of Company B integrates the letter into a package of records to be considered by the board of directors of Company B in making a decision about a transaction between the two companies. If litigation results from the subsequent transaction, and one party wishes to introduce the letter as evidence of the financial condition of Company A, the party will be faced with the difficulty of introducing what may be a business record of one company that has been integrated into the business records of another company.

The integration of business records problem stems from the first requirement of Rule 803(6). As previously discussed, Rule 803(6) requires that each person who participates in the making of the record in question be acting in the routine course of the business.<sup>168</sup> As such, if a proponent lays a proper foundation showing a business duty for all participants, the information contained in both the original record and the second record (into which the original was integrated) would be admissible.<sup>169</sup>

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167. Jonathan E. Grant, *The Equivalent Circumstantial Guarantees of Trustworthiness Standard for Federal Rule of Evidence 803(24)*, 90 Dickinson L Rev 75, 83 (1985), citing Weinstein & Berger, *Weinstein's Evidence* ¶ 803(24)[01] at 803-69 (cited in note 33).

168. Loisel & Mueller, 4 *Federal Evidence* at 655 (cited in note 46). See notes 143-48 and accompanying text.

169. FRE 805. See note 162.

In *United States v Veytia-Bravo*,<sup>170</sup> which involved a criminal prosecution for violations of the regulations of the Bureau of Alcohol, Tobacco and Firearms, the court held that records of one company in the custody of another could be admissible under Rule 803(6).<sup>171</sup>

Rule 803(6) does not require that the records be prepared by the business which has custody of them. Where circumstances indicate that the records are trustworthy, the party seeking to introduce them does not have to present the testimony of the party who kept the record or supervised its preparation. Testimony by the custodian of the record or other qualified witness that the record is authentic and was made and kept in the regular course of business will suffice to support its admission.<sup>172</sup>

*White Industries, Inc. v Cessna Aircraft Co.* is also a leading case in the area of integrated business records.<sup>173</sup> In *White Industries*, the court held that the document sought to be introduced must first meet the criteria for the business records exception. The primary consideration is that of the trustworthiness of the document. As discussed above, this trustworthiness can be found in

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170. 603 F2d 1187 (5th Cir 1979).

171. *Veytia-Bravo*, 603 F2d at 1192.

172. *Id* at 1193-94, citing *United States v Colyer*, 571 F2d 941 (5th Cir 1978) (prosecution for illegal use of credit card; purchase tickets evidencing such use were properly received, through testimony of assistant bank manager who "pulled the tickets" indicating use of the particular cards after they were automatically "flagged" by a computer. This testimony sufficed even though the tickets were made by businesses other than the bank. "Where the circumstances indicate trustworthiness, it is not necessary that the person who kept the record or even had supervision over its preparation testify." Here the custodian testified, and he was knowledgeable as to how the cards arrived at the bank and how they were handled thereafter); *United States v Flom*, 558 F2d 1179, 1182 (5th Cir 1977) (invoices prepared and sent by one company, held by another, were adequately authenticated as required by FRE 803(6) by testimony of an official of the latter company without testimony by anyone from the preparing company. "Under circumstances which demonstrate trustworthiness it is not necessary that the one who kept the record, or even had supervision over their [sic] preparation, testify"); *United States v Jones*, 554 F2d 251 (5th Cir 1977) ("not essential that the offering witness be the recorder or even be certain of who recorded the item," so long as he is "able to identify the record as authentic and [to] specify that it was made and preserved in the regular course of business"). See also *United States v Carranco*, 551 F2d 1197, 1200 (10th Cir 1977) (in prosecution for knowing receipt and possession of goods stolen from interstate shipment, a freight bill prepared initially by the carrier and presented in evidence as a business record of a freight terminal was properly received. It was this freight bill which led to the discovery that the goods here in issue were missing from a shipment); *United States v Pfeiffer*, 539 F2d 668, 670-71 (8th Cir 1976) (prosecution for knowing possession of stolen goods; delivery receipts or freight bills prepared by carrier on basis of manufacturer's bill of lading and transmitted to manufacturer by carrier for payment were properly received as business records to prove that the tires in issue here were on a particular shipment which was stolen).

173. *White Indus.*, 611 F Supp 1049 (W D Mo 1985).

some situations where a contractual relationship exists between two companies. The *White Industries* court concluded that where such a relationship exists, "an independent business entity which supplies information to another may in fact be deemed to be acting under a 'business duty' for purposes of Rule 803(6)."<sup>174</sup>

The same issue was considered in *United States v Marrinson*.<sup>175</sup> *Marrinson* involved a prosecution for filing a false income tax return.<sup>176</sup> One piece of evidence the government sought to introduce was deposit slips written by the defendant.<sup>177</sup> The defendant objected on grounds that since the slips were not "made" by the business entity which kept them that they were "stranger documents" and not within the business records exception.<sup>178</sup> The court noted that this alone did not disqualify the documents, but rather made the documents suspect. The proponent must establish their trustworthiness. "To ensure trustworthiness, the entity which is the original source of the document must have a relationship with the entity keeping the document such that reliability arises from the same sort of incentives as those involved between an employee or agent and his or her employer company."<sup>179</sup> The deposit slips were then allowed, since the information about the amount deposited and the account involved were verified by the bank employee carrying out the transactions at the time of the transaction, thus lending credibility to the slips.<sup>180</sup>

*White Industries* and *Marrinson* describe a "one-step" technique to have the business records of one entity that are integrated into those of another admitted into evidence. The general idea is that if you can prove the two entities are closely enough related, the exception made for the second entity encompasses that of the first. In other words, the record is considered trustworthy as produced from the second company because it meets the traditional business records exception criteria.<sup>181</sup> Although the second company did not produce the record, its relationship to the first company is such that the court will treat the record as if the second company did produce it. The relationship is close enough that the

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174. Id at 1062.

175. *United States v Marrinson*, 1986 WL 2123 (N D Ill).

176. *Marrinson*, 1986 WL 2123, 1 (N D Ill).

177. Id.

178. Id at 2.

179. Id, citing *White Indus.*, 611 F Supp at 1061.

180. *Marrinson*, 1986 WL 2123 at 2.

181. See note 15.

court can impute the trustworthiness of the second company to the first.

