

## *Practice Tip*: Alternative Ways to Admit Business Records Into Evidence When Rule 803(6) is Unavailable

*Practice Tip* will be a continuing series of columns that feature suggestions for considering alternative ways to admit or exclude evidence under specific evidence rules or practices. In this issue, the business records hearsay exception is considered.



### Usual Rule 803(6) Approach

Under Federal Rule of Evidence 803(6), business records may be admitted as an exception to the rule excluding hearsay. The proponent of the evidence must show that the records to be admitted were kept in the course of a regularly conducted business activity. See, e.g., *United States v. Sokolow*, 91 F.3d 396 (3d Cir. 1996) (noting that under Rule 803(6) a summary of claims the business paid could be admitted regardless of the hearsay exclusion because it was prepared in the course of regularly conducted business). But what options can counsel consider if the trial court, in the exercise of its discretion is not satisfied that these foundational elements are met and excludes the evidence?

### Alternative Approaches

At least five alternative bases to the business records rule may apply, depending on the facts of the case:

#### Party Admission (FRE 801(d)(2)(A))

Consider whether the record contain party admissions. For an example of this approach consider:

❖ *United States v. Ray*, 930 F.2d 1368, 1370 n.6 (9th Cir. 1991) (financial information in a welfare file was admissible as a party admission, where it was unclear whether a business duty to report existed as required under FRE 803(6)), *cert. denied*, 498 U.S. 1124 (1991)

#### Adoptive Admission (FRE 801(d)(2)(B))

Consider whether any adoptive admissions were made in the records. If so, counsel may be able to admit the evidence under an adoptive admission exception to the hearsay rule, as suggested in the following case:

❖ *United States v. Smith*, 609 F.2d 1294, 1301 n.7 (9th Cir. 1979) (court

notes possibility that hotel records could be admitted as an adoptive admission, although the records were admitted under FRE 803(6))

#### Public Record or Report (FRE 803(8))

If public records are involved, consider the public records exception as a way to admit the business records. For instance:

❖ *United States v. Bland*, 961 F.2d 123, 128 n.4 (9th Cir.) (noting the potential availability of the public records exception to admit government firearm transaction records (ATF Form 4473), although the records were introduced under FRE 803(6)), *cert. denied*, 506 U.S. 858 (1992)

#### Residual Hearsay Exception (FRE 807)

Several courts have used the residual hearsay exception as a basis for the admission of business records when FRE 803(6) was applicable, for example:

❖ *United States v. Nivica*, 887 F.2d 1110, 1127 (1st Cir. 1989) (bank records inadmissible as business records were admissible under residual hearsay exception), *cert. denied*, 494 U.S. 1005 (1990)

❖ *Karme v. Commissioner*, 673 F.2d 1062, 1064 (9th

Cir. 1982) (bank record were inadmissible under FRE 803(6) because witness, an IRS special agent, was not a “custodian or other qualified witness,” but records were admissible under residual hearsay exception)

❖ *United States v. Bachsian*, 4 F.3d 796, 799 & n.2 (9th Cir. 1993) (shipping documents - including ocean bills of lading, packing lists and commercial invoices - admitted under FRE 807 although offered under FRE 803(6)), *cert. denied*, 510 U.S. 1080 (1994)

### Non-Hearsay Purpose (Not Offered For The Truth Of The Matter Asserted)


There may be non-hearsay purposes for admitting statements in business records. In such an instance, the evidence would not fall under the hearsay bar of Rule 802, and therefore may be admissible if relevant. For several examples of this approach, consult:

❖ *United States v. Ray*, 930 F.2d 1368, 1370 n.6 (9th Cir. 1991) (financial information in a welfare file); “Nonhearsay statements recorded in a business record need not have been made under a business duty to be admissible.”), *cert. denied*, 498 U.S. 1124 (1991).

### Importance of Alternative Ground

Alternative grounds for admitting or excluding evidence are important for two reasons.

❖ First, before evidence is admitted or excluded at trial (particularly on close trial evidence questions), counsel may wish to have a backup to ensure admission or exclusion of the evidence.

❖ Second, on appeal, if any errors were made at trial, alternative grounds may be necessary to determine whether the trial court can be affirmed on another basis finding support in the record. 

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