Admitting Recorded Hearsay: A Comparison Of Past Recollection Recorded And Business Records

I. INTRODUCTION

An attorney who offers a record of a prior event into evidence faces a possible hearsay objection.[1] He may overcome this objection, however, by utilizing the past recollection recorded or business records exceptions to the hearsay rule.[2] The past recollection recorded exception permits a witness to substitute a previously recorded writing for oral testimony if he has an insufficient present recollection of its contents. The business records exception allows into evidence a writing made in the regular course of business.

Necessity underlies both hearsay exceptions. The deficient memory of the observer of the recorded event and the strong interest in admitting as much relevant information as possible justify the past recollection recorded exception.[3] Similarly, the large number of transactions characteristic of modern business makes direct testimony regarding the contents of most business records difficult, if not impossible. The proponent of the writing will often find it impractical to identify and call as a witness the observer of the

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[1] A writing not offered to prove the truth of the matter asserted is admissible without qualifying under *any* hearsay exception. *See, e.g.*, People v. Erving, 189 Cal. App. 2d 283, 290-92, 11 Cal. Rptr. 203, 207-09 (2d Dist. 1961) (hotel register admitted as handwriting sample without laying business records foundation). *See generally* Comment, *Hearsay: The Threshold Question*, this volume. The remainder of this article assumes that the writing is being offered to prove the truth of the matter asserted, and seeks to maximize the chances of admitting its contents into evidence.

[2] An attorney may admit a writing using *neither* of these exceptions if the writing qualifies under some other hearsay exception such as admissions of a party opponent or declarations against interest. London v. Guberman, 214 Cal. App. 2d 215, 220, 29 Cal. Rptr. 279, 283 (2d Dist. 1963); Richmond v. Frederick, 116 Cal. App. 2d 541, 548, 253 P.2d 977, 982 (1st Dist. 1953). The remainder of this article assumes that no other hearsay exception is applicable.

Note: Throughout this article, male pronouns are used generically.

[3] 3 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 738 (Chadbourn rev. 1970) [hereinafter cited as 3 WIGMORE].

recorded event.[4] Rarely will the observer, even if he is known, recall the specific event because the events recorded by most businesses are routine and commonplace. Therefore, his appearance in court as a witness would be futile.

As with the other hearsay exceptions, both past recollection recorded and business records may preclude thorough cross-examination of the declarant of the recorded statement.[5] Both exceptions therefore substitute certain foundational requirements which are designed to ensure the writing's trustworthiness. Both exceptions require that the observer have had personal knowledge of the recorded fact,[6] and that his statement appear in a writing.[7] To minimize the danger of memory lapse, both exceptions also require that the record have been produced simultaneously with the event or soon thereafter.[8]

The different conditions underlying the two hearsay exceptions, however, have resulted in additional foundational requirements peculiar to each. To further ensure the reliability of a past recollection recorded, testimony is required of both the observer and recorder that their statements were true and recorded accurately.[9] In contrast, the trustworthiness of a business record is inferred from the circumstances surrounding its preparation. Businesses have an interest in keeping accurate records, because they rely on these writings in their day-to-day operations.[10] The proponent of a business record must therefore show that the writing was made in the

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[4] *See* E. CLEARY, *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 306 & 311 (2d ed. 1972) [hereinafter cited as MCCORMICK. (2d ed.)].

[5] B. WITKIN, CALIFORNIA EVIDENCE § 448 (2d ed. 1966) [hereinafter cited as WITKIN].

[6] FED. R. EVID. 803(5) & (6); CAL. EVID. CODE § 1271, Law Rev. Comm'n Comment (West 1968). *See* CAL. EVID. CODE § 1237(a) (West 1968). The Federal Rules of Evidence are found at 28 U.S.C. FED. R. EVID. 101 *et seq.* (1975).

[7] MCCORMICK (2d ed.), *supra* note 4, § 307: 3 WIGMORE, *supra* note 3, § 744.

[8] MCCORMICK (2d ed.), *supra* note 4, §§ 301 & 309. The past recollection recorded exception requires that the recording take place when the event occurs or while it is still fresh in the witness' memory. The business records exception requires that the record be made "at or near" the time of the event. The past recollection recorded formulation is more flexible than the business records formulation and more accurately reflects the purpose of the requirement, which is to guard against loss of memory between the time of observation and the time of recordation.

If circumstances indicate that the danger of memory lapse was not involved, a business record is admissible even if made months after the event recorded. United States v. Russo, 480 F.2d 1228, 1240 (6th Cir.), *cert. denied* 414 U.S. 1157 (1973) (computer printouts); Standard Oil Co. of California v. Moore, 251 F.2d 188, 223 (9th Cir. 1957), *cert. denied* 356 U.S. 975 (1958) (ledger summaries).

[9] MCCORMICK (2d ed.), *supra* note 4, § 303.

[10] *Id.*, § 306.

regular course of business.[11]

This article will describe how a California attorney may enter recorded hearsay into evidence under either of these two hearsay exceptions. The article will begin by describing the advantages of the business records exception over the past recollection recorded exception when *both* are applicable to the same writing. The article will then examine the circumstances in which only *one* of the two exceptions can be used to admit a writing. Finally, the article will focus on how to admit certain types of writings ordinarily offered as business records if they fail to qualify under the business records exception. Throughout, the article will contrast the California Evidence Code[12] with the Federal Rules of Evidence.[13]

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[11] FED. R. EVID. 803(6); CAL. EVID. CODE § 1271(a) (West 1968).

[12] CAL. EVID. CODE § 1237 (West 1968), Past recollection recorded:

> (a) Evidence of a statement previously made by a witness is not made admissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:
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> (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
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> (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;
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> (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and
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> (4) Is offered after the writing is authenticated as an accurate record of the statement.
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> (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

See note 34 *infra* for this statute's predecessor.

CAL. EVID. CODE § 1271 (West 1968), Business record:

> Evidence of a writing made as a record of an act, condition, or event is made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
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> (a) The writing was made in the regular course of a business;
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> (b) The writing was made at or near the time of the act, condition, or event;
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> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
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> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Evidence Code section 1271 is essentially a recodification of the Uniform Business Records as Evidence Act (Ch. 482, § 1, [1941] Cal. Stat. 1788). CAL. EVID. CODE § 1271, Law Rev. Comm'n Comment (West 1968).