If the relationship between the two entities is not close enough to warrant this "one-step" approach, then a "two-step" approach is called for. In the "two-step" approach, the foundation for the business records exception is simply laid twice. Once for the first record and once for the second. As long as the foundational requirements are met for both records, the consolidated record should be admissible.<sup>182</sup>

In order to have business records of a company, which contain the business records of another company, admitted, the proponent should attempt to get the record of the integrating company admitted first by laying a foundation for the business records exception. This requires the following elements:

- (1) The business record was prepared by a person with knowledge;
- (2) the person who prepared the record had a duty to report the information and prepare the record;
- (3) the person who prepared the record had personal knowledge of the facts and events reported in the record;
- (4) the report was prepared at or near the time the acts or events occurred;
- (5) it was the regular practice of the business to prepare such reports; . . .
- (6) the preparer's report was made in the regular course of business;
- (7) the information reported was of a factual nature;<sup>183</sup>
- (8) there are no indications of unreliability or lack of trustworthiness.<sup>184</sup>

Once this foundation has been laid for the integrating record, the proponent must establish that a relationship existed between the entities that was either of a contractual nature, or that there is some other equivalent guarantee of trustworthiness which will allow the record that was integrated to come under the umbrella of the integrating record's foundation. If the proponent cannot show such a relationship, then the proponent should lay another foundation for the record that was integrated.

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182. See FRE 805; note 162.

183. But see notes 127-30 and accompanying text, dealing with opinions in business records.

184. John A. Tarantino, *Trial Evidence Foundations* § 651 at 6-24 - 6-25 (James, 1986).



#### IV. EXCLUSIONS AND OTHER EXCEPTIONS TO THE HEARSAY RULE FOR BUSINESS DOCUMENTS

In some cases, a proponent may be fortunate enough to have a range of exclusions and exceptions to choose from in having a business document admitted into evidence.<sup>185</sup> In other cases, a commercial document may not qualify for the business records exception, but may qualify instead for another exception or an exclusion. The most significant of these exclusions and exceptions are the public records exception, admissions of a party-opponent, and past recollection recorded.<sup>186</sup>

##### A. *The Public Records Exception*

In many lawsuits, the documentary evidence consists of records produced or maintained by federal, state or local governmental entities. For such documents, the public records exception should apply. The public records and business records exceptions are very similar in their foundational requirements. "The force of public duty and the presence of routine, systematic practices combine to make the analogy [of the public records exception] to the exception for business records compelling."<sup>187</sup> The most significant difference between the two exceptions lies in the requirement of having the custodian appear as a witness. This is due to the impracticality of having a public custodian or his or her surrogate appear in court to verify the record is genuine and is held in proper custody.<sup>188</sup>

At common law, courts would allow public records to be admitted into evidence if the record was made by a public employee pursuant to a public duty.<sup>189</sup> Furthermore, the recorder must have had personal knowledge of the facts recorded, or someone with a public duty and personal knowledge must have reported to the recorder.<sup>190</sup> The two rationales offered for the exception are that a

185. The authors refer to evidence admissible under Rule 801 ("not hearsay" by definition) as exclusions. See FRE 801. That evidence that is hearsay by the definition in Rule 801, but is admissible under Rule 803, is referred to as exceptions. See FRE 803.

186. There are others, such as the declaration against interest, but these three are the most common.

187. Lilly, *An Introduction to the Law of Evidence* § 7.18 at 271 (cited in note 28).

188. *Id.* at 272.

189. See generally Cleary, ed, *McCormick on Evidence* § 315 at 888-89 (cited in note 3); Wigmore, 5 *Evidence* §§ 1630-84 at 615-976 (cited in note 3); John J. Dutton, *The Official Records Exception to the Hearsay Rule in California*, 6 *Santa Clara L Rev* 2-3 (1965); Note, 30 *Mont L Rev* 227 (1969).

190. *Id.*

public official will perform his or her duty properly and it is unlikely that he or she will remember details independently of the record.<sup>191</sup>

Federal Rule of Evidence 803(8) is basically a codification of the common law rule but broadens it by providing for the admissibility of "factual findings" resulting from public investigations.<sup>192</sup> Evaluative reports in the form of opinions have been construed to be admissible, despite being based upon evidence that is not necessarily admissible in the proceeding in which the factual findings are offered.<sup>193</sup>

Thus, the public records exception, where applicable, should be more attractive than the business records exception if the document contains some statements in the form of opinions or conclusions.<sup>194</sup> In *Beech Aircraft Corp. v Rainey*,<sup>195</sup> the United States Supreme Court held that "factual findings" need not necessarily be something other than opinions.<sup>196</sup> The Court noted that the definition of "finding of fact" given by *Black's Law Dictionary* is "[a] conclusion by way of reasonable inference from the evidence."<sup>197</sup> Second, Rule 803(8) itself only requires that "reports . . . [set] forth . . . factual findings." Thus, the language of the Rule does not create a distinction between "fact" and "opinion" contained in such reports.<sup>198</sup> Finally, the Court examined the legislative history and Advisory Committee Notes, and concluded that reports which otherwise qualify for the public records exception are not inadmis-

191. FRE 803(8) advisory committee note, citing *Wong Wing Foo v McGrath*, 196 F2d 120 (9th Cir 1952), and *Chesapeake & Delaware Canal Co. v United States*, 250 US 123 (1919).

192. FRE 803(8) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the 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, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings against the Government in criminal cases, 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.

FRE 803(8).

193. See, for example, *Beech v Aircraft Corp. Rainey*, 488 US 153 (1988).

194. See notes 188-91 and accompanying text.

195. 488 US 153 (1988).

196. *Beech Aircraft Corp.*, 488 US at 161-62, rev'g *Smith v Ithaca Corp.*, 612 F2d 215 (5th Cir 1980).

197. *Id.* at 164.

198. *Id.*

sible merely because they contain a conclusion or opinion.<sup>199</sup>

Reports of governmental agencies may be admitted under the public records exception without resort to formal hearings.<sup>200</sup> In *Sabel v Mead Johnson & Co.*,<sup>201</sup> the document in issue was a letter drafted by the director of the Food & Drug Administration's (hereinafter "FDA") Division of Neuropharmacological Drug Products recommending that a warning be placed on certain drugs which had been taken by the plaintiff.<sup>202</sup> The court determined that this letter was a public record as it was produced by a public agency, the FDA.<sup>203</sup> The court applied the four factors listed in the Advisory Committee Notes to Rule 803(8): "(1) the timeliness of the investigation; (2) the investigator's skill or expertise; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation . . .," and concluded that in this case, the letter was properly admitted.<sup>204</sup>

While it is occasionally advantageous to have a business record treated as a public record, sometimes this is not possible. If the element of a "public duty" is lacking, it may be possible to have what looks like a public record admitted as a business record.

Another issue in *Sabel* dealt with notations made by FDA employees following telephone conversations. The *Sabel* court held these notes to be inadmissible under the public records exception because they were neither "matters observed pursuant to duty imposed by law as to which matters there was a duty to report" nor "factual findings resulting from an investigation made pursuant to authority granted by law."<sup>205</sup> The court claimed that although the notes were possibly admissible under the business records exception, since it might have been a regular practice of FDA employees to record the contents of their phone conversations, the plaintiff did not lay an adequate foundation for the application of the

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199. Id at 170.

