

TRIAL OF A CRIMINAL TAX CASE

GENERAL PRINCIPLES

1. Not a -- "what happened next officer" case
2. Preparation is essential -- organization is the key
3. Ultimate aim -- to make the case interesting and obvious
4. Three C's of a lawsuit: Comfort, Confidence, and Control

OPENING SCENE

1. DOJ letter -- authorization of prosecution or an investigation
2. Criminal Reference Letter (CRL) -- IRS recommendation and tax computations
3. Prosecution Memorandum -- DOJ analysis of case
4. Statements of the defendant
5. Special Agent's report (SAR) -- agent's evidence
6. Exhibits -- One volume to several boxes of documents

FIRST STEP TO TRIAL

1. Read (don't study) Nos. 1-5 above in the order listed
2. Get a stomach feel for what happened
3. Find a theme song as soon as you can:
 - Tax deductions for sale
 - The man who had a nest egg
 - Playing is more fun than paying
 - Angels don't conspire
4. Talk to the agents:
 - Mechanical details will come later
 - What is the case really about?
 - What are the weaknesses in the case? -- they are there
 - Are there serious proof problems?
 - What is the likely defense?

FOURTEEN PREPARATION STEPS

1. Arrange for assistance of IRS agents -- including summary expert
2. Set up pleadings, opening statement, and argument folders
3. Set up witness folder for each witness - place statements, affidavits, etc. of witness in folder
4. Set up exhibit folders - place each exhibit in numbered folder
5. Pre-mark exhibits - make up exhibit list as you go
6. Prepare witness outlines
7. Prepare tentative order of proof as you go
8. Issue subpoenas
9. Interview witnesses
10. Prepare trial brief (earlier, if possible)
11. Prepare jury instructions
12. Turn over discovery material
13. Prepare opening statement
14. Pray for more time

PLEADINGS, OPENING STATEMENT, LEGAL AND ARGUMENT FOLDERS

1. Set up folders at the onset
2. Use designated color in labels and stick to same color, *e.g.*, Pleadings - brown, Legal - blue, Opening and Argument Folders - green
3. Make notes in opening and argument folders from day one

WITNESS FOLDERS -- GENERALLY

1. Trials proceed through witnesses
2. No T.V. flashbacks so entire story must be told
3. Make a separate trial folder for each witness -- material for use at trial - including witnesses you may not call
4. Some witnesses will require several folders

5. Make a second set of folders for each witness -- backup material only
6. Make third set of folders for each witness -- material to give defense, eg. *Jencks Act* statements, *Brady* material
7. Use colors to distinguish different sets of witness folders

WITNESS FOLDERS -- MECHANICS

1. Be fussy on style of folders
2. Choose a style and then make sure every folder is the same
3. Name of witness on each folder -- last, first name, middle initial
4. Block print with marking pen or typed labels
5. Always print every name in same color and at same position on folder - left, right or center of folder
6. Use institutional name not witness name when the entity is the real witness

Example: John Smith, trust officer, will introduce bank records of First National Bank

Folder will be: FIRST NATIONAL BANK

If you want witness name -- then

Folder will be: FIRST NATIONAL BANK
(John Smith, Trust Officer)

7. List Exhibits for each witness on flap of witness' folder, e.g.

SMITH, JAMES A.
(18) (26) (48)

8. Defendant -- separate trial folder for each defendant
9. Place each witness folder in accordion-type folder can then have separate folders for a witness grouped in one place -- *Example*:
Accordion folder can contain separate witness folders with outline, etc. separate folder for statements of witness where voluminous, etc.
10. Arrange witness folders in alphabetical order -- including folder for defendant -- and keep them that way

WITNESS FOLDERS -- CONTENTS

1. Outline of anticipated testimony for use in examination
2. Original of all statements made by witness, arranged chronologically -- earliest date on top
3. Copies of exhibits for witnesses:
 - A. Can place *extra* copy of exhibit in witness folder
 - B. Better procedure is to cut up extra copy of exhibit and include in witness outline any portion of exhibit important to testimony
 - C. Reference to the numbers of the exhibits in witness outline
 - D. Rely on your copy of exhibit when examining the witness at trial
4. Cross reference sheet in each witness folder to related witnesses, documents, etc.
5. Reference to pertinent legal memo or copy of memo
6. Anything you will need to examine witness, but limit file to needed material
7. Basic witness folder used to examine the witness should be clean and easy to manage