[13] FED. R. EVID. 803(5). Recorded recollection.

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly [is not excluded by the hearsay rule]. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered

II. THE PREFERENCE FOR THE BUSINESS RECORDS EXCEPTION

Both the past recollection recorded and the business records exceptions can often be used to admit the same document. A writing made in the regular course of business at or near the time of the recorded event may qualify as a business record.[14] In addition, if the observer of the event and the recorder of the writing are available to testify to the truth and accuracy of their recorded statements, but the observer lacks a sufficient recollection to testify to the facts therein, the writing may be admitted as a past recollection recorded.[15]

When an attorney has a choice between the two exceptions, he will find that the business records exception offers two advantages over the past recollection recorded exception. The first is practical: under the business records exception, the observer and recorder are not required to lay the foundation. The second is tactical: under the business records exception, the writing itself is admissible into evidence and hence available to the jury as an exhibit rather than merely as a witness' statement from the stand.

A. WITNESSES REQUIRED TO LAY THE FOUNDATION

To qualify a writing as a past recollection recorded, the observer must testify that his recorded statement was a true account of the fact observed.[16] The exception also requires a showing that the observer's statement was recorded accurately.[17] Often, the observer and the recorder are the same individual, and therefore only that person need testify. However, if another person recorded the observer's statement, either the observer must testify that he verified the accuracy of the writing while the event recorded was still fresh

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by an adverse party.

FED. R. EVID. 803(6). Records of regularly conducted [business] 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, [is not excluded by the hearsay rule] 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. . . .

Under rule 803(6), business records containing opinions are now expressly admissible, and lack of trustworthiness is now a statutory ground for exclusion. *See* text accompanying notes 64 and 77, *infra*.

Rule 803(5) codifies federal case law regarding the past recollection recorded exception to the hearsay rule. *See* FED. R. EVID. 803(5). Advisory Comm. Note.

[14] FED. R . EVID. 803(6); CAL. EVID. CODE § 1271 (West 1968).

[15] *See* FED. R. EVID. 803(5); CAL. EVID. CODE § 1237 (West 1968).

[16] CAL. EVID. CODE § 1237(a)(3) (West 1968). *But cf.* note 36, *infra*.

[17] FED. R. EVID. 803(5); CAL. EVID. CODE § 1237 (West 1968).

in his memory, or else the recorder must testify to the accuracy of the recordation.[18]

Under the business records exception, neither the observer nor the recorder need testify. The custodian of the record[19] or any other witness who can testify to the identity and mode of preparation of the writing[20] may lay the foundation. This witness need not possess personal knowledge of the recorded fact,[21] nor need he actually have recorded the statement.[22] In contrast, only the observer and the recorder may qualify the writing as a past recollection recorded. The unavailability of either of the two parties to the recording may render the writing inadmissible.[23]

The difficulties of admitting a writing as a past recollection recorded multiply when the proffered writing consists of the recorded declarations of numerous persons. Each observer would have to testify to the truth and accuracy of his statement. If the writing was submitted as a business record, however, only one person would have to authenticate it.

Reports of blood alcohol test results[24] illustrate this advantage of the business records exception over the past recollection recorded exception. When blood is tested for alcoholic content, the blood is extracted from the body and placed in a bottle labelled with the

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[18] *See* People v. Gentry, 270 Cal. App. 2d 462, 468-70, 76 Cal. Rptr. 336, 340-41 (3d Dist. 1969); People v. Davis, 265 Cal. App. 2d 341, 348-50, 71 Cal. Rptr. 242, 247-48 (2d Dist. 1968). Allowing joint testimony by the observer and recorder represented a substantial change from the superseded statute relating to past recollection recorded, which required that the observer make, or direct the making of, the record. *See* note 34, *infra*. The present statute permits the writing to be made not only by the witness or someone under his direction, but also by someone for the purpose of recording the witness' statement at the time it was made. This addition means that the declarant need not know whether the recorder transcribed the declarant's statement accurately, if the recorder appears in court to verify the accuracy of his recordation. CAL. EVID. CODE § 1237, Law Rev. Comm'n Comment (West 1968). *See also* note 37, *infra*.

[19] FED. R. EVID. 803(6); CAL. EVID. CODE § 1271 (West 1968).

[20] United States v. Leal, 509 F.2d 122, 127 (9th Cir. 1975); Doyle v. Chief Oil Co., 64 Cal. App. 2d 284, 292, 148 P.2d 915, 920 (2d Dist. 1944). *See also* People v. Porterfield, 186 Cal. App. 2d 149, 8 Cal. Rptr. 892 (2d Dist. 1970).

[21] *See* La Porte v. United States, 300 F.2d 878, 881 (9th Cir. 1962); People v. Southern Cal. Edison Co., 56 Cal. App. 3d 593, 605-06, 128 Cal. Rptr. 697, 706 (5th Dist. 1976); S. REP. NO. 93-1227, 93d Cong., 2d Sess. 17 (1974).

[22] La Porte v. United States, 300 F.2d at 881 n.11 (9th Cir. 1962). *See* People v. Crosslin, 251 Cal. App. 2d 968, 976, 60 Cal. Rptr. 309, 315 (1st Dist. 1967); FED. R. EVID. 803(6), Advisory Comm. Note.

[23] *See* People v. Sam, 71 Cal. 2d 194, 208, 454 P.2d 700, 707-08, 77 Cal. Rptr. 804, 811-12 (1969).

[24] *See* Lew Moon Cheung v. Rogers, 272 F.2d 354 (9th Cir. 1959); Nichols v. McCoy, 38 Cal. 2d 447, 240 P.2d 569 (1952); Nesje v. Metropolitan Coach Lines, 140 Cal. App. 2d 807, 295 P.2d 979 (2d Dist. 1956); Dobson v. Industrial Accident Commission, 114 Cal. App. 2d 782, 251 P.2d 349 (3d Dist. 1952); McGowan v. City of Los Angeles, 100 Cal. App. 2d 386, 223 P.2d 862 (2d Dist. 1950).

donor's name. The blood is then tested and a report is prepared. Before an attorney can submit this report to prove or disprove the donor's intoxication, he must first prove that the blood tested was in fact extracted from the donor. The label can be used for this purpose. To admit the label and report as past recollections recorded, the attorney would have to call as witnesses the person who extracted the blood and reported the donor's name, the person who labelled the bottle and delivered it to the laboratory, the person who performed the test, and the person who recorded the results. Under the business records exception, however, a qualified witness from the agency extracting the blood and one from the agency testing the blood could establish the foundation for the label and the report. Furthermore, if the same agency prepared both the label and the report in the regular course of its business, a single witness could lay the foundation for both. This procedure would eliminate the necessity and inconvenience of calling as witnesses all four participants in the making of the records.

