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## **The Business Records Exception to the Hearsay Rule - New is Not Necessarily Better**

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# The Business Records Exception to the Hearsay Rule—New is Not Necessarily Better

*Sidney Kwestel\**

## I. INTRODUCTION

Among the most significant exceptions to the hearsay rule is the business records exception.<sup>1</sup> With roots in the common law,<sup>2</sup> it is based on the premise that records made in the regular course of business are sufficiently reliable to justify admitting them as proof of the matters asserted in them without the safeguard of cross examination.<sup>3</sup> Widespread acceptance of a codified business records exception followed a 1927 study<sup>4</sup> that proposed such a statute (the Model Act)<sup>5</sup> and urged its passage by every jurisdiction.<sup>6</sup> Congress,<sup>7</sup> as well as several

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\* © 1999. Sidney Kwestel, Professor of Law, Touro College, Jacob D. Fuchsberg Law Center, B.A. 1958, Yeshiva University; J.D., 1961, New York University School of Law. The Author gratefully acknowledges with thanks the valuable comments of his former partner Michael Malina, Esq. of Kaye Scholer, Fierman, Hays & Handler and his colleague Professor Eileen Kaufman and the assistance of Jill B. Selden, Stephanie Hatzakos, Shawn Nelson, R. Stephanie Estevez and David Allweiss.

1. *People v. Kennedy*, 503 N.E.2d 501, 507 (N.Y. 1986).

2. The exception is primarily grounded on the common law business entries rule and the shop book doctrine. MORGAN ET AL., *THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM* 51 (1927) (hereinafter "MORGAN ET AL.") (advocating "proof of business transactions to harmonize with current business practice").

3. See *Timberlake Constr. Co. v. U.S. Fidelity & Guar. Co.*, 71 F.3d 335, 341 (10th Cir. 1995); *Kennedy*, 503 N.E.2d at 507; *Crowder v. Aurora Co-op. Elevator Co.*, 393 N.W.2d 250, 258 (Neb. 1986) (holding that "routine record keeping, essential to the conduct of business, produces the reliability necessary for admissibility of business records"); *Williams v. Alexander*, 129 N.E.2d 417, 417-19 (N.Y. 1955).

The oft-quoted Advisory Committee's Note to Rule 803(6) of the Federal Rules of Evidence states:

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying on them, or by a duty to make an accurate record as part of a continuing job or occupation.

56 F.R.D. 183, 308 (citation omitted).

4. MORGAN ET AL., *supra* note 2, at 51. The Legal Research Committee of the Commonwealth Fund conducted the study. See *Johnson v. Lutz*, 170 N.E. 517, 518 (N.Y. 1930).

5. The Model Act reads as follows:

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,

states including New York,<sup>8</sup> adopted the Model Act. Other states enacted different versions of the business records exception,<sup>9</sup> including the Uniform Business Records Evidence Act (hereinafter UBRE)<sup>10</sup> and former Section 63(13) of the Uniform Rules of Evidence.<sup>11</sup>

In 1975, Congress passed the comprehensive Federal Rules of Evidence, which included Rule 803(6) (hereinafter 803(6)),<sup>12</sup> a revised, but not necessarily more liberal, version of the business records exception.<sup>13</sup> Today the business

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 it 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 a 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 include business, profession, occupation and calling of every kind.

MORGAN ET AL., *supra* note 2, at 63.

6. MORGAN ET AL., *supra* note 2, at 63.

7. Congress adopted the Act in 1936. 28 U.S.C. § 695 (1940) (recodified in 28 U.S.C. § 1732 (1994)).

8. 5 WIGMORE, EVIDENCE § 1561a (Chadbourn rev. 1974).

9. *Id.*

10. UNIF. BUS. RECORDS AS EVIDENCE ACT, 9A U.L.A. § 1-6 (1965 and Supp. 1968). This Uniform Act was adopted in 1936 by the National Conference of Commissioners on Uniform State Laws. 5 WIGMORE, *supra* note 8, § 1561a.

11. 5 WIGMORE, *supra* note 8, § 1561a.

12. FED. R. EVID., PUB. L. NO. 93-595, 88 Stat. 1926 (1975). Rule 803(6) reads as follows:

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

...

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. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

*Id.*

13. The language of 803(6) is no more liberal than its predecessor, Section 1732, and in fact may be more restrictive. Under the Model Act, if a document satisfies the foundation requirement for admissibility, all of the circumstances surrounding its making may be shown to affect its weight but not its admissibility. On the other hand, under

records exception is codified in virtually every jurisdiction,<sup>14</sup> with most codifications patterned on 803(6).<sup>15</sup>

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803(6), even if a document satisfies the foundation requirements, the court may exclude it if the sources of the information or the method or circumstances of its preparation indicate a lack of trustworthiness. In short, under the Model Act it appears that the court must admit a document that satisfies the foundation requirements and leave it to the *trier of fact* to consider the affect of all other circumstances, whereas under 803(6) all other such circumstances are considered by the *court* in determining admissibility. See *Solomon v. Shuell*, 457 N.W.2d 669, 679 (1990). Even under the Model Act, however, "a showing of unreliability may be so complete as to overcome the presumption of verity, and in such a case the trial judge should exclude the record." *Thomas v. Hogan*, 308 F.2d 355, 361 (4th Cir. 1962).

14. ALA. R. EVID. 803(6); ALASKA R. EVID. 803(6); ARIZ. R. EVID. 803(6); ARK. R. EVID. 803(6); CAL. EVID. CODE § 1271 (West 1997); COLO. R. EVID. 803(6); CONN. GEN. STAT. § 52-180 (1997); DEL. R. EVID. 803(6); FLA. STAT. § 90.803(6) (1997); GA. CODE ANN. § 24-3-14 (1997); HAW. R. EVID. 803(b)(6); IDAHO CODE § 9-414 (1997); 725 ILL. COMP. STAT. 5/115-5 (West 1998); IND. R. EVID. 803(6); KAN. STAT. ANN. § 60-460(m) (1996); KY. R. EVID. 803(6); LA. CODE EVID. ANN. art. 803(6) (West 1997); MD. CODE ANN., CTS & JUD. PROC. § 10-101 (1996); MASS. GEN. LAWS ch. 233, § 78 (1997); ME. R. EVID. 803(6); MICH. R. EVID. 803(6); MINN. R. EVID. 803(a); MISS. R. EVID. 803(6); MONT. R. EVID. 803(6); N.C. R. EVID. 803(6); N.D. CENT. CODE § 31-08-01 (1995); N.H. R. EVID. 803(6); N.Y. C.P.L.R. 4518 (McKinney 1992); NEB. REV. STAT. § 27-803(5) (1997); NEV. REV. STAT. § 51.135 (1997); N.J. R. EVID. 803(c)(6); N.M. STAT. ANN. § 11-803(F) (Michie 1998); OHIO R. EVID. 803(6); OKLA. STAT. tit. 12, § 2803(6) (1998); OR. REV. STAT. § 404.460(6) (1997); 42 PA. CONS. STAT. § 6108 (1997); P.R. R. EVID. 65(F); R.I. R. EVID. 803(6); S.C. CODE ANN. § 19-5-510 (Law Co-op 1997); TENN. R. EVID. 803(6); TEX. R. CIV. EVID. 803(6); UTAH R. EVID. 803(6); VT. R. EVID. 803(6); WASH. REV. CODE § 5.45.020 (West 1997); W. VA. R. EVID. 803(6); WIS. STAT. § 908.03(6) (1997); WYO. R. EVID. 803(6).

15. Thirty-seven (37) states have a business records rule patterned on 803(6). Fifteen (15) states—Alabama, Arkansas, Colorado, Delaware, Maine, Minnesota, New Hampshire, New Mexico, North Carolina, Oregon, Rhode Island, Utah, Vermont, West Virginia, and Wyoming—adopted 803(6) verbatim; eighteen (18) states—Alaska, Arizona, Florida, Iowa, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, New Jersey, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and Tennessee—adopted 803(6) with some modification, and four (4) states—Hawaii, Nebraska, Nevada, and Wisconsin—adopted the Supreme Court's draft text verbatim or with some modification. See *infra* note 41.

Seven (7) states—California, Idaho, Kansas, South Dakota, Pennsylvania, South Carolina, and Washington—have a business records rule patterned on the UBRE; five (5) states—Connecticut, Georgia, Illinois, Massachusetts, and New York—and the District of Columbia have a business records rule patterned on the Model Act.

Virginia has a non-codified business records exception. See *Ford Motor Co. v. Phelps*, 389 S.E.2d 454, 457 (Va. 1990); "Automatic" *Sprinkler Corp. v. Coley & Petersen, Inc.*, 250 S.E.2d 765, 773 (Va. 1979).

Different formulations of the business records exception do not necessarily produce different results.<sup>16</sup> As a practical matter, a judge who believes a particular business document to be trustworthy and favors admitting business records may do so without serious concern for reversal by basically ignoring any language that might otherwise pose an impediment to admissibility.<sup>17</sup> The chances of reversal are quite small because the trial court has broad discretion on such evidentiary rulings.<sup>18</sup> In many cases, even if the appellate court finds an abuse of discretion, it usually concludes that the error was harmless.<sup>19</sup>

The following chart sets forth relevant portions of the business records exceptions contained in 803(6), the Model Act, and the UBRE.

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16. See Thomas F. Green, Jr., *The Model and Uniform Statutes Relating to Business Entries as Evidence*, 31 TULANE L. REV. 49, 54, 65-66 (1956); Gerald J. Norville, *The Uniform Business Records as Evidence Act*, 27 ORE. L. REV. 188, 189 (1948); Commentary, *Revised Business Entry Statutes: Theory and Practice*, 48 COL.L.REV. 920, 922 n.15 (1948).

17. See, e.g., *Falcon Jet Corp. v. King Enter. Inc.*, 678 F.2d 73, 77 (8th Cir. 1982) (stating that trial court has discretion to admit evidence under 803(6) if it finds "it to be sufficiently trustworthy;" court admitted invoices that business received from other entities for supplies and services); *Ollag Constr. Equip. Corp. v. Goldman*, 665 F.2d 43, 46 (2d Cir. 1981) (concluding that debtors' financial statements submitted to a bank "satisfied the primary requirements" of 803(6) where testimony established that they "were on the Bank's own form, were completed at its request, and were of a type regularly used by the Bank in making decisions whether or not to extend credit"). However, the Second Circuit in *Ollag* did not delineate the "primary requirements" to which it referred, but plainly they were not those of 803(6)). See also *infra* note 181 and accompanying text.

18. There are also many cases which approve the admission of documents under the business records rule with little or no explanation. See, e.g., *United States v. Metallo*, 908 F.2d 795, 799 (11th Cir. 1990); *Higgins v. Martin Marietta Corp.*, 752 F.2d 492, 497 (10th Cir. 1985) (concluding that a letter written by plaintiff's treating physician relating to cause of plaintiff's respiratory problems was admissible because "[a]pparently this kind of correspondence is regularly kept in the course of this physician's business"); *United States v. Colyer*, 571 F.2d 941, 947 (5th Cir. 1978).

19. See *United States v. Williams*, 109 F.3d 502, 507-08 (8th Cir. 1997) (stating that any error to admit hotel records under 803(6) was harmless); *United States v. Mitchell*, 49 F.3d 769, 778 (D.C. Cir. 1995); *United States v. Reilly*, 33 F.3d 1396, 1414 (3d Cir. 1994); *Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1090 (5th Cir. 1988) (finding harmless error to admit memorandum for its hearsay purpose); *Wilson v. Zapata Off Shore Co.*, 939 F.2d 260, 272 (5th Cir. 1991) (holding that any error in admitting hospital record was harmless).

803(6) <sup>20</sup>	Model Act	UBRE
A memorandum, record or data compilation, in any form	Any writing or record . . . made as a memorandum or record	A record
of act, events, conditions, opinions, or diagnoses,	of any act, transaction, occurrence or event	of an act, condition or event
made at or near the time	shall be admissible in evidence in proof of said act, transaction, occurrence or event,	shall, in so far as relevant, be competent evidence
by, or from information transmitted by, a person with knowledge,	if the trial judge shall find	if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and
if kept in the course of a regularly conducted business activity, and	that it was made in the regular course of any business, and	if it was made in the regular course of business,
if it was the regular practice of that business to make the memorandum, report, record or data compilation,	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.	at or near the time of the act, condition or event, and
. . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.	All other circumstances of the making of the record including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but . . . not . . . its admissibility.	if, in the opinion of the Court, the sources of information, method and time of preparation were such as to justify its admission.

On its face, any version of the business records exception seems relatively simple to apply. 803(6) is a good example. Apart from the foundation requirements of timely preparation and personal knowledge by the individual transmitting the information, the party offering into evidence a memorandum or record of an event must establish: (i) that the memorandum or record was made in the course of a regularly conducted business activity, and (ii) that it was the regular practice of that business to make the memorandum or record. For example, assume that a bank officer wrote a memorandum memorializing a meeting she attended to explore the possibility of a loan to X. Subsequently, in a suit against X in federal court, the bank wishes to offer the memorandum into

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20. FED. R. EVID. 803(6). This Rule begins: "The following are not excluded by the hearsay rule . . ."

evidence through the bank records' custodian. The bank's attorney would ask the custodian<sup>21</sup> four questions using the rule's conclusory language:

I show you a memorandum dated January 4, 1999 that has been marked as Exhibit 1 for identification. Was this memorandum, Exhibit 1, made in the course of the bank's regularly conducted business activity?

Was it the regular practice of the bank to make the memorandum?

Was the memorandum made at or near the time of the meeting?

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21. Under 803(6) and other business records codifications, the foundation requirements may be established "by the testimony of the custodian or other qualified witness." FED. R. EVID. 803(6). The phrase "other qualified witness" has been broadly interpreted. See *United States v. Franks*, 939 F.2d 600, 602 (8th Cir. 1991) (stating that foundation witness need not have personal knowledge of document preparation); *National Tea Co. v. Tyler Refrigeration Co.*, 339 N.W. 2d 59, 61 (Minn. 1983) (stating that foundation witness "need not be an employee of the entity so long as he understands the system"). In place of a foundation witness, a party often obtains a stipulation from the opposing party, particularly when the business records are those of the opposing party or a non-party. See, e.g., *United States v. Gonzalez*, 71 F.3d 819, 832-33 (11th Cir. 1996); *United States v. Saunders*, 886 F.2d 56, 59 (4th Cir. 1989); *Cooper Sportswear Manuf. Co. v. Hartford Cas. Ins. Co.*, 818 F. Supp. 721, 724 (D.N.J. 1993). If an opposing party refuses to stipulate, the proponent should consider serving requests for admissions during the pre-trial discovery stage, as suggested in *Romano v. United Parcel Serv. Gen. Servs. Co.*, 1996 U.S. Dist. LEXIS 19364, AT \*3 (D. Or. 1996). See also *Phoenix Mut. Life Ins. v. Adams*, 828 F. Supp. 379, 389 (D.S.C. 1993).

Some states have adopted Rule 902(11) of the Uniform Rules of Evidence, which allows the proponent to satisfy the foundation requirements by submitting the custodian's sworn written statement certifying, in conclusory terms, the existence of each condition for admissibility under the business records exception. See, e.g., ALASKA R. EVID. 902(11); KY. R. EVID. 902(11); MD. R. EVID. 5-902(a)(11); TEX. R. CIV. EVID. 902(10). Some states permit this procedure only for certain categories of documents. See, e.g., NEV. REV. STAT. §§ 52.320-.375 (Michie 1997) (hospital records); N.Y. C.P.L.R. 4518(c) (McKinney 1992) (hospital records); and §§ 4518(b)-(e) (records: regarding DNA/Genetic Marker Testing).

Federal law allows admission of foreign business records in criminal proceedings based on a custodian's written declaration. 18 U.S.C. § 3505 (1994). See *United States v. Ross*, 33 F.3d 1507, 1515 (11th Cir. 1994); *United States v. Bertoli*, 854 F. Supp. 975, 1030-34 (D.N.J. 1994); *United States v. Gleave*, 786 F. Supp. 258, 276-80 (W.D.N.Y. 1992), *rev'd on other grounds sub nom.* *United States v. Knoll*, 16 F.3d 1313 (2d Cir. 1994). Although the statute requires that a party intending to offer a document in evidence under its provisions must give written notice to the other party, it has been held that timely compliance with the notice requirement is not a pre-condition to admissibility. See 18 U.S.C. § 3505(b); *United States v. Abrego*, 141 F.3d 142, 177 (5th Cir. 1998).

Was the memorandum made from information supplied by a person who had personal knowledge of what transpired at the meeting?

Most likely, opposing counsel would not object to these questions, the custodian would answer "yes" to each of them, and the memorandum would be received in evidence.<sup>22</sup> But suppose opposing counsel objects to the form of the question concerning the bank's "regular practice" as calling for a conclusion. Or, suppose that during voir dire, opposing counsel probes whether it was the bank's regular practice to make this type of memorandum. What factual showing must the proponent of the memorandum then make in order to establish that it was the regular practice of the business activity to make the memorandum? Unfortunately, no definitive answer can be given to this question because it is difficult to find a clear common thread in or to reconcile all of the decisions that discuss or apply the regular practice requirement. Indeed, it is rare to find a case that meaningfully analyzes the regular practice requirement, and even more difficult to find one that gives trial courts and practitioners clear direction.

This Article addresses this question and certain other aspects of the business records exception that need clarification and utilizes 803(6) as the central focus of the discussion. After a brief discussion of whether codifications other than 803(6) have a regular practice requirement, this Article will explore the requirement's meaning and scope. The discussion will touch upon the interplay and overlap between the regular practice requirement and the requirement that the record be made in the regular course of business. Next, this Article will examine the extent to which the exception requires that the declarant (the person who supplied the information to the entrant) act under a duty to report. It will explore situations where the declarant and the entrant are employees of different companies or where the declarant is under a contractual but not a business duty to supply information to the entrant. Then, the admissibility of a variety of documents will be considered, including (i) documents produced from Company R's files but which it received from Company S, and (ii) reports, audits, or other documents prepared for businesses by independent firms such as appraisers, accountants, and engineers. Finally, the issue of whether documents that satisfy the business records exception to the hearsay rule must also satisfy all other evidentiary rules, particularly the rules governing expert opinions, will be considered.

As we shall see, courts are rarely careful or analytical when dealing with the business records exception. They seem to gloss over difficulties that would arise from a more faithful application of the exception's requirements and intuitively admit documents they deem trustworthy. They do not appear hampered by

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22. James W. McElhaney, *On Admissibility*, 83 A.B.A. J. 76 (1997). See *Cobb v. State*, 585 N.E.2d 40, 42 n.1 (Ind. Ct. App. 1992) (holding witness's conclusory answers to counsel's foundation questions sufficient to satisfy foundation elements).



particular codified language. As a result, courts have injected a degree of confusion into an area that should be relatively clear. To eliminate this confusion, courts should not only spell out the criteria that must be met in order to satisfy each foundation requirement, but they should be more analytical and precise in applying them, particularly where R offers in evidence documents received from S. This clarification is necessary to give the business records exception as codified its full effect, and to provide litigants a sounder basis on which to predict the admissibility of their proffered evidence.

## II. REGULAR PRACTICE REQUIREMENT

### *A. Basis of Requirement*

Each codified version of the business records exception expressly conditions admissibility on a showing that the document was made in the regular course of business at or near the time of the matter recorded.<sup>23</sup> Only 803(6) and 18 U.S.C. §3505<sup>24</sup> expressly spell out an additional requirement—that it was the regular practice of the business to make the document. At first blush, this requirement would appear to be distinct from the requirement that the record be made in the course of a regularly conducted business activity. But that is not necessarily so. The requirement that the document be made in the regular course of business or in the course of a regularly conducted business activity may itself encompass a regular practice requirement.

As written, the Model Act contains no express equivalent to 803(6)'s regular practice requirement.<sup>25</sup> The Weinstein & Berger treatise ("Weinstein") notes that the Federal Business Records Act ("Section 1732"),<sup>26</sup> 803(6)'s predecessor, required a showing that it was the business's regular course to make the memorandum or record.<sup>27</sup> Although Weinstein's reading of the statutory language is questionable,<sup>28</sup> state courts that have adopted the Model Act have

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23. See *supra* note 14.

24. The language of 18 U.S.C. § 3505 is derived from 803(6), and Congress intended that it should be interpreted the same as 803(6) is interpreted. See H. R. REP. NO. 98-907 (1984), reprinted in 1984 U.S.C.C.A.N. 3578, 3581-82.

25. See *supra* note 4; *infra* note 28.

26. Formerly 28 U.S.C. § 1732, reprinted in U.S. Code Cong. Ser. A104 (1948). Section 1732(a) is [virtually] identical to the Model Act. Compare the Model Act, *supra* note 4, with § 1732.

27. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE ¶803(6)[03], at 803-204 (1996) ("[A virtually identical requirement] [to 803(6)'s regular practice requirement] had been contained in the Federal Business Records Act").

28. In support of its position, Weinstein states that Section 1732 provided that "if the judge shall find that it was made in the regular course of any business, and that it was the regular course of business to make such memorandum or record." *Id.* ¶ 803(6)[3], at 803-204 n.1. A careful reading of the full text, however, reveals that there is no express statement in Section 1732 that the business have a regular course of making such

similarly indicated that it has two requirements of regularity: (1) that the memorandum be made in the regular course of any business, and (2) that it be the regular course of business to make the memorandum.<sup>29</sup> They apparently read the Model Act, as Weinstein does, by divorcing the phrase "regular course of business" to make such a memorandum or record from the phrase "at the time of such act . . ." which immediately follows.<sup>30</sup> I would suggest instead that a regular practice requirement is encompassed within the statutory phrase "made in the regular course of any business" or its equivalent.<sup>31</sup> For one can plausibly argue that a document should not be considered as having been "made in the regular course of business" if it is not the regular course of the business to make the memorandum.

