Prudent Consideration Required

Getting Nonparty Business Records into Evidence

By Gianfranco A. Pietrafesa

Exploring methods for introducing documents that may be crucial to your case.

Statements made out of court that are offered at trial to prove the truth of the matter asserted are considered hearsay. Fed. R. Evid. 801(c). Documents often contain hearsay and are not admissible in evidence unless they fall within certain exceptions set forth in the rules of evidence. Fed. R. Evid. 802. One such exception is for business records. Fed. R. Evid. 803(6). This article suggests various methods to get the business records of *nonparties* into evidence.

Consider, for example, a lawsuit between siblings concerning the financial accounts of their deceased father. The business records in issue are the account statements issued to their father by various nonparty financial institutions. How can these nonparty business records be admitted into evidence?

Business Records

Federal Rule of Evidence 803(6) identifies the requirements of a business record:

> 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, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, 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.

Generally, the following elements must be satisfied in order to prove that a document is a business record:

- The record must be made at or near the time of (*i.e.*, contemporaneously with) the event referred to in the record.
- The record must be made by or from information transmitted by a person with knowledge of the event.
- The record must be kept in the course of regularly conducted business activity.
- It was the regular practice of the business to make such a record.

See, e.g., U.S. v. Furst, 886 F.2d 558, 571 (3d Cir. 1989).

■ Gianfranco A. Pietrafesa is a shareholder in Lindabury, McCormick, Estabrook & Cooper, P.C., in Westfield, New Jersey, where his practice includes commercial litigation. He is a member of DRI, including its Trial Tactics Committee, and the author of the post trial motions chapter in DRI's *Trial Tactics Defense Litigation Manual*.

If these elements are satisfied, then the document will constitute a business record admissible into evidence, "unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy." Fed. R. Evid. 803(6). For example, a record prepared in anticipation of litigation may not be trustworthy. *See*, *e.g.*, *Certain Underwriters of Lloyds, London v. Sinkovich*, 232 F.3d 200, 204–05 (4th Cir. 2000).

As noted, this article will focus on the various ways to establish that a document from a nonparty is a business record that can be admitted into evidence.

By Stipulation

The first way to get a nonparty's business records into evidence is also the fastest, easiest and least expensive—your adversary can simply stipulate that the documents are admissible into evidence as business records. For example, at the pretrial conference the parties should consider "the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof [and] stipulations regarding the authenticity of documents…" Fed. R. Civ. P. 16(c)(3). Likewise, the "participants at [the final pretrial conference] shall formulate a plan for trial, including a program for facilitating the admission of evidence." Fed. R. Civ. P. 16(d). *See also U.S. v. Saunders*, 886 F.2d 56, 58–59 (4th Cir. 1989) (counsel stipulated that certain documents were business records; in light of the stipulation, the court held that the documents were admissible as business records).

Experience shows that parties do not often make such stipulations and, when they do, they are made late in the litigation. Therefore, you should try to get a stipulation from your adversary as soon as possible. If your case depends on nonparty business records, then you cannot afford to assume that your adversary will stipulate to the admission of the documents in evidence. Instead, you should try another means to make sure that the documents will be admitted into evidence.

Request for Admissions

You can send a request for admissions to your adversary, requesting an admission as to the genuineness of nonparty business records. Federal Rule of Civil Procedure 36(a) provides that "[a] party may serve upon any other party a written request for the admission… [of] the genuineness of *any* documents…" (emphasis added). Therefore, by the plain language of the rule, the request is not limited to the documents of the parties. Instead, a party may request an admission as to the genuineness of any documents, including a nonparty's business records. *See*, *e.g.*, *Francis v. Bryant*, 2006 WL 947771 (E.D. Cal. 2006).

In response to the request, your adversary must admit, deny or set forth in detail the reason why he or she cannot truthfully admit or deny the request. However, he or she cannot merely use lack of information or knowledge as a reason for failing to admit or deny. Your adversary must make a reasonable inquiry before stating that the information known or *readily obtainable* is insufficient to allow him or her to admit or deny. Fed. R. Civ. P. 36(a).

Under our hypothetical fact pattern, a reasonable inquiry may include contacting the financial institutions, which may provide the readily obtainable information sufficient to admit (or deny) the genuineness of the nonparty business records. *See*, *e.g.*, *A. Farber & Partners v. Garber*, 237 F.R.D. 250, 254 (C.D. Cal. 2006) (reasonable inquiry may include investigation and inquiry of non-parties); *Concerned Citizens of Belle Haven v. Belle Haven Club*, 223 F.R.D. 39, 44 (D. Conn. 2004) (same); *Al-Jundi v. Rockefeller*, 91 F.R.D. 590, 593 (D.C.N.Y. 1981) (noting the "reasonable inquiry" and "readily obtainable" language in Fed. R. Civ. P. 36 and holding that "under certain circumstances parties must inquire of third persons in responding to admission requests").