In certain settings, California courts have made the business records exception even more advantageous by striking the requirement that a qualified witness appear in court to lay the foundation. Two cases have stated that invoices may be admitted into evidence under the business records exception without testimony by a witness from the business which prepared them if the invoices are used simply to corroborate testimony.[25] Furthermore, under certain circumstances, when a subpoena duces tecum for a record is served upon a business, the proponent may lay the foundation for the record with the affidavit of the custodian or other qualified witness.[26]

B. ADMISSIBILITY OF THE WRITING INTO EVIDENCE

The second advantage of the business records exception stems from the form in which the jury receives the recorded fact. Under the past recollection recorded exception, the contents of the writing, once admitted, are read to the jury by the observer. The proponent of the writing cannot submit the writing itself into evidence;[27] only the adverse party may do so.[28] Under the business records exception,

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[25] Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 43, 442 P.2d 641, 647, 69 Cal. Rptr. 561, 567 (1968); Rodgers v. Kemper Construction Co., 50 Cal. App. 3d 608, 626-27, 124 Cal. Rptr. 143, 154 (4th Dist. 1975) (medical bills). However, *Rodgers* merely cited *P.G.&E.*, which in turn merely cited common law cases which did not address the hearsay aspect of admitting bills and invoices to prove the truth of the matter asserted, even if only used to corroborate testimony.

[26] CAL. EVID. CODE §§ 1560, 1561 (West Supp. 1976). The federal rules contain no corresponding provision.

[27] MCCORMICK (2d ed.), *supra* note 4, § 299, at 713 n.8.

[28] FED. R. EVID. 803(5); CAL. EVID. CODE § 1237 (West 1968).

however, the proponent may offer the writing itself into evidence.[29]

Theoretically, a past recollection recorded constitutes the observer's oral testimony.[30] The recorded statements are admissible only because the observer lacks a sufficient recollection to give present testimony. Therefore, the courts do not permit the jury to see the writing in order to prevent the jury from giving the writing more evidentiary weight than it would give to oral testimony.[31] Presumably, if the jury takes into the jury room only its memory of the past recollection recorded and not the writing itself, this goal is accomplished.

Submitting the writing itself to the jury is tactically advantageous.[32] Jurors may give more weight to a writing, if only because they can refresh their memories with regard to the statements therein. When a writing is complex or cannot be easily described, its admission as a business record would allow the jurors to study its contents and thereby better understand it.

Admitting the contents of the record into evidence remains the objective of both exceptions, and to that end, either is adequate. However, when an attorney has a choice between the two exceptions, the business records exception is preferable.

III. EXCLUSIVE APPLICABILITY OF THE BUSINESS RECORDS EXCEPTION

Because the foundational requirements of the two exceptions differ, often only one of the two can be used to admit a particular writing. This section focuses upon two situations in which the past recollection recorded exception is inapplicable and an attorney should consider using the business records exception.

A. SUFFICIENT RECOLLECTION BY THE DECLARANT

When the observer of an event possesses a sufficient recollection to testify with precision, he must offer present testimony of the event. Both the California statute and the federal rule require that the declarant of a past recollection recorded lack sufficient memory of the recorded event to testify accurately.[33] Before an attorney may invoke

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[29] *See* MCCORMICK (2d ed.), *supra* note 4, § 306.

[30] *See* WITKIN, *supra* note 5, § 1173.

[31] MCCORMICK (2d ed.), *supra* note 4, § 299, at 713 n.8.

[32] *Id.*

[33] FED. R. EVID. 803(5); CAL. EVID. CODE § 1237(a) (West 1968). This is a compromise solution to the long-standing argument over whether a lack of recollection should be a requirement at all. Some authorities, including Wigmore, have urged the abolition of this requirement, while others have advocated the application of the past recollection recorded exception only when the witness manifests a *complete* lack of recollection. *See* MCCORMICK (2d ed.), *supra* note 4, § 302, and 3 WIGMORE, *supra* note 3, § 738.

the past recollection recorded exception, the observer must attempt to recall the event by reading the record to himself. If the writing refreshes the observer's recollection, he must testify without its aid. Only if the observer's memory is not sufficiently refreshed may the attorney submit the writing as a past recollection recorded.[34]

The business records exception imposes no such limitation. The observer's recollection of the event recorded in a business record does not preclude the record's admission. The observer may, for example, use the record to corroborate his oral testimony.[35] Such usage may reinforce the observer's credibility and reemphasize the fact to which he has testified.

B. UNAVAILABILITY OF THE OBSERVER OR RECORDER

The past recollection recorded exception requires both the observer and the recorder to appear in court to lay the foundation. In California, the *observer's* unavailability precludes the use of the past recollection recorded exception to prove the truth of his assertions.[36] Likewise, unless the observer verified the writing's accuracy

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[34] Note, *The Forgetful Witness: Refreshing Memory and Past Recollection Recorded*, 3 U.C.L.A. L. REV. 616 (1955). Throughout its history, past recollection recorded has been confused with refreshing the recollection, a similar-sounding but conceptually different principle. While past recollection recorded permits a writing to serve as a *substitute* for present testimony, refreshing the recollection utilizes a writing to *stimulate* a witness' forgotten memory, so that he may testify from a revived memory. Despite the substantial difference between the two doctrines, the courts classified both as "refreshing the memory" and did not distinguish them. In California, this confusion was codified in 1872, in Cal. Code Civ. P. § 2047 (repealed by Ch. 299, § 126, [1965] Cal. Stat. 1366):

> A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution.

Apparently, the first two sentences of the statute applied to refreshing the recollection, while the third referred to past recollection recorded. Because both were contained in the same statute, refreshing the recollection was required to meet the same foundational requirements as past recollection recorded. Refreshing the recollection is now separately codified in federal rule 612 and California Evidence Code section 771 (West 1968).