200. See *Sabel v Mead Johnson & Co.*, 737 F Supp 135, 156 (D Mass 1990) ("weight of authority is that no formal proceedings are necessary to satisfy the prerequisites of the rule"), citing *In re Japanese Electronic Prod. Antitrust Litig.*, 723 F2d 238, 268 (3d Cir 1983) (no evidentiary hearing or opportunity for cross-examination required), rev'd on other grounds sub nom, *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 US 574 (1986); and Stephen A. Saltzburg and Kenneth R. Redden, *Federal Rules of Evidence Manual* 879 (Michie, 4th ed 1986).

201. 737 F Supp 135 (D Mass 1990).

202. *Sabel*, 737 F Supp at 140-41.

203. Id at 141.

204. Id at 143-44.

205. Id at 146.

rule.<sup>206</sup> They could not be admitted under the public records exception because the notes did not have the "built-in indicia of reliability afforded by the existence of a legal duty and legal authority which underpins the [Federal Rule of Evidence] 803(8)(B) and (C) exceptions."<sup>207</sup>

In *Haskell v United States Dept. of Agriculture*,<sup>208</sup> an investigative report made by employees of the USDA was held to be admissible on either grounds of the business records exception or the public records exception. The court found it was admissible as a business record because it was rendered in the regular course of a federal agency investigation.<sup>209</sup> Because it was a public agency and was made pursuant to a public duty, it was also admissible under the public records exception.<sup>210</sup>

Thus, in many cases, a document which is produced by a governmental agency could be admitted as either a public record or as a business record. There is an advantage to having the document admitted as a public record in that the public records exception does not require that the official custodian of the record or other qualified witness be brought forward as a sponsoring witness, while the business records exception would require testimony of the custodian or a qualified witness.<sup>211</sup>

On the other hand, admission as a public record requires proof that the record was created pursuant to a public duty, while the business records exception only requires that the record be regularly kept (i.e., business duty). This is why in some cases, like *Sabel*, the documents might qualify as a business record (they are regularly kept) but not as a public record (there is no public duty to keep the record).

### B. Admissions of a Party-Opponent

In some situations, a document may qualify as a business record but will contain damaging statements which may not be admissible

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206. Id.

207. Id, citing *Kehm v Proctor & Gamble Mfg. Co.*, 724 F2d 613, 618 (8th Cir 1983).

208. 743 F Supp 765 (D Kan 1990), aff'd, 930 F2d 816 (10th Cir 1991).

209. *Haskell*, 743 F Supp at 767.

210. Id, citing *Abdel v United States*, 670 F2d 73, 76 (7th Cir 1982) (transaction reports of USDA employees completed after each compliance investigation visit held admissible as business records in de novo proceeding to review a supermarket's disqualification from the food stamp program); *Hotel Employees—Hotel Ass'n Pension Fund v Timperio*, 622 F Supp 606, 608 (S D Fla 1985) (records generated in regular course of federal agency law enforcement investigations admissible under public records exception).

211. See notes 188-91 and accompanying text.

pursuant to the business records exception. As discussed previously, the proponent must deal with this situation by finding an exclusion or exception for the statement within the document.<sup>212</sup> The hearsay exclusion for admissions of a party-opponent contained in Rule 801 is a common technique which a proponent can use to have statements made in business records admitted.<sup>213</sup>

Admissions of a party-opponent is not an exception to the hearsay rule. Rather, it is defined in such a way so that it is not hearsay at all.<sup>214</sup> However, defining admissions of a party-opponent as non-hearsay is an odd way around the hearsay problem, because no objective guarantee of trustworthiness is required as it is for all the exceptions to the hearsay rule. "The party is not even required to have had firsthand knowledge of the matter declared; the declaration may have been self-serving when it was made; and the declarant is probably sitting in the courtroom."<sup>215</sup> But an objective guarantee of trustworthiness is not necessary. It is the adversary relationship between the parties which lends credence to the statement. "A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath."<sup>216</sup>

The exclusion from hearsay made for admissions of a party opponent is codified in Federal Rule of Evidence 801(d)(2) (hereinafter "Rule 801(d)(2)"), which provides:

Statements which are not hearsay. A statement is not hearsay if—The statement is offered against a party and is (A) the party's own statement, in either his individual or representative capacity or (B) a statement of which the party has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.<sup>217</sup>

Thus, statements contained within a document will be admissible for the truth of the matter asserted if they qualify as an admission of a party-opponent regardless of whether the document can sat-

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212. FRE 805. See also notes 162-63.

213. FRE 801(d)(2).

214. See *Id.* Even though admissions of a party would technically fall within the definition of FRE 801(c), it is excepted in subsection (d) with a little legislative magic.

215. Cleary, ed, *McCormick on Evidence* § 262 at 775 (cited in note 3).

216. Edmond Morris Morgan, *Basic Problems of Evidence* 266 (American Law Institute, 1962).

217. FRE 801(d)(2).

isfy the business record test.

A recent Fifth Circuit case involved the use of an admission within a public document which took the form of an opinion. In *Federal Deposit Insurance Corp. v Mmahat*,<sup>218</sup> the court held that a Federal Home Loan Bank Board examination report, which qualified as a public record, was properly admitted by the trial court, despite the fact that the report contained hearsay statements. Within the document a brother of one of the defendants, who was a defendant himself for part of the case, opined that the defendant encouraged improper loans in his capacity as counsel for a federally chartered savings and loan. It was the brother's opinion that the intention was that the defendant's law firm would make more fees if these loans were granted.

The *Mmahat* court held that although the documents were admissible under the public records exception, the statements within the document were still hearsay.<sup>219</sup> Thus, pursuant to Federal Rule of Evidence 805, that hearsay must have its own exception.<sup>220</sup> The court found that since the brother himself was still a defendant at the time the document was introduced into evidence, "it was clearly admissible as a non-hearsay admission under Fed. R. Evid. 801(d)(2)(A)."<sup>221</sup>

In summary, certain documents may be highly relevant to your case, but contain either hearsay within hearsay, as in the *Mmahat* case discussed above, or cannot qualify for the business records exception in the first place. In these situations, the proponent must find another way to have the document admitted into evidence. If the document represents or contains a statement which is an admission of a party-opponent, the document or statement may be admissible under Rule 801(d)(2).