WITNESS FOLDER -- DEFENDANT

1. Original of all statements made by defendant arranged chronologically -- earliest date on top
2. Backup material considered significant
3. Reference to key exhibits
4. Notes made before and during trial for cross examination
5. Cross reference sheet to exhibits, witnesses, legal memoranda, etc.

WITNESS FOLDER -- AGENT

1. Generally -- same material as any witness -- *see* above
2. Original of Special Agent's Report (SAR)
3. *Copy* (not original) of any statements of defendant taken or witnessed by agent; original goes in defendant's folder
4. Schedules prepared by agent -- separate folder for schedules may be necessary; file in accordion folder for witness

DOCUMENTS -- ALWAYS IN A TAX CASE

1. Stipulated -- Authenticity, Admissibility, Factual
2. Private documents
3. Business records
4. Public -- official documents
5. Self-authenticating documents
6. Summaries and schedules

CLASSIFICATION OF DOCUMENTS

1. Originals
2. Duplicates
3. Certified copies
4. Copies

ORIGINAL -- DEFINITION

Rule 1001(3), Fed. R. Evid.

1. What you have always known as an original.
2. Any counterpart intended as an original -- *Examples*:
 - A. Contract executed in duplicate, triplicate, or any number of times -- all are originals
 - B. Carbon copies of Master Charge sales slips properly admitted as originals
United States v. Rangel 585 F.2d 344, 346 (8th Cir. 1978)
3. *Accurate printout of data stored in a computer is an original* --
Rule 1001(3)
4. If you have an original, you can forget about rules as to the use of duplicates, or copies, or secondary evidence.

***BEST EVIDENCE RULE --
REQUIREMENT OF ORIGINAL
ORIGINAL WRITING RULE
Rule 1002, Fed. R. Evid.***

1. *To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by Act of Congress.*
2. Original only required where event is to be proved via a document -- contents or terms of a writing are sought to be proved.

United States v. Jones, 958 F.2d 520, 521 (2d Cir. 1992)

3. An event may be proved by non-documentary evidence even though a written record was made where contents are not sought to be proved.
 - A. *Example:* prove payment made for furniture by testimony of witness who bought furniture -- not necessary to produce receipt or books and records
 - B. Point -- transaction exists independent of any document
 - C. See Adv. Comm. Note to Rule 1002
4. BUT when transaction necessarily involves a document such as a deed or contract then must produce original document *or its equivalent*.
5. Practical matter -- under the rules duplicates are used more often than original.

***DUPLICATE -- DEFINITION
Rule 1001(4), Fed. R. Evid.***

1. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction or by other equivalent techniques which accurately reproduces the original.
2. *BUT* does not include handwritten or other manual copies such as typed copies.
3. A handwritten or typed copy would be just that -- a copy, not a duplicate.
4. *Example:* A typed copy of a letter is a copy; a xerox copy or a photostat is a duplicate.
5. Important because duplicates are given the same status as originals under the rules -- except in some instances. Copies are not.

ADMISSIBILITY OF DUPLICATES -- PRIVATE DOCUMENTS

Rule 1003, Fed. R. Evid.

1. A duplicate is *admissible to the same extent as an original* unless (1) a *genuine question* is raised as to the authenticity of the original or (2) in the circumstances it would be *unfair to admit* the duplicate in lieu of the original.
2. A key rule that recognizes a xerox world and the practical fact that in most situations a duplicate is as good as an original.
3. Simply stated a xerox copy, photostat, microfilm, etc. print of a document is admissible the same as an original *unless there is a genuine question as to the authenticity of the original; or it is unfair to admit a copy.*
4. That a duplicate is presumptively admissible is the approach unless a real question is raised as to the authenticity of the original or the fairness of using a copy.