[35] Franco Western Oil v. Fariss, 259 Cal. App. 2d 325, 333, 66 Cal. Rptr. 458, 465 (3d Dist. 1968). *See also* People v. King, 104 Cal. App. 2d 298, 307-09, 231 P.2d 156, 161-62 (1st Dist. 1951).

[36] Suppose *X* and *Y* observe an event. *X* records the event and *Y* checks the accuracy of the record while the event is still fresh in his memory. Suppose further that *X* is unavailable to testify, but that *Y*, who lacks a sufficient recollection of the event but remembers that *X* recorded it correctly, is available to lay the foundation. A case decided prior to rule 803(5) held that *Y* could show

while the fact was still fresh in his memory and can attest to this accuracy, the *recorder's* unavailability also precludes the use of this exception.[37]

Vanguard Recording Society v. Fantasy Records[38] illustrates this point. The court admitted a summary of 50,000 sales invoices, each of which would have been admissible as a business record. The person who directed the preparation of the summary testified to the foundational requirements. If the attorney had offered the invoices as past recollections recorded, he would have had to call as a witness each salesclerk who had prepared an invoice, an impossible task.

If the observer is unavailable, and the writing also fails to qualify as a business record, the writing cannot be admitted under either exception alone. However, the California Evidence Code and the Federal Rules of Evidence contain multiple hearsay provisions under which an attorney may qualify the observer's out-of-court statement to the recorder under one hearsay exception and the recorder's written out-of-court statement under a different exception.[39]

For example, suppose a patient who was injured in an automobile accident with the defendant tells his doctor that the accident was his

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that the record correctly reflected his knowledge of the event. Washington v. Washington, Virginia & Maryland Coach Co., 250 F. Supp. 888, 890 (D.D.C. 1966). Rule 803(5) would seem to permit the same result. However, Evidence Code section 1237(a)(3) would seem to require that *X*, who made the statement, testify that his statement was true.

[37] Federal Rule 803(5) states that the writing must have been made or adopted by the witness when the matter was fresh in his memory. This language lends itself to the interpretation that the observer must have made the record himself or that he must have verified while the recorded fact was fresh in his mind that the recorder accurately recorded his statement. Some pre-rules cases so stated, United States v. Payne, 492 F.2d 449, 455-56 (4th Cir. 1974) (Widener, J. concurring & dissenting). However, the Advisory Committee Note and the legislative history to Rule 803(5) cite with approval cases where the observer neither made nor adopted the writing and the recorder was allowed to testify that he accurately recorded the observer's statement. *See* S. REP. NO. 93-1277, 93d Cong., 2d Sess. 27 (1974) and FED. R. EVID. 803(5), Advisory Committee Note, both citing Rathbun v. Brancatella, 93 N.J.L. 222, 107 A. 279 (1919). Thus it is unlikely that rule 803(5) was intended to overrule cases such as Swart v. United States, 394 F.2d 5 (9th Cir. 1968) and United States v. Booz, 451 F.2d 719, 725 (3d Cir. 1971) which allowed the recorder to testify to the accuracy of his recordation. *See also* note 18 *supra.*

[38] 24 Cal. App. 3d 410, 418-19, 100 Cal. Rptr. 826, 832 (1st Dist. 1972).

[39] FED. R. EVID. 805:

> Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

CAL. EVID. CODE § 1201 (West 1968):

> A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such a statement is hearsay evidence if such hearsay evidence consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.

own fault, and the doctor records this information. Later, in a civil suit by the patient against the defendant for negligence, the defendant offers into evidence the record of the patient's admission of fault. If the patient cannot testify to the truthfulness of his statement, the court would not admit the record as a past recollection recorded to prove that the patient was at fault. Due to the lack of a business duty on the part of the doctor to record the patient's admission, the court would not admit the writing as a business record.[40] However, utilizing multiple hearsay exceptions, the court might admit the record to prove that the patient was at fault if the patient's statement to the doctor qualified as an admission of a party opponent, and if the doctor, assuming he had an insufficient recollection, verified the accuracy of his written statement, thereby qualifying it as a past recollection recorded.[41]

IV. EXCLUSIVE APPLICABILITY OF THE PAST RECOLLECTION RECORDED EXCEPTION

The advantages of the business records exception suggest that, whenever possible, an attorney should invoke it rather than the past recollection recorded exception. A writing, however, is not admissible as a business record if it was not made in the "regular course of business" or is otherwise not trustworthy. A writing will fail to meet the business records exception's foundational requirements if it was not made by a business, if it was made by someone lacking a business duty, or if it was prepared for litigation. In these situations, an attorney should consider submitting the writing under the past recollection recorded exception.

A. WRITINGS NOT MADE BY A "BUSINESS"

A writing is not made in the "regular course of business" unless it is made by a "business." Under both California Evidence Code section 1270 and federal rule 803(6),[42] a "business" includes govern-

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[40] MCCORMICK (2d ed.), *supra* note 4, § 313.

[41] J. PRINCE, RICHARDSON ON EVIDENCE § 233 (9th ed. 1964).

[42] CAL. EVID. CODE § 1270 (West 1968):

> . . . "a business" includes every kind of business, governmental activity, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

FED. R. EVID. 803(6):

> . . . 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.

Evidence Code Section 1270 adds "governmental activities" to the previous statutory definition to reflect recent developments in the case law. Rule 803(6) adds "associations and institutions" to the previous statutory definition and specifies that the "business" need not be conducted for profit.

mental agencies[43] and such institutions and associations as schools,[44] churches,[45] and hospitals.[46]

The courts exclude few writings as not being made by a "business." For example, private financial records made in the regular course of personal business are usually admissible.[47] Courts have held, however, that personal diaries and memos are inadmissible as business records.[48] In one case, the court excluded a personal diary describing a loan because the recorder was not in the lending business.[49] Likewise, a court has excluded a record of gardening chores performed by a nephew for his aunt because he was not in the gardening business.[50] In such cases, if the observer manifests an insufficient recollection and is available to lay the foundation, the contents of the writing can be offered under the past recollection recorded exception.

B. LACK OF BUSINESS DUTY

To qualify under the business records exception, a record must have been prepared within the business duty of the observer and the recorder.[51] This business duty provides a guarantee of reliability, since the continued employment of the observer and recorder depend upon the precision of their work. Moreover, an employer usually hires a record keeper on the basis of his ability to keep accurate records.