Testimony of Nonparty Witness at Trial

You can subpoena (or otherwise persuade) a representative of the nonparty to testify at trial about the preparation of the business records in order to get the documents admitted into evidence. *See* Fed. R. Civ. P. 45. However, it is not always possible to present such testimony at trial; for example, when the nonparty business entity is located a considerable distance away from the district of the court. *See*, *e.g.*, Fed. R. Civ. P. 45(b)(2), (c)(3)(A)(ii) & (c)(3)(B)(iii).

Deposition Used at Trial

In circumstances where a nonparty business entity is located a considerable distance from the district of the court where the action is pending, and you cannot subpoena the witness to testify at trial, you can take the deposition of the witness to be used at trial. At the deposition, you can ask the witness about the preparation of the business records. You can then use the deposition testimony at trial to lay a foundation for the admission of the business records into evidence if the nonparty witness is not available to testify (where, because of his or her distance away from the court, he or she cannot be subpoenaed or persuaded to testify at trial). *See* Fed. R. Civ. P. 32(a)(3)(B).

Declaration

If your client cannot bear the expense of taking such a deposition, then you can try to obtain a declaration from the nonparty business entity establishing that the records were prepared in the ordinary course of business. Federal Rule of Evidence 803(6) allows the admission of business records into evidence through a declaration rather than the testimony of the custodian or other qualified witness. The advisory committee's note provides that "the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses." Fed. R. Evid. 803(6), advisory committee's note (2000 amend.).

Therefore, such a declaration normally will be sufficient to establish a foundation to admit the nonparty business records into evidence under Federal Rule of Evidence 803(6). Custodians of records frequently provide such declarations when producing documents during discovery, especially if the declaration is requested and will obviate the need to testify at a deposition or trial.

Note that Federal Rule of Evidence 902(11) provides in pertinent part:

> A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

There is an identical rule for foreign records. *See* Fed. R. Evid. 902(12).

Testimony by a Person with Knowledge of the Nonparty's Business

If you cannot obtain a declaration, then perhaps you can present the testimony at trial of a person knowledgeable about the business records of a nonparty business entity. This approach does not require the testimony of the custodian of records or even an employee of the nonparty. Instead, Federal Rule of Evidence 803(6) allows some "other qualified witness" to testify about the business records. *See*, *e.g.*, *U.S. v. Lawrence*, 276 F.3d 193, 196 (5th Cir. 2001). *See also* McCormick on Evidence §292, at 262 (John W. Strong, ed., 5th ed. 1999 & Supp. 2003) ("Any witness with the necessary knowledge about the particular record keeping process could testify.").

Therefore, you may be able to get the documents of a nonparty business entity admitted into evidence as business records through the testimony of a witness knowledgeable about the records. For example, this witness may be a former employee of the nonparty business entity, or an employee of another business that integrates the documents into its own business, or even a party to the litigation. The witness needs to be familiar with the general business and record keeping of the nonparty business entity. *See*, *e.g.*, *United States v. Curcio*, 13 F.3d 641, 657 (3d Cir. 1993) (the witness is required only to have knowledge about the record keeping process). *See also* McCormick on Evidence §292, at 262–63 (John W. Strong, ed., 5th ed. 1999 & Supp. 2003) ("when the business offering the records of another has made an independent check of the records, has integrated them into their own business operation, or can establish accuracy by other means, the necessary foundation may be established.").

Judicial Notice

You may be able to persuade the court to admit certain business records into evidence by judicial notice. Fed. R. Evid. 201. "In some cases, very little foundation testimony may be needed. Indeed, admissibility 'may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court, particularly in the case of bank and similar statements.'" Jeffrey Cole, *The Continuing Riddle of the Federal Hearsay Rule*, Vol. 25, No. 3 Litigation 15, 20 (Spring 1999). *See also U.S. v. Cooper*, 375 F.3d 1041, 1047 (10th Cir. 2004).

Business Records as a Statement against Interest

Finally, you can argue that the nonparty business records should be admitted into evidence as a statement against interest. Federal Rule of Evidence 804(b)(3) provides in pertinent part that "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest… that a reasonable person in the declarant's position would not have made the statement unless believing it to be true…." A statement against interest is another exception to the hearsay rule and the person making the declaration or statement, known as the declarant, does not have to be a party in order for the statement to be admissible into evidence.

Business records very often contain statements against interest. For example, in our hypothetical fact pattern, the account statements setting forth account balances may constitute statements against the interests of the financial institutions and, therefore, may be admitted into evidence. The nonparty financial institutions would not have made the statements in the documents—for example, account balances—unless they believed them to be true. Therefore, the business records of these nonparties may be admitted into evidence as statements against interest. *See*, *e.g.*, *U.S. v. Ford*, 435 F.3d 204, 215 (2d Cir. 2006).

Conclusion

There are many ways to get nonparty business records admitted into evidence. If the documents are important to your case, then you should carefully consider each of these methods to ensure that the documents have a good chance to get into evidence.