### C. Past Recollection Recorded

In some circumstances where a document does not fit under any exception to the hearsay rule it may be possible to use the document as a record of past recollection.<sup>222</sup> This is more difficult than the other exceptions because it is necessary to put the author of the document on the stand. If the witness cannot testify suffi-

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218. 907 F2d 546 (5th Cir 1990), cert denied, *Mmahat v Federal Deposit Ins. Corp.*, 111 S Ct 1387 (1991).

219. *Federal Deposit Ins. Corp.*, 907 F2d at 551.

220. See FRE 805; note 162.

221. *Federal Deposit Ins. Corp.*, 907 F2d at 551. See FRE 805; notes 162-63.

222. FRE 803(5).

ciently from his memory, and looking at the document does not adequately refresh his memory, then the information in the document may be admissible as a past recollection recorded.<sup>223</sup>

At common law, it was required that the proponent satisfy four elements to have a document admitted as past recollection recorded. First, "the witness must have had first hand knowledge of the event."<sup>224</sup> Second, "the written statement must be an original memorandum made at or near the time of the event and while the witness had a clear and accurate memory of it."<sup>225</sup> Third, "the witness must lack a present recollection of the event,"<sup>226</sup> and fourth, "the witness must vouch for the accuracy of the written memorandum."<sup>227</sup>

The exception is now contained in Federal Rule of Evidence 803(5), which provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.<sup>228</sup>

The information in such documents is considered trustworthy because of the "reliability inherent in a record made while events were still fresh in mind and accurately reflecting them."<sup>229</sup>

Thus, a proper foundation for the admission of information in a document as a past recollection recorded will establish (a) first-hand knowledge, (b) preparation of the statement at a time sufficiently close to the event, and (c) at least some inability presently

223. Id.

224. Cleary, ed, *McCormick on Evidence* § 299 at 864 (cited in note 3), citing *Vicksburg & Meridian R.R. Co. v O'Brien*, 119 US 99 (1886); *Kinsey v State*, 49 Ariz 201, 65 P2d 1141 (1937); *Mathis v Strickland*, 201 Kan 655, 443 P2d 673 (1968).

225. Cleary, ed, *McCormick on Evidence* § 299 at 864 (cited in note 3).

226. Id.

227. Id.

228. FRE 803(5). Note that the last sentence of the Rule requires that, in most cases, the document itself not be placed into evidence but rather be read into evidence. This requirement is meant to prevent the jury from giving any more weight to the information in the document than if the witness had testified only from pure memory. See Lilly, *An Introduction to the Law of Evidence* at 234 (cited in note 28). Thus, an exception such as the business records exception or public records exception is preferable, since those exceptions place the actual document into evidence, and should be used if available.

229. FRE 803(5) advisory committee note, citing *Owens v State*, 67 Md 307, 316, 10 A 210, 212 (1887).

to recall the event.<sup>230</sup> In addition, it will be necessary for a witness to testify as to the accuracy of the record.<sup>231</sup> This testimony may be simply that it is the witness' usual practice to record such matters accurately.<sup>232</sup>

#### D. *The "Catch-All" Exception*

Federal Rule of Evidence 803(24) contains the hearsay exception that should be employed as a last resort for admission of documentary evidence. It is assumed that the proponent has attempted to convince the court that the exhibit is, first, not hearsay, second, an admission of a party-opponent, third, a business or public record, or fourth, past recollection recorded. If all four of these arguments have failed, the proponent is left with the "catch-all" exception found in Federal Rule of Evidence 803(24).<sup>233</sup>

The drafters of the Federal Rules of Evidence realized that they could not possibly cover every type of out-of-court statement that should be admissible despite its status as hearsay in just twenty-three exceptions.<sup>234</sup> "Without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were introduced to include (even if broadly construed)."<sup>235</sup> Thus, Congress included Rule 803(24) in the Federal Rules of Evidence. Rule 803(24) requires the proponent to establish three things. First, the proponent

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230. Cleary, ed, *McCormick on Evidence* § 309 at 867 (cited in note 3).

231. *Williams v Stroh Plumbing & Elec., Inc.*, 250 Iowa 599, 94 NW2d 750 (1959).

232. Cleary, ed, *McCormick on Evidence* § 303 at 868 (cited in note 3), citing *Hancock v Kelly*, 81 Ala 368, 2 So 281, 286 (1887); *Newton v Higdon*, 226 Ga 649, 177 SE2d 57 (1970) (lawyer testifies to practice in witnessing wills).

233. FRE 803(24):

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

234. See FRE 803(24) advisory committee note ("It would be . . . presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system").

235. Notes of Committee on the Judiciary, S Rep No 93-1277, 93rd Cong, 2d Sess 7065 (1974).



must show that the "statement is offered as evidence of a material fact."<sup>236</sup> Second, "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."<sup>237</sup> Third, "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."<sup>238</sup> In addition to these three foundational elements, the proponent must have provided notice to the opponent sufficiently in advance of trial to afford the opponent a fair opportunity to prepare to meet the evidence.<sup>239</sup>

These foundational elements are relatively simple to meet. The more perplexing problem is complying with the threshold requirement for the admission of out-of-court statements that do not specifically fit any other hearsay exception. The threshold requirement is that the proponent demonstrate "equivalent circumstantial guarantees of trustworthiness."<sup>240</sup> This section of the article will first address the three foundational elements and then discuss in depth the threshold requirement of "equivalent circumstantial guarantees of trustworthiness."

### 1. Foundational Elements

The first element, that the statement be offered as evidence of a material fact, is nothing more than "a restatement of the general requirement that the evidence be relevant."<sup>241</sup> However, the second element requires the proponent to demonstrate that the evidence is more probative than any other evidence obtainable through reasonable effort.<sup>242</sup> The proponent should be prepared to address the second element, even though the first and third elements do not require any special preparation. The final requirement, "that the

236. FRE 803(24).

237. *Id.*

238. *Id.*

239. *Id.* For a discussion of the requirements of Rule 803(24), see Thomas Black, *Federal Rules of Evidence 803(24) & 804(b)(5) — The Residual Exceptions — An Overview*, 25 *Houston L Rev* 13 (1988).

240. FRE 803(24).

241. Cleary, ed, *McCormick on Evidence* § 324.1 at 909 (cited in note 3), citing *Huff v White Motor Corp.*, 609 F2d 286, 294 (7th Cir 1979).

242. *Huff*, 609 F2d at 294 (statement of deceased truck driver as to origin of truck fire more probative than other available evidence); *United States v Mathis*, 559 F2d 294, 298 (5th Cir 1977) (requirement invoked to exclude prior statement of a prosecution witness who was unavailable to testify); *United States v Boulahanis*, 677 F2d 586, 588 (7th Cir 1982) (evidence need not be essential; sufficient if it is the most probative reasonably available on a material issue).

general purposes of the rules and the interests of justice will be served by admitting the evidence, in effect restates Federal Rule of Evidence 102."<sup>243</sup> These preliminary considerations will not be discussed further except where relevant. The bulk of the case law is concerned with the required demonstration of "equivalent circumstantial guarantees of trustworthiness."