Police reports illustrate the use of the past recollection recorded exception to admit a record containing a statement not made within

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[43] *See, e.g.*, Hrynko v. Crawford, 402 F. Supp. 1083, 1087 (E.D. Pa. 1975); La Porte v. United States, 300 F.2d 878, 880 (9th Cir. 1962); CAL. EVID. CODE § 1270 (West 1968), Law Rev. Comm'n Comments. There is also a separate hearsay exception for public records in FED. R. EVID. 803(8) and CAL. EVID. CODE § 1280 (West 1968).

[44] H. REP. NO 93-1597, 93d Cong., 2d Sess. 11 (1974). *See, e.g.*, People v. Arauz, 5 Cal. App. 3d 523, 532-33, 85 Cal. Rptr. 266, 272-73 (4th Dist. 1970).

[45] H. REP. NO. 93-1597, 93d Cong., 2d Sess 11 (1974); CAL. EVID. CODE § 1270 (West 1968), Law Rev. Comm'n Comments. There is also a separate hearsay exception for church records of family history in FED. R. EVID. 803(11) and CAL. EVID. CODE § 1315 (West 1968).

[46] H. REP. NO. 93-1597, 93d Cong., 2d Sess. 11 (1974). *See, e.g.*, People v. Moore, 5 Cal. App. 3d 486, 492-93, 85 Cal. Rptr. 194, 199 (2d Dist. 1970).

[47] *See, e.g.*, United States v. Tucker, 435 F.2d 1017, 1019 (9th Cir. 1970), *cert. denied* 401 U.S. 976 (1971) (records of dividends received by stockholder); Sabatino v. Curtiss National Bank of Miami Springs, 415 F.2d 632 (5th Cir. 1969), *cert. denied* 396 U.S. 1057 (1970) (personal checkbook and reconciliation of accounts).

[48] MCCORMICK (2d ed.), *supra* note 4, § 308.

[49] Buckley v. Altheimer, 152 F.2d 502, 507-08 (7th Cir. 1945).

[50] Gough v. Securities Trust & Savings Bank, 162 Cal. App. 2d 90, 93-94, 327 P.2d 555, 557 (4th Dist. 1958).

[51] Standard Oil Co. of California v. Moore, 251 F.2d 188, 214 (9th Cir. 1958); McCormick (2d ed.), *supra* note 4, § 310. *But cf.* United States v. Lange, 466 F.2d 1021, 1024-25 (9th Cir. 1972).

the business duty of the *observer*. In one case, an eyewitness to a crime could not recall at trial the event she had witnessed and reported to a police officer.[52] The officer's report would have been inadmissible as a business record to prove the truth of the eyewitness' assertions since the eyewitness had no business duty to report accurately to the officer.[53] However, after the eyewitness testified to the truth of her statement to the officer, and the officer in turn verified the recording's accuracy, the court admitted the police report as a past recollection recorded.[54]

When the *recorder* lacks a business duty to record, the business records exception is again inapplicable. For example, a hospital record containing an injured patient's statement to his physician of the license number of the car which struck him is inadmissible as a business record because such information is unrelated to the diagnosis or treatment of the patient's injury.[55] However, if at trial the patient has an insufficient recollection of the license number but can testify to the truthfulness of his statement, and if the physician can verify the record's accuracy, the court may admit the statement as a past recollection recorded.

If the observer lacks a business duty to observe and report *and* is unavailable to lay the foundation, the record is not admissible either as a business record *or* as a past recollection recorded to prove the truth of his assertions. The multiple hearsay statute, however, may again prove useful.[56] If the recorder's written statement was made in the regular course of business and if the observer's statement to the recorder qualified under some other hearsay exception such as admissions, declarations against interest, or excited utterances, the record would be admissible to prove the truth of the assertions of both the observer and the recorder.[57]

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[52] People v. Gentry, 270 Cal. App. 2d 462, 468-70, 76 Cal. Rptr. 336, 340-41 (3d Dist. 1969).

[53] Colvin v. United States, 479 F.2d 998 (9th Cir. 1973); Taylor v. Centennial Bowl, Inc., 65 Cal. 2d 114, 126, 416 P.2d 793, 800-01, 52 Cal. Rptr. 561, 568-69 (1966); FED. R. EVID. 803(6), Advisory Comm. Note; CAL. EVID. CODE § 1271 (West 1968), Law Rev. Comm'n Comments. However such a police report might be admissible if used for a purpose other than proving the truth of the bystander's assertions. *Cf.* United States v. Wolosyn, 411 F.2d 550 (9th Cir. 1969) (to prove date theft reported).

[54] A police report containing the observations of a *police officer* who has a business duty to observe and report truthfully and accurately *is* admissible as a business record. Taylor v. Centennial Bowl, Inc., 65 Cal. 2d 114, 126, 416 P.2d 793, 800-01, 52 Cal. Rptr. 561, 568-69 (1966); Rousseau v. West Coast House Movers, 256 Cal. App. 2d 878, 886-87, 64 Cal. Rptr. 655, 660-61 (2d Dist. 1967).

[55] *See* MCCORMICK (2d ed.), *supra* note 4, § 313.

[56] *See* note 39 *supra*. No California appellate court has yet applied this statute to such records.

[57] *See* Yates v. Bair Transport, Inc., 249 F. Supp. 681 (S.D. N.Y. 1965); MC-

If the observer lacks a business duty and the *recorder* is unavailable to lay the foundation, an attorney could attempt to combine the business records exception with the past recollection recorded exception to admit the record into evidence. For example, suppose that a bystander reports his eyewitness account of a crime to a police officer who records the statement. Suppose also that the officer is unavailable at trial to verify the record's accuracy. An attorney could not submit the writing as a past recollection recorded because of the officer's unavailability. Nor could the attorney submit the writing as a business record to prove the truth of the bystander's assertions because of the lack of a business duty to observe and report on the part of the bystander.[58] However, using multiple hearsay exceptions, the bystander could swear to the truthfulness of his statement to the officer, thus qualifying it under the past recollection recorded exception, and the custodian of the report or some other qualified witness from the police department could establish that the record accurately reflected the bystander's statement, thus qualifying the officer's written statement under the business records exception.[59]