United States v. Bakhtiar, 994 F.2d 970, 979 (2d Cir. 1993) (failure to produce original counterfeit bank checks did not deprive defendants of a fair trial)

United States v. Rodriguez, 524 F.2d 485, 487 (5th Cir. 1975), *cert. denied*, 424 U.S. 972 (1976) -- xerox copy of vehicle certificate of title made by agent admitted but note defendant never denied ownership of vehicle

CTS Corp. v. Piher Intern. Corp., 527 F.2d 95, 104 (7th Cir. 1975), *cert. denied*, 424 U.S. 978 (1976) -- carbon copies admitted

United States v. Gerhart, 538 F.2d 807, 810 n.4 (8th Cir. 1976) -- photocopy of a photocopy of a bank check admitted as a duplicate

United States v. Morgan, 555 F.2d 238, 243 (9th Cir. 1977) -- xerox copy of insurance certification admitted as a duplicate

5. Without proper foundation to authenticate, however, a duplicate may be inadmissible.
Von Brimer v. Whirlpool Corp., 362 F. Supp. 1182, 1187 (N.D. Cal. 1973).
6. BUT -- if no stipulation -- must present testimony that the copy is an accurate reproduction of the original, Rule 1001(4), Fed. R. Evid.
7. Burden is on party challenging use of duplicate.

United States v. Georgalis, 631 F.2d 1199, 1205 (5th Cir. 1980) -- burden on party opposing duplicate

United States v. Garmany, 762 F.2d 929, 938 (11th Cir. 1985) -- photocopy of a check in lieu of original introduced by government, burden of challenging photocopy rested on defendant

8. Best evidence rule not applicable, not necessary to explain absence of original to come under Rule 1003; absence of original's coloring in duplicate is no bar to admissibility; *i.e.*, xerox copy:
 - United States v. Enstam*, 622 F.2d 857, 866 (5th Cir. 1980, *cert. denied*, 450 U.S. 912 (1981))
 - United States v. Wagoner*, 713 F.2d 1371, 1377 (8th Cir. 1983)
9. Original should sometimes be used even if a duplicate is technically admissible.

Key points:

 - Obtain and put original in evidence, *e.g.* an original check for \$100,000 is far more real than a xerox copy
 - Originals generally have more jury appeal -- copies do not pick up colors, do not look "real"
 - Criminal Tax Cases: original returns should always be in the courtroom even if a certified copy or a testified to copy is put in evidence
 - Original returns -- if admitted, move to substitute copies
10. Admissibility of "duplicates" of public records is governed by Rule 1005 and *not* Rule 1003, Fed. R. Evid.

PUBLIC DOCUMENTS

Rule 1005, Fed. R. Evid.

1. Public records -- the contents of official records and recorded documents authorized to be recorded and actually recorded or filed, *e.g.*, government records, deeds, mortgages, and other documents filed in a county recorder's office, may be proved by copy, certified in accordance with Rule 902 or testified to as correct by a witness who has compared it with the original.
2. A document authorized to be recorded or filed is required to be filed by statute or is customarily recorded in practice.
 - Amoco Production Co. v. United States*, 619 F.2d 1383, 1390 (10th Cir. 1980) (original deed returned to parties after recording is not a public record)
3. Duplicates of private records come under Rule 1003 and are subject to challenge as being unfair to use instead of originals.
4. Public records come under Rule 1005 and issue is *not* available as to whether it is fair to use a certified copy of a public record.
5. Public records are also *not* subject to secondary evidence requirements (Rule 1004) --

makes no difference whether the original is available or not.

STIPULATIONS

1. Can apply to any document, *e.g.*, letters, schedules, affidavits, etc.
2. Authenticity stipulation - no foundation required, copies can be used -- does not say they are admissible.
3. Admissibility -- agreement that document can go in to evidence.
4. Factual -- go to ultimate fact, *e.g.*, item in net worth, bank account balance, cost of stock, etc.
5. Consider: Discovery inevitable so volunteer stipulations on an exchange basis or at least in exchange for authenticity.
6. *Government discovery*: Rule 16(b)(1), Fed R. Crim. P. Government gets discovery if defense is given discovery under Rule 16(a)(1)(C) or (D). As of December 1, 1993, the government is entitled to discovery if defense is given discovery under Rule 16(a)(1)(E).