In sum, business records statutes that do not include an express regular practice requirement have been treated as if they contained such a requirement. Regularity of record making, therefore, is an integral part of the business records exception, regardless of the precise statutory language.

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a memorandum, as Weinstein's truncated version would indicate. The full relevant text states that "if the judge shall find that it was made in the regular course of any business, and that it was the regular course of business to make such memorandum or record *at the time of such act . . . or within a reasonable time thereafter.*" *Id.* (emphasis added). Weinstein's quote omits the italicized phrase which changes the meaning of the portion that Weinstein quotes. Thus, the language after the word "and" did not expressly impose an additional requirement that the business have a regular practice of making the memorandum or record. Rather it merely allowed the proponent to prove the timeliness of an entry by introducing evidence that the business had a *regular practice of timely preparation* in lieu of testimony that the entry was timely made. In short, as the Ninth Circuit said, the above quoted relevant text expressly spells out "[t]he requirement that the procedure call for *timely entry* of such records." *Standard Oil Co. v. Moore*, 251 F.2d 188, 215 n.34 (9th Cir. 1957) (emphasis added).

29. *People v. Kennedy*, 503 N.E.2d 501, 505 (N.Y. 1986) (holding that N.Y.C.P.L.R. 4518(a) has two regularity requirements "*first*, that the record be made in the regular course of business . . . and *second* that it be the regular course of business to make the record") (citing *Cent. Fabricators Inc. v. Dutchman*, 247 N.W.2d 804, 806 (Mich. 1976)). These courts do not explain how they reached their conclusions.

30. New York's statute, but not the Model Act, has a comma after the phrase "regular course of any business to make the memorandum" and before the words "at the time of such transaction." See also *United States v. Delgado*, 459 F.2d 471, 472 n.5 (2d Cir. 1972). The House Committee on the Judiciary also read Section 1732 to mean "that it must have been the regular practice of a business to make the record." H.R. REP. NO. 93-650, at 14 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 2087-88.

31. See *Standard Oil Co. v. Moore*, 251 F.2d 188, 215 (9th Cir. 1957); *Scanlon v. Hartman*, 579 P.2d 851, 854 (Or. 1978) (holding that "[t]he phrase 'regular course of business' [in the UBRE] means the record must be made regularly in addition to being incident to a business").

*B. Congress's Insertion of Regular Practice Requirement in the Supreme Court's Draft of 803(6)*

This Article's discussion of 803(6)'s regular practice requirement will be overlaid by a discussion of Weinstein's view, relied on by some courts, that the absence of routineness, without more, is insufficient to exclude a business record under 803(6).<sup>32</sup> This view is built on the stated premise that "[n]umerous courts had stated in dicta that the [Federal Business Records] Act required . . . that it was the regular course of business to make that particular type of record," but that "[a] reading of the cases indicates that this second factor was not usually stressed."<sup>33</sup> According to Weinstein, courts "customarily admitted" records "made in the course of the business without regard to whether the particular type of record was routinely made."<sup>34</sup> From this premise, Weinstein argues that "[s]ince Congress did not intend to make the business records exception [under 803(6)] more restrictive than it had previously been [under Section 1732]," it follows that "Rule 803(6) has been correctly interpreted so that the absence of 'routineness' without more is not sufficiently significant to require exclusion of the record."<sup>35</sup>

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32. WEINSTEIN, *supra* note 27, ¶803(6)[03], at 803-204. WEINSTEIN expresses this view more fully as follows:

Numerous courts had stated in dicta that the Act required not only that the record be made in the ordinary course of business, but also that it was the regular course of business to make that particular type of record. A reading of the cases indicates that this second factor was not usually stressed. Records were customarily admitted if made in the course of the business without regard to whether the particular type of record was routinely made, except when the court was concerned with the trustworthiness of the record. Then, as in the leading case of *Palmer v. Hoffman*, the court might say that the record was not 'typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls.' Since Congress did not intend to make the business record exception more restrictive than it had previously been, Rule 803(6) has been correctly interpreted so that the absence of 'routineness' without more is not sufficiently significant to require exclusion of the record. Nonroutine 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 sources of information or other circumstances indicate lack of trustworthiness.' This latter condition operates not as a blanket exclusion but only when the facts of the case indicate unreliability. A contention without more that records of that type were not regularly kept should not suffice to overcome admissibility.

WEINSTEIN, *supra* note 27, ¶ 803(6)[3], at 803-204.

33. WEINSTEIN, *supra* note 27, ¶ 803(6)[3], at 803-204.

34. WEINSTEIN, *supra* note 27, ¶ 803(6)[3], at 803-204.

35. WEINSTEIN, *supra* note 27, ¶ 803(6)[3], at 803-204.

Weinstein's view, however, should be discounted. To begin with, it is based on an erroneous premise. Weinstein cites but two cases—*United States v. Hyde*<sup>36</sup> and *United States v. Moran*<sup>37</sup>—to support his argument that records were admitted under Section 1732 “if made in the regular course of business without regard to whether the particular type of record was routinely made.”<sup>38</sup> But neither case discusses the question of whether a document must be routinely made in order to be admissible under Section 1732,<sup>39</sup> nor does either opinion even hint that the document's admissibility was challenged on the ground that the proponent failed to show that it was the business's regular course to make the record. In addition, Weinstein failed to cite cases under Section 1732 emphasizing routineness or the regular course of business factor.<sup>40</sup>

More importantly, Weinstein does not credit the expressed intent of Congress or the specific language of 803(6). Even if the courts did not enforce the regular course of business factor under Section 1732, as Weinstein asserts, Congress made it clear that it wanted that factor stressed when it deliberately added the regular practice requirement to 803(6). In 1973, the United States Supreme Court submitted a draft of 803(6) to Congress (“Supreme Court text”),

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36. 448 F.2d 815 (5th Cir. 1971).

37. 151 F.2d 661 (2d Cir. 1945).

38. WEINSTEIN, *supra* note 27, ¶ 803(6)[3], at 803-204.

39. In *Moran*, the trial court admitted a memorandum of a telephone conversation prepared by a bank employee. *Moran*, 151 F.2d at 662. The *only* objection raised was that the bank memorandum was similar to the engineer's report of an accident in *Palmer v. Hoffman*, 318 U.S. 109 (1943). *Id.* The Second Circuit in *Moran* rejected this contention, pointing out that, unlike the report in *Palmer*, the memorandum “is a routine record made for the bank's business as such and with no motivation to prepare for litigation.” *Id.* at 662. Moreover, if anything, *Hyde* undercuts Weinstein's point. In *Hyde*, the maker of the written notes offered in evidence testified “that he regularly kept informal notes of transactions on note cards in such situations,” which he turned over to another company officer for safekeeping. *Hyde*, 448 F.2d at 846. The maker had routinely made informal notes of certain transactions. *Id.*

40. See *Hanley v. United States*, 416 F.2d 1160, 1167 (5th Cir. 1969) (stating that “the trustworthiness of the records arises because of their being created in the ordinary course of business affairs, as routine recurring entries to identify routine transactions”); *Gass v. United States*, 416 F.2d 767, 771-72 (D.C. Cir. 1969) (holding that Section 1732 required not only that slides were made in the course of the hospital's business, but also that it was the regular course of the hospital's business to make them; evidence established that both aspects were satisfied); *Sabatino v. Curtis Nat'l Bank*, 415 F.2d 632, 637 (5th Cir. 1969) (holding that “[r]ecords must be kept pursuant to some routine procedure designed to assure their accuracy”); *Standard Oil Co. v. Moore*, 251 F.2d 188, 215 (9th Cir. 1957) (“A memorandum or record cannot be considered as having been made in the ‘regular course’ of business, within the meaning of § 1732, unless it was made pursuant to established company procedures for the systematic or routine and timely making and preserving of company records.”); *Smith v. Bear*, 237 F.2d 79, 89 (2d Cir. 1956).

which did not include the regular practice requirement.<sup>41</sup> The House Judiciary Committee, however, concluded that the regular practice requirement was a "necessary further assurance of [the record's] trustworthiness."<sup>42</sup> It therefore amended the Supreme Court's text and inserted the express language now found in 803(6) requiring the proponent to show that the record was made pursuant to "a regular practice of the business activity."<sup>43</sup> The Senate Conference Report left the House Judiciary Committee's regular practice amendment intact<sup>44</sup> and Congress adopted 803(6) with the House Committee's amendment. Thus, the regular practice requirement added by Congress is no less a condition of admissibility under the plain language of 803(6) than the requirement that the record be made in the course of a regularly conducted business activity.

Further, the Advisory Committee's Note to the Supreme Court's text, which was available to Congress, states that existing statutes and rules had a tendency to unduly emphasize routineness and repetitiveness.<sup>45</sup> Congress clearly voted in favor of continuing to emphasize routineness and repetitiveness by including the regular practice requirement in 803(6) with knowledge of the Advisory Committee's statement. While, as Weinstein says, Congress may not have intended to make 803(6) more restrictive than Section 1732, it is certainly true that Congress did not intend to make it less restrictive than the existing law. Simply put, had Congress intended the law to be as Weinstein asserts, it would have left the Supreme Court text intact.<sup>46</sup>

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41. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972); S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7052. The Supreme Court text reads as follows:

(6) Records of regularly conducted activity. 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, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

56 F.R.D. at 300-01.

42. Report on Federal Rules of Evidence, Committee on the Judiciary, H.R. REP. NO. 93-650, at 14 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7087-88.

43. *Id.*

44. The Senate Judiciary Committee Report did not mention the House Committee's proposed regular practice amendment although it disagreed with the House Committee's addition of the word "business" before the word "activity." S. REP. NO. 93-1277, at 27 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7063. The Conference Report adopted the House version of 803(6) "that the records must be those of a regularly conducted 'business' activity." H.R. CONF. REP. NO. 93-1597, at 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7104.

45. 56 F.R.D. 183, 307 advisory committee's note.

46. One other point should be kept in mind. Courts and commentators gloss over the fact that the Advisory Committee's Note to 803(6) does not discuss or even mention

### *C. Meaning and Scope of Regular Practice Requirement*

The notion of drafting a business record exception to the hearsay rule that would be trouble free in its application is wishful thinking. No doubt those who inserted the regular practice requirement in 803(6) believed that its meaning was quite clear and that the limitation it imposed on admissibility would be easily comprehended. In fact, few practitioners ask what this requirement entails. Experience shows that if an employee has made a memorandum of a particular event, the employee will most likely automatically answer "yes" if asked at a deposition or trial whether it was his or the business's regular practice to make such a memorandum. It would be most unusual for a lawyer to object to the form of the question or for the witness to ask, "What do you mean by 'regular'?"

But what if a witness did ask the question? What answer should a lawyer give her? Should a lawyer focus on frequency and answer that the word "regular" means consistent, habitual, normal, usual, customary, or periodic? If he did so answer, the witness would probably be more confused because these definitions do not necessarily connote the same degree of frequency. Perhaps the attorney should focus on the business's record-making procedure and respond that the word "regular" means an action conforming to an established procedure. This definition would not be satisfactory unless the witness was also told whose established procedure is relevant—the business's, the witness's, or both. Suppose the business did not have an established procedure but the witness invariably memorialized the type of event recorded. Or, suppose the business had a fixed procedure for recording a certain type of event but the

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the regular practice requirement. 56 F.R.D. at 307-11. The Note was prepared as a commentary to a text that did not include an express regular practice requirement. However, even after Congress added the regular practice requirement as a necessary further assurance of trustworthiness, the Advisory Committee did not change its Note to mention, much less discuss, Congress's action and its implications. Whether the Advisory Committee deliberately failed to do so, its failure to refer to the regular practice requirement should further limit the Note's usefulness as a guide to the proper interpretation of 803(6) as enacted.

It appears that after Congress enacted 803(6), the Federal Judicial Center caused a compilation to be prepared which contained, among other things, "the original Advisory Committee Note (with such deletions as are required by any amendment made by Congress to the rule)." The compilation was prepared "at the request of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Professor Edward W. Cleary, who was the Reporter to the Advisory Committee on Rules of Evidence, prepared the compilation, and it has been reviewed by Judge Albert B. Maris, the former Chairman of the Standing Committee; Judge Roszel C. Thomsen, the present Chairman of the Standing Committee; Judge Charles W. Joiner, who was a member of the Advisory Committee and is now a member of the Standing Committee; and Richard M. Mischke, a member of the staff of the Center." *See Federal Rules of Evidence Annotated, Foreword* (Mathew Bender 1975).

witness recorded such an event only on this one occasion. Should the witness answer "yes" in both cases or only one, or should the witness answer "no" unless both she and the business had an established procedure?

There is no packaged answer that the deposing attorney can give a witness. Everyone would agree that the words "regular practice . . . to make the memorandum" certainly include a repetitive practice pursuant to an established company procedure to invariably record a particular event each time the event occurs. But if the memorandum was not invariably made or was not made pursuant to an established company procedure, no clear answer can be given based on precedent because no clear definition of "regular practice" exists.

For example, in *In re Japanese Electronic Products Antitrust Litigation*,<sup>47</sup> the Third Circuit rejected the district court's holding that the regular practice provision requires the proponent to show that the records were "created by routine practices where careful checking and habits of precision and regularity assure their accuracy."<sup>48</sup> The court did not believe that 803(6) requires a court to independently analyze a business's record-making procedures, stating that "[t]he principal indice of reliability is that reliance on routine record keeping is essential to ongoing business activity."<sup>49</sup> It further noted that the opposing party may point out any record-keeping "deficiencies to show that the method or circumstances of preparation indicate lack of trustworthiness."<sup>50</sup> The Third Circuit concluded:

Given the separate treatment in Rule 803(6) of untrustworthiness, we think the regular practice requirement should be generously construed to favor admission. Thus, for example, it may well be that a record of a single meeting satisfied the regular practice requirement if the business in question routinely records other important meetings.<sup>51</sup>

The court's heavy emphasis on 803(6)'s separate treatment of lack of trustworthiness seems misplaced. Establishing that the business has a regular practice is an independent condition to admissibility under 803(6), and it is the proponent's burden to establish that the condition has been met. If the proponent does not satisfy the regular practice requirement, the court, without reaching 803(6)'s separate treatment of untrustworthiness, which the opponent must prove, should not admit the document. In other words, only if the proponent has established that the business had a regular practice of making the document must

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47. 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

48. *Id.* at 288-89.

49. *Id.* at 289. Actual reliance, however, is not a condition of admissibility. *See* FED. R. EVID. 803(6).

50. *Japanese Electronic*, 723 F.2d at 289.

51. *Id.*

the opponent go forward with its burden of showing a lack of trustworthiness if it wishes to have the document excluded.<sup>52</sup>

In the final analysis, the Third Circuit does not define the phrase "regular practice." The court tells us only that the regular practice requirement "should be generously construed in favor of admission," and, by way of example, says that a record of a single meeting may satisfy the regular practice requirement if the business "routinely records other important meetings."<sup>53</sup> The court's single example, however, provides little guidance. The only point that emerges somewhat clearly from *Japanese Electronic* is that a certain degree of repetitiveness, some frequency of recording by the business, is required to satisfy the regular practice requirement.<sup>54</sup> Whatever other parameters might be gleaned or extrapolated from the single example leads only to more unanswered questions such as:

Would the regular practice requirement be met where the employee did not record other important meetings but the business routinely recorded other important meetings?

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52. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 289 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986). The *Japanese Electronic* court makes this very point only a few pages later, albeit in a different context. *Id.* at 291. The Court stated:

The circumstantial guaranty of trustworthiness for Rule 803(6) is regular recording of regular business activity. The trustworthiness proviso [of 803(6)] assumes that this guarantee is satisfied, and places on the opponent the burden of overcoming that badge of reliability by showing other reasons for untrustworthiness.

*Id.*

The Third Circuit's statement that 803(6) does not require a court to "independently analyze the procedures used . . . in making regularly kept records of regularly conducted business" is also problematic. *Id.* at 289. Under 803(6), the proponent must produce evidence to satisfy the regularity requirements. If the proponent produces such evidence, the court must analyze it to determine whether those requirements have been met. This is precisely what the Third Circuit did in making its determination as to the admissibility under 803(6) of certain diaries, internal memoranda, and minutes of trade group meetings. *Id.* at 289-98.

53. *Id.* at 289.

54. The *Japanese Electronic* court considered the admissibility under 803(6) of specific documents including diaries, internal memoranda, and minutes of trade group meetings. *Id.* at 289-98. Its discussion of their admissibility does not shed much light on its view of the regular practice requirement. At times the court split on whether the evidence established a regular practice as to certain documents. *Id.* at 293, 296. Of some significance is its holding that a memorandum by an employee of defendant Mitsubishi Electric reporting on a meeting of a TV council was not admissible under 803(6) because "[w]hat is missing . . . in the record . . . is anything suggesting the regularity of Melco's [Mitsubishi's] practices with regard to recording what transpired at the meetings of the Council." *Id.* at 298.



Would the requirement be met if the employee routinely recorded important meetings but the business did not routinely record them?

For a court to find that the business routinely records other important meetings, must the proponent show that all other employees routinely recorded important meetings?

Does the word "routinely" as used by the Third Circuit mean "invariably," as it seems from the context?

The Second Circuit's effort in *United States v. Freidin*<sup>55</sup> does little to clarify the meaning of "regular practice." In *Freidin*, a Touche Ross client paid defendant, a Touche Ross partner, an additional \$22,000 fee for serving on its advisory board; defendant deposited the fee in his checking account and, in turn, gave Touche Ross a personal check from the same amount. The day Touche Ross received defendant's check, the manager of its partners' affairs office was away and Colasanti, the controller's secretary, who on occasion worked for the partners' affairs office,<sup>56</sup> was on duty. Colasanti prepared an intraoffice memo to the manager stating, in part:<sup>57</sup>

Dick Freidin of New York Office gave me his check for 22m\*

8M = Rollover Capital

14M = Capital Loan

He would like his full April distribution.

\*gave to Parabatie [assistant to the manager].

The Government accused Freidin of failing to report this \$22,000 as income and offered the Colasanti intraoffice memorandum in evidence to dispute his claim that Touche Ross had reported it. Based on testimony that only partners' secretaries prepared any memoranda giving instructions on how to allocate partners' funds among three types of capital accounts and that it was not Colasanti's or her supervisor's common practice to prepare any interoffice communication concerning receipt of partners' checks,<sup>58</sup> the Second Circuit emphasized that it "must respect Congress's addition of the [regular practice requirement] phrase."<sup>59</sup> The court concluded that the Colasanti memorandum,

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55. 849 F.2d 716 (2d Cir. 1988).

56. "On such occasions, Colasanti would keep track of the cash coming in for daily borrowings or investing and would be told the amounts collected and the total of any checks issued on a given day." *Id.* at 718.

57. *Id.*

58. Apart from Colasanti's secretarial duties of typing, filing, answering the phone, and taking messages, "her only routine responsibilities" were accumulating information daily on the amount of money the national office received and disbursed. *Id.* at 720.

59. *Id.* at 723. See also *Yankee Bank for Fin. & Sav. v. Task Assocs., Inc.*, 139 B.R. 71, 79 (Bankr. N.D.N.Y. 1992). *Freidin* is perhaps the only circuit court that has given effect to Congress's inclusion of the regular practice requirement.

which it characterized as an "isolated document,"<sup>60</sup> was inadmissible because it was "not shown to have been made pursuant to a 'regular practice' of Touche Ross."<sup>61</sup>

Would the *Japanese Electronic* court have decided the *Freidin* case the same way? Perhaps not. In *Freidin*, Touche Ross routinely made memoranda that reflected the instructions given on how to allocate partners' funds; Colasanti made such a memorandum on the single occasion in question.<sup>62</sup> *Japanese Electronic*, as noted, instructs that the regular practice requirement may be satisfied when an employee [here Colasanti] makes a memorandum of a single important meeting "[here an instruction] if the business [here Touche Ross] regularly memorializes other important meetings."<sup>63</sup> Superficially, it seems that *Japanese Electronic* and *Freidin* are not compatible. I say superficially because whether *Japanese Electronic* and *Freidin* are incompatible depends on the resolution of questions that were not addressed in either of these opinions. *Japanese Electronic*, for instance, is silent on whether the memorandum or record must be prepared as part of the employee's regular duties, as *Freidin* required. And *Freidin* leaves unanswered whether "regular practice" requires some degree of frequency of recording by the employee. Stated differently, *Freidin* is unclear whether it would have characterized the memorandum as an "isolated document" or, consistent with *Japanese Electronic*, found that the memorandum satisfied the regular practice requirement, in the event that Colasanti had made the memorandum as part of her duties, even though she never made another such memorandum.

One difficulty with *Freidin* is that Colasanti had a regular practice of recording messages; thus, in recording the information she received from Freidin, Colasanti was doing what she regularly did—recording a message. The Second Circuit does not explain why the content of the subject matter recorded, rather than the regularity of recording information generally, should determine whether the regular practice requirement is satisfied. Implicit from its holding is that "regular practice" means a practice within the scope of the employee's duties; the Colasanti memorandum did not meet this standard because the recording of partners' allocation instructions was part of the duties of partners' secretaries only.

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60. *United States v. Freidin*, 849 F.2d 716, 720 (2d Cir. 1988).

61. *Id.* at 723. The government did not invoke the catchall provision, FED. R. EVID. 807 (formerly FED. R. EVID. 803(24)). The Colasanti memorandum was a perfect candidate for admission under 807 because it had many indicia of trustworthiness and was critical to the government's case. *Id.* at 722 n.4, 723.