C. RECORDS MADE IN ANTICIPATION OF LITIGATION

Courts consider business records trustworthy primarily because the business routinely produces them and relies upon their truth and accuracy.[60] A report made for use in litigation, however, lacks these attributes of trustworthiness because of the inherent incentives to falsify.[61] Thus even if the report is made by a business as a regular practice, a court may still exclude it if it was prepared in anticipation of litigation.[62] In the leading case of *Palmer v. Hoffman*, the United

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CORMICK (2d ed.), *supra* note 4, § 310 (police reports containing statements by bystanders). The same principles apply to hospital records containing statements by patients to hospital attendants. *See* FED. R. EVID. 805, Advisory Comm. Note; People v. Williams, 187 Cal. App. 2d 355, 365-66, 9 Cal. Rptr. 722, 729 (2d Dist. 1970) (dictum); MCCORMICK (2d ed.), *supra* note 4, § 313. This kind of hospital record may be used to show the *basis* for an expert witness' medical opinion, even if the patient's statement is inadmissible hearsay. *See, e.g.*, Springer v. Reimers, 4 Cal. App. 3d 325, 338-39, 84 Cal. Rptr. 486, 497 (1st Dist. 1970).

[58] *See* note 53 *supra*.

[59] Another way of admitting such a writing would be to offer it as a past recollection recorded whose accuracy is being authenticated by the custodian or other qualified witness rather than by the recorder, since Evidence Code § 1237(a)(4) does not specify *who* must authenticate the writing or *how* it is to be done.

[60] MCCORMICK (2d ed.), *supra* note 4, § 306.

[61] Kincaid & King Construction Co. v. United States, 333 F.2d 561, 564 (9th Cir. 1964); Gee v. Timineri, 248 Cal. App. 2d 139, 146-48, 56 Cal. Rptr. 211, 215-16 (2d Dist. 1967); Reisman v. Los Angeles City School District, 123 Cal. App. 2d 493, 503, 267 P.2d 36, 43 (2d Dist. 1954); 4 J. WEINSTEIN and M. BERGER, WEINSTEIN'S EVIDENCE ¶803(6)[05] [hereinafter cited as WEINSTEIN].

[62] Palmer v. Hoffman, 318 U.S. 109 (1943); FED. R. EVID. 803(6), Advisory Committee Note.

States Supreme Court excluded an accident report dictated by an engineer to his employers regarding the facts of a train accident.[63] Although the railroad which submitted the accident report made such reports as a regular practice, the Court considered the report untrustworthy because the company and the engineer, who were both potentially liable, both had a strong motive to falsify the report.[64]

Most federal courts have restricted *Palmer v. Hoffman* to its facts and have admitted accident reports if the persons preparing the report lacked any motive to falsify, or if countervailing incentives for truthfulness outweighed the motive to falsify.[65] Other federal courts have strictly adhered to *Palmer v. Hoffman* and have excluded any accident report made in anticipation of litigation.[66] Such a report might be admissible as a past recollection recorded if the observer and the recorder testified to the truthfulness and accuracy of their statements. Despite the suspicious circumstances under which the report was prepared, testimonial assurance of its trustworthiness by the persons who actually prepared the report should qualify it under the past recollection recorded exception.

The courts have split over the admissibility of accident reports under the business records exception when offered *against* the business which prepared the report. Most courts have reasoned that when a party offers this type of report against the business which prepared the report, the rationale for exclusion no longer applies.[67] Other courts, however, have strictly adhered to the broad language of *Palmer v. Hoffman* and have refused to admit as business records reports made in anticipation of litigation, even when offered against the business which prepared the report.[68] An accident report, however, has been admitted against the business which prepared the report under the past recollection recorded exception, the observer

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[63] 318 U.S. 109 (1943).

[64] The former federal business records statute (Act of June 25, 1948, Ch. 646, 62 Stat. 945) expressly stated that the circumstances of preparation went to the weight of the evidence but not to its admissibility. Therefore federal courts often excluded records made under trustworthy circumstances on the grounds that such records were not "made in the regular course of business." Today such a report would be excluded on the grounds that the circumstances surrounding its preparation were such as to indicate its lack of trustworthiness. *See* FED. R. EVID. 803(6), Advisory Committee Note.

[65] The recorder might have lacked a motive to falsify because he was not a potential party to the litigation. Likewise, the recorder might have been under a statutory duty to be truthful which outweighed any incentive to falsify. *See* cases collected in Annot., 10 A.L.R. Fed. 858 (1972).

[66] Annot., 10 A.L.R. Fed. 858 (1972).

[67] *Id.* Any falsifications in the report would prejudice the falsifier rather than his opponent.

[68] *Id.*

having testified to the truth and accuracy of the report.[69]

V. ADMITTING SPECIAL TYPES OF WRITINGS

This section discusses the possibility of admitting into evidence records containing opinions and diagnoses, records lacking entries to show the nonoccurrence of events, and records kept by computer, if such records fail to meet the foundational requirements of the business records exception.

A. OPINIONS AND DIAGNOSES

1. BUSINESS RECORDS

In California, the business records exception requires that the writing contain a statement of an act, condition, or event.[70] Courts therefore refuse to admit records of *opinions and conclusions* as business records to prove the truth of the opinion or conclusion.[71] The courts exclude such records because the opposing party cannot cross-examine the declarant to determine whether his reasoning was correct and based upon personal knowledge, and whether he was qualified to state the opinion or conclusion.[72]

In contrast, a record of a *diagnosis* may be admissible as a business record. While the courts will exclude a diagnosis amounting to an opinion or conclusion, they will admit a diagnosis amounting to a statement of condition.[73] One court has held, for example, that a

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[69]Washington v. Washington, Virginia, & Maryland Coach Co., 250 F. Supp. 888, 890 (D.D.C. 1966). However, it may not always be possible to pursuade the observer and recorder to testify against their employer.

[70]CAL. EVID. CODE § 1271 (West 1968).

[71]*See, e.g.*, People v. Reyes, 12 Cal. 3d 486, 503-03, 526 P.2d 225, 235, 116 Cal. Rptr. 217, 227 (1974); People v. Arauz, 5 Cal. App. 3d 523, 532-33, 85 Cal. Rptr. 266, 273 (4th Dist. 1970). The California Supreme Court in *Reyes* adopted the reasoning first enunicated in People v. Terrell, 138 Cal. App. 2d 35, 57-58, 291 P.2d 155, 169 (2d Dist. 1955) without addressing the seeming conflict among the cases listed in People v. O'Tremba, 4 Cal. App. 3d 524, 528-29, 84 Cal. Rptr. 336, 338-39 (2d Dist. 1970). The recorded opinions excluded in the pre—*Reyes* cases were all statements by unqualified declarants. A recorded opinion, not involving a psychological diagnosis, by a *competent* declarant has yet to be excluded in California. An attorney attempting to admit such a writing could attempt to distinguish the entire *Terrell* line of cases, but the *Terrell* dictum as adopted by *Reyes* does seem to exclude all recorded opinions and conclusions regardless of their nature or source.