## 2. *Equivalent Circumstantial Guarantees of Trustworthiness*

*Huff v White Motor Corp.*<sup>244</sup> is a widely cited decision on Rule 803(24). In *Huff*, the proponent wished to introduce statements made by the plaintiff's decedent while in the hospital concerning the nature and cause of the fire which caused his injuries.<sup>245</sup> Although the trial court did not feel that the statements were admissible under Rule 803(24), the Court of Appeals for the Seventh Circuit reversed.<sup>246</sup> In reaching its decision, the court cited the lack of any opinion or speculation in the statement, the fact that the statement was made of his own free will, and the lack of motive to fabricate, since the statement was against his pecuniary interest.

In contrast, the District Court for the Eastern District of Michigan in *Land v American Mutual Ins. Co.*<sup>247</sup> refused to allow evidence in the form of an unsworn statement made by plaintiff's decedent to an insurance company claims adjuster. The *Land* court considered the character of the declarant's statement, the relationship of the parties, the probable motivation of the declarant in making the statement, and the circumstances under which it was made.<sup>248</sup> Because there was an adverse relationship between both

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243. Cleary, ed, *McCormick on Evidence* § 324.1 at 909 (cited in note 3), citing *Huff*, 609 F2d at 294 (interests of justice served by increasing likelihood that jury will ascertain the truth).

FRE 102 reads: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

244. 609 F2d 286 (7th Cir 1979).

245. *Huff*, 609 F2d 286, 290 (7th Cir 1979). The defendant had already argued that the statement qualified as an admission under Rule 801(d)(2), and was overruled.

246. *Id.*

247. *Land v American Mutual Ins. Co.*, 582 F Supp 1484 (E D Mich 1984) (the plaintiff was injured while operating a machine manufactured by the defendant Harris Seybold Company. Following the accident, she made a statement to the insurance company describing how she was injured. Land subsequently died under circumstances unrelated to the injury. She had never been deposed, and the plaintiff wished to have the unsworn statement admitted under Rule 803(24)).

248. *Id.*

the declarant and the adjuster to the defendant, and because they were the only persons present when the statement was made, the necessary equivalent circumstantial guarantees of trustworthiness were lacking, and the evidence was not admitted.<sup>249</sup> The case of *United States v American Tel. & Tel. Co.*<sup>250</sup> was an antitrust suit in which the government wished to have "third-party" documents admitted into evidence pursuant to Rule 803(24). Among these were memoranda of meetings or conversations which contained a recital of comments or statements made at said meetings. The court looked at whether the memoranda reliably represented the meeting and whether the substantive statements themselves were trustworthy.<sup>251</sup>

In looking at the committee notes to Rule 803(1), the *American Tel. & Tel. Co.* court discovered that the "substantial contemporaneity of event and statement negates the likelihood of deliberate or conscious misrepresentation."<sup>252</sup> This was held to meet the standard of "equivalent circumstantial guarantees of trustworthiness."<sup>253</sup> The court went on to determine that the statements were admissible as well, even though they did not fit perfectly into any of the enumerated exceptions to the hearsay rule. The court looked at Rule 804(b)(3), the exception for statements against interest, and found that the theory of that exception applied in this case.<sup>254</sup> The idea behind Rule 804(b)(3) is that persons do not make statements which are damaging to themselves unless they are true.<sup>255</sup> This was another example of an "equivalent circumstantial guarantee of trustworthiness."

The case of *In re A.H. Robins Co.*<sup>256</sup> raised issues similar to those in *American Tel. & Tel. Co.* Patients had difficulties with their intrauterine devices (IUDs) and related these problems to their doctors.<sup>257</sup> The doctors in turn related the statements to A.H. Robins Co. employees, who repeated the statements at intracompany meetings.<sup>258</sup> The court allowed the admission of the state-

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249. *Id.*

250. 516 F Supp 1237 (D DC 1981).

251. *American Tel. & Tel. Co.*, 516 F Supp 1237.

252. FRE 803(1) advisory committee notes, quoted in *American Tel. & Tel. Co.*, 516 F Supp at 1241.

253. *American Tel. & Tel. Co.*, 516 F Supp at 1241.

254. *Id.*

255. *Id.*, quoting FRE 804(b)(3) advisory committee notes.

256. 575 F Supp 718 (D Kan 1983).

257. *In re A.H. Robins Co.*, 575 F Supp at 724.

258. *Id.*

ments after hearing argument on Rule 803(24).<sup>259</sup>

The *Robins* court determined that the statements of such "outsiders" had a circumstantial guarantee of trustworthiness because of the necessity for A.H. Robins to understand the performance of its product, and that these statements had been produced from Robins' corporate files.<sup>260</sup> Counsel for Robins could not demonstrate that the doctors' and patients' statements in the documents lacked trustworthiness and the statements were thus admitted.<sup>261</sup>

### 3. *The Near Miss Theory*

Sometimes the exhibit the proponent wishes to have entered into evidence is missing one of the foundational elements for an enumerated exception. Some commentators refer to this as the "near miss" theory.<sup>262</sup> Such was the case in *United States v Nivica*,<sup>263</sup> a criminal prosecution for fraud. In that case the prosecution attempted to enter certain documents which would have otherwise qualified for the business records exception, except that the proponent was unable to demonstrate the fact that the records were prepared in the course of a regularly conducted business activity. This was fatal to the Rule 803(6) foundation, obviously, but Rule 803(24) was invoked to take its place. The court noted that the "documents were 'authentic . . . documents of the Defendant; that the documents were reliable and trustworthy; and that, given the provenance and character of the materials, their admission was justified.'"<sup>264</sup> Furthermore, the opponent's rights were not unfairly compromised and the interests of justice appeared to be well-served by their admission.<sup>265</sup>

Courts may not excuse the lack of certain foundational elements. For example, the public records exception and the business records exception require public duty and business duty, respectively, as part of the foundation for each of these exceptions. The lack of demonstrated duty cannot be compensated for by other equivalent circumstantial guarantees of trustworthiness, at least according to

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259. *Id.*

260. *Id.*

261. *Id.*

262. Black, 25 Houston L. Rev at 27 (cited in note 239).

263. 887 F2d 1110 (1st Cir 1989).

264. *Nivica*, 887 F2d at 1127.