62. *Id.* at 722.

63. *See supra* note 51 and accompanying text. In fact, the lower court in *Freidin* stated that it was "clear" that it was Touche Ross's regular practice to make the memorandum because records had to be kept of capital account contributions. *United States v. Freidin*, 1987 WL 9442, \*2 (S.D.N.Y. 1987).

In those jurisdictions which have adopted the Supreme Court text of 803(6),<sup>64</sup> which, as noted, does not contain an express regular practice requirement,<sup>65</sup> *Freidin* would probably be decided no differently<sup>66</sup> because another way of approaching the *Freidin* scenario is to ask whether the Colasanti memo was made in the course of a regularly conducted activity,<sup>67</sup> instead of asking whether it satisfied the regular practice requirement. The facts establish that Colasanti was acting beyond the scope of her duties in making the memorandum; thus, it may be concluded that she (and thus the business) was not acting "in the course of a regularly conducted activity."<sup>68</sup> Taking the latter approach, such a memorandum may be excluded under any version of the business records exception because all versions require a showing that the memorandum was prepared in the regular course of business.

*Zenith*, as noted, requires a showing of some degree of frequency of recording by the business to satisfy the regular practice requirement. However, implicit in the court's statement that the recording of a single meeting satisfies the requirement (if the business "routinely records other important meetings")<sup>69</sup> is that the requirement is met even if the maker exercises his or her judgment to decide whether the meeting was an "important" meeting that should be memorialized. Since *Zenith*, several courts have held that the regular practice requirement was met even in instances where the maker exercised judgment about whether an event should be recorded<sup>70</sup> without discussing whether the

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64. See *supra* note 15.

65. See *supra* note 41.

66. This is true even assuming that these jurisdictions would not interpret their text, more specifically the phrase "in the course of a regularly conducted activity," to include such a requirement. There is precedent for interpreting such a phrase to include both regularity requirements. See *Standard Oil v. Moore*, 251 F.2d 188, 215 (9th Cir. 1957) (decided under Section 1732); *infra* note 112-13 and accompanying text. However, in light of the fact that the Supreme Court text was intended to downplay routineness and repetitiveness, it is not likely that these jurisdictions would interpret the text in this manner and thus make the text the equivalent of Congress's version of 803(6).

67. See *infra* notes 172-73 and accompanying text.

68. See *infra* note 173 and accompanying text.

69. See *supra* note 51 and accompanying text.

70. See *United States v. Jacoby*, 955 F.2d 1527 (11th Cir. 1992) (discussed *infra* note 71 and accompanying text); *Kassel v. Gannett Co.*, 875 F.2d 935 (1st Cir. 1989); *United States v. Hedman*, 630 F.2d 1184 (7th Cir. 1980) (discussed *infra* note 92 and accompanying text); *Levinson v. Basic, Inc.*, 1984 FED. SEC. L. REP. (CCH) ¶ 91,801(N.D. Ohio 1984). In *Levinson*, the court concluded that the records were "kept in the course of a regularly conducted business activity" but made no reference to the regular practice requirement. The court admitted (i) a memo where executive's "normal practice" was to prepare a written record "if something of significance happened" and (ii) a "memory crutch chronology" that the executive maintained "for significant corporate developments" but excluded a board member's memorandum described by him as "sketch list of notes" of a telephone conversation with another board member.

business routinely records other important events. However, it is fair to say that none of these later decisions gives significant additional guidance.

For example, in *United States v. Jacoby*,<sup>71</sup> the Eleventh Circuit rejected an interpretation of 803(6) that would exclude business records not routinely made. In *Jacoby*, defendant objected to the admission under 803(6) of a closing memorandum of loan transactions prepared by Scheer, an associate in a law firm. In the memo, Scheer stated that he had closed the loans at his client Jacoby's direction after advising Jacoby of many document deficiencies and other problems with the loans.<sup>72</sup> Scheer did not make a memorandum of every closing. Rather, the court noted, he dictated memoranda to the file "whenever something about a transaction needed to be explained or noted."<sup>73</sup> The Eleventh Circuit held the memorandum admissible under 803(6), concluding that "the routineness or repetitiveness with which a record is prepared is not the touchstone of admissibility" under 803(6).<sup>74</sup> Thus, the court considered the regular practice requirement satisfied, even though Scheer only frequently (not invariably) prepared memoranda to the file as part of his regular business activity of closing loans, and even though he only made them whenever he "believed it necessary to explain something or make a record of an unusual circumstance."<sup>75</sup>

Unfortunately the *Jacoby* court neither discusses nor indicates that it was aware of the legislative history of the regular practice requirement. Instead of making an independent analysis of 803(6), the court relied on Weinstein's view that "the absence of routineness without more is not sufficiently significant to require exclusion of the record,"<sup>76</sup> a view which, as previously explained,<sup>77</sup> should not be given much credit. To be sure, the court stated that "we are guided by the Advisory Committee Notes to Rule 803(6)."<sup>78</sup> The Note to which the court refers, however, is the Advisory Committee's Note to the Supreme Court's text of 803(6),<sup>79</sup> not the Note to the text of 803(6) as enacted by Congress. The

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71. 955 F.2d 1527 (11th Cir. 1992).

72. *Id.* at 1537.

73. *Id.* at 1536. A real estate paralegal in the law firm testified that more than occasionally Scheer would prepare memoranda; that it was his habit to prepare a memo to the file if something had to be explained. *Id.*

74. *Id.* at 1537. The court, however, does not explain what is the "touchstone of admissibility."

75. *United States v. Jacoby*, 955 F.2d 1536-37 (11th Cir. 1992).

76. *Id.*

77. See *supra* note 36 and accompanying text.

78. *Jacoby*, 955 F.2d at 1537.

79. The portion of the Advisory Committee's Note that "guided" the *Jacoby* court states:

The element of unusual reliability of business records is . . . supplied by . . . actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation . . . . The model statutes and rules have sought to capture these factors and to extend their

Note explains that the model statutes used the phrase "regular course of business" in conjunction with a broad definition of "business." This resulted, the Note states, in an undue emphasis on "a requirement of routineness and repetitiveness and an insistence that other types of records be squeezed into the fact pattern which give rise to traditional business records."<sup>80</sup> Because of this, the Note concludes that the Supreme Court text "adopts the phrase 'the course of a regularly conducted activity' as capturing the essential basis of the hearsay exception . . .,"<sup>81</sup> clearly implying that the Supreme Court text rejected the prior undue emphasis on routineness and repetitiveness. However, since Congress did not pass the Supreme Court's text to which the Note is addressed, but instead added the word "business" to the phrase "the course of a regularly conducted activity,"<sup>82</sup> *Jacoby's* reliance on the Note is misplaced. If the Note provides any guidance, it is that Congress's rejection of the Supreme Court's text and its insistence on the phrase "regularly conducted business activity" are indications that Congress did not intend to change the tendency [of model statutes and rules] to emphasize routineness and repetitiveness under 803(6).<sup>83</sup>

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impact by employing the phrase "regular course of business," in conjunction with a definition of "business" far broader than its ordinary accepted meaning. The result is a tendency unduly to emphasize a requirement of routineness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The rule therefore adopts the phrase 'the course of a regularly conducted activity' as capturing the essential basis of the hearsay exception . . .

*Id.* at 1537-38 (citations omitted in original).

80. *United States v. Jacoby*, 955 F.2d 1527, 1537-38 (11th cir. 1992).

81. *Id.*

82. After Congress enacted 803(6), the Federal Judicial Center published the original Advisory Committee's Note, *FEDERAL RULES OF EVIDENCE ANNOTATED* 140 (Mathew Bender 1975), with the following sentence deleted:

The rule therefore adopts the phrase 'the course of a regularly conducted activity' as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a 'business.'

*FED. R. EVID.* 803(6), advisory committee's note, 56 F.R.D. 183, 308 (1973).

However, it should be noted that the Advisory Committee's Notes published in the United States Code are entitled "Notes of Advisory Committee on Proposed Rules;" that is, the Notes to the Supreme Court's text of 803(6), and they contain this sentence. 28 U.S.C. app. at 898-99 (1994).

83. Leaving aside *Jacoby's* misplaced reliance on the Note, it is doubtful that the relevant portion of Scheer's memorandum was made in the course of a regularly conducted business activity. In memorializing his version of a conversation in which his client allegedly instructed him to close a loan without proper documentation, Scheer appears to have prepared the memorandum primarily to protect himself and his firm in the event the client or a third party challenged his actions in closing the loan. It does not appear to be a memorandum prepared for conducting the firm's primary business, which is to represent clients (here, the closing of loans) or even its own internal business

In any event, *Jacoby* does not explain satisfactorily how Scheer's practice constitutes a "regular practice" and does not attempt to define the words "regular practice." Scheer's actions in making memoranda do not seem to fit any of the basic definitions of the word "regular"; his actions did not conform to a fixed procedure or standard and they were not habitual or certain. The memorandum in question was made only because Scheer believed it prudent to memorialize the clients' instructions, not because he or the firm had an established procedure to memorialize clients' instructions or to make closing memoranda.

The First Circuit's decision in *Kassel v. Gannett Co.*<sup>84</sup> also takes the position that the regular practice requirement may be satisfied in cases where the frequency of record-making depends on the maker's judgment. In *Kassel*, the court approved the admission under 803(6) of VA forms that memorialized telephone contacts with certain Senators' aides based on the maker's testimony that he completed telephone contact forms only in those instances when he perceived the need.<sup>85</sup> Although the court noted that the failure to record every phone call does not require exclusion and that "some degree of discontinuity or selectivity remains permissible," it did so without explaining why the subjective nature of the "practice" to record phone calls satisfied the rule's regular practice condition.<sup>86</sup> The court's allowance for some degree of discontinuity may be understandable but it does not give any guiding criteria. Perhaps discontinuity should not be fatal if, at the very least, the business has an established procedure for recording certain events that on occasion is not followed. However, *Kassel* does not indicate that the VA had a policy requiring employees to fill out a form for each telephone conversation. Under such circumstances, there is no compelling case to consider the telephone forms as having been made pursuant to a "regular practice."

Other circuits that have considered the regular practice requirement have not necessarily admitted documents made as a result of individual judgment. For example, in *United States v. Ramsey*,<sup>87</sup> the Seventh Circuit excluded a desk calendar on which Harvey, a businessman, had taken notes to keep track of his telephone calls to SURE, a company which supposedly was arranging a large loan for him.<sup>88</sup> According to the court, entries made "at the whim of the writer[] do not have the sort of regularity that supports a reliable inference."<sup>89</sup> Harvey's calendar notes were made because of "his desire to record his dealings with SURE," not because he had a consistent pattern of making notes of other

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operations.

84. 875 F.2d 935 (1st Cir. 1989).

85. *Id.* at 944.

86. *Id.* at 945. *Accord* *United States v. Skeddle*, 981 F. Supp. 1069, 1072-73 (D.N.D. 1997). Nor did *Kassel* discuss Congress's intent in adding the regular practice requirement.

87. 785 F.2d 184 (7th Cir 1986).

88. *Id.* at 192-93.

89. *Id.* at 192.

telephone conversations.<sup>90</sup> The Seventh Circuit therefore concluded that the calendar notes were not made with the "regularity" that 803(6) contemplates.<sup>91</sup> Put somewhat differently, in *Ramsey*, the Seventh Circuit seems to interpret 803(6) as requiring a consistent pattern of entries, which is not present if the maker's decision to record is *ad hoc* in nature. However, as in previously examined cases, *Ramsey* fails to set out clear guiding principles.

In *Ramsey*, the Seventh Circuit was faced with its prior decision in *United States v. Hedman*.<sup>92</sup> In *Hedman*, a corporate employee who had been making payoffs to building inspectors for several years voluntarily began recording the payoffs in a notebook and continued to do so for nine years in order to give an accounting to defendant's vice president if he ever demanded one.<sup>93</sup> The court held that the fact that the corporate employee "was not told to keep the diary and did not make it available to others . . . did not affect its admissibility under Rule 803(6)."<sup>94</sup> The court noted that since the employee believed he would be required to account, it was unlikely he would make false entries.<sup>95</sup> Here, as in *Ramsey*, the entries were prompted, to paraphrase *Ramsey*, by the employee's desire to record his dealings with the building inspectors. The entries were

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90. *Id.*

91. *Id.* at 192. The court fully explained:

Miscellaneous jottings should not be admitted under Rule 803(6) just because they have some connection with a regular business. The idea behind Rule 803(6) is that when a record is kept with sufficient regularity, the existence of an entry (or the absence of one) is good evidence that the thing in question took place (or did not take place). Business records are reliable to the extent they are compiled consistently and conscientiously. Occasional desk calendars, in which entries may or may not appear at the whim of the writer, do not have the sort of regularity that supports a reliable inference. This is not to say that desk calendars never may be business records; they may, if they are maintained regularly, without regard to the events subject to the trial, and there is a demonstrable pattern of inclusion or exclusion. Harvey's note-taking evidently was prompted by his desire to record his dealings with SURE, however, and this is not the sort of regularity that allows a court to treat the document as a business record.

*Id.* (citations omitted). Note that the Seventh Circuit used the word "regularity" and not the phrase "regular practice" or "in the course of a regularly conducted business activity." Its discussion might be applicable even if a statutory business records exception did not have an express "regular practice" provision.

92. 630 F.2d 1184 (7th Cir. 1980). The two cases were decided by two entirely different panels.

93. *Id.* at 1197.

94. *Id.* at 1198.

95. *Id.* Perhaps, as the court asserts, the employee was not likely to falsify. However, the employee had no incentive to be accurate. The employee had no risk if his records were not accurate because the employer had no way of checking if all of the cash payments were made and to whom they were made.

made, as in *Ramsey*, at the employee's whim, and it was he who decided whether to make the entry without any established business procedure. Indeed, there is every reason to believe the business probably did not want any record of the payoffs. As in *Ramsey*, there was no showing that the employee had a consistent pattern of making notes of other business contacts or events. The only difference between *Hedman* and *Ramsey* is that the employee in *Hedman*, who decided keep records in the same manner as Harvey, maintained records longer than Harvey. In any event, neither *Ramsey* nor *Hedman* provides workable criteria for determining whether the regular practice requirement has been met.<sup>96</sup>

Apart from the regular practice requirement, it seems questionable, as in *Jacoby*,<sup>97</sup> that the corporate employee made the entries in the course of a regularly conducted business activity. The payoff records suffer from the same impediment as the protective memorandum in *Jacoby*. Here, too, the employee probably made the payoff records to protect himself from any future accusation that he pocketed the monies. Nothing indicates that he made the records to help in the ongoing conduct of his employer's business or because the company wanted a record of such transactions. There was no evidence that he informed anyone at the company that he was maintaining payoff records or that the employer relied or would rely in any way on them.

Neither *Jacoby*, *Kassel*, nor *Hedman* cited *Smith v. Bear*,<sup>98</sup> which the Second Circuit decided under Section 1732. In *Smith*, plaintiff offered in evidence three memoranda prepared by Gill, a bank official, of events that transpired at luncheon meetings Gill attended. The foundation witness testified that Gill had no duty to make such memoranda, that he decided when to make the memoranda depending upon the importance of the incident, and that he might write a memorandum at a time other than when the incident occurred.<sup>99</sup> Recognizing that Section 1732 was intended to bring business practice realities into the courtroom and that the statute should not be interpreted in a "dryly

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96. *Ramsey* also distinguished *United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979). In *McPartlin*, the court admitted an executive's "desk calendar-appointment diary in which he noted "anticipated meetings, telephone calls, personnel matters and [job] bids." *Id.* at 1347. The court stated that these records "were kept as part of a business activity and the entries were made with regularity at or near the time of the described event." *Id.* They also satisfied, in the court's view, "the central rationale" of 803(6) because the executive had to rely on these entries, which he used, for example, to prepare letters or memoranda or to recall a bid. *Id.* The court did not indicate whether the executive recorded all anticipated meetings, bids and phone calls or whether he did so only when he believed that it was important to do so. As to the lack of a company policy to maintain such records, the court said that even if they were not mandated by company policy, they "were kept in accord with the widespread practice of business executives to maintain such records." *Id.* at 1348. See *United States v. Skeddle*, 981 F. Supp. 1069, 1072-73 (N.D. Ohio 1997).

97. See *supra* note 71.

98. 237 F.2d 79 (2d Cir. 1956).

99. *Id.* at 89.



technical way," the Second Circuit nevertheless concluded that the foundation testimony did not establish that "the memoranda were made in the regular course of business".<sup>100</sup>

The test of admissibility of memoranda covered by the business entry rule is the 'regularity' of the business practice in making such a record. This is the standard fixed by the Supreme Court when it said that the basis for the rule is '[t]he probability of trustworthiness of records because they were routine reflections of the day to day operations of a business.' We believe [the] testimony did not establish that degree of regularity which is required by the statute.<sup>101</sup>

*Smith* appears to teach us that where the entrant has discretion to decide when and if a memorandum should be prepared, the "made in the regular course of any business" requirement is not satisfied. Unlike *Jacoby*, *Kessel*, or *Hedman*, *Smith* implicitly emphasizes routineness and established procedures or, in short, "regularity," as the applicable standard. Yet, like the above-mentioned cases, *Smith* is not very informative. It does not expressly define the statute's regularity requirement, nor does it set forth specific guidelines to judge whether a document satisfies the "degree of regularity" that the statute requires.<sup>102</sup>

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100. *Id.* The court acknowledged that "a responsible corporate officer such as Gill might well deem it advisable 'in regular course of any business' to make notes of transactions at such [luncheon] meetings." *Id.* *Smith* seems to treat the "made in the regular course of any business" requirement as including a regular practice component.

101. *Smith*, 237 F.2d at 89 (citations omitted).

102. Many cases have considered the admissibility, under 803(6) and other business record exceptions, of a variety of memoranda, notes, and reports of events, but virtually none have defined regular practice or regular course of business or given clear guidance as to its meaning. See, e.g., *Phoenix Associates III v. Stone*, 60 F.3d 95, 101 (2d Cir. 1995) (holding that plaintiff's written notation that wire transfer it received was for payment where it was shown that there was a "regular practice to get information from the person who created the document"); *Hoselton v. Metz Baking Co.*, 48 F.3d 1056, 1061 (8th Cir. 1995) (holding that an accountant's notes concerning the negotiation of an agreement were admissible under 803(6) to prove that certain statements were made at a conference where he was acting as client's accountant and consultant in transaction and where it was his practice to take notes of meetings which he initialed, dated, and filed were business records); *United States v. Goodchild*, 25 F.3d 55, 61-62 (1st Cir. 1994) (holding that memos of telephone conversations made by credit card company's collections department were admissible under 803(6) because they were made in the course of a regularly conducted activity—telephone investigations of delinquent accounts—and it was standard procedure to have all phone calls "memoed"); *Wheeler v. Sims*, 951 F.2d 796, 803 (7th Cir. 1992) (holding that a report documenting prisoner's physical movements that contradicted his paralysis claim were made in regular course of prison's business because authorities had valid interest in determining whether prisoner's claim was legitimate; no regular practice issues were raised); *United States v. Leo*, 941 F.2d 184, 194 (3d Cir. 1991) (admitting, without explanation, summaries

Strong support for an approach that emphasizes repetitiveness—and rejects individual discretion—may be derived from Rule 803(7),<sup>103</sup> which provides that

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containing conclusions from an audit of firm's subcontracting costs made by finance executive after question arose as to the propriety of such costs; executive testified that audit's goal was to discover truth and the firm refunded millions of dollars to government based on audit); *United States v. Goins*, 593 F.2d 88, 91 (8th Cir. 1979) (admitting memorandum prepared by tavern operator, with daughter's assistance, listing bribe payments to defendant from proceeds of the tavern's operation); *Gibbs v. State Farm Mut. Ins. Co.*, 544 F.2d 423, 428 (9th Cir. 1976) (holding that an insurance company's interdepartment memorandum quoting an independent investigator working for the company that insurer would have settled within the policy limits was admissible under 803(6) in an action for bad faith failure to settle where testimony showed that company had a regular practice of preparing and circulating memoranda relating to a claim); *Hiram Ricker & Sons v. Students Int'l Meditation Soc'y*, 501 F.2d 550, 554 (1st Cir. 1974) (holding that tables of adjustment of numbers of guests prepared by resort owner based on room checks by maintenance employees were inadmissible under Section 1732 because the room checks were "hardly the kind of regular systematic business activity which is encompassed by the exception"); *Pritchard v. MacNeal Hosp.*, 960 F. Supp. 1321, 1325 (N.D. Ill. 1997) (holding supervisors' memoranda of employee's performance problems admissible under 803(6) because company had regular practice of using supervisory evaluations to document employee performance); *In re Drexel Burnham Lambert Group Inc.*, 160 B.R. 729, 734 (Bankr. S.D.N.Y. 1993) (admitting, without discussion of regular practice issue raised by employee, interoffice memo written by Drexel's New York personnel administrator to Drexel's Tokyo office manager reciting separation terms of Tokyo employee as reported by employee's supervisor); *Holmes v. State*, 671 N.E. 2d 841, 858 (Ind. 1996) (holding that a restaurant's night shift manager's handwritten message for day manager was made as part of her routine duties to inform next shift of relevant event occurring on her watch and describing serious discord between defendant who had been fired, and an employee admissible under 803(6) in prosecution of defendant for death of the employee); *People v. Perfetto*, 518 N.Y.S. 2d 662, 664 (N.Y. App. Div. 1987) (admitting, under New York's Model Act, night watchman's report prepared a few days after a murder, offered as evidence that defendant was on plant premises on morning of murder, in murder prosecution where it was shown that night watchman was required to file reports of "unusual" occurrences with his superiors); *Ruegg v. Fairfield Sec. Corp.*, 308 N.Y. 313, 322-23 (N.Y. 1955) (admitting "as made in the regular course of business" memorandum by attorney's secretary reporting on a telephone call from client to attorney's office); *Sullivan v. Carpenter*, 199 P.2d 655, 658 (Or. 1948) (holding that a list of materials used on paint job admissible under UBRE as record made in regular course of business because it consisted of a series of entries regularly made in relation to plaintiff's business and was not a casual or isolated entry); *Crane v. State*, 786 S.W.2d 338, 353 (Tex. Crim. App. 1990) (holding that a transcript of tape recordings of some of defendant's telephone calls while incarcerated not admissible under 803(6) because, among other things, most calls were recorded under a discretionary policy and, thus, transcript was apparently not a regularly conducted activity).