STIPULATIONS -- CONDITIONS

1. Affidavits, letters, etc. - same as if witness called.
2. Reserve right to call witness, explain background.
3. No stipulation as to willfulness.
4. Have *both* defense counsel and defendant sign stipulation.

ORGANIZING EXHIBITS

1. Foregoing principles determine form of exhibit that can be used.
2. Review exhibits - do you have foundation for rule on which you rely?

PRE-MARK EXHIBITS

1. Voluminous exhibits -- *always pre-mark*.
2. See Judge's courtroom clerk -- first place to go.
3. Explain system to be used -- obtain exhibit stickers.
4. Mount exhibits -- effective and simple to do.

EXHIBIT LIST -- ESSENTIAL

1. Many ways to pre-mark -- depends on case, court and your style.
2. Exhibit list -- should always have one.
3. Suggest exhibit list in chart form containing the following columns:
 - Exhibit No.
 - Description of Exhibit
 - Identified
 - Admitted/Stipulated *
 - Witness (optional on copies to court and to defense)

4. *Example:*

<i>Ex. No.</i>	<i>Description</i>	<i>Id.</i>	<i>Adm/Stip*</i>	<i>Witness</i>
1.	Adams, 1990 Income Tax Return	4/8/93	4/8/93	Certified
2.	Deed: Brown to Smith		4/6/93*	Brown
3.	\$10,000 check from Carter to Jones dated 4/6/90	4/7/93	4/12/93	Carter

5. Witness column will lead you to source.
6. Agent or associate counsel maintains exhibit book at trial.
7. Copy of Exhibit list to court, courtroom clerk, probably defense, and reporter.

PRE-MARKING PROCEDURE

1. Visualize presentation as chronological or logical -- usually chronological with logical subdivisions.
2. Step No. 1 is not essential but is preferred if time permits - not fixed in concrete order of proof.
3. Review witness statements, exhibits and other material and place sticker with a number on each exhibit for the witness.
4. Make exhibit list out as you go, *i.e.* list number, description of exhibit and witness to introduce.

5. Place each numbered exhibit in a separate exhibit folder:
 - Separate Folder: EXHIBIT 1
 - Separate Folder: EXHIBIT 2
 - Separate Folder: EXHIBIT 3
6. Helpful to number in expected order of offering exhibits, but not necessary -- waste of time to agonize over which exhibit will be first, second, etc.
7. Use a color code and stick with it - if folder for EXHIBIT 1 is labeled in green, then all exhibit folders should be labeled in green.
8. Recommended: *Keep sets of exhibits in numerical order*
 - A. Arranging and keeping exhibits in numerical order gives flexibility and control
 - B. Numbers control and exhibit is easy to locate
 - C. Extra copy can always be made and placed in appropriate witness folder
9. *Make at least five sets of numbered exhibits:*
 - 1 set for admission into evidence
 - 1 set for use by you at trial
 - 1 work set to cut up and incorporate in witness outlines, or to use as needed
 - 1 set for each defendant -- probably required
 - 1 set for the Judge -- check with local practice
10. *Procedure:* first number court set of exhibits with stickers and then xerox this set for additional copies needed -- in this way all sets will reflect the number assigned to an exhibit.

WITNESS OUTLINES

1. After numbering exhibits -- prepare witness outlines.
2. Tools -- all pertinent statements and exhibits, scissors and scotch tape.
3. Style that gives you the most comfort is the one to use.
4. Writing out questions and answers:
 - A. Not recommended for the long run
 - B. *Exception* -- may want to do this for a hypothetical question or important big

questions

- 5. Topical outline form:
 - A. Advantage of flexibility and control of examination
 - B. Can be as detailed as you wish -- but key detail to each topic you are covering
 - C. Cut and scotch tape in outline appropriate portions of statements obtained from witness
- 6. Outline goes in witness folder.