265. *Id.* See also *Karme v Commissioner*, 673 F2d 1062, 1064-65 (9th Cir 1982) (although Rule 803(6) did not justify admission of bank records because proof was lacking that they were kept in the course of a regularly conducted business activity, court had discretion to admit them under Rule 803(24)).

the Ninth Circuit. That court held in *United States v Perlmutter*<sup>266</sup> that the lack of evidence of a duty on behalf of a person signing a report rendered the document inadmissible. The court stated that Rule 803(24) could not be used to "circumvent" the duty to record requirements of Rules 803(6) and 803(8).<sup>267</sup>

While *Perlmutter* will not allow the "near miss" theory to make up for the lack of duty required in Rules 803(6) and 803(8), other elements may not be as inflexible. The "near miss" theory was applied by the Fifth Circuit in *United States v Hitsman*<sup>268</sup> to admit a college transcript even though the transcript did not qualify as a business record under 803(6).<sup>269</sup> In *Hitsman*, the custodian of the record could not qualify it as a business record, because the testifying witness did not have sufficient knowledge that the record was kept in the regular course of business. The court admitted the record based upon 803(24), however, because of the other indicia of reliability, including authenticity, corroboration and the daily routine of college administration, which circumstantially guaranteed trustworthiness.<sup>270</sup>

#### 4. Additional Circumstantial Guarantees of Trustworthiness

In addition to the cases described above, courts have looked at the following factors which will favor a circumstantial guarantee of trustworthiness: corroboration,<sup>271</sup> whether the declarant has recanted or reaffirmed the statement,<sup>272</sup> and whether the declarant is

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266. 693 F2d 1290, 1293 (9th Cir 1982).

267. *Perlmutter*, 693 F2d at 1293.

268. 604 F2d 443 (5th Cir 1979).

269. See Black, 25 Houston L Rev at 29 (cited in note 239), citing *Hitsman*, 604 F2d 443 (5th Cir 1979).

270. *Hitsman*, 604 F2d at 447.

271. Cleary, ed, *McCormick on Evidence* § 324.1 at 909 (cited in note 3), citing *United States v West*, 574 F2d 1131 (4th Cir 1978); *United States v Garner*, 574 F2d 1141 (4th Cir 1978); *United States v Ward*, 552 F2d 1080 (5th Cir 1977); *United States v Barlow*, 693 F2d 954 (6th Cir 1982); *State v Beam*, 206 Neb 248, 292 NW2d 302 (1980). Taking the contrary view that corroboration is not relevant for purposes of the residual exceptions is *Huff v White Motor Corp.*, 609 F2d 286, 293 (7th Cir 1979). *United States v Boulahanis*, 677 F2d 586 (7th Cir 1982), suggests that corroboration may tend to undermine a claim that the hearsay is the most probative available evidence. *Boulahanis*, 677 F2d at 588-89.

272. Cleary, ed, *McCormick on Evidence* § 324.1 at 907-09 (cited in note 3), citing *United States v Leslie*, 542 F2d 285 (5th Cir 1976) (prosecution witness admitted making statements against accused but testified in his favor, asserting forgetfulness or untruth of statements); *United States v Carlson*, 547 F2d 1346 (8th Cir 1976) (witness reaffirmed truth of grand jury testimony but refused to testify for prosecution at trial); *United States v Barlow*, 693 F2d 954 (6th Cir 1982).

now subject to cross examination.<sup>273</sup> Certain cases have discussed the length of time between the event and the statement as being a significant factor in whether the statement is sufficiently trustworthy.<sup>274</sup>

One equivalent circumstantial guarantee of trustworthiness mentioned above is statements which go against the declarant's interest.<sup>275</sup> However, "courts frequently exclude self-serving statements as untrustworthy, even when such statements actually go against the declarant's interests."<sup>276</sup> Thus, the discretionary nature of Rule 803(24) renders it an unpredictable tool of admission.

Ultimately, the residual hearsay exception of Rule 803(24) is extremely fact specific. It seems to be most useful when a document is very close to admission under another enumerated exception, and is immune to a "lack of trustworthiness" attack by an opponent. It is also useful where the logical arguments in support of its admission are very strong. Nevertheless, as mentioned above, it is unpredictable given the amount of judicial discretion involved. Therefore, it should only be used where all other attempts have failed.

In other words, for any out of court statement, the proponent should first attempt to show that the statement is not in fact hearsay by virtue of Rule 801(d). If this fails, then the foundation should be laid for either the business or public records exception. Finally, after all of these motions have been denied, the proponent should raise all of the facts that tend to show that the statement is trustworthy, including all the foundational elements the statement meets, and move for admission pursuant to Rule 803(24). If that motion is denied, the information must be put in evidence another way, such as the live testimony of the declarant.

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273. Cleary, ed, *McCormick on Evidence* § 324.1 at 907-09 (cited in note 3), citing *United States v Bailey*, 581 F2d 341 (3d Cir 1978); *United States v Leslie*, 542 F2d 285 (5th Cir 1976); *United States v Iaconetti*, 406 F Supp 554 (E D NY), aff'd, 540 F2d 574 (2d Cir 1976).

274. See, for example, *Robinson v Shapiro*, 646 F2d 734 (2d Cir 1981); *United States v Medico*, 557 F2d 309 (2d Cir 1977).

275. See, for example, *Robinson*, 646 F2d 734 (2d Cir 1981); *United States v Bailey*, 581 F2d 341 (3d Cir 1978); *United States v White*, 611 F2d 531 (5th Cir 1980); *Huff v White Motor Corp.*, 609 F2d 286 (7th Cir 1979); *United States v Barlow*, 693 F2d 954 (6th Cir 1982).

276. Jonathan E. Grant, *The Equivalent Circumstantial Guarantees of Trustworthiness Standard for Federal Rule of Evidence 803(24)*, 90 Dickinson L Rev 75, 93 (1985).

## V. AUTHENTICATION OF BUSINESS DOCUMENTS

Usually a court will not accept a document into evidence without the proponent establishing the writing's authenticity through a sponsoring witness who identifies it and relates it to the cause of action through some circumstantial method.<sup>277</sup> There are a number of methods used to authenticate evidence: direct authentication, circumstantial authentication, and self-authentication. Each will be discussed, including subcategories, seriatim.

### A. *Direct Authentication*

Direct authentication is a method of authentication whereby an individual who has knowledge of a document's authenticity by way of witnessing its execution is called to testify. "Ideally the proponent of a business record will call to the stand the person who actually prepared it and the person who has firsthand knowledge of the matter recorded, who of course may be one and the same individual."<sup>278</sup>

### B. *Circumstantial Authentication*

Because it would be inconvenient to require direct authentication in every situation, courts will allow evidence to be authenticated by circumstantial evidence. There must usually be some additional evidence other than just the appearance of a signature to authenticate by circumstantial evidence.<sup>279</sup> Some methods of authentication by circumstantial evidence include testimony by a witness familiar with the type of document that it is genuine, or that "distinctive characteristics of the appearance or contents of a document may be shown in support of a finding that the signature or recital of authorship is authentic."<sup>280</sup>

The usual method for authentication by circumstantial evidence, however, is through testimony of the regular custodian of the rec-

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277. See Cleary, ed, *McCormick on Evidence* § 220 at 688-89 (cited in note 3); John E. Tracy, *The Introduction of Documentary Evidence*, 24 Iowa L Rev 436 (1939).