103. FED. R. EVID. 803(7). This rule provides:

Evidence that a matter is not included in the memoranda, reports, records, or data compilations in any form, kept in accordance with the

the absence of an entry in a record kept in accordance with 803(6) may be used to prove the nonoccurrence or nonexistence of a matter if a record of the matter was "regularly made and preserved."<sup>104</sup> It seems evident in this context, where a proponent wants to use the record to prove a negative—that an event did not occur—that the word "regularly" does not mean in the entrant's judgment, or sometimes, or frequently, or even usually.<sup>105</sup> Rather it must mean habitually or invariably. Only if a business has a practice of making a record each time a certain event occurs can one logically infer that the event did not occur when the business's records contain no entry of such an event.

Furthermore, because Rule 803(7) expressly incorporates the provisions of 803(6), a proponent who wishes to invoke 803(7) to prove the nonoccurrence of a matter must show that the business records were "kept" in accordance with Rule 803(6).<sup>106</sup> Thus, the proponent must establish that it was the business's regular practice to record the type of event. Again, in this context, the words "regular practice" must mean habitually or invariably. The incorporation of 803(6) into Rule 803(7) strongly supports an interpretation of the regular practice requirement in 803(6) that is consistent with the interpretation of Rule 803(7).<sup>107</sup>

Apart from 803(7), strong support for defining "regular practice" to mean essentially habitual or invariable may also be found in cases decided under the Model Act. In *People v. Kennedy*,<sup>108</sup> the Court of Appeals interpreted New

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provisions of [803(6)], to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

104. *Id.*

105. *Cf. Armstead v. United States Dept. of H.U.D.*, 815 F.2d 278, 282 n.3 (3d Cir. 1987) (implying that the words "regular practice" are not synonymous with "usual practice").

106. To make sense in the context of 803(7), the word "kept" must mean "made" and "kept," not merely "retained." Congress added the phrase "kept in accordance with the provisions of [803(6)]" to the Supreme Court's draft text of Rule 803(7), *reprinted in* 1974 U.S.C.A.N. 7075, 7088. The phrase, however, seems redundant in light of the explicit provision at the end of 803(7), which reads: "[I]f the matter was of a kind of which a memorandum . . . was regularly made and preserved."

107. *See United States v. Ramsey*, 785 F.2d 184, 192 (7th Cir. 1980) (stating that "the idea behind Rule 803(6) is that when a record is kept with sufficient regularity, the existence of an entry (or the absence of one) is good evidence that the thing in question took place (or did not take place)"). Of course, given the different focus of each rule, courts might feel at liberty to apply them differently, being more lenient in applying the "regular practice" requirement for 803(6) purposes; that is, allowing for some lapses in following established procedures or frequency than for purposes of 803(7). Nonetheless, since the same language, in essence, appears in both, it makes sense that they should basically have the same meaning.

108. 503 N.E.2d 501(N.Y. 1986).

York's version of the Model Act<sup>109</sup> as containing a "double requirement of regularity: (1) that the records be made in the regular course of business<sup>110</sup> and (2) that it be the regular course of business to make the record."<sup>111</sup> The second requirement seems to be the equivalent of 803(6)'s phrase "regular practice." However, in contrast to *Freidin*, *Zenith*, and *Jacoby*, *Kennedy* explicitly defined the "regular course of business to make a record" requirement as meaning "essentially that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record."<sup>112</sup>

*Kennedy* did not refer to the earlier Ninth Circuit decision in *Standard Oil Co. v. Moore*,<sup>113</sup> which interpreted Section 1732 similarly albeit using a different route. In *Standard Oil*, the Ninth Circuit defined the statutory phrase "made in the regular course of any business" using virtually the same language that *Kennedy* did in defining the statutory requirement that it be the "regular course of such business" to make the document. The Ninth Circuit concluded that a document is "made in the regular course of any business" within the meaning of Section 1732 if "it [is] made pursuant to established company procedures for the systematic or routine and timely making and preserving of company records."<sup>114</sup>

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109. N.Y. C.P.L.R. 4518(a) (McKinney 1992).

110. *Kennedy*, 503 N.E.2d at 508-09. It defined the "made in the regular course of business" requirement to mean that the record "reflects a routine, regularly conducted business activity . . . needed and relied on in the performance of functions of the business." *Id.* at 509.

111. *Id.* at 507-08.

112. *Id.*

113. 251 F.2d 188 (9th Cir. 1958).

114. *Id.* at 215. Note that New York added the word "habitual" between the words "systematic" and "routine" after reversing their order. See *supra* note 112 and accompanying text. See also *Continental Bakery Co. v. United States*, 281 F.2d 137, 148 (6th Cir. 1960) (holding that written reports were admissible as having been made in regular course of business because Continental had an "established policy" for depot managers to report on competitors field activities).

The Ninth Circuit concluded that the proponent had not established an adequate foundation for the admission of the typical day-to-day intra-company memoranda that businesses churn out. It observed that the absence of an established procedure for the systematic routine and timely making and preserving of company records was "self-evident" because:

They were patently intended as communications between employees, and not as records of company activity. Many of them were casual and informal in nature, seeking or providing information of a kind which could be, and no doubt often was, communicated by telephone or in conference. Most of them were apparently written as a result of the exercise of individual judgment and discretion.

*Standard Oil*, 251 F.2d at 215. The court hastened to say that "informal memoranda, prepared for the purposes of recording company acts . . . would be admissible." *Id.* at 223 n.35.

The Ninth Circuit has continued the *Standard Oil* approach under 803(6). See,

Given that Congress specifically added the regular practice requirement to the Supreme Court's draft text and that a similar requirement is found in 803(7), it would be reasonable to define "regular practice" to mean "essentially that the record be made pursuant to established procedures for the routine, habitual, systematic making of such record."<sup>115</sup> Even under this definition, courts no doubt would differ in applying the rule to given situations. Some courts might stretch the criteria for admissibility to cover cases in the grey area,<sup>116</sup> and there will always be cases that test the outer limits of the definition. For the most part, application of this definition should not limit, at least in federal courts, the general admissibility of trustworthy documents. To be sure, it will limit their admissibility under 803(6). But, for the most part, business records should be

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e.g., *City of Long Beach v. Standard Oil Co.*, 46 F.3d 929, 937 (9th Cir. 1995) (no showing that notes were made pursuant to company procedures and relied upon by company); *Monotype Corp. PLC v. Int'l Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994); *United States v. Foster*, 711 F.2d 871, 882 (9th Cir. 1983); *Clark v. City of Los Angeles*, 650 F.2d 1033, 1037 (9th Cir. 1981). In *Monotype*, 43 F.3d at 450, the Ninth Circuit, without citing its *Standard Oil* decision, concluded that an E-mail transmission from an employee to his superior is not admissible under 803(6) because such messages are not made in the course of regularly conducted business activity. It distinguished its decision in *United States v. Catabran*, 836 F.2d 453 (9th Cir. 1988), which admitted computer printouts of bookkeeping records entered into the computer monthly, stating:

The difference between *Catabran* and the present case is that E-mail is far less of a systematic business activity than a monthly inventory printout. E-mail is an ongoing electronic message and retrieval system whereas an electronic inventory recording system is a regular, systematic function of bookkeeping prepared in the course of business.

*Monotype*, 43 F.3d at 450. The Third Circuit, however, refused to adopt the *Standard Oil* approach under 803(6), at least to the extent that *Standard Oil* requires the proponent to show an established procedure. See *supra* note 49 and accompanying text. See also *Scanlon v. Hartman*, 579 P.2d 851, 854 (1978) (discussing the UBRE, the court said that "[t]he phrase 'regular course of business' means the records must be made regularly in addition to being incident to a business").

115. *Kennedy*, 503 N.E.2d at 507-08.

116. See, e.g., *United States v. Foster*, 711 F.2d 871, 882 (9th Cir. 1983) (holding that a drug dealer's ledger in which she entered "most of her large drug transactions" was admissible under 803(6) against one of defendant; fact that dealer did not record every sale and that the ledger was an incomplete record of that defendant's drug dealing did not alter accuracy of other entries); *United States v. Skeddle*, 981 F. Supp. 1069, 1072-73 (N.D. Ohio 1997) (holding that although accounting firm had no formal policy requiring note taking at client meetings, employees customarily took notes when they wanted to have a record for future reference; court admitted certain notes stating that the note taking "was a regular, although not universally followed, business practice").

admissible under Rule 807,<sup>117</sup> 803(1),<sup>118</sup> or some other hearsay exception,<sup>119</sup> depending on the circumstances.

To some degree, the regular practice requirement overlaps with the other regularity requirement—that the record be made in the course of a regularly conducted business activity or in the regular course of business. As seen, *Kennedy* defined “regular practice” in virtually the same terms as *Standard Oil* defined “made in the regular course of business.” Indeed, the same facts may establish that a document does not meet either of the regularity requirements.<sup>120</sup>

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117. FED. R. EVID. 807. This rule, commonly known as the residual exception or catchall provision, provides:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule, 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 declarant.

*Id.* See, e.g., *United States v. Ismoila*, 100 F.3d 380, 392-94 (5th Cir. 1996) (holding bank personnel’s computer record of credit cardholder’s oral statements not admissible under 803(6) to prove the truth of the statements, but admissible under the residual exception); *United States v. Nivica*, 887 F.2d 1110, 1127 (1st Cir. 1989); *Karme v. Comm’r*, 673 F.2d 1062, 1064-65 (9th Cir. 1982) (holding foreign bank’s records not admissible under 803(6) because witness not qualified to lay proper foundation, admitted under catchall provision); *United States v. American Tel. and Tel. Co.*, 516 F. Supp. 1237, 1240-42 (D.D.C. 1981). A proponent must be diligent to comply with the residual exception’s notice provision or risk forfeiting the right to rely on it. See, e.g., *United States v. Pelullo*, 964 F.2d 193, 202 (3d Cir. 1992).

118. FED. R. EVID. 803(1). This rule provides that “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter” will not be excluded even though the declarant is available as a witness. See, e.g., *United States v. Kehoe*, 562 F.2d 65, 70 (1st Cir. 1977); *United States v. Ferber*, 966 F. Supp. 90, 99 (D. Mass. 1997) (E-mail message inadmissible under 803(6) admitted under 803(1)).

119. See e.g., FED. R. EVID. 803(5) (recorded recollection); *United States v. Ramsey*, 785 F.2d 184, 192-93 (7th Cir. 1986); *Good v. A.B. Chauce Co.*, 565 P.2d 217, 222 (Colo. Ct. App. 1977); see also *State v. Ross*, 714 P.2d 703, 705-06 (Wash. Ct. App. 1986) (holding that statements on 911 tape recording not admissible under business records exception admissible as excited utterances).

120. See *State v. Perniciaro*, 374 So. 2d 1244, 1247 (La. 1979) (applying a restrictive formulation of the common law business records exception, court excluded records that “were not kept and checked with a degree of habit, system, regularity and

Except for *Kennedy*, virtually no case separately and specifically defines both of these requirements. There are, of course, cases that define "made in regular course of any business" in some manner.<sup>121</sup> Basically, these definitions are based on the Supreme Court's statements in *Palmer v. Hoffman*.<sup>122</sup> According to *Palmer*, a document is "made in the regular course of business" if it is the type of document that is "made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls."<sup>123</sup> This definition does not include records of events or occurrences that have "little or nothing to do with the management or operation of the business as such," even if the business has established procedures for recording such events and occurrences.<sup>124</sup> As the Supreme Court said, only business records which are "routine reflections of the day-to-day operations of a business" are presumed to be trustworthy.<sup>125</sup> Thus, the phrase "regular course of business" must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.<sup>126</sup>

From *Palmer*, it would appear that the business records exception should only cover events that are not unusual or outside the daily business routine. As *Kennedy* said, "made in the regular course of business" means "essentially that

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continuity which would prevent casual inaccuracies and counteract the possible temptation to misstatements"); *infra* note 129 and accompanying text. Cases might not make clear whether they are speaking of both or only one of the regularity requirements. See *Hiram Ricker & Sons v. Students Int'l Meditation Soc'y*, 501 F.2d 550, 554 (1st Cir. 1974) (stating that "a crucial aspect of the business records exception is that entries be prepared as a regular part of the business"); *infra* note 128 and accompanying text.

121. See *Koppinger v. Cullen Schiltz & Assocs.*, 513 F.2d 901, 907 (8th Cir. 1975); *Gass v. United States*, 416 F.2d 767, 772 n.19, (D.C. Cir. 1969); *Thomas v. Hogan*, 308 F.2d 355, 358 (4th Cir. 1962) (stating that "to the extent that a record describes a usual routine operation of business, it is considered trustworthy. But outside the area of such usual business routine, no presumption of verity attaches.") (citing *Palmer v. Hoffman*, 318 U.S. 109, 111-15 (1943)); *State v. Garlick*, 545 A.2d 27, 32 (Md. 1988); *Williams v. Alexander*, 129 N.E.2d 417, 418-19 (N.Y. 1955).

122. 318 U.S. 109 (1943).

123. *Id.* at 113.

124. *Id.* The Supreme Court emphasized that the Act applies to regular course of business and not to regular course of conduct which may have some relationship to business. *Id.*

125. *Id.* at 113-14.

126. *Id.* at 115. *Palmer's* definition incorporates elements which others may include as part of the "regular practice" requirement, such as routineness or systematic recording. *Kennedy*, on the other hand, defined "made in the regular course of business" solely in terms of the nature of the business activity—essentially that the record "reflect a routine regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business." *People v. Kennedy*, 503 N.E.2d 501, 507 (N.Y. 1988).

it reflects a routine, regularly conducted business activity and that it be needed and relied on in the performance of functions of the business.”<sup>127</sup> Records of isolated or unusual events, therefore, may be excluded because by definition they are not “made in the regular course of business.” Such records may also be excluded on the ground that they do not satisfy the regular practice requirement.<sup>128</sup> Thus, a document that records an unusual or isolated event may arguably be excluded because either (i) the event did not occur in the course of a regularly conducted business activity or (ii) the regular practice requirement is not satisfied.<sup>129</sup>

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127. *Kennedy*, 503 N.E.2d at 508-09. See *Thomas v. Hogan*, 308 F.2d 355 (4th Cir. 1962); *Crowder v. Aurora Coop. Elevator Co.*, 393 N.W.2d 250, 258 (Neb. 1986) (holding that “the activity recorded must be a type which regularly occurs in the course of the business’s day-to-day activity”). But see *Birch v. Township of Drummer*, 487 N.E.2d 798, 806 (Ill. App. Ct. 1985) (holding that record made in response to act which never previously occurred may be admissible if made in the regular course of business); *Newark Elects. Corp. v. City of Chicago*, 264 N.E.2d 868, 873 (Ill. App. Ct. 1970) (admitting under Illinois Model Act, water damage calculation over objection that it was not made in the regular course of business because it was not the business of the entity whose property was damaged to prepare such compilation-computation). In *Newark*, the Illinois appeals court rejected the concept that the recording of an isolated event cannot satisfy the business record exception. The court explained:

[I]n our opinion, prior, regular floodings are not a precondition for the admission of a compilation-computation of a business’s first experience with a disaster in order to make such admissible within the confines of Rule 236. Being in business—any kind—demands records for the routine day-by-day transactions, but regular, in our opinion, need not be day-by-day as to transactions or events that do not occur and have not occurred. A given event, transaction, or occurrence may occur only once and simply because it has never happened before it is not a contradiction to say that in making a record of such event, transaction or occurrence, singular though it may be, it was not made in the regular course of business.

*Id.*

128. See *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 588 F.2d 24, 31 (2d Cir. 1978) (holding that a list of customers that plaintiff allegedly lost to defendant as a result of defendant’s pricing policy “presents a close question of admissibility” because the “list [was] compiled under the special circumstances of [defendant’s] price cut rather than a record kept as a ‘regular practice’ of the plaintiff’s business”).

129. Unless the court, in excluding a document, discussed each foundation requirement separately, it may be difficult to determine on which ground the document was excluded. See *O’Malley v. United States Fidelity and Guar. Co.*, 776 F.2d 494, 500 n.2 (5th Cir. 1985) (holding that an engineer’s report on the causes of mudslides inadmissible because evidence did not establish that the engineering firm regularly wrote reports on the causes of mudslides); *United States v. Lemire*, 720 F.2d 1327, 1350-51 (D.C. Cir. 1983) (holding inadmissible memoranda detailing history of contracts company awarded because the company did not have a regular practice to make such memoranda) (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943)). Practically speaking, it should make no difference which theory a court uses, except perhaps in a jurisdiction



A blanket rule that a document recording an isolated or unusual event is not admissible under 803(6) would appear quite extreme. At times, a business routinely records events that transpire during the course of business without differentiating between usual and unusual occurrences. For example, a night business manager may record all events of which the business's day manager should be aware, or a secretary may record all messages even if the message is unusual.<sup>130</sup> In such cases, the frequency with which the event occurs should not be controlling. In other words, a document should not be excluded simply because the document records unusual or isolated events if such events are recorded in the usual routine of the business. As in all situations, a court should consider each foundation requirement separately to determine whether the document satisfies all of the requirements.

An examination of two other hypothetical situations proves helpful. Suppose that a laboratory performs a test that it has never performed before and records the results pursuant to the laboratory's established procedure for the systematic, routine, and habitual recording of all lab tests. Is the lab test record admissible under the business records exception? Or, suppose an appraisal firm which regularly appraises industrial buildings is asked to appraise an office building. Is the appraisal's company's written appraisal of the office building admissible if the appraisal firm's established procedure is to prepare a written report of every appraisal it performs? In other words, assuming that the laboratory and appraisal firm have the necessary expertise to do the lab test or the appraisal, should the lack of experience in performing the test or doing the appraisal mean that either of the regularity requirements has not been met?<sup>131</sup> In these two hypothetical situations, there is much to be said for the argument that the lab test and appraisal report meet the regular practice requirement because they were prepared pursuant to established procedures for recording the work done by the lab and the appraisal firm. But do they meet the other regularity requirement? It may be that until it can be said that the lab is in the business of performing such a test and the appraisal firm is in the business of appraising industrial buildings, the lab test record and the appraisal report would not satisfy the regularity requirement of having been "made in the course of a regularly conducted business activity." Yet, if the lab and appraisal firm have the expertise but not the experience, it is arguable that such reports were "made in

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which has no explicit "regular practice" requirement and which does not interpret the phrase "made in the regular course of business" as including a regular practice requirement.

130. See, e.g., *Holmes v. State*, 671 N.E.2d 841, 858 (Ind. 1996) (holding that night manager's note to day manager describing personnel problems admissible because note was prepared "as part of her routine duties to inform the next shift supervisor of relevant events occurring under her supervision").

131. These reports, of course, might still be excluded under 803(6)'s "lack of trustworthiness" provision.

the regular course of business," if the respective organizations intended to continue to do business in these areas.

The outer limits imposed by the business records exception's regularity requirements cannot be precisely delineated. There will always be cases that do not fall into any clear category and that test the outer limits of admissibility. Some stretching of those limits may be necessary to cover cases that arguably are in the gray area. Courts should be cautious, however, not to stretch those limits and increase confusion in this area. Unlike 807's catchall provision,<sup>132</sup> the business records exception has no advance notice provision.<sup>133</sup> The need for predictability is therefore all the more important. Certainly in those jurisdictions that have a catchall provision such as 807, or have implemented a like provision through case law,<sup>134</sup> there is no legitimate or compelling reason to stretch the limits of the business records exception.

Finally, parties who want documents excluded must discover the facts necessary to establish a lack of regularity during the pre-trial stage.<sup>135</sup> This is particularly important in jurisdictions permitting admission of documents upon written certification<sup>136</sup> because such certifications always use conclusory language. Thus, if opponents desiring to exclude a document have appropriately prepared themselves during the pre-trial stage, they will be in a position to make a factual showing that the document does not satisfy the exception's foundation requirements. Similarly, attorneys who are not hesitant to object at trial to foundation questions seeking to elicit a conclusory answer will be prepared to voir dire the foundation witness.

### III. BUSINESS DUTY REQUIREMENT

#### *A. Duty to Report*

Most codifications of the business records exception do not explicitly require a showing that the person who furnished the information (declarant) to the entrant acted under a business duty to report; that is, acted in the regular

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132. See e.g., FED. R. EVID. 807; see also *supra* note 103.

133. See *supra* note 12.

134. See, e.g., *State v. Sharpe*, 491 A.2d 345, 354 (Conn. 1985) (holding that information in a business record which was furnished by a volunteer who had no duty to report it admissible "because it contained sufficient indicia of reliability and trustworthiness and because it was necessary to the resolution of the case"). Connecticut codified the catchall provision in 1997. CONN. GEN. STAT. § 52-180 (1997).

135. Attorneys might be surprised by how unprepared deponents are to answer questions concerning the regularity of their practice in making memoranda or other records.