[72]People v. Reyes, 12 Cal. 3d 486, 502-03, 526 P.2d 225, 235, 116 Cal. Rptr. 217, 227 (1974). Given this rationale, such a record should be admissible if the declarant is made available for cross-examination.

[73]*Id.* The older cases, which seem to hold that any diagnosis by a qualified declarant based on personal observation is admissible, can be analyzed as involving statements of fact or condition. Thus these cases are not necessarily inconsistent with *Reyes*.

psychiatric diagnosis constitutes an opinion or conclusion,[74] while another has stated that a diagnosis of a compound fracture of the femur constitutes a statement of condition.[75] The characterization of the diagnosis as a statement of condition or as an opinion depends upon its complexity and subjectivity.[76] If the reasoning involved in the diagnosis is complex or if different physicians could reasonably arrive at different diagnoses given the same set of observations, the courts are likely to call the diagnosis an opinion and exclude it if offered under the business records exception.

Unlike the California Evidence Code, the federal rules expressly allow a record of an opinion or diagnosis to be used to prove the truth of the opinion or diagnosis.[77] Unlike prior federal cases,[78] federal rule 803(6) does not distinguish between physical and psychiatric diagnoses or between routine and conjectural diagnoses.[79] The Advisory Committee Note to federal rule 803(6) cites with approval a case admitting a record of a psychiatric diagnosis of manic-depressive insanity.[80] When a speculative and potentially prejudicial opinion *is* offered, a judge may, in his discretion, either subpoena the declarant to ascertain his reasoning and qualifications, or exclude the record for lack of trustworthiness.[81] Admissibility may be limited to records of expert opinions, although federal rule 803(6) does not so state.[82]

2. *PAST RECOLLECTION RECORDED*

A record of an opinion or diagnosis which fails to qualify as a busi-

[74] *Id.* *See* cases cited therein for other examples of "opinions and conclusions."
[75] People v. Terrell, 138 Cal. App. 2d 35, 57-58, 291 P.2d 155, 169 (2d Dist. 1955) (dictum).
[76] MCCORMICK (2d ed.), *supra* note 4, § 313.
[77] *See* note 13 *supra.* Federal rule 803(6) supersedes those cases which excluded records because they contained opinions or diagnoses. FED. R. EVID. 803(6), Advisory Comm. Note.
[78] *See* cases collected in Annot., 9 A.L.R. Fed. 457, 468-74 (1971).
[79] WEINSTEIN, *supra* note 61, ¶ 803(6)[04]. However the opinion or diagnosis must still be based upon personal observations by a competent declarant.
[80] People v. Kohlmeyer, 284 N.Y. 366, 31 N.E. 2d 490 (1940). *See also* Medina v. Erickson, 226 F.2d 475, 482 (9th Cir. 1955), *cert. denied* 351 U.S. 912 (1956) (diagnosis of bronchogenic carcinoma and metastasis of the liver).
[81] WEINSTEIN, *supra* note 61, ¶ 803(6)[04]. One pre-rules case excluded the use of a business record containing a psychiatric diagnosis against a criminal defendant because the proponent failed to show that the declarant was unavailable for cross-examination. The use of unreliable hearsay with no showing of necessity, *even if permitted by statute,* violated the defendant's confrontation rights. Phillips v. Neil, 452 F.2d 337, 347-48 (6th Cir. 1971). *But see* United States v. Leal, 509 F.2d 122, 127 (9th Cir. 1975).
[82] *Proceedings of the Thirty-fourth Annual Judicial Conference of the District of Columbia,* 61 F.R.D. 147, 220 (1973). Query whether business records containing opinions of competent lay witnesses are admissible. Query also whether records of non-medical opinions are admissible.

ness record[83] might be admissible as a past recollection recorded. However, in California, the past recollection recorded exception requires that the record state a "fact."[84] Nevertheless, the courts should admit a record of an opinion or diagnosis as a past recollection recorded. Several arguments support this contention. The requirement that the declarant must testify to the statement's truthfulness permits some cross-examination of the declarant. Although, by definition, the declarant lacks the recollection to testify to the specific diagnosis from present memory, he could nonetheless swear that the diagnosis was based upon personal observation. The declarant could also testify to the reasoning he would have employed in reaching such a diagnosis and to his qualifications at the time of the diagnosis.[85]

A recorded opinion or diagnosis is more likely to be admitted as a past recollection recorded in federal court than in California. Unlike the California statute, federal rule 803(5) speaks of recorded "matter," not facts.[86] Moreover, in a case decided prior to the adoption of the federal rules, a court admitted a jeweler's appraisal of the value of a diamond ring as a past recollection recorded.[87] The courts have yet to consider the admissibility of a writing containing an opinion or diagnosis as a past recollection recorded under the new federal rules. The statutory language and prior case law, however, support their admissibility.

B. ABSENCE OF ENTRY TO SHOW NONOCCURRENCE OF EVENTS

Both California Evidence Code section 1272 and federal rule 803(7) permit the use of the absence of an entry in a business record to prove the nonoccurrence of an event,[88] as does the prior case

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[83] *See, e.g.*, Otney v. United States, 340 F.2d 696, 700 (10th Cir. 1965) (record of psychiatric examination conducted for evidentiary purposes excluded).

[84] CAL. EVID. CODE § 1237(a)(1) (West 1968), set forth in note 12, *supra*.

[85] *See also* MCCORMICK (2d ed.), *supra* note 4, § 313(a) at 732-33.

[86] FED. R. EVID. 803(5).

[87] D'Angelo v. Columbia Fire Insurance Co. of Ohio, 118 F. Supp. 474, 477 (E.D. N.Y. 1954).