278. Louisell & Mueller, 4 *Federal Evidence* at 662 (cited in note 46), citing *United States v Wyant*, 576 F2d 1312, 1216 (8th Cir 1978) (corporate records were authenticated for purposes of Federal Rule of Evidence 803(6) by corporate officer, public accountant, corporate accountant, and corporate manager whose activities were reflected in the records; this foundation, which included testimony by the "originator" of the records and the "person who compiled them," was "more than adequate" to justify admission into evidence).

279. Lilly, *An Introduction to the Law of Evidence* at 525-27 (cited in note 28).

280. *Id* at 526.

ord.<sup>281</sup> Testimony of the person who supervised the preparation of the document may also be used.<sup>282</sup>

“In the end the requirement may be satisfied by anyone who is familiar with the manner in which the record was prepared, even if he lacks firsthand knowledge of the matter reported, and even if he did not himself either prepare the record or even observe its preparation.”<sup>283</sup> But it is essential that the witness be familiar with the recording procedure.

What is important is that the witness be familiar enough with the practices of the business in question, and with the circumstances in which the record was stored and retrieved, to be able to say with assurance based upon this circumstantial knowledge that the record is what it purports to be and was prepared in the ordinary course of business in the manner contemplated by Rule 803(6).<sup>284</sup>

### C. Self-Authentication

Under some circumstances, usually under statute, a document can be authenticated “within its four corners.”<sup>285</sup> This is known as “self-authentication.” “Analytically, the process of self-authentication normally involves an assertion on the face of the document that it is genuine, coupled with an indication (such as an official

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281. See *United States v Bowers*, 593 F2d 376, 380 (10th Cir 1979) (U.S. Postal Service report discussing security procedures; custodian of records for postal district testified to report's origin; the evidence was properly admitted despite fact that witness had not prepared the report). See also *United States v Colyer*, 571 F2d 941, 947 (5th Cir 1978); *United States v Rose*, 562 F2d 409, 410 (7th Cir 1977).

282. *Peter Eckrich & Sons, Inc. v Selected Meat Co.*, 512 F2d 1158 (7th Cir 1975) (plaintiff's corporate manager of technical standards and procedures testified that certain batching records were prepared by his department and filled in by batching operators in the regular course of business; this testimony sufficed as a foundation for the batching records under the Federal Business Records Act).

283. *Loisell & Mueller*, 4 *Federal Evidence* at 663-65 (cited in note 46), citing *United States v Grossman*, 614 F2d 295, 297 (1st Cir 1980) (anyone familiar with manner in which record was prepared may authenticate); *United States v Veytia-Bravo*, 603 F2d 1187, 1191-92 (5th Cir 1979) (anyone familiar with manner in which record was prepared may authenticate, even if the person did not observe the preparation); *United States v Ullrich*, 580 F2d 765, 771-72 (5th Cir 1978) (anyone familiar with manner in which record was prepared may authenticate); *United States v Evans*, 572 F2d 455, 490 (5th Cir 1978) (anyone familiar with manner in which record was prepared may authenticate); *Colyer*, 571 F2d at 947 (anyone familiar with manner in which record was prepared may authenticate, even if lacking firsthand knowledge or observation of its preparation); *United States v Reese*, 568 F2d 1246, 1252 (6th Cir 1977) (anyone familiar with manner in which record was prepared may authenticate, even if lacking firsthand knowledge); *Peter Eckrich & Sons, Inc.*, 512 F2d at 1159 (person who makes the record need not testify).

284. *Loisell & Mueller*, 4 *Federal Evidence* at 666-67 (cited in note 46).

285. *Lilly, An Introduction to the Law of Evidence* at 433 (cited in note 28).



seal or stamp) that the asserter is the official duly authorized to certify authenticity."<sup>286</sup> Lilly indicates that usually this will be a notarized document or one in the custody of a public official who has certified the document.<sup>287</sup>

#### D. *Authentication under the Federal Rules*

The authentication of documents is covered in the Federal Rules of Evidence by Rules 901 and 902. Rule 901 lists, by way of illustration, examples of identification sufficient to authenticate a document for purposes of the rule. Rule 901(b)(4) provides that "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" will satisfy the requirement of authentication. Another relevant provision is found in subsection (7), which provides that "evidence that a writing authorized by law to be recorded or filed and in fact is recorded or filed in a public office or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept" will also satisfy the rule. Furthermore, public records are regularly authenticated by proof of custody, without more.<sup>288</sup>

A document will be self-authenticated under Rule 902 if it is a domestic public document purporting to bear the signature in the official capacity of an officer or employee of a United States or State government department or agency thereof. Rule 902 also provides that certified copies of public records are self-authenticating.

In the case of *Haskell v United States Dept. of Agriculture*, which was discussed earlier, a report prepared by an investigative aide on food stamp trafficking at a grocery store was held to be admissible under both the business records exception and the public records exception contained in Federal Rules of Evidence 803(6) and (8).<sup>289</sup> The report was authenticated by a sworn affidavit of a federal investigator who had supervised the investigation.<sup>290</sup> The

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286. *Id.*

287. *Id.*

288. FRE 901 advisory committee notes, citing Cleary, ed, *McCormick on Evidence* § 191 at 566-70 (cited in note 3), and Wigmore, 7 *Wigmore* §§ 2158, 2159 at 626-631 (cited in note 3).

289. *Haskell v United States Dept. of Agriculture*, 743 F Supp 765 (D Kan 1990), *aff'd*, 1991 US App. LEXIS 6026.

290. *Haskell*, 743 F Supp at 767.

affidavit was sufficient to authenticate the document for either exception.<sup>291</sup>

### E. Authentication by Production

Another case which dealt with authentication of documentary evidence was *Brown & Williamson Tobacco Corp. v Jacobson*.<sup>292</sup> There, the court held that since the documents sought to be entered were produced by the defendants from their files, and dealt with a subject familiar to defendants' employees, the documents were considered to be authentic.<sup>293</sup> A similar case from California echoes this doctrine. In *E.W. French & Sons, Inc. v General Portland, Inc.*,<sup>294</sup> a case involving antitrust and price-fixing, the court held that documents found within an alleged conspirator's file were sufficiently authenticated to warrant admission.