136. See, e.g., ALASKA R. EVID. 902(11); KY. R. EVID. 902(11); MD. R. EVID. 5-902(a)(11); TEX. R. CIV. EVID. 902(10).

course of business.<sup>137</sup> The phrase "made in the regular course of any business," however, implicitly imposes such a requirement if it is interpreted to include not only the entrant's actions but also those of the declarant. That is, "made" is construed to cover the actions of all those whose participation is essential to produce the written record. New York's landmark case of *Johnson v. Lutz*, which has been widely followed, filled the void.<sup>138</sup> *Johnson* firmly established

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137. This requirement is explicitly included in the Supreme Court's draft text of 803(6) and the version of the business records exception adopted in Alaska, ALASKA R. EVID. 803(6) (information must be supplied by "a person with knowledge acquired of a regularly conducted business activity"); Arizona, ARIZ. R. EVID. 803(6) (information supplied must be "acquired in the course of a regularly conducted activity"), Louisiana, LA. CODE EVID. ANN. 803(6) ("[t]his exception is inapplicable unless the recorded information was furnished to the business either by a person who was routinely acting for the business in reporting the information" or is otherwise not excluded by the hearsay rule); and Tennessee, TENN. R. EVID. 803(6) (information must be supplied "by a person with knowledge and a business duty to record or transmit"). See *supra* note 142.

138. *Johnson v. Lutz*, 170 N.E. 517, 519 (N.Y. 1930) (holding that police accident report of accident not admissible under New York's business records exception because witnesses furnishing the information were not acting under a duty to furnish it). *Accord* FED R. EVID. 803(6) advisory committee's note, 56 F.R.D. at 308-09; *Cameron v. Otto Bock Orthopedic Indust., Inc.*, 43 F.3d 14, 16-17 (1st Cir. 1994); *Gray v. Busch Entertainment Corp.*, 886 F.2d 14, 15 (2d Cir. 1989); *United States v. Bortnovsky*, 879 F.2d 30, 34 (2d Cir. 1989); *United States v. Pazsint*, 703 F.2d 420, 424-25 (9th Cir. 1983); *United States v. Burruss*, 418 F.2d 677, 678-79 (4th Cir. 1969); *United States v. Grayson*, 166 F.2d 863, 869 (2d Cir. 1948); *Taylor v. Centennial Bowl, Inc.*, 416 P.2d 793, 800-801 (Cal. 1966); *Thirsk v. Ethicon*, 687 P.2d 1315, 1319 (Colo. Ct. App. 1983); *State v. Sharpe*, 491 A.2d 345, 353 (Conn. 1985); *Meaders v. United States*, 519 A.2d 1248, 1255 (D.C. 1986); *Eichholz v. Pepo Petroleum Co.*, 475 So. 2d 1244, 1245-46 (Fla. Dist. Ct. App. 1985); *Alexander v. Commonwealth*, 862 S.W.2d 856 (Ky. 1993); *Wingate v. Emery Air Freight Corp.*, 432 N.E.2d 474, 478 (Mass. 1982); *Sas v. Strelecki*, 264 A.2d 247, 250 (N.J. Super. Ct. App. Div. 1970) (stating that declarant must be under "business duty to supply honest information"); *Fagan v. City of Newark*, 188 A.2d 427, 439-40 (N.J. Super. Ct. App. Div. 1963); *Synder v. Portland Traction Co.*, 187 P.2d 563, 566 (Or. 1947); *TXO Production Corp. v. Alliance Resource Corp.*, 419 S.E.2d 870, 885 (W.Va. 1992). But see *Bondie v. Bic Corp.*, 947 F.2d 1531, 1534 (6th Cir. 1991); *Downing v. Overhead Door Corp.*, 707 P.2d 1027, 1031 (Colo. Ct. App. 1985); *State v. Brunette*, 501 A.2d 419, 426 (Me. 1985); *Pencom Sys., Inc. v. Shapiro*, 658 N.Y.S.2d 258, 259 (N.Y. App. Div. 1997) (holding that a recruiter's notes of information provided by job applicant concerning reasons for job change, job requirements, and the like, admissible under C.P.L.R. 4518 because applicant's desire to secure better position, the recruiter's reliance on the information, and applicant's awareness of that reliance "created an equivalent business duty" on applicant's part to respond accurately to recruiter's questions). None of these factors, however, seems to provide a logical basis for the New York court's conclusion that a business duty was created. For example, how does an applicant's desire for a better job point to creation of a business duty to the prospective employer? The applicant is still nothing more than a prospective employee who would be expected to act in her own interests.

the principle that a memorandum or record is admissible under the business records exception to prove the truth of the matter asserted in the document only if the declarant was under a business duty to report the information;<sup>139</sup> that is, if

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When Congress amended the Supreme Court text to add a regular practice requirement, it deleted the phrase "in the course of a regularly conducted activity" and substituted the phrase "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." However, it does not appear that Congress intended to make any change other than to add the regular practice requirement and the word "business" before the word "activity." See VT. R. EVID. 803(6) reporter's notes (rejecting construing Congress's changes to Supreme Court's text of 803(6) as eliminating the requirement of a business duty to transmit). The Congressional Committee Reports neither mention the business duty requirement nor do they indicate that Congress intended to reject it. Further, since 803(6) as passed does contain the phrase "if kept in the course of a regularly conducted business activity," which is similar to the language in Section 1732, the drafters probably assumed that the business duty requirement was encompassed within that phrase. The Advisory Committee's Note to 803(6) is not very relevant to this issue; it addressed the Supreme Court's text of 803(6), not the final version, and the Advisory Committee did not change its Note after 803(6) was enacted. *But see* United States v. Reyes, 157 F.3d 949 (2d Cir. 1998) (stating that "the requirement of a business duty is not in the language of 803(6) but it has long been recognized as the principal means of establishing the reliability of a hearsay statement offered under the rule"); Bondie v. Bic Corp., 947 F.2d 1531, 1534 (6th Cir. 1991) (stating that "unlike some state rules . . . 803(6) does not require that the declarant have a duty to supply the information").

Some courts admit documents under the business records exception without focusing on, or by overlooking, the business duty issue. See, e.g., United States v. Pent-R-Books, Inc., 538 F.2d 519, 529 (2d Cir. 1976).

139. If the declarant was not under a duty to report, but the entrant was under a business duty to record, then the memorandum or record may be admitted under the business records exception, but only to prove that the declarant made the statement, not to prove the truth of the declarant's statement, unless the declarant's statement satisfies some other hearsay exception. A simple hypothetical will illustrate this point. Suppose that A, an employee of X Co., made a memorandum which states that she was told by B that two of X's factories were shut down for one day in 1997. If B were an employee of X and had firsthand information, the memorandum would be admitted under the business records exception to prove the truth of the matter that B asserted—that two of X's factories were shut down for one day in 1997. If B were not an employee, but a newspaper reporter, the memorandum would present a multiple hearsay problem. The memorandum itself would still be admissible under the business records exception to prove only that B, the newspaper reporter, made the statement, but *not* to prove the truth of the matter asserted in the statement—that two of X's factories were shut down for one day in 1997—unless the reporter's statement satisfied another exception. See United States v. Ismoil, 100 F.3d 380, 392-93 (5th Cir. 1996); United States v. Smith, 521 F.2d 957, 964-65 (D.C. Cir. 1975); United States v. Bohle, 445 F.2d 54, 62-63 (7th Cir. 1971); United States v. Burruss, 418 F.2d 677, 678 (4th Cir. 1969) (holding police report admissible to show car reported stolen, but not to prove it was stolen); Thirsk v. Ethicon Inc., 687 P.2d 1315, 1319 (Colo. Ct. App. 1983) (holding complaint forms admissible

the declarant was acting in "the regular course of business."<sup>140</sup> Put differently, a document is not "made in the regular course of business" if the supplier of the information to the entrant is an outsider, as distinguished from a person acting under a business duty.<sup>141</sup> As the Advisory Committee's Note to 803(6) explains, if the information supplier is not acting in the regular course of business, "an essential link is broken," and the assurance of accuracy does not extend to the information itself . . . ."<sup>142</sup>

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to prove truth of the matter asserted if persons who transmitted information were acting under a business duty to report; if not, forms admissible only to show complaints were made); *Morrow v. Bofferding*, 581 N.W. 2d 696, 700-01 (Mich. 1998); *Toll v. State*, 299 N.Y.S.2d 589 (N.Y. App. Div. 1969). Needless to say, a business duty to report includes the duty to supply honest information.

140. See *United States v. Bohle*, 445 F.2d 54, 62 (7th Cir. 1971); *Standard Oil Co. v. Moore*, 251 F.2d 188, 214 (9th Cir. 1957); *United States v. Grayson*, 166 F.2d 863, 869 (2d Cir. 1948). As The Ninth Circuit said in *Standard Oil*: "Where the information comes to the entrant or maker from unauthorized persons, the memorandum or record is therefore inadmissible, not because it contains hearsay, *but because it was not made in the regular course of business.*" *Standard Oil*, 251 F.2d at 214 (emphasis added). See also ALA. R. EVID. 803(6), advisory committee's note ("Rule 803(6) does require that one transmitting information that another records in the regular course of business must have 'knowledge' of the facts communicated . . . . Equally clear is the fact that the person transmitting the information must be doing so in conformance with regular business practice."); *Johnson v. Lutz*, 170 N.E. 517 (N.Y. 1930); *Snyder v. Portland Traction Co.*, 185 P.2d 563, 566 (Or. 1947).

141. See *infra* note 150 and accompanying text.

142. 56 F.R.D. at 308-09. More fully, the Note explains:

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; 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 avail. An illustration is the police report incorporating information obtained from the bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson v. Lutz*, . . . held that a report thus prepared was inadmissible. Most of the authorities have agreed with this decision . . . .

*Id.* See also *Johnson*, 170 N.E. at 519 ("An important consideration leading to the amendment [enacting the Model Act] was the fact that in the business world credit is given to records made in the course of business by persons who are engaged in the business upon information given by others engaged in the same business as part of their duty.").

If a document is made pursuant to a duty imposed by law, is such a document made in the regular course of business? Compare *Mathews v. United States*, 217 F.2d 409, 413-15 (5th Cir. 1954) (excluding such documents under Section 1732) and *United States v. Veytia-Bravo*, 603 F.2d 1187, 1191 (5th Cir. 1979) (admitting such documents

Courts have relaxed the business duty requirement in several instances, each of which raises questions. To begin with, courts purport to relax the requirement either: (1) where the business-entrant verified the information furnished by a declarant who is not under a business duty, or (2) where other adequate guarantees of trustworthiness exist.<sup>143</sup> Thus, for instance, a hotel registration card will be admitted under 803(6) to prove the truth of the matter recorded; that is, to prove the identity of the person registered, if the hotel employee verifies the information "for example, by examining a credit card, driver's license, or other form of identification."<sup>144</sup> Implicit is the assumption that the hearsay

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under 803(6)) with *Lewis v. Baker*, 526 F.2d 470, 473-74 (2d Cir. 1975). The answer, it seems, should depend on whether the business made the record solely for the purpose of complying with a legal duty to make such records or whether the business also intended to use it as a record of its business activities. If the business intended to use the document in the same manner as it does any of its other business records, then it should be admissible under the exception. If however, the document was made solely for purposes of complying with a legal duty, it should not be deemed a record made in the regular course of business. See *Starkovich v. Noye*, 529 P.2d 698, 704 (Ariz. 1974).

143. *United States v. David*, 96 F.3d 1477, 1482 (D.C. Cir. 1996) (company required photo identification); *United States v. Sokolow*, 91 F.3d 396, 403 (3d Cir. 1996); *United States v. Mitchell*, 49 F.3d 769, 778 (D.C. Cir. 1995) (questioning whether verification procedures were sufficient to verify recipient's actual receipt but concluding that any error was harmless); *United States v. Console*, 13 F.3d 641, 657 (3d Cir. 1993) (holding that entrants had personal knowledge or made entry based on existing history charts which themselves would be admissible business records); *United States v. McIntyre*, 997 F.2d 687, 700 (10th Cir. 1993) (admitting motel registration card where identity of guest verified by examining driver's license); *United States v. Bland*, 961 F.2d 123, 127 (9th Cir. 1992) (form identifying person as purchaser of gun); *United States v. Patrick*, 959 F.2d 991, 1001 (D.C. Cir. 1992) (holding that 803(6) does not require that declarant be under a business duty to provide accurate information; sufficient if proponent shows that standard practice was to verify information or that information satisfies another exception); *United States v. Zapata*, 871 F.2d 616, 625 (7th Cir. 1989) (hotel guest registration record); *United States v. Lieberman*, 637 F.2d 95, 101 (2d Cir. 1980).

144. *Lieberman*, 637 F.2d at 101. See also *United States v. McIntyre* which would include cases where there has been no verification, but other adequate guarantees of trustworthiness exist. 997 F.2d at 687, 700. The court said:

[T]he fact that the name on the registration was obtained from an actor not under a business compulsion does not necessarily mean the business records exception is inapplicable. If the business entity has adequate verification or other assurance of accuracy of the information provided by the outside person, the exception may still apply. Some courts have required that the business employee recording the information be 'able in some way to verify the information provided—for example, by examining a credit card, driver's license, or other form of identification.' We do not feel that in every case there must be direct testimony that an employee actually verified the information, nor is it necessary that there be an express policy that identification be checked. In some cases, the interests of the business may be

within hearsay problem<sup>145</sup> is solved by the verification procedure or some additional guarantees of trustworthiness. None of the cases, however, explains how these verification procedures or additional trustworthiness guarantees in fact eliminate the multiple hearsay problem; indeed, it seems that in most cases they do not eliminate it.

For analysis purposes, let us use the hotel guest registration card. To the extent the guest furnished the information, the registration card should be inadmissible because the guest was under no business duty, and thus the registration card was not "made in the course of a regularly conducted business activity." This leaves the verification procedures. The flaw in considering these procedures sufficient for purposes of 803(6) is that 803(6) also requires that the record be made "from information transmitted by a person with knowledge."<sup>146</sup> When the entrant verifies the recorded information from a license or credit card, however, the entrant's knowledge is plainly second-hand or hearsay and does not satisfy the rule's personal knowledge requirement.<sup>147</sup> For the entrant knows only what he was "told" by the license or credit card, which in turn is connected to the guest only by the guest's implicit or explicit statement that the license or credit card is his. Here too the guest's statements should not be considered sufficient for purposes of the business records exception because, in vouching for the license or credit card, the guest is not acting under a duty. In sum, courts should not view the verification procedures as a substitute for the business duty requirement; rather, such procedures must be tested in 803(6)'s personal knowledge requirement. If they satisfy it, the documents should be admissible; but if they do not, courts should exclude them and should not substitute other criteria for those of 803(6).

It may be answered that the requirement of a business duty to report does not spring from the express requirement that the document be made in the regular course of business but is an independent court-imposed requirement to further ensure the accuracy of the record.<sup>148</sup> If the rule is viewed in this manner,

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such that there exists a sufficient self-interest in the accuracy of the log that we can find its contents to be trustworthy. However, in the instant case we do not find adequate guarantees of trustworthiness in the financial self-interests of the motel. Moreover, there was no evidence either that the identity of the individual claiming to be Vickie Hogg was actually checked or that there was a policy to do so. Nor do we find it persuasive that a motel employee transcribed the information rather than the guest.

*Id.* (citations omitted).

145. *See supra* note 139.

146. *See supra* note 12.

147. Unless the license, credit card, or other document used for verification purposes is a self-authenticating document. *See e.g.*, FED. R. EVID. 902(1).

148. *See United States v. Reyes*, 157 F.3d 949 (2d Cir. 1998) ("The requirement of a business duty is not in the language of 803(6), but it has long been recognized as the principal means of establishing the reliability of a hearsay statement offered under the

courts may relax their self-imposed requirement when the entrant verifies the outsider's information, even if the verification is based on hearsay sources. However, if the business duty rule is not encompassed within the language of 803(6), then the proponent should not have the burden of proving that the business duty requirement or its equivalent is satisfied. For under 803(6), the proponent only has the burden of proving the foundation requirements contained in the rule. Put differently, there is no statutory basis to impose on the proponent the additional burden of satisfying a business duty requirement unless it is an inherent part of the "made in the regular course of any business" foundation requirement. If it is not, that is, if the business duty requirement is imposed independent of the exception's codified requirements, then it seems that the burden should be on the opponent to show the lack of a business duty or its equivalent as part of the opponent's burden under 803(6) to show a lack of trustworthiness.

In any event, the business duty requirement should be viewed as inherent in the "made in the regular course of any business" requirement,<sup>149</sup> not as a requirement imposed in addition to the foundation requirements contained in the codified language of the exception. *Johnson v. Lutz* makes this clear.<sup>150</sup> After reviewing the history and purpose of the Model Act, the *Johnson* court concluded that the business records exception was not intended to apply to a memorandum made from information imparted by a person who was not acting under a duty to report.<sup>151</sup> It therefore excluded a police report based on information imparted by volunteers because—and this is the key—"[t]he memorandum in question was not made in the regular course of any business . . . ."<sup>152</sup> In sum, the business duty requirement should be treated as nothing less than an integral part of the "made in the regular course of any business" requirement. Thus, a document prepared from information supplied by a declarant not under a business duty should not be admissible because it does not satisfy that regularity requirement.

*White Industries, Inc. v. Cessna Aircraft Co.*<sup>153</sup> would relax the business duty requirement where the outsider-declarant has a contractual duty to the entrant to furnish the information. In *White Industries*, the plaintiff offered into evidence forms that Cessna had initially prepared identifying each aircraft it manufactured and leaving space for the distributors or dealers to fill in

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rule."); *Bondie v. Bic Corp.*, 947 F.2d 1531, 1534 (6th Cir. 1991) ("Unlike some state rules of evidence, Federal Rule of Evidence 803(6) does not require that the declarant have a duty to supply the information . . . .").

149. In States that have expressly included the business duty requirement in their codifications of the exception, verification from outside sources should certainly not be acceptable. See *supra* note 15.

150. *Johnson v. Lutz*, 170 N.E. 517, 518 (N.Y. 1930); see also *supra* note 140.

151. *Id.*

152. *Id.*

153. 611 F. Supp. 1049 (W.D. Mo. 1985).



information about the monthly status of each aircraft in their hands. The distributors and dealers completed and returned the forms to Cessna pursuant to a reporting obligation imposed by Cessna's standard contract with each of them. Cessna used the completed forms for planning production schedules.<sup>154</sup> Defendant objected to their admissibility under 803(6) because the recorded information allegedly came from an outside source.

Recognizing that "existing case law provides little real analytical guidance," the district court viewed the problem from a trustworthiness perspective.<sup>155</sup> It distilled from the employer-employee and principal-agent relationship the factors that it believed gave written business reports circumstantial guarantees of trustworthiness.<sup>156</sup> The court then analyzed the reporting duty arising out of an ongoing contractual duty of one business to another to determine whether this duty had "the same general indicia of trustworthiness" as found in the business duty arising out of an employer-employee or principal-agent relationship.<sup>157</sup> The

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154. *Id.*

155. *Id.* at 1060

156. *Id.* at 1060-61. Noting that all hearsay exceptions are grounded in the concept that they possess sufficient guarantees of trustworthiness to justify admissibility without producing the declarant, the court listed the following factors which, it indicated, appear to supply those guarantees in the context of written reports by an employee to employer or by an agent to principal:

A business interest in obtaining the information on the employer or principal's part, usually expressed by way of some custom, policy or directive and reflected in the employer or principal's reliance on and use of the information, coupled with steps (training programs, audits, etc.) to insure that those requirements are accurately carried out;

(b) A corresponding duty on the employee or agent's part to collect and record the information, accompanied by an element of potential detriment to the employee or agent—as by discipline, failure of advancement, termination of relationship, etc.—if the duty is breached; and

(c) The general trustworthiness which attends the fact that most employees and agents are loyal and have an interest in reporting correct business information to their employer or principal.

*Id.* at 1060.

157. *Id.* at 1061. The court felt that the same general indicia of trustworthiness as found in the employee-employer relationship could be found in other contexts, stating that:

These same general indicia of trustworthiness, it seems to me, can also be found in some situations where the reporting duty arises by way of a continuing business relationship between two independent business entities. For example, a business entity's interest in receiving information can be quite as easily found in a continuing contractual requirement for the same as in a directive to employees, at least when the receiving entity customarily uses and relies on that information. The counterpart element of compulsion and potential sanction as concerns the reporting entity can likewise be found in a continuing contractual requirement, if the requirement is sufficiently specific

court then held that an ongoing relationship in which one business has a "contractual duty to report" information to another possessed indicia of trustworthiness equivalent to an employee's or agent's business duty. It therefore admitted Cessna's forms.<sup>158</sup>

*White Industries's* focus on whether the contractual duty provided the same general indicia of trustworthiness as an employee's business duty is misplaced. Such an analysis would be appropriate if the relevant question were whether the written records had equal guarantees of trustworthiness, which it would have been had the records been offered under Rule 807. However, under 803(6), the relevant question is: Are records "made in the regular course of business" within the meaning of 803(6) if the declarant is an employee of an outsider with a contractual duty to report to the entrant?

The Second Circuit in *LeRoy v. Sabena Belgian World Airlines*<sup>159</sup> went further than *White Industries* in relaxing the business duty requirement. In *Sabena*, the court admitted under Section 1732 a tape recording that an air controller made as part of his regular air control procedures of a plane crew's

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and if the nature of the information to be furnished is such as to suggest that both entities would attach some significance to the requirement. The last factor does present possible problems; and it is here that one must be particularly careful. The interests of a business entity and its employees or agents generally coincide in this context; those of two independent business entities, even though a contractual or other business relationship exists between them, may not or may do so only to a limited degree. It is that relationship, and in particular the interests and motivation of the reporting entity, which must be examined with special care.

