



Online

Published on *Voice For The Defense Online* (<http://voiceforthedefenseonline.com>)

[Home](#) > Printer-friendly PDF

The "Business Duty" Rule for Business and Public Records

[1] [Features](#)

[2] [Clint Broden](#)

Friday, March 9th, 2018



Clint Broden

[3]

The prosecution often seeks to introduce business records at trial to prove relevant evidentiary points contained within those records. Often times, whether in state or federal court, the prosecution will attach a business records affidavit to the exhibit to overcome any hearsay objection. The affidavit typically purports to establish: (1) the records were made at or near the time by or from information transmitted by someone with knowledge; (2) the records were kept in the course of a regularly conducted activity of a business; and (3) making the records was a regular practice of that activity. These business records are often admitted without objection from the defense not because there's not a valid objection, but because the defense attorney failed to recognize the "business duty rule" applicable to the exhibit proffered by the prosecution.

Consider the following situations a defense lawyer might face at trial:

Scenario 1: In a money laundering trial, the government seeks to introduce business records from Western Union to show your client sent money to an alleged drug dealer in another state;

Scenario 2: In a drug trafficking trial, the government seeks to introduce business records from a hotel to establish your client was registered there and was in the area when the drug transaction took place;

Scenario 3: In a probation revocation hearing, the state seeks to introduce the business records of the probation department to establish your client's progress in a drug treatment program. The records reflect the supervising officer was informed by the treatment provider that your client was not attending the program as ordered; or

Scenario 4: In a mortgage fraud trial, the government seeks to introduce title company records contained in the file of the Department of Housing and Urban Development to establish the physical location of the title company.

Are any of these records admissible for the purposes sought by the prosecution? Said another way, do these "business records" comply with the business duty rule? If not, then none of them are admissible for the purposes for which they may be offered.

The "Business Duty" Requirement

The "business duty" requirement was established in common law.¹ Under the business duty requirement, the record is not admissible unless the person reporting the information had a business duty to do so. In other words, was the information reported in the regular course of regularly conducted activity?²

As explained in Weinstein's treatise on federal evidence:

To satisfy Rule 803(6), each participant in the chain which created the record—from the initial observer/reporter to the final entrant—must generally be acting in the course of the regularly conducted business. If some participant is not so engaged, some other hearsay exception must apply to that link of the chain.³

Importantly, the business duty requirement still applied after the adoption of the Federal Rules of Evidence.⁴ Indeed, abolishing the business duty requirement would lead to the introduction of double hearsay by way of a business record in violation of Fed. R. Evid. 805.⁵

Perhaps the Court of Criminal Appeals explained the business duty requirement best in *Garcia v. State*, 126 S.W.3d 921, 929 n. 2 (Tex. Crim. App. 2004):

[A] delusional person might call Crimestoppers to report that George Washington was cutting down a cherry tree on the Capitol grounds. Although Crimestoppers has a business duty to accurately record all incoming calls and to keep the records as part of its business records, the caller had no business duty to report accurately. His statements may be contained within a business record, but they are not admissible to establish the fact that George Washington was, in fact, cutting down a cherry tree, although they would be admissible to establish that the person did call and make a report of some type on a given day.

Indeed, there are numerous cases holding that records kept in the ordinary course of business may still be inadmissible if the evidentiary point in the records the proffering party seeks to prove was provided to the business by someone *without* a business duty to the business. One court held that a sales receipt with a defendant's name and address was not admissible to prove the defendant lived at the address indicated on the receipt since the person making the purchase had no business duty to the store to give accurate information.⁶ Similarly, other courts have held that records of Western Union were inadmissible to prove who purchased a particular money order.⁷ Likewise, hotel registers have been held inadmissible if they were

offered to show that a particular guest was registered at the hotel.⁸

The *Garcia* court also recognized the business duty requirement as it applied to Tex. R. Evid. 803(6) and Tex. R. Evid. 803(8). In particular, the Court of Criminal Appeals held that a person's statements made to a Battered Women's Shelter could not be admitted as a business record of the shelter:

The State laid a proper foundation for admission of the shelter's business records under Rule 803(6). The records themselves were admissible, but that does not mean that all information, from whatever source or of whatever reliability, contained within those business records is necessarily admissible. When a business receives information from a person who is outside the business and who has no business duty to report or to report accurately, those statements are not covered by the business records exception. Those statements must independently qualify for admission under their own hearsay exception—such as statements made for medical diagnosis or treatment, statements concerning a present sense impression, an excited utterance, or an admission by a party opponent.⁹

Similarly, *Willis v. State*, 2 S.W.3d 397, 401 (Tex. App.—Austin 1999), involved a probation revocation hearing in which the state used a probation officer to sponsor records indicating the defendant had committed a felony, by stealing fish hooks, while on probation. The Court of Appeals held this was error and reversed the District Court's order revoking probation:

At trial the State contended and now on appeal contends that the narrative report was admissible as a record of regularly conducted activity. *See* Tex. R. Evid. 803(6). The sponsoring witness testified that he had no personal knowledge that appellant had stolen the fish hooks. When Exhibit 3 was offered in evidence, appellant objected that no one in the probation department had direct knowledge of whether [appellant] stole the fish hooks? and that it was an allegation which is hearsay.? Documents inadmissible under 803(8)(B) may not be admitted under 803(6) . . . [citations omitted] . . . Moreover, inadmissible hearsay testimony does not become admissible simply because it is contained within an admissible document or transcript [citations omitted].