There are other cases where courts have allowed a finding of authentication even though there is no direct evidence in support of such a finding. In *United States v Brown*,<sup>295</sup> the documents were authenticated because they were previously produced in response to a subpoena, so they were implicitly authenticated. Another court determined records were authenticated because they were found in the document producer's warehouse.<sup>296</sup>

Although there is no requirement that a party offering a business record under Rule 803(6) produce the author of the item,<sup>297</sup> a "qualified witness" is required.<sup>298</sup> *Wallace Motor Sales, Inc. v American Motor Sales Corp.* indicates that a "qualified witness" is one who can explain and be cross-examined concerning the manner in which the records are made and kept.<sup>299</sup> It is not necessary that the qualified witness have personally participated in or observed the creation of the document.<sup>300</sup>

Public records will be self-authenticating if they meet the requirements of Rules 901 and 902. This will usually require a certi-

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291. *Id.*

292. 644 F Supp 1240 (N D Ill 1986), *aff'd in part and rev'd in part*, 827 F2d 1119 (7th Cir 1987).

293. *Brown & Williamson Tobacco Corp.*, 644 F Supp at 1253.

294. 885 F2d 1392 (9th Cir 1989).

295. *United States v Brown*, 688 F2d 1112 (7th Cir 1982).

296. *Burgess v Premier Corp.*, 727 F2d 826 (9th Cir 1984).

297. *Federal Deposit Ins. Corp. v Staudinger*, 797 F2d 908 (10th Cir 1986).

298. *Wallace Motor Sales, Inc. v American Motor Sales Corp.*, 780 F2d 1049 (1st Cir 1985).

299. *Wallace Motor Sales, Inc.*, 780 F2d 1049. See also *Louisell & Mueller*, 4 *Federal Evidence* at 663-65 (cited in note 46).

300. *Pieters v B-Right Trucking, Inc.*, 669 F Supp 1463 (N D Ind 1987).

fied copy or signature of a government official or employee. This rule extends to any United States or state governmental agency.

It is important to bear in mind the technical difference between an exception to the hearsay rule and authentication. Before the contents of any document can be considered for an exception such as the business records exception or the public records exception, the document itself must be proven to be what you say it is. This point is amply illustrated by the case of *Mayer v Angelica*.<sup>301</sup> The *Mayer* case was a civil RICO case in which the plaintiff sought to introduce a letter which it contended was an admission of a co-conspirator.<sup>302</sup> Because it fell within an exception to the hearsay rule, the trial judge skipped the step of authentication, since the document was blatantly admissible as an admission of a conspirator.<sup>303</sup> This oversight caused the Seventh Circuit to reverse and remand.<sup>304</sup>

*Mayer* shows that the proponent should always prove that the document is what it purports to be, before the proponent starts laying a foundation for the *contents* of the document to fall within some exception to the hearsay rule.

#### F. *Judicial Notice*

When laying a foundation for a document to be admitted under the business records exception, it will save some time and effort if the court takes judicial notice of the fact that the producer of the record regularly keeps records. "Judicial notice is generally defined as a judge's utilization of knowledge other than that derived from formal evidentiary proof in the pending case."<sup>305</sup> Federal Rule of Evidence 201 covers judicial notice and indicates in subsection (a) that the "rule governs only judicial notice of adjudicative facts." Adjudicative facts, in turn, are those facts ". . . to which the law is applied in the process of adjudication. They are the facts that normally go to a jury in a jury case. They relate to the parties, their activities, their properties, their business."<sup>306</sup>

301. 790 F2d 1315 (7th Cir 1986).

302. *Mayer*, 790 F2d at 1316.

303. *Id* at 1339.

304. *Mayer*, 790 F2d at 1341.

305. Weinstein & Berger, 4 *Weinstein's Evidence* ¶ 200[01] at 200-02 (cited in note 33). See also Comment, *The Presently Expanding Concept of Judicial Notice*, 13 *Vill L Rev* 528, 530 (1968) ("Judicial notice may be defined generally as a court's acceptance of the truth of a matter without formal evidentiary proof").

306. Kenneth Culp Davis, *Judicial Notice*, 55 *Colum L Rev* 945, 952 (1955).

Judges are given wide discretion in determining the facts of which they take judicial notice. Judges may require supplementary proof even when the matter is well-established common knowledge.<sup>307</sup> "Generally speaking, in order that a fact may be judicially noticed, it must be a matter of common and general knowledge, it must be well and authoritatively settled, and not doubtful or uncertain, and it must be known to be within the limits of the jurisdiction of the court."<sup>308</sup> Thus, if there were disagreement or widespread difference in belief with respect to the fact in question, there could be no judicial notice of the fact.<sup>309</sup>

For example, a federal district court took judicial notice of the fact that many private law firms do not bill claims for time expended in keeping daily log sheets of their hours.<sup>310</sup> This is roughly analogous to the fact that most businesses regularly keep records in their normal course of business. This is unlike the situation in *Brown & Williamson*, where the Seventh Circuit determined that the district court could not take judicial notice of the fact that television coverage of a verdict in favor of the cigarette manufacturer who brought a libel suit was "fair" when it reduced the compensatory damages to \$1.00.<sup>311</sup>

## VI. CONCLUSION

Due to the nature of the rule against hearsay and the number and complexity of the exclusions and exceptions to such rule, this article has only provided an overview of the vast and difficult subject of documentary evidence. However, proponents should find many of the topics discussed useful when attempting to enter documents into evidence. The proponent should keep the following procedure in mind.

The proponent should first ask the court to take judicial notice of the fact that the enterprise producing the record regularly keeps such records in the usual course of its business. The proponent should then establish the records's relevancy and have the record authenticated. Finally, the proponent should lay a foundation for the business records exception or other relevant exclusion or

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307. *United States v Lamont*, 236 F2d 312 (2d Cir 1956).

308. 29 Am Jur 2d Evidence § 22 (1967 & 1990 Supp).

309. *Id* at § 24.

310. *Cook v Block*, 609 F Supp 1036 (D DC 1985). See also *United States v Ceballos*, 719 F Supp 119 (E D NY 1989) (judicial notice could be taken that drug dealers use beepers and public telephones in plying illicit trade).

311. *Brown & Williamson Tobacco Corp.*, 644 F Supp 1240 (N D Ill 1986).

exception.

When unusual situations are encountered, such as where a business record contains an opinion or one record has been integrated into another, the proponent should remember to establish the exception or exclusion one at a time. In each case the proponent should lay an adequate foundation for each element of the exception or exclusion. If proponents approach documentary evidence in this methodical, step-by-step manner, it is more likely courts will admit the documents into evidence.