*Id.* Any trustworthiness problem appearing in such a relationship, the court noted, could be handled under 803(6)'s separate treatment of untrustworthiness. The court stated that "any blanket rule of exclusion based solely upon a potential for difficulty in connection with this last [third] factor would appear inappropriate." *Id.*

158. *White Indust., Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1061 (W.D. Mo. 1985). The court, and perhaps the parties, complicated a relatively simple matter. The documents were probably admissible as the business records of the distributors or dealers, as the case may be. The court mistakenly treated Cessna as the author and the distributors and dealers as the declarants. However, Cessna was the author of only the initial portion of the forms—the information identifying the aircraft and the distributor to whom sold; it made no entries on the forms based on information supplied to it by the distributors or dealers. It appears that each distributor filled in the forms with the information it had and the dealers filled in the information they had. The distributors and dealers were both entrants and declarants of their respective information. The proponent therefore could have offered the documents as business records of the distributors, with respect to the information they supplied, and the dealers with regard to the information they supplied. Had the parties and the court focused on the true author of each portion of the forms, there would have been no necessity for the court to consider extending the business duty requirement. *See also* *Meaders v. United States*, 519 A.2d 1248, 1255 (D.C. 1986).

159. 344 F.2d 266 (2d Cir. 1965).

statements to him concerning the plane's flight positions. The court held that even if the crew members had no obligation to report, the *Johnson v. Lutz* principle was inapplicable because the crew's regular business practice was to make the report it did. Thus, the court noted, the crew's statements were "not the gratuitous reports of persons not involved in the business."<sup>160</sup> The court concluded that the crew's reports "should be as reliable as the typical business record."<sup>161</sup> Here, too, the Second Circuit appeared to focus on the recording's general reliability and apparently was not concerned that the declarants (the crew) were not airport employees.

Fundamentally, the issue presented by *White Industries* and *Sabena*, but not discussed by them, is one of statutory interpretation. Everyone would agree that a document is "made in the course of a regularly conducted business activity" and thus admissible under the business records exception to prove the truth of the statements it contains if both the maker and declarant acted under a business duty in the same business. Is the same true if the maker and declarant did not act in the regular course of the same business but each acted under a duty to, or in the regular course of, different businesses—the maker acting in the regular course of business X and the declarant in the regular course of business Y? Put another way, can a memorandum produced by a joint business activity, where the entrant and declarant work for two different companies, be characterized as having been made in the regular course of business for purposes of 803(6) or a similar rule?<sup>162</sup>

The facts of *Northeast Bank & Trust Co. v. Soley*<sup>163</sup> are illustrative. In *Northeast Bank*, Bank A prepared a daily prime rate schedule based on the prime rate that Bank B's employee reported to it in the regular course of his duties at Bank B.<sup>164</sup> Since the employees of Bank A and Bank B acted in the regular course of their respective businesses, *Northeast Bank* clearly presented the issue of whether Bank A's record of Bank B's prime rate was a record produced "in

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160. *Id.* at 273. See also *United States v. Pfeiffer*, 539 F.2d 668, 671 (8th Cir. 1976) ("The common carriers who prepared the delivery receipts and transmitted them to Goodyear did so in the regular chain of business activity and cannot be called 'non-participants.'"); *Schmutz v. Bolles*, 800 P.2d 1307, 1313 (Colo. 1990) (holding reports of drill malfunctions prepared by drill manufacturers from information supplied by doctors and hospital personnel admissible under 803(6)); *Great West Food Packers, Inc. v. Longmont Foods Co., Inc.*, 636 P.2d 1331, 1333 (Colo. Ct. App. 1981). Neither the *Sabena* nor *Baxter* court discussed whether they considered the entrant and declarant as acting in the regular course of the same business or as acting in the regular course of their respective separate businesses.

161. *Sabena*, 344 F.2d at 273.

162. This question grew out of a conversation with my colleague Judge George C. Pratt concerning the opinion he wrote in *United States v. Jakobetz*, 955 F.2d 786 (2d Cir. 1992).

163. 481 A.2d 1123 (Me. 1984).

164. *Id.* at 1126. It was common practice for Boston banks to rely on Bank B's floating prime rate. *Id.*

the course of a regularly conducted business activity” within the meaning of 803(6). But, in admitting the schedule, *Northeast Bank* did not discuss the issue.<sup>165</sup> Indeed, no court has squarely analyzed it. Comments in several cases indicate that the business records exception applies only where the document

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165. The court admitted the schedule, relying on cases which held that records furnished by one business to another which are integrated into the latter's records and relied on by it are admissible under 803(6). *Id.* at 1127. Even if this concept were otherwise sound, Bank B did not furnish a record to Bank A; Bank B's employee only orally reported to Bank A. In a subsequent decision, *Leen Co. v. Web Electric Inc.*, 611 A.2d 83, 84 (Me. 1992), Maine's Supreme Court recognized that in *Northeast Bank* it admitted a document based on information from an outsider. Citing to its *Northeast Bank* decision, the court stated that “in certain circumstances, business records may include information prepared outside the business” provided the information contained “indicia of reliability that form the basis of the business records exception.” *Id.* at 83-84. The court did not address the issue of business duty in this context; instead it apparently relied on a general “indicia of reliability” test.

was prepared by an entrant and a declarant employed by the same business.<sup>166</sup> For example in *Johnson v. Lutz*, the New York Court of Appeals said:

[A]n important consideration leading to the [enactment of New York's business record exception] was the fact that in the business world credit is given to records made in the course of business by persons who are engaged in the business upon information given by others engaged in the same business as part of their duty.<sup>167</sup>

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166. *Johnson v. Lutz*, 170 N.E. 517 (N.Y. 1930); see also *Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1090 (5th Cir. 1988) (stating that 803(6) requires showing that document was "prepared in the regular course of *author's* business"; the court, however, was not faced with the situation discussed in the text and emphasis on the word "author's" may be misplaced); *State v. Winslow*, 197 A.2d 778 (Conn. App. Ct. 1963) (stating that "to be admissible the entry must be one based on entrant's own observation or information of others whose duty is to transmit it to him, and those others must be members of the organization whose record it is"); *Chapman v. State*, 628 A.2d 676, 683 (Md. 1993) (holding that bank's records of account would qualify as business records if information is reported by an employee with a duty to report and recorded by an employee with a duty to record); cf. *United States v. Smith*, 521 F.2d 957, 964 (D.C. Cir. 1975) (holding that a witness's description of crime recorded in police officer's report is not admissible because it "is not made in regular course of witness's business"). Apropos are the remarks in *Wingate v. Emery Air Freight Corp.*, 432 N.E.2d 474 (Mass. 1982):

[I]f the original source of information did not have a business interest to report accurately, reliability is lacking. Thus, the statute makes admissible a business record which results from reports, passing through any number of people, so long as each person had a duty to report, *and the information originally came from an employee* with personal knowledge who also had a duty to report. Then, and only then, are there the necessary indicia of reliability. Only then may a record be substituted for the direct testimony of the employee with personal knowledge.

*Id.* at 478 (emphasis added). See also N.Y.C.P.L.R. 4518, commentary at 4518:3 (McKinney 1992) which states:

The motive to make accurate observations, upon which the reliability of business records depends, cannot be assumed when the person who supplied the information that goes into the record are not members of the same business enterprise. While co-employees may share an incentive to be accurate and make reliable reports to one another, no such incentive is operative in the case of outsiders. No sanctions or discipline can be imposed on outsiders who are careless or dishonest.

*Id.* See Glen Weisenberger, *Hearsay: Business Records and Public Records*, 51 U. CIN. L. REV. 42, 51 (1982) (stating that "each person in chain must be an employee or agent of the business which retains the records in the regular course of its activity").

167. *Johnson*, 170 N.E. at 517. The Appellate Division opinion in *Johnson* was even clearer. It said that the New York statute "refers to an act, transaction, occurrence or event in which someone engaged in the business actually participated. The witnesses of the accident who made statements to the policeman were not engaged in the police

Of course, neither *Johnson v. Lutz*, nor any of the cases making similar comments, focused on the issue of multiple businesses. Without much instruction from the decided cases, what approach should the courts take? The most reasonable reading of the business records exception would consider a record as having been "made in the regular course of business" only if all participants are employees or agents of the same business. For how can it be said that a document is made in the regular course of business X if the person furnishing the information has a loyalty to another business? Or to state it differently, how can it be said that a document is "made in the regular course of business" where the declarant's business duty is to business Y and not to the entrant, business X? In such a case, the declarant may not be as careful as he would be if he were employed by business X and not business Y. *White Industries* acknowledged the potential for such difficulty. The case took the position that under 803(6) any such difficulty can be addressed under its separate treatment of untrustworthiness.<sup>168</sup> However, the potential for difficulty alone should be sufficient to disqualify the document as not made in the regular course of business, and the separate untrustworthiness provision as to which the opponent has the burden should be irrelevant in reaching this conclusion.<sup>169</sup>

Courts should be cautious in pushing the boundaries of the exception and should not readily relax the business duty requirement. In doing so, courts are substituting general criteria, circumstantial guarantees of trustworthiness, for the exception's specific requirement that the document be "made in the regular

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business in the course of which the memorandum of the transaction was made." *Johnson v. Lutz*, 234 N.Y.S. 328 (1929). Cf. *United States v. Pitman*, 475 F.2d 1335 (9th Cir. 1973) (holding a document admissible if the information was supplied by an authorized person; court admitted lost order form prepared by Avon from information transmitted by an Avon independent sales representative because "a sales representative is an integral part of the Avon organization" and thus, "not an outsider but rather an authorized person").

168. *White Indust. Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049 (W.D. Mo. 1985).

169. Query whether *White Industries* would have taken the same view under the Model Act, which does not have a lack of trustworthiness provision? See *supra* note 5.

course of business."<sup>170</sup> Instead, litigants should be required to pursue other possible avenues of admissibility (e.g. Rule 807), as previously discussed.<sup>171</sup>

### B. Duty To Record

Most discussions of the business duty requirement focus on the declarant, just as this Article does initially. Now let us put the spotlight on the entrant, and ask—must the entrant be under a duty to record? Support can be found for the proposition that the entrant must be acting under a duty to record in making the entries just as a declarant must be acting under a duty to report in furnishing the information.<sup>172</sup> And this makes sense. If the document being offered in evidence was prepared by an employee whose duties did not include preparing that particular type of document, it can scarcely be said that the document was "made in the regular course of the employer's business."<sup>173</sup> In addition, under 803(6)

170. This general standard was rejected not only by Congress but also by the drafters of 803. Prior to the submission of the Supreme Court's text, the following general standard for admission of hearsay was proposed:

GENERAL PROVISIONS. A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer strong assurances of accuracy and the declarant is unavailable as a witness.

ILLUSTRATIONS. By way of illustration only, and not by way of limitation, the following examples of statements conforming with the requirements of this rule...

46 F.R.D. 161, 377 (1969).

171. See *supra* note 118 and accompanying text.

172. *United States v. Robinson*, 700 F.2d 205, 210 (5th Cir. 1983); *United States v. Grayson*, 166 F.2d 863, 869 (2d Cir.1948) (holding that where entrant records information supplied by declarant, the document is admissible to prove truth of recorded information, only if "it was part of the regular course of business to report to him what the declarants themselves knew it was part of the business to record what they said"); *Chapman v. State*, 628 A.2d 676, 683 (Md. 1993); *In re Leon RR*, 397 N.E.2d 374, 377 (N.Y. 1979) (holding that for a document to be admissible the proponent must show "that it was within the scope of the entrant's business duty to record the act . . . sought to be admitted"); *Johnson v. Lutz*, 170 N.E. 517 (N.Y. 1930). Tennessee's codified exception expressly requires a business duty to record. TENN. R. EVID. 803(6) (requiring "[a] memorandum . . . made . . . by or from information transmitted by a person with knowledge and a duty to record or transmit"). See also *Romano v. Howarth*, 998 F.2d 101, 108 (2d Cir. 1993).

If the entrant did not act under a duty to record, the document is not admissible under the business records exception *for any purpose*. In contrast, where the declarant did not act under a duty but the entrant did, the document is admissible under 803(6) to prove that the declarant made the statement but not to prove the truth of it, unless the statement satisfies another hearsay exception. See *supra* note 139.

173. See *United States v. Robinson*, 700 F.2d 205, 210 (5th Cir. 1983). In *Robinson*, a county purchasing clerk regularly made notes at Board of Supervisors meetings for his use as a purchasing clerk. The court held them admissible under 803(6),

or a similar codification, the regular practice requirement would not be satisfied.<sup>174</sup>

The "duty to record" requirement, however, may be more inclusive. It may also mean that the proponent must show that company procedures required the entrant to reduce the information to writing. Thus, even assuming that an employee's duties included the preparation of certain types of documents, the documents would not be admissible unless they were made pursuant to the company's established procedures.<sup>175</sup> Viewed in this manner, this aspect of the duty to record is already encompassed within the regularity requirements as defined by *Kennedy* and *Standard Oil*.<sup>176</sup>

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stating that the "notes may not be considered 'records of regularly conducted activity' . . . absent a showing that [purchasing clerk] regularly compiled them as part of his official duties . . . This was not done." *Id.* Viewing the "duty to record" in this manner makes sense because the exception applies to all types of businesses, including sole proprietorships. See *People v. Kennedy*, 503 N.E.2d 501, 504 (N.Y. 1986).

174. *Robinson*, 700 F.2d at 210. See also *supra* note 61 and accompanying text.

175. *United States v. Ferber*, 966 F. Supp. 90, 99 (D. Mass. 1989) seems supportive. In *Ferber*, a Merrill Lynch employee sent an E-mail message to his superior relating a conversation he had with defendant *Ferber*. The employee had a "routine practice" of sending E-mail messages to co-workers concerning important telephone conversation with clients. However, the court did not admit the messages under 803(6) because the employee "was under no business duty to make and maintain the E-mail messages and the evidence failed to show that Merrill Lynch itself followed such a routine." *Id.* The court noted that if such documents were admissible then "virtually any document found in the files of a business which pertained in any way to the functioning of the business would be admitted willy-nilly as a business record." *Id.* "This," the court said, "is not the law." *Id.*

Ironically, the court noted that if Carey made E-mail messages concerning important telephone conversations in running his household they might be admissible "on a preliminary finding that Carey was the responsible individual for making and maintaining such records." *Id.* at 98. This would be equally applicable to a sole proprietorship.

*Ferber* did not explain its basis for holding that Carey was under no business duty; nor did it state whether the E-mail messages failed to satisfy the requirement that the memorandum be made in the course of a regularly conducted business activity or the regular practice requirement or some other requirements. However, it seems that in *Ferber* the court was not saying that the employee had acted beyond the scope of his duties. Rather, the court was apparently excluding the E-mail because the business had no established procedures for making and retaining such messages. In short, the employee had no obligation to advise his co-workers in writing.

176. See *supra* notes 108, 112 and accompanying text.



#### IV. DOCUMENTS PREPARED BY BUSINESS S AND SENT TO BUSINESS R

The admissibility of memoranda or records prepared by Company S ("Sender" or "S") and sent to Company R ("Receiver" or "R") is another issue that has not been well scrutinized. Loose language and the absence of analysis, much less clear analysis, characterizes some of the cases addressing the issue. For example, in *United States v. Flom*,<sup>177</sup> invoices received and held by defendant from another company were admitted in evidence based on defendant employee's testimony "that the invoices were received and held in the regular course of [defendant's] business."<sup>178</sup> Such testimony, however, only established that defendant had a regular practice to maintain invoices received from another company. It did not establish any of the foundation requirements of 803(6), including that the documents were made in the regular course of either defendant's or sender's business, or that either business had a regular practice to make them. There simply was no valid basis on which the Fifth Circuit approved the admissibility of the invoices under 803(6). Unlike the *Flom* court, most courts have recognized that the mere filing and retaining in the regular course of business papers received from another business does not qualify the papers under the business records exception.<sup>179</sup>

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177. 558 F.2d 1179 (5th Cir. 1977).

178. *Id.* at 1182. See also *United States v. Mitchell*, 85 F.3d 800, 812 n.11 (1st Cir. 1996); *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1333 (10th Cir. 1984) (holding that documents received and filed admissible under 803(6)); *Fernandez v. Chios Shipping Co.*, 542 F.2d 145, 154 (2d Cir. 1976) (admitting marine surveyor's reports that Time Charterer "ordered, received and recorded in the regular and ordinary course of business"; apparently no one offered the reports as the business records of the marine surveyor); *Boesl v. Suburban Trust & Sav. Bank*, 642 F. Supp. 1503, 1508 (D. Del. 1986); *Precision Steel Warehouse, Inc. v. Anderson-Martin Mach. Co.*, 854 S.W.2d 321, 328 (Ark. 1993) (holding that an independent lab test report prepared for Forgecraft of steel Forgecraft was selling to military admissible under 803(6) as "record acquired and maintained by Forgecraft in regular course of business" because military required an independent test).

179. *Synder v. Whittaker*, 839 F.2d 1085, 1090 (5th Cir. 1988); *United States v. Rosenstein*, 474 F.2d 705, 710 (2d Cir. 1973); *United States v. Berkowitz*, 429 F.2d 921, 927 (1st Cir. 1970); *Phillips v. United States*, 356 F.2d 297, 307 (9th Cir. 1965) (under Section 1732), *cert. denied*, 304 U.S. 952 (1966); *Marshall Trucking Co. v. State*, 743 S.W.2d 16 (Ark. Ct. App. 1988); *People v. Pollard*, 503 N.E.2d 548 (Ill. 1987); *Leen Co. v. Web Elec. Inc.*, 611 A.2d 83 (Me. 1992) (holding that the fact that document is received in the ordinary course of business does not alone satisfy 803(6)'s foundation requirements; Maine's 803(6) "applies only to the records of the authors of the letters, not the recipient"); *People v. Cratsley*, 653 N.E.2d 1162 (N.Y. 1995). But see *United States v. Mitchell*, 85 F.3d 800, 812 n.11 (1st Cir. 1996).

The reason for this rule, the New York Court of Appeals explained, is that the receiving entity is generally in no position to establish the necessary foundation

Some circuits have admitted documents prepared by S which were sent to and maintained by R if witnesses testified that R integrated them into its records and relied on them in its operations.<sup>180</sup> *Ollag Construction Equipment Corp. v.*

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requirements. *Cratsley*, 660 N.E.2d at 397. The court stated:

It is true that as a rule, 'the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records'. An objection for lack of foundation is warranted when 'the writing is a business record but received from another business entity.' The reason for this rule is that [s]uch papers are not made in the regular course of business of the recipient, who is in no position to provide the necessary foundation testimony as to the regularity and timeliness of their preparation or the source of information contained in the records. Nor, generally, would the recipient be aware whether the information was imparted by one under a 'business duty' to report to the entrant.

*Id.* (citations omitted). In other words, retention alone by R of a document received from S does not satisfy any of the foundation requirements of 803(6) to admit the document as R's business record. However, if R offers it as S's business record, and R produces a qualified witness to testify to the necessary foundation requirements—that it was made in the regular course of S's business and that S had a regular practice to make such documents—then it should be admitted under the business records exception.

180. See *United States v. Childs*, 5 F.3d 1328, 1333-34 (9th Cir. 1993) (admitting as business records, documents produced from auto dealers' files which were prepared by and received from a credit company and an automobile manufacturer, where the documents "were kept in the regular course of business at the dealerships" and that the dealerships relied on them in keeping track of their cars); *United States v. Doe*, 960 F.2d 221, 223 (1st Cir. 1992); *United States v. Jakobetz*, 955 F.2d 786, 800 (2d Cir. 1992); *United States v. Mendel*, 746 F.2d 155, 166 (2d Cir. 1984); *United States v. Ullrich*, 580 F.2d 765, 771 (5th Cir. 1978). In *Ullrich*, a computer inventory schedule of dealership's cars prepared by Ford Motor Credit ("Ford") which was integrated into dealership's records and used by it, admitted under 803(6) to prove that a car in defendant's possession was stolen from the dealer. *Id.* The opinion notes that the inventory schedule was used by the dealership to "cross check the amount of interest paid" to Ford and as a record disclosing whether a car was sold, transferred to another dealer, or in inventory. *Id.* However, so far as the opinion reveals, Ford, not the dealer, made the record and periodically inspected the cars on the dealer's lot to confirm the inventory. Neither the government, which offered the schedules, nor the court apparently thought of considering the schedules as Ford's business records. See also *United States v. Carranco*, 551 F.2d 1197, 1200 (10th Cir. 1997); *Ollag Constr. Equip. Corp. v. Goldman*, 665 F.2d 43, 46 (2d Cir. 1981); *Black Sea & Baltic Gen'l Ins. Co. v. S.S. Hellenic Destiny*, 575 F. Supp. 685 690-91 (S.D.N.Y. 1983) (holding that commercial invoices of one company admissible under 803(6) where witnesses of company that received them testified that they were kept in the files and relied on in the regular course of business); *Plymouth Rock Fuel Corp. v. Leucadia, Inc.*, 498 N.Y.S.2d 453, 454 (N.Y. App. Div. 1986). But see *White Indus., Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1061 n.3 (W.D. Mo. 1985) ("The mere fact that a business obtains information from an outside source and 'integrates' that information into its own files seems to me, absent some other circumstance, to be an insufficient predicate for Rule 803(6) admissibility.").