[88] CAL. EVID. CODE § 1272 (West 1968):

> Evidence of the absence from the records of a business of the record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the nonoccurrence of the act or event, or the nonexistence of the condition, if: (a) It was the regular course of that business to make records of all such acts, conditions, or events at or near the time of the act, condition, or event, and to preserve them; and (b) The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the

law.[89] The proponent of the record must show that the event would have been recorded if it had occurred. If the proponent presents sufficient proof, the courts will admit the record as evidence of the nonoccurrence of the event.

The drafters of both the California Evidence Code and the Federal Rules of Evidence recognized that use of the absence of an entry in a record to prove the nonoccurrence of an event might not constitute hearsay.[90] Arguably, a record lacking an entry is circumstantial evidence of the nonoccurrence of an event rather than an assertion.[91] The purpose of Evidence Code section 1272 and federal rule 803(7) was to provide a basis for admitting such evidence even if it was considered hearsay.[92] Nothing indicates, however, that either Evidence Code section 1272 or federal rule 803(7) was intended to be the sole basis for admitting evidence of the absence of an entry. Therefore, if a writing lacking an entry fails to qualify as a business record, the courts should still admit it as *circumstantial evidence* of the nonoccurrence of an event.

In practice, an attorney should offer a record lacking an entry as non-hearsay. For example, suppose that plaintiff claims that he was injured on defendant's ship on January 1 and sues defendant for negligence. At trial, defendant offers its ship safety committee report which contains no record of any accident occurring on January 1. If the report is offered as a business record, the court might exclude it as having been made in anticipation of litigation. However, the court might permit the defendant to utilize the absence of an entry in the report as circumstantial evidence that no accident had occurred.[93] As such, the untrustworthy circumstances under which the report was prepared would go to the weight of the evidence and not to its admissibility.

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condition did not exist.

FED. R. EVID. 803(7):

> Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of [FED. R. EVID. 803(6)][is not excluded by the hearsay rule] 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.

[89] United States v. DeGeorgia, 420 F.2d 889 (9th Cir. 1969); People v. Torres, 201 Cal. App. 2d 290, 295-98, 20 Cal. Rptr. 315, 318-20 (1st Dist. 1962).

[90] FED. R. EVID. 803(7), Advisory Committee Note; CAL. EVID. CODE § 1272, Law Rev. Comm'n Comment (West 1968).

[91] *See* Comment, *Hearsay: The Threshold Question*, this volume.

[92] *See* authorities cited in note 90 *supra*.

[93] *See* Lindheimer v. United Fruit Co., 418 F.2d 606 (2d Cir. 1969). *Cf.* People v. Trombino, 253 Cal. App. 2d 643, 646-47, 61 Cal. Rptr. 634, 636-37 (2d Dist. 1967).

C. COMPUTER-KEPT RECORDS

California Evidence Code sections 1237 and 1271 require that a past recollection recorded or a business record be in the form of a writing.[94] Evidence Code section 250 defines a "writing" to include any means of recording upon any tangible thing any form of communication or representation.[95] This definition is sufficiently broad to include information stored in a computer.[96] No California appellate court has explicitly ruled on the question, but one court has hinted that computer-kept bank records would be considered trustworthy,[97] while another has admitted summaries prepared by data-processing machines.[98]

Federal rule 803(6) expressly provides that a business record may consist of a data compilation in any form.[99] The term "data compilation" includes computer-kept records.[100] The federal rule for past recollection recorded, however, mentions only the admissibility of "memoranda" and "records."[101] Thus, on its face, this rule seems much more limited in scope than federal rule 803(6) or Evidence Code sections 1237 and 1271, which incorporate Evidence Code section 250. The statutory wording probably reflects the fact that most past recollections recorded have thus far existed in conventional written form. However, the wording of federal rule 803(5) should not act as a limitation if and when a computer-kept record must be offered under the past recollection recorded exception. Information which is stored within a computer is protected against memory lapse as well as information which is recorded on paper.

For example, computer print-outs containing information compiled in preparation for litigation presumably would be inadmissible under the business records exception for lack of trustworthiness. The courts might admit the print-out, however, as a past recollection recorded, if the computer operator testified that the information was truthfully and accurately fed into the computer and accurately retrieved, and if the person supplying the information to the computer

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[94] CAL. EVID. CODE § § 1237 & 1271 (West 1968).

[95] CAL. EVID. CODE § 250 (West 1968).

[96] The use of computer printouts as evidence might raise a best-evidence objection. *See* Comment, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, this volume.

[97] People v. Dorsey, 43 Cal. App. 3d 953, 960-61, 118 Cal. Rptr. 362, 367 (5th Dist. 1974).

[98] Vanguard Recording Society, Inc. v. Fantasy Records, Inc., 24 Cal. App. 3d 410, 418-19, 100 Cal. Rptr. 826, 832 (1st Dist. 1972).

[99] FED. R. EVID. 803(6).

[100] FED. R. EVID. 803(6), Advisory Comm. Note. *See generally* United States v. De Georgia, 420 F.2d 889 (9th Cir. 1969), and Annot., 11 A.L.R.3d 1377 (1967).

[101] FED. R. EVID. 803(5).

operator testified that he did so truthfully and accurately.[102]

VI. CONCLUSION

An attorney seeking to admit a recorded statement into evidence should consider both the business records and the past recollection recorded exceptions as alternative ways of overcoming a hearsay objection. When both exceptions are applicable to a particular writing, the business records exception offers practical and tactical advantages. When the observer or recorder is unavailable to testify, or when the observer is available and possesses a sufficient recollection, an attorney should submit the writing as a business record. When the record was not made in the regular course of business or the record is otherwise untrustworthy, an attorney should offer the record as a past recollection recorded. When neither the past recollection recorded nor the business records exception alone is applicable to a particular writing, the attorney should consider combining hearsay exceptions and submitting the record under multiple hearsay exceptions. By considering these alternatives, an attorney can enhance his chances of admitting recorded information into evidence and avoid the unnecessary exclusion of favorable evidence.

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[102] An attorney might be able to avoid having to call as witnesses the persons who originally observed and recorded the underlying information by combining the business records and past recollection recorded exceptions. For example, suppose that information is observed and recorded onto ledgers in the regular course of business. In response to a subpoena duces tecum, the information is fed into a computer and retrieved in the form of computer printouts. The custodian of the ledgers or some other qualified witness could qualify the underlying information as being recorded in the regular course of business. Then the computer operator could swear that he truthfully and accurately transferred the information from the ledgers onto the computer printout by way of the computer.