In a recent federal court trial, the government attempted to prove venue through closing documents that listed the address at which the closing took place. Their problem? The records came from HUD and HUD had not created the closing documents. The government was only prepared to call the custodian from HUD and not the custodian from the title company. Since the title company had no business duty to HUD, the HUD records were not admissible to prove the address where the closing took place.¹⁰ Ultimately, the HUD files were introduced for other purposes, but not for the truth of the matters asserted.? Still, the government mistakenly believed it could prove the closing location from the documents contained in the HUD file. After the court sustained the defense objection, the prosecutor could not understand: ?I just don't understand how something can be hearsay that's it's in evidence pursuant to hearsay exceptions.?¹¹

How to Avoid a Business Duty Hearsay Objection

There are ways around a business duty objection to documents otherwise admissible as business records. First, if the business maintaining the records verified the information contained in the records, most courts would hold the records admissible over a business duty objection. So, although Western Union does not verify the identity of a person sending a money order, it does identify the person picking it up. Thus, even though Western Union records may not be admissible to show who sent a particular money order, they could be admissible to prove who received the same money order.¹² The same argument would apply to hotel registers if the party seeking to introduce the hotel register could prove the hotel verified the identity of its guests by reliable means.¹³ Second, as noted by the court in *Garcia*, if the underlying statement from the person not having a business duty satisfied an independent hearsay exception—such as statements made for medical diagnosis or treatment, statements concerning a present sense impression, an excited utterance, or an admission by a party opponent—the information provided by that person would be admissible for the truth of

the matters asserted therein.¹⁴ Third, if the underlying statement from the person not having a business duty is not introduced for the truth of the matter asserted, there is no business duty objection. In the HUD example above, it was permissible for the government to introduce HUD records to show what matters were contained in the HUD files, but it could not introduce the records to prove the accuracy of what was written in the records since they were not created by HUD.¹⁵

Conclusion

The importance of reviewing business records offered through a records custodian affidavit (or through a live witness) to determine (1) what the prosecution is trying to prove with the records, and (2) where the information in the records originated, cannot be understated. If the prosecution tries to use the records to prove the truth of information contained in the records, but that information was provided by a person not having a business duty to the business maintaining the records, you should object to the admissibility of the records. Sometimes the prosecution may overcome the objection by having a witness explain the business information verification process or by identifying an independent hearsay exception, but often the prosecutor will not be prepared to respond. Lastly, even if your objection is overruled because the judge does not understand the business duty requirement, you will have preserved error for the appeal.

Endnotes

1. Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, *Federal Rules of Evidence Manual* §803.02[7][c] at 803?53 (Lexis-Nexis 2015).
2. *Id.*
3. 5 Weinstein's Federal Evidence, §803.08[8][2] (2d ed. 2004).
4. *United States v. Vigneau*, 187 F.3d 70, 74 (1st Cir. 1999) (?[D]espite its language, the business records exception does not embrace statements contained within a business record that were made by one who is not a part of the business if the embraced statements are offered for their truth?), *cert. denied*, 528 U.S. 1172 (2000).
5. *Federal Rules of Evidence Manual* §803.02[7][c] at 803?54.
6. *United States v. Patrick*, 959 F.2d 991, 1000?02 (D.C. Cir. 1992).
7. *Vigneau*, 187 F.3d at 74?77; *United States v. Cestnik*, 36 F.3d 904, 908 (10th Cir. 1994), *cert. denied*, 513 U.S. 1175 (1995).
8. *United States v. McIntyre*, 997 F.2d 687, 698?700 (10th Cir. 1993), *cert. denied*, 510 U.S. 1063 (1994).
9. *Garcia*, 126 S.W.3d at 926?27.
10. *United States v. Brown*, No. NO. 4:12CR87 (E.D. Tx.)
11. *Id.*
12. *United States v. Mitchell*, 49 F.3d 769 (D.C. Cir. 1995).
13. *McIntyre*, 997 F.2d at 698?701; *United States v. Lieberman*, 637 F.2d 95, 100?01 (2d Cir. 1980) (?Lieberman's objection to the admission of the hotel guest card was that the lines showing the guest's name and address had been filled in by the guest, not the hotel's employee. This objection missed the mark. We do not view the applicability of the business records exception as depending on the purely formal matter

of whether the guest supplies the information by writing it on the card, or by stating it so that it may be written on the card by the employee. The latter process would not suffice to make the business records exception applicable to prove the identity of the guest unless the employee were able in some way to verify the information provided for example, by examining a credit card, driver's license, or other form of identification . . . By the same token, however, if such verification is obtained by the employee, we see no reason why the guest card that has been filled in by the guest himself would not qualify as a business record and thus be admissible for the truth of its statements.?).

14. *Garcia*, 126 S.W.3d at 926-27. *See also Bondi v. Bic Corp.*, 947 F.2d 1531, 1534 (6th Cir. 1991) (Hospital record was admissible even though it included the statement of the mother of the patient. Despite the fact that the mother did not have a "business duty" to the hospital, the mother's statements constituted a "party admission" allowing the hearsay within the hospital records to be introduced for the truth of the matters asserted therein.).

15. *See also Hoselton v. Metz Baking Co.*, 48 F.3d 1056, 1061-62 (8th Cir. 1995) (Records of accounting business containing statements by persons without a "business duty" to the business were admissible because the statements from others were not offered to prove the truth of the matters asserted, but merely to show that the plaintiffs were on notice of certain expectations that the defendants had in the negotiation.).

. © Copyright by Texas Criminal Defense Lawyers Association
Web hosting and design by ChiliPepperWeb.net

Source URL: <http://voiceforthedefenseonline.com/story/%E2%80%9Cbusiness-duty%E2%80%9D-rule-business-and-public-records>

Links:

[1] <http://voiceforthedefenseonline.com/channel/1/stories>

[2] <http://voiceforthedefenseonline.com/source/clint-broden>

[3] <http://voiceforthedefenseonline.com/image/%E2%80%9Cbusiness-duty%E2%80%9D-rule-business-and-public-records>