*Goldman* provides a good example. There, corporate principals submitted financial statements to Manufacturers and Traders Trust Company in connection with a possible bank loan to the corporation. After noting that other circuits had admitted documents where witnesses testified that the documents were integrated into a company's records and were relied on in daily operations, the Second Circuit held the financial statements admissible under 803(6) because "the [t]estimony established that the financial statements were on the Bank's own form, were completed at its request and were of the type regularly used by the Bank in making decisions whether or not to extend credit."<sup>181</sup> The court,

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*United States v. Jakobetz* illustrates the lack of clarity in this area. First, it confused authentication with hearsay. In *Jakobetz*, the defendant's employee submitted to defendant "Trip Cost Report" that included a Throgs Neck Bridge toll receipt in order to be reimbursed for the toll expense. Defendant objected to admission of the toll receipt to prove the date and time of the toll on the ground that it was not "authenticated by a person with first-hand knowledge of the Throgs Neck Bridge record system." *Jakobetz*, 995 F.2d at 800. The court responded that it did not read 803(6) so narrowly and that defendant's employer incorporated the toll receipt into its record "to a sufficient degree to permit an inference as to the receipt's authenticity." *Id.* But authenticity is an issue of relevancy to be decided under Rule 901, not a hearsay issue to be decided under 803. The toll receipt apparently would have been admissible under 901(4).

Second, to the extent *Jakobetz* admitted the toll receipt under 803(6), it erroneously relied on cases admitting business records of S which R integrated into its records. In *Jakobetz*, there was no showing that R relied on the "time" stamped on the toll receipt. In other words, the proponent did not introduce evidence to show that the employee would not have been reimbursed if the toll receipt bore the date, but not the time the toll was paid. Under such circumstances, the "integration" concept is not applicable. *See, e.g., N.L.R.B. v. First Termite Control Co.*, 646 F.2d 424 (9th Cir. 1981)

Furthermore, in relying on the "integration" concept, *Jakobetz* overlooked the fact that an employee, not an outsider, submitted the outsider's toll receipts. The employee therefore was the declarant and the toll receipt he submitted was simply a shorthand way of relating to the entrant, his employer, the details (date, time, and amount) of which he had personal knowledge. None of the "integration" cases *Jakobetz* cited involved a declarant-employee who had personal knowledge of the information and, thus, could have furnished it without the outsider's document; rather, they involved outsider documents submitted by outsiders. The "integration" concept was therefore irrelevant. In other words, if defendant's employee was under a business duty to supply the information (date and time of the toll) of which he had personal knowledge, then the toll receipt should have been admissible as part of the reimbursement form; that is, as defendant's employer's business record. However, if the employee was not under such a duty and would have been reimbursed without it, then any entries he made relating to "time" were not made in the regular course of business.

Finally, the court said that "Jakobetz himself relied on its authenticity, when he submitted the receipt for reimbursement." *Jakobetz*, 995 F.2d at 801. If so, why did the court not admit the toll receipt as an admission?

181. *Ollag*, 665 F.2d at 46.

therefore, concluded that the financial statements "satisfied the primary requirements" of the business records exception.<sup>182</sup>

The court's conclusion is fascinating since the financial statements did not satisfy any of the requirements. Neither the entrant nor the declarant was a Bank employee or agent. Thus, the statements were not prepared in the course of the Bank's regularly conducted business activity. Likewise, it cannot be said that it was the Bank's regular practice to make financial statements for the principals of a prospective borrower. Furthermore, the financial statements probably would not have been admissible as business records of the corporate principals. Since they apparently were prepared specifically for the purpose of obtaining a loan, the financial statements would not have satisfied the regularity requirements.

General statements that a document is admissible if a witness testifies that R integrated the document into its files and relied on it are not very helpful. They substitute clichés for analysis. The requirements for admissibility under 803(6) or any other business records exception for a written record of S received by R should be no different from the requirements for any other document. The question that must be answered in all cases is: Has the proponent established each of the foundation requirements for admissibility? To answer this question, a court must first require the proponent to state whose document is being offered in evidence—S's, R's, or both. Depending on the proponent's offer, the court can then coherently analyze the admissibility issue. If the proponent offers the document as S's business record, it should be admissible if, apart from any other requirements, the proponent establishes that the document was prepared in S's regularly conducted business activity and that it was S's regular practice to make it. In short, the proponent must show that S's document satisfies each of the foundation requirements of the applicable business records exception. If the proponent fails to do so, the document should not be admitted as S's business record.

If, however, the document is offered as R's business record, it should not be admissible if the proponent only shows that R received and filed it,<sup>183</sup> nor should the document be admissible if R integrated it into its records if integration means only that R relied on it. R's reliance alone obviously does not satisfy the regularity requirements of the business records exception.<sup>184</sup> However, if the proponent shows more, namely, that R integrated S's document into its records in such a way that R can be deemed to be a maker of the document, the document should be admissible if all other foundation requirements are met. *Duncan Development, Inc. v. Harvey*<sup>185</sup> provides a perfect example. In *Duncan*,

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182. *Id.*

183. *See supra* note 12.

184. To paraphrase the court in *Berkowitz*, the fact that R relied on the document does not supply the critical evidence that S made and preserved it in the regular course of business. *United States v. Berkowitz*, 429 F.2d 921, 927 (1st Cir. 1970). *See also* *Ortho Pharm. Corp. v. Cosprophar Corp.*, 828 F. Supp. 1114, 1119 (S.D.N.Y. 1993).

185. 634 S.W.2d 811 (Tex. 1982).

a subcontractor's invoices satisfied the Texas business records exception because the contractor checked "to see whether the subcontractor's work had been performed and whether the submitted invoices were proper for payment."<sup>186</sup> The invoices, therefore, "became [the contractor's] record of its subcontractor's activities and charges."<sup>187</sup>

Greater care by the courts in this area would go a long way in clearing up the existing confusion. As noted, the key lies in first identifying whose document is being offered, and then determining whether each of the exception's foundation requirements has been satisfied. If courts take these basic steps, clarity might prevail.

## V. DOCUMENTS PREPARED BY PROFESSIONAL FIRM A FOR COMPANY B

### *A. Are They the Business Records of the Professional Firm or Its Client?*

Another challenging situation is whether expert reports prepared by an independent party, such as a professional firm, at the request of a customer are admissible under the business records exception. Certainly, the first question that should be asked is whether such reports are, for purposes of the business records exception, documents of the independent professional firm or of the person requesting them.<sup>188</sup> At first blush, it seems obvious that such documents are the business records of the firm that prepared them. Indeed, under Section 1732, the Second Circuit indicated that a report prepared by a professional at the

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186. *Id.* at 814.

187. *Id.* at 813-14. The documents would also have been admissible as the subcontractor's business records, but as far as the opinion shows, the proponent neither offered them as such, nor did it lay the appropriate foundation. *See also* United States v. Carranco, 551 F.2d 1197, 1199-1200 (10th Cir. 1997) (holding that a freight bill initially prepared by Admiral-Merchants was also deemed made in regular course of ICX's business because ICX used the freight bill to verify the shipment and made notations of any discrepancies).

188. *See infra* note 215 for a discussion of the extent to which such reports are admissible.

request of a third party is clearly part of the professional's business.<sup>189</sup> However, recent cases have not answered the question either directly or with consistency.

In *Waddell v. Commissioner*,<sup>190</sup> plaintiffs offered into evidence an appraisal prepared for Comp-U-Med<sup>191</sup> of computer terminals that plaintiffs had purchased from Comp-U-Med. Without discussing or deciding whose business record was being offered, the Ninth Circuit held that the appraisal was not admissible as a Comp-U-Med business record because there was no showing "that Comp-U-Med obtained appraisals of this sort as a 'regular practice.'"<sup>192</sup> The implication is that if the proponent had shown that Comp-U-Med regularly commissioned appraisals, the appraisal would have been admissible. But why? All that such evidence would establish is that Comp-U-Med had a regular practice to obtain appraisals, not a regular practice to make them as 803(6) requires.<sup>193</sup>

The Ninth Circuit also concluded that the appraisal was inadmissible as a business record of the appraisal firm because there was no showing that the appraisal firm "had a regular practice of preparing appraisals for Comp-U-Med."<sup>194</sup> However, if the appraisal firm had a regular practice of preparing

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189. *White v. Zutell*, 263 F.2d 613 (2d Cir. 1959). In *White*, the Second Circuit concluded that the medical report of a doctor who had examined the plaintiff at the request of an insurance company was admissible as part of the doctor's business. "The making of this report," the court said, "was clearly a part of their specialist's 'business'; indeed, that is what he was commissioned to do." *Id.* at 615. *Accord* *Yates v. Bear Trans., Inc.*, 249 F. Supp. 681, 689 (S.D.N.Y. 1965). See *Transamerica Ins. Co. v. Trout*, 701 P.2d 851, 856 (Ariz. Ct. App. 1985) (discussing admissibility of an appraisal of property made by an independent appraiser for the owner, the court said that business records admissible under 803(6) "must have been prepared and retained as part of the normal course of business of the party preparing them").

190. 841 F.2d 264 (9th Cir. 1988).

191. The professional appraiser died before trial. *Id.* at 267.

192. *Id.* In *Selig v. United States*, 740 F.2d 572 (7th Cir. 1984), the court admitted under 803(6) the appraisals the Brewers obtained of its player roster shortly after it purchased the Seattle Pilots. In admitting two appraisals apparently as the Brewers' business records, the Seventh Circuit stated that the appraisals satisfied the rule's "regularity requirements." The court did not explain how such requirements had been met other than to state that "the appraisals were prepared in the regular course of the management of the team." *Id.* at 578. Under any view, the appraisals should not have been admitted as the Brewers' business records. The Brewers did not prepare the appraisals, and there was no indication that the Brewers even prepared other appraisals. Further, the evidence indicated that this was the first time the Brewers had ever obtained such appraisals. Apparently, no one suggested that the appraisals were the business records of the appraisers, and the court did not consider the issue.

193. In *Rancho Oil Co. v. United States*, 43 A.F.T.R.2d ¶ 79-308 (D. Tex. 1978), the court held that a real estate appraisal was admissible under 803(6) and other rules because plaintiff kept the appraisal in conjunction with the transfer of real estate and, further, plaintiff had a customary practice to obtain such real estate appraisals.

194. *Waddell*, 841 F.2d at 267. The court noted with approval the tax court's observation that "if the report were admissible as the appraiser's business record 'any

appraisals of computer terminals generally, why should the fact that it prepared only one such appraisal for Comp-U-Med mean that the appraisal firm did not have a regular practice for purposes of 803(6)? The focus should be on the regularity of making appraisals, not on the entity for whom they are made. If courts use the *Waddell* approach, they should exclude a lab report of a routine test, such as a pregnancy test, unless the lab regularly makes reports of such tests for the person requesting the test, a result that makes little sense.

The *Waddell* court did not cite its earlier decision in *Paddack v. Dave Christensen, Inc.*,<sup>195</sup> which addressed the admissibility of an accountant's compliance audit report under 803(6).<sup>196</sup> In *Paddack*, Touche Ross was hired to audit an employer's contributions to trust funds for shop employees to determine the fund contribution deficiencies because the trustees suspected that the employer's reports were incorrect.<sup>197</sup> The trustees did not have a regular compliance audit procedure; they hired an accountant to do an audit only when they suspected a deficiency.<sup>198</sup> Because the audits were conducted with an "irregular frequency," the court concluded that, "the audit reports were not kept in the course of a regularly conducted business activity of the Trust Funds or the Employer."<sup>199</sup> And because it was a special audit and not one regularly conducted, the court went on to hold that the accountant's reports were not Touche Ross's business records within the meaning of 803(6).<sup>200</sup> It commented that "[a] contrary interpretation would allow any firm to produce 'business records' that would be automatically admissible. Such reports do not contain the same reliability that normally attends records kept in the course of a regularly conducted business activity."<sup>201</sup>

A contrary interpretation, however, would not automatically produce admissible business records. The records would be admissible only if they met the foundation requirements of 803(6). *Paddack* may have assumed that each such compliance audit report would always be considered a special report that does not satisfy the regular practice provision or the requirement that the document be "made in the course of a regularly conducted business activity."

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appraisal report prepared by any appraising company in the country would come in without the appraiser having to be there to verify it." *Id.*

195. 745 F.2d 1254 (9th Cir. 1984).

196. The Ninth Circuit indicated that a traditional financial statement audit is generally admissible under Rule 803(6) as a business record of the audited entity; whether it could ever be the accountant's record, the court said, "is best left for another day." *Id.* at 1257 n.3.

197. *Id.* at 1257-58, 1258 n.6.

198. *Id.* at 1258.

199. *Id.* More fundamentally, however, the audit reports were not the employer's or trust fund's business records because neither the employer nor the trust funds prepared them; they were prepared by an independent firm.

200. *Id.*

201. *Id.*

Such an assumption may not be justified. Because an accounting firm such as Touche Ross regularly prepared compliance audit reports for clients, it would seem that such reports should be deemed made in the course of the accounting firm's regularly conducted business activity.<sup>202</sup>

In contrast to *Paddack*, the Tenth Circuit in *United States v. Frazier*<sup>203</sup> had no difficulty concluding that an accounting firm's regulatory compliance audit report was admissible as the firm's business record. The audit was performed at the request of the Department of Labor ("DOL") to determine whether funds it had provided were expended for their intended use.<sup>204</sup> The accounting firm was under a ten year contract to perform regulatory audits for the DOL and had previously audited the company in question. Without much discussion, the court held that the audit report was made in the course of the accounting firm's regular business activity and that it was that firm's regular practice to make such a report.<sup>205</sup> In a final observation that should be applicable to almost any accounting firm audit report, the court noted, "[a]s an accounting firm, Sorensen [the firm] regularly prepared audit reports."<sup>206</sup>

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202. The *Paddack* opinion does not indicate whether Touche Ross did compliance audits on a regular basis for clients. Independent of its holding that the compliance audit reports did not meet the foundation threshold requirement under 803(6), the court noted that even if they were Touche Ross's business records, they were inadmissible because they were prepared in anticipation of litigation. This conclusion also seems troubling. The audit was not prepared in anticipation of any litigation in which Touche Ross was involved. To paraphrase the Tenth Circuit in *United States v. Frazier*, 53 F.3d 1105 (10th Cir. 1995), Touche Ross was a neutral third party with nothing to gain from any possible litigation against the audited entity. See *infra* note 203 and accompanying text. But maybe, once the independent professional firm is aware that the audit's use lies outside the regular business activities of the requesting firm, it can no longer be said that the audit is being performed in the regular course of business.

203. 53 F.3d 1105 (10th Cir. 1995).

204. *Id.* at 1109. Similarly, in *Conduis v. Howard Sav. Bank*, 986 F. Supp. 914, 916-19 (D.N.J. 1997), reports of a consulting firm hired by a bank's governance committee to make an independent assessment of the bank's procedures were admitted as consulting firm's business records where firm's entire business was to analyze banks and issue reports of their findings.

205. *Frazier*, 53 F.3d at 1110.

206. *Id.* The court then rejected the defendant's contention that the audit report was untrustworthy because it allegedly was prepared for litigation purposes. *Id.* See also *U.S. v. Blackwell*, 954 F. Supp. 944, 974 (D.N.J. 1997). Relying on *Frazier*, the court admitted under 803(6) a special investigation audit report prepared by bank's financial audit department based on testimony that audit department would routinely investigate and prepare reports when it was determined that bank policy had been violated. The court's reliance on *Frazier* is misplaced. *Frazier* involved an audit by an independent accounting firm, not an internal audit department.

In *Birch v. Township of Drummer*, 487 N.E.2d 798 (Ill. App. Ct. 1985), the Town hired an independent engineering firm to review all traffic signs in the county and determine where more signs were necessary. *Id.* at 805. In holding the engineering



In a different context, an Illinois court<sup>207</sup> did not discuss whether a testing service company's reports of ultrasonic tests of spindle pins performed at defendant's request were defendant's business records or those of the testing service company.<sup>208</sup> Rather, it simply treated them as defendant's business records<sup>209</sup> and held them admissible under 803(6), explaining:

The key consideration is the authority of the third party to act on the business' behalf. Where a third party is authorized by a business to generate the record at issue, the record is of no use to the business unless it is accurate and, therefore, the record bears sufficient indicia of reliability to qualify as a business record under the hearsay rule.<sup>210</sup>

While it may be true, as the court said, that the reports were of no use to defendant unless they were accurate, this is not a proper basis for their admission as business records. A document is not admissible under the business records exception simply because it "bears sufficient indicia of reliability." It is admissible only if it meets each of the exception's foundation requirements, one of which is that the record must be made in the regular course of the maker's business. Here, defendant did not make the reports. Of course, this only means that the reports should not have been admitted as defendant's business records. It does not mean that the reports were completely inadmissible under 803(6). Had the Illinois court recognized that the reports were the testing company's business records, as it should have done, the reports would have been admissible because they apparently satisfied the foundation requirements. Nevertheless, the Illinois case illustrates the lack of clarity in this area.

*People v. Cratsley*<sup>211</sup> also illustrates how a court's failure to recognize and deal with the issue of whose business records were being offered into evidence muddies the waters. In *Cratsley*, an association for retarded citizens ("ARC") ran a sheltered workshop which accepted no one into the program without an evaluation report prepared in accordance with ARC's requirements. Rhors, an independent psychologist, prepared an IQ test report of X that the court admitted

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firm's report admissible under its version of the Model Act, the court stated that "[w]e see no difference between this particular report and an audit or inventory report prepared at the request of one business organization by another. The report was useless unless accurate." *Id.* at 806. Although there was no evidence that the engineering firm regularly made such safety studies, the court did not consider its effect on the report's admissibility; nor did the court clearly indicate whether it considered the report the business record of the town or the engineering firm.

207. See *Argueta v. Baltimore & Ohio Chicago Terminal R. R.*, 586 N.E.2d 386 (Ill. App. Ct. 1991).

208. The tests were performed as part of defendant's "routine testing the spindle pins." *Id.*

209. The parties probably did not raise the issue.

210. *Argueta*, 586 N.E.2d at 392 (citations omitted).

211. 653 N.E.2d 1162 (N.Y. 1995).

under New York's business records exception ("CPLR 4518") to prove X's IQ. The court noted that Rohrs was acting on ARC's behalf and according to its requirements, and that his report conformed to statutory and regulatory requirements.<sup>212</sup> Based on the above, the testimony that such reports were an absolute condition to anyone being accepted in the program, and that ARC routinely relied on them, the court concluded that the evidence established that Rohrs's report satisfied both regularity requirements.<sup>213</sup>

The obvious question is: How could the court decide that the regularity requirements were met without first deciding whose record was being offered in evidence? It is the regular practice of that entity that is relevant. ARC neither prepared the report, nor did it supply the information. The fact that no one was admitted to the program without such a report only establishes that ARC had a regular practice to obtain such reports, not that ARC had a regular practice to make them. Quite clearly, Rohrs was the maker as well as the declarant because he prepared the report that was admitted, and the report contained Rohrs's opinion. Thus, the court should have inquired into Rohrs's, not ARC's, regular practice. But the court did not do so because it failed to first decide whose business record was being offered.

To be sure, the court and ARC believed the report was trustworthy. However, this is not the test of admissibility under the business records exception. To quote the Court of Appeals in *Kennedy*, "the requirements of [New York's business records exception] CPLR 4518(a) . . . must be satisfied, however reliable such records may otherwise be."<sup>214</sup>

In summary, when considering documents prepared by an independent professional X for business Y, the first question that must be decided is: Whose document is being offered? Courts have not decisively dealt with the issue and have not given it much attention. For purposes of the exception, it seems that such a document should be considered the document of the firm that prepares it. Stated otherwise, for purposes of the business records exception, financial

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212. *Id.* at 1167.

213. *Id.* The foundation witness, however, was unable to relate Rohrs's specific record-making practice. *Id.* In reaching its decision, the court also noted that the rule, that the mere filing of a document received from another entity is not sufficient to satisfy CPLR 4518, was not applicable. The court stated that the reason for this rule is that:

Such papers simply are not made in the regular course of business of the recipient, who is in no position to provide the necessary foundation testimony as to the regularity and timeliness of their preparation or the source of information contained in the records. Nor, generally, would the recipient be aware whether the information was imparted by one under a "business duty" to report to the entrant.

*Id.* (citations omitted). Although Rohrs was not an ARC employee, the court found the rule inapplicable because "Rohrs was also not a complete outsider"; in preparing the report Rohrs acted on ARC's behalf and in accordance with its requirements. *Id.*

214. *People v. Kennedy*, 503 N.E.2d 501, 505 (N.Y. 1986).

statements prepared by accounting firm X for business Y should be deemed the business records of accounting firm X, engineering reports those of the engineering firm, lab tests those of the laboratory, appraisal reports those of the appraisal firm, and so on. At the very least, courts should require a proponent to identify the entity whose document is being offered under the exception and then to satisfy the exception's foundation requirements for a business record of that entity.

### *B. Extent of Admissibility*

Assuming that a professional report is admissible under the business records exception, a court must then determine the extent to which it is admissible. Let us take a hypothetical appraisal report by A, an expert appraiser, of the market value of X's house which X wishes to sell. Assuming that the appraisal report stating the appraiser's opinion satisfies the foundation requirements and that the proponent has shown A's expert qualifications,<sup>215</sup> the report should be admissible under the business records exception to prove A's opinion unless the opponent shows that it is untrustworthy. However, this does not mean that the portion of the appraisal report which states the underlying facts on which A relied is equally admissible. If the factual portion of the report is offered to show only the basis of A's opinion, but not to prove the truth of the facts stated, it should be admissible for that limited function,<sup>216</sup> provided that the facts are of a type reasonably relied on by appraisers in the field.<sup>217</sup> But if the report is offered to prove the truth of the facts stated, it should not be admissible unless the information was furnished by a declarant with first-hand knowledge who had a business duty to report to A or satisfied another hearsay exception.<sup>218</sup> For example, if A used comparable sales of other houses to arrive at his opinion of the value of X's house, the portion of A's report containing the details of those comparable sales, including prices and surrounding circumstances, would not be admissible to prove the truth of those details unless the proponent established that the sales information was secured from someone with personal knowledge who was under a business duty to report the information to A.

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215. See *infra* notes 219-43 and accompanying text.

216. *United States v. Bohle*, 445 F.2d 54, 62, (7th Cir. 1971) (holding that statements forming part of basis of expert's opinion properly admitted under Section 1732, whether or not true).

217. See FED. R. EVID. 703. This rule provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

*Id.*

218. *Bohle*, 445 F.2d at 62-63. See also *supra* note 139 and accompanying text.

## VI. APPLICATION OF OTHER EVIDENTIARY RULES TO BUSINESS RECORDS

A document offered in evidence to prove the truth of the matters asserted in the document is not admissible under the hearsay rule<sup>219</sup> unless it falls within an exception. Thus, if the proponent can establish the foundation requirements of the business records exception, the hearsay barrier will be lifted. We will now examine whether a document admissible under that exception is immune from exclusion under any other rule of evidence, or whether it is subject to other evidentiary rules to the same extent as if live testimony were being offered. As we will see, not every court is sensitive to the fact that the business records exception is an exception to the hearsay rule only, and not to all other evidentiary rules.

In *United States v. Licavoli*,<sup>220</sup> the defendant objected to the admission under 803(6) of an appraisal report<sup>221</sup> because the government had not established, as required by Rule 702 of the Federal Rules of Evidence,<sup>222</sup> that the person who made the appraisal had the necessary expert qualifications.<sup>223</sup> After noting that the question raised "is one for which there is little helpful precedent,"<sup>224</sup> the Ninth Court concluded that there was no reason to adopt an "inflexible rule" requiring the proponent to establish affirmatively the qualifications of the person whose opinion is contained in the business records.<sup>225</sup> In so doing, the court shifted the burden to the opponent by requiring the opponent to raise any qualification deficiencies under 803(6)'s lack of trustworthiness provision.<sup>226</sup>

*Licavoli* apparently overlooked the express language of 803 and the Advisory Committee's Note, both of which limit the evidentiary function of the listed hearsay exceptions. Rule 803 itself makes it perfectly clear that the Rule

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219. See, e.g., FED. R. EVID. 801.

220. 604 F.2d 613 (9th Cir. 1979).

221. The appraisal of stolen artwork had been made for the owner and her insurance company. Apparently the court did not consider whether the appraisal was the business record of the appraiser for purposes of the exception; it admitted the appraisal as the insurance company's business record. *Id.* at 622.

222. FED. R. EVID. 702 provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

*Id.*

223. The defendant did not claim that the government failed to establish the foundation requirements of 803(6). *Licavoli*, 604 F.2d at 622.

224. *Id.* at 622.

225. *Id.*

226. *United States v. Licavoli*, 604 F.2d 613, 622-23 (9th Cir. 1979).

is nothing more than an exception to Rule 802 (the hearsay rule) when it expressly says: "the following are not excluded by the hearsay rule . . ." <sup>227</sup> This point is underscored in the Advisory Committee's Note: <sup>228</sup>

The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

Unlike the *Licavoli* court, other courts, both state and federal, have concluded that if an appropriate objection is made, the proponent of a business record otherwise admissible under 803(6) bears the burden of establishing the document's admissibility under any other evidentiary rule, just as it would if live testimony were being offered. Stated otherwise, in contrast to *Licavoli*, there are federal and state decisions applying 803(6) or a comparable business records exception that have treated all other evidentiary rules as independent hurdles to the admissibility of a business record. <sup>229</sup>

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227. See *supra* note 12.

228. 56 F.R.D. 186, 303 (1973). See *Forward Communications v. United States*, 608 F.2d 485 (Ct. Cl. 1979) (noting that 803(6) merely provides that business records are not excluded by Rule 802 but that "nothing in Rule 803 says they may not be excluded by some other rule").

229. See *Vance v. Peters*, 97 F.3d 987 (7th Cir. 1996) (ruling document admissible under Rule 803(6) inadmissible under Rule 403); *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 786 (3d Cir. 1996) (applying Rule 403 to redact references to the diagnosis of Mesothelioma contained in autopsy reports and hospital records admitted under 803(6), stating the Rule 803 "does not *mandate* admission of this evidence, but rather allows evidence to be admitted when it would otherwise be objectionable hearsay"); *Higgins v. Martin Marietta Corp.*, 752 F.2d 492 (10th Cir. 1985) (considering Rule 403 in connection with document admitted under 803(6)); *Prater v. Cabinet for Human Resources*, 954 S.W.2d 954, 958 (Ky. 1997) (holding that 803(6) only satisfies hearsay aspect of business record and any entry inadmissible "for another reason" does not become admissible because it is contained in a business record; court therefore excluded social workers' recorded opinions because the social workers were "insufficiently qualified to render expert opinions"). See also *Transamerica Ins. Co. v. Trout*, 701 P.2d 851, 856 (Ariz. Ct. App. 1985) ("[R]ecords must be introduced through the testimony of a custodian who can be cross-examined concerning the methods of preparation, the qualifications of the preparer, and other relevant matters.").

Montana's Rule 803(6) does not contain the phrase "by or from information transmitted by, a person with knowledge." It was not included because Montana law, pre-803(6), did not specifically require compliance with the personal knowledge rule. The Montana Commission indicates that if there is insufficient personal knowledge, then the opponent should show it as part of his burden to establish lack of trustworthiness. MONT. R. EVID. 803(6) commission notes. However, given the introductory statement of Montana's Rule 803 that "the following are not excluded by the hearsay requirement rule . . ." personal knowledge under Montana's Rule 601 should be relevant despite the

If the discussion stopped at this point, there should be no question that Rule 702 should have been applied to the *Licavoli* appraisal report. However, 803(6) itself expressly provides for the admissibility of memoranda or records, not only of "acts" or "events," but also of "opinions" and "diagnoses." How does the inclusion of "opinions" in 803(6) affect the applicability of the opinion rules to business records which otherwise satisfy 803(6)'s foundation requirements? The answer should be that it does not. Section 1732, the predecessor of 803(6), did not contain the words "opinions" or "diagnoses."<sup>230</sup> It referred only to a memorandum of any "act, transaction, occurrence or event," which may have led some courts to exclude diagnostic entries in business records.<sup>231</sup> Accordingly, in such cases, the proponent was required to call a witness to testify in court about the diagnosis. To make clear that such entries in business records should be treated the same as entries of acts or events, Congress included in 803(6) "opinions" and "diagnoses" as well as "acts" and "events."<sup>232</sup> Thus, whether the business record is a record of acts or of opinions, 803(6) prevents it from being excluded by the hearsay rule and thereby obviates the need to call a witness to testify in court. In other words, the inclusion of the words "opinions" and "diagnoses" simply insured that opinion and diagnostic entries now had the same protection against a hearsay objection "acts" or "events" enjoyed pre-803(6). However, since by its express terms Rule 803 only lifts the hearsay barrier and does not otherwise mandate admissibility, any memorandum, whether of an act or of an opinion, should be subject to other evidentiary rules, including those relating to testimonial qualifications such as qualifications for expert testimony.<sup>233</sup>

This approach, in contrast to *Licavoli*'s, may result in a very practical difference. Under Rule 702, the proponent has the burden to satisfy the

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Commission's explanation as to why a personal knowledge requirement was not included in Rule 803(6). In other words, given that Rule 803(6) only lifts the hearsay barrier and not the express requirement of Rule 601, the omission from Rule 803(6) of a personal knowledge requirement should be irrelevant.

230. See *supra* note 7.

231. FED. R. EVID. 803(6) advisory committee's note, 56 F.R.D. 183, 309 (1973).

232. *Id.* States have omitted the words from 803(6). Ohio omitted "opinions or diagnosis." OHIO R. EVID. 803(6). South Carolina omitted "opinions" from its version of 803(6). S.C. CODE ANN. § 19-5-510 (Law Co-op 1997).

233. Florida and Kentucky expressly provide for the exclusion of a person's opinions and diagnosis in a business record otherwise admissible under 803(6), unless the person would be permitted to testify about them in court. See FLA. STAT. § 90.803 (1997) (stating that person's opinion and diagnosis in an otherwise admissible business record are admissible only to the extent the person would be permitted to testify to them); KY. R. EVID. 803(6); see also N.J. R. EVID. 808 (providing that an expert opinion in business record is not admissible if declarant has not been produced as a witness, unless "trial judge finds that the circumstances involved in rendering the opinion . . . tend to establish its trustworthiness").

foundation requirements for the admissibility of an expert's testimony.<sup>234</sup> On the other hand, under 803(6), the opponent has the burden of showing a lack of trustworthiness. In *Licavoli*, the government introduced no evidence of the expert's qualifications. Thus, if *Licavoli* had applied Rule 702 independent of 803(6), the appraisal report would not have been admitted, just the opposite of the result reached.

One commentator has expressed the view that "*Licavoli* is more consistent with the structure of the Federal Rule [803(6)], which explicitly admits opinions . . ."<sup>235</sup> However, given 803's express and unambiguous introductory language, not contained in its predecessor,<sup>236</sup> it seems that Rule 702 should apply to any document offered under 803(6), and that the proponent should have the burden of establishing that the opinion was expressed by a qualified person. There appears to be no reason why opinions expressed in a document should be accorded better treatment than opinions expressed in court by live witnesses available for cross-examination.<sup>237</sup>

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234. See *supra* note 222.

235. MCCORMICK ON EVIDENCE § 287, at 268 n.15 (John William Strong ed., 4th ed. 1992).

236. See *supra* note 7.

237. A related and more basic question is whether the word "opinions" covered by 803(6) includes expert opinions. The question has scarcely been raised and almost all courts have assumed that expert opinions are included. Recently, a federal district court rejected, without analysis, defendant's argument that expert reports "by definition cannot constitute a business record admissible under Rule 803(6)," stating that defendant did not cite any support for the "conclusory assertion." *Conduis v. Howard Sav. Bank*, 986 F. Supp. 914, 918 (D.N.J. 1997). The court relied on cases that admitted expert reports, but none of them discussed the issue of whether 803(6) covered expert opinions.

The Court of Claims's decision in *Forward Communications Corp. v. United States*, 608 F.2d 485 (Ct. Cl. 1979), is perhaps the only opinion squarely addressing the question in holding an appraiser's report inadmissible. After referring to the Advisory Committee's Note to 803(6), the court concluded that the word "opinions" refers to those statements "which are incident to or part of factual reports of contemporaneous events or transactions" and not to expert opinions. *Id.* at 511. Reports prepared to state expert opinions, the court said, are inadmissible unless, pursuant to Rules 702 and 705, the expert is in court to testify as to his qualifications and to be cross-examined. *Id.* The court expressed the concern that if 803(6) were construed to override the opinion rules, then every appraiser's report "would be admissible upon the mere showing that the preparer was in the business of making such appraisals, without more." *Id.* at 510. This should not be a concern, however, because the court has discretion to exclude the expert opinion under Rules 403 and 702. See *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 323 (4th Cir. 1982); *Dell Publ'g Co. v. Whedon*, 577 F. Supp. 1459, 1464-65 n.5 (S.D.N.Y. 1984) (holding that "[w]here, as here, the opinions merely record the readers' [editors'] subjective evaluations of the quality of the manuscript, cross examination is essential to fix the authors' precise meaning, their basis of comparison, and even the good faith of their judgments"). The *Whedon* court did not believe 803(6) covered such opinions. *Id.*

Until now, we have discussed the application of other evidentiary rules in the context of 803(6). Now, let us turn to the Model Act, which is phrased in positive terms of admissibility, not in terms of nonapplication of the hearsay rules. By its terms, the Model Act provides that if the trial judge finds that a memorandum or record meets the statutory criteria, it "shall be admissible in evidence" as proof of the matter recorded.<sup>238</sup> Read literally, this business records exception statute makes a memorandum or record admissible even if other valid evidentiary objections exist. Such a reading is buttressed by the additional provision in the Model Act, not found in 803(6), that "all other circumstances" of the making of the record "shall not affect its admissibility."<sup>239</sup> Of course, to interpret the statute as overcoming every evidentiary barrier would be ludicrous. It would mean that even an irrelevant document that satisfied the business records exception would be admissible, a result that could not reasonably have been intended.<sup>240</sup> Although the Model Act does not contain language indicating

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*Forward Communications* is problematic. First, 803(6) uses the word "opinions" without any qualifications. Second, 803(6) also covers diagnoses and a diagnosis usually requires expertise. What is the difference between expert diagnosis incidental to a report of a patient's illness and an expert opinion on any other subject?

In any event, once *Forward Communications* concluded that expert reports were not covered by 803(6), it should have excluded the appraiser's report on the ground that 803(6) did not cover such reports and that the appraiser was not in court to testify. Instead, the court injected an element of confusion when it concluded that the report was inadmissible because the record did not contain any evidence of the appraiser's qualifications or even his identity and therefore the report did not meet Rule 702's requirements. *Id.* at 511. Was the court backtracking on its view that 803(6) does not cover reports of experts? In other words, would it have admitted the report if the proponent had adduced evidence of the preparer's qualifications to express the expert opinions? Finally, it should be noted that the plaintiff offered no testimony to show that the appraisal was created as part of the appraisal firm's regularly conducted business. *Id.*

238. See *supra* note 5. The Advisory Committee's Note to 803(6) does not mention this difference.

In dealing with opinions or diagnoses under the Model Act, an initial question of statutory interpretation arises because it only refers to a memorandum or record of any act, transaction, or occurrence and does not mention opinions or diagnoses. Cases under the Act are split as to whether it applies to opinions or diagnoses. *K.P. Knudsen v. Duffee-Freeman*, 99 S.E. 2d 370 (Ga. Ct. App. 1957). See *People v. Kohlmeier*, 31 N.E.2d 490 (N.Y. 1940) (holding hospital records containing doctor's diagnosis of patient's mental condition admissible under New York's business records statute). But among those cases that indicate it does apply, there is a further split as to the admissibility of a doctor's diagnostic opinion or the results of a scientific test which requires a special expertise as distinguished from routine diagnoses and scientific tests. See *Thomas v. Hogan*, 308 F.2d 355, 359-60 (4th Cir. 1962).

239. See *supra* note 5.

240. The Commonwealth Fund Report noted that the then-existing English and American Business Entries Rule "presupposes testimonial qualification of the entrant or declarant, so that the entrant or declarant must have personal knowledge of the subject



that its purpose is limited to removing only a hearsay objection, the statute's history indicates that the drafters were focusing only on the hearsay obstacle that prevented regular business entries from being received in evidence without calling every person in the business who participated in making the entries.<sup>241</sup>

Courts have addressed this issue under the Model Act and have limited the evidentiary scope of the Act to the hearsay arena.<sup>242</sup> For example, after noting that a police officer could not be permitted to testify in court about his conclusions as to the cause of a collision, the New York Appellate Division held that his written conclusions in a police report should be excluded because "the business entry lifts the barrier of the hearsay objection, it does not overcome any other exclusionary rule which might properly be invoked."<sup>243</sup> Thus, if an

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matter of the entry or declaration." See MORGAN ET AL., *supra* note 2, at 53. Nowhere in its report did the Committee hint that its proposed Model Act did not also presuppose testimonial qualifications, such as personal knowledge on the part of the entrant or declarant as the then existing business entries rule did. See also *Continental Baking Co. v. United States*, 281 F.2d 137, 148 (6th Cir. 1960) (holding that documents admissible under Section 1732 "must also be competent and relevant").

241. MORGAN, ET AL., *supra* note 2, at 51. See *In re Coddington's Will*, 120 N.E.2d 777, 784 (N.Y. 1954) (stating that purpose of The Model Act "was to overcome the objection of the hearsay rule").

242. See *Powell v. Brady*, 496 P.2d 328, 332 (Colo. Ct. App. 1972) (stating that Section 1732 applied in Colorado state court "does not abandon the requirement that the relevancy of the tendered record be established"); *Reynolds v. State*, 633 A.2d 455, 459-60 (Md. Ct. Spec. App. 1993) (holding an opinion that hospital record is inadmissible if it would be excluded with the expert on the witness stand); *Murray v. Donlan*, 433 N.Y.S. 2d 184, 190 (N.Y. 1980) (holding police officer's post-accident opinion in accident report as to cause of accident inadmissible because, among other things, there was no proof that he was qualified to do an expert analysis of the physical evidence or to render an opinion based on such analysis); *Toll v. State*, 299 N.Y.S. 2d 589, 591 (N.Y. App. Div. 1969); *Coddington*, 120 N.E.2d at 784. See also N.Y.C.P.L.R. 4518, commentaries at C4518:4 (McKinney 1992) (stating that "regularly recorded opinions should be admissible to the same extent they would be admissible if the opinion holder were testifying at trial"); RICHARDSON ON EVIDENCE § 235 (Jerome Prince ed., 9th ed. 1964) (stating that N.Y.C.P.L.R. 4518 (a) "does not overcome any other exclusionary rule").

The same appears to be the case under the UBRE. See *Williams v. McClain*, 520 A.2d 1374, 1376-77 (Pa. 1987) (stating that where record does not show that social worker was qualified to make diagnosis contained in her report, her opinion was inadmissible under Pennsylvania's business record exception adopted from UBRE; to admit the evidence when it would not be admissible if she testified in court would be contrary to purposes of the exception); *In re Wildoner*, 407 A.2d 1351, 1354 (Pa. Super. Ct. 1979) (stating that business records admissible under Pennsylvania's business record exception "must not be violative of other evidentiary rules").

243. *Toll v. State*, 299 N.Y.S.2d 589 (N.Y. App. Div. 1969).

objection is made, a proponent should be required to show that the business records also satisfy other relevant evidentiary rules.<sup>244</sup>

## VII. CONCLUSION

Courts should adhere more closely to the requirements set forth in business records exception codifications. This should particularly be true with 803(6) because Congress amended the Supreme Court's text and insisted on including an express regular practice requirement as an additional guarantee of trustworthiness. No doubt Congress did not intend for courts to pay only lip service to this requirement, as courts have done. Significant language differences in the various codifications of the business records exception should mean something. Courts must flesh out the foundation requirements and spell out the criteria that must be met in order to satisfy those requirements. They must be more analytical and more precise in applying those requirements in determining a document's admissibility under a given exception. Unless courts do this, results will not differ despite differences in the codified language, and litigants will not have a solid basis to predict admissibility. Of course, despite language differences, courts may interpret the different codifications to impose substantially the same requirements because, in the final analysis, the key language in each codification is the requirement that the document be made in the regular course of business. As we have seen, this language may be interpreted as including a regular practice requirement, and as requiring both that the entrant be under a duty to enter and that the declarant be under a duty to report.

More careful analysis and greater adherence to the codified language will likely produce greater consistency.<sup>245</sup> At the same time, it will give litigants a much better idea of whether they will succeed in having a document admitted

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244. It is not clear whether the proponent must introduce evidence independent of the document or whether the document itself may establish the qualifications. See CAL. EVID. CODE § 720(a) (West 1996) (stating that proponent must first show expert qualified if opponent objects to expert testifying); *Williams*, 520 A.2d at 1376-77; *Reynolds*, 633 A.2d at 459 (stating that record itself must show that person is qualified to express expert opinion and that there was an adequate factual basis for it); Abraham P. Ordovery, *Expert Testimony: A Proposed Code for New York*, 19 N.Y.L.F. 809, 814 (1974) (stating that proposed requirement that proponent has burden of showing expert witness's qualifications is codification of existing New York law). But cf. *Thomas v. Hogan*, 308 F.2d 355, 360 (4th Cir. 1962) (stating there is presumption that diagnosis and scientific tests are properly made by qualified personnel if the recorded information [in hospital record] reflects usual routine of hospital"); *Marlow v. Cerino*, 313 A.2d 505, 514 (Md. Ct. Spec. App. 1974) (holding opinion in hospital record admissible where it appears from such record that person qualified to give opinion; inference arises that physician diagnosis made by qualified person if it is established that hospital record is from reputable hospital of high standards).

245. It may also result in a decrease of business documents admissible under the exception.

under a given exception. However, given the limitless variety of documents that businesses prepare, and that many such documents may not fit neatly into the foundation requirements, courts should be allowed some flexibility in dealing with unusual documents. More specifically, the exception should be expanded to give courts discretion to admit documents not otherwise admissible under 803(6) or a similar exception where the documents were made in the regular course of business by an entrant using information transmitted by a declarant with personal knowledge, provided: (i) the business substantially relied on the information in conducting its business affairs with persons other than the declarant, and the declarant transmitted the information in the regular course of declarant's business,<sup>246</sup> or (ii) the business verified the information and substantially relied on it in the regular conduct of its business. Finally, the business duty requirement should be codified to eliminate any question as to its applicability, and consideration should be given to adopting New Jersey's Rule 808,<sup>247</sup> which excludes expert opinions in business records unless the trial court finds that the circumstances involved in rendering the opinions establish their trustworthiness.

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246. This would cover situations such as those present in *Leroy v. Sabena Belgian World Airlines Inc.*, 344 F.2d 266 (2d Cir. 1965) and *Northeast Bank Trust Co. v. Soley*, 481 A.2d 1123 (Me. 1984). See *supra* notes 159, 163 and accompanying text. But, it would not cover a document that a bank prepared based on a financial statement that a borrower gave the bank even though the bank relied on the financial statement in making a loan to the borrower.

247. N.J. R. EVID. 803(8).