ABBREVIATED SAMPLE OUTLINE

Dr. JOHN SMITH
 Boston, Massachusetts
 Investor

SUMMARY: 1990 "Invested" \$30,000 (cash), \$120,000
 nonrecourse note in defendant's tax shelter; note backdated to 1989

EXHIBITS: 33, 18, 43, 275

BACKGROUND: Doctor -- internist, 10 years, practices in Philadelphia

INVESTOR: Invests in stocks, real estate, shelters
 No investor-advisor -- handles it himself

KNOWS DEFENDANT: Met defendant in 1985; bought several shelters from defendant -- movies, records, oil and gas

MOVIE SHELTER PURCHASED:
DEFENDANT CALLED 4/5/90: First contact with defendant, re: movie shelter
 Took call at office -- April 5, 1990
 Defendant told him about movie shelter for 1989

DEF. DESCRIBED SHELTER

TERMS: [Detail conversation -- scotch-tape portion of defendant's statement that describes terms]

DEF. SAID ON 4/5/90 --
COULD TAKE DEDUCTION ON
1989 RETURN: Defendant: "makes no difference that it is 1990"
 "Note can be dated in 1989 -- no one will know."

July 1994

TRIAL OF A CRIMINAL TAX CASE

SIGNED BACKDATED NOTE:

EX. 18

Gave \$250,000 note to defendant

Signed note at defendant's office, 4/14/90

ORDER OF PROOF

1. Try to arrange case in chronological order - mix strong and weak witnesses.
2. ***Start strong, finish strong.***
3. Devise form so you have tentative order of proof as you go.
4. Use separate form (*e.g.*, file cards) for each witness -- this way you can shuffle order of witnesses until you have final order of proof.

SUBPOENAS

1. Witness trial folders and applicable exhibits can be used to draft subpoenas.
2. Issue subpoenas three to four weeks before return date.
3. List your name and telephone number on subpoena.
4. Have I.R.S. agents serve subpoenas -- they are authorized to do so -- 26 U.S.C. § 7608.
5. Use catch-all phrases but also list specific documents wanted when you can.
6. State on subpoenas -- original documents are to be produced, if you do *not* have the original but do have a copy, then the copy is to be produced.

SUBPOENAS -- LARGE CASE

1. Draft stock phrases for use in numerous subpoenas.
2. Stagger return dates -- can't have 200 witnesses appearing at the same time.
3. Suggested Procedure:
 - A. Do not know precise date witness is going on stand
 - B. Use first day of trial as return date on all subpoenas -- ***BUT***
 - C. Attach letter to subpoena with a telephone notice card. If witness signs and returns card then no appearance is required until called
 - D. Telephone card is to be signed by witness and attached to copy of subpoena returned by

process server

- E. If telephone card is not signed and returned -- must appear on first day of trial and wait until called to the stand
 - F. Telephone card should contain, name of witness, home and business address and telephone numbers
 - G. Telephone cards -- some for one-day telephone notice, two days, three days, etc.
4. Make up telephone card file and have an agent in charge of witness traffic.
 5. Arrange for de-briefing session with witness.

JURY MATTERS

1. *Voir dire*, peremptory challenges and alternate jurors, Rule 24, Fed.R.Crim.P.
2. Qualifications, exemptions, manner of drawing, inspection of records, excuses, etc. -- 28 U.S.C. §§ 1861, *et seq.*
3. Jury of less than twelve -- only if both parties stipulate in writing *any time* before verdict and court approves, Rule 23(b), Fed. R. Crim. P.
4. No stipulation - if court finds it necessary to excuse a juror for cause *after the jury has retired*, valid verdict may be returned by the remaining eleven jurors. Rule 23(b), Fed. R. Crim. P.

GOVERNMENT RIGHT TO JURY TRIAL

Rule 23(a), Fed. R. Crim. P.

1. Trial is by jury "unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."
Rule 23(a), Fed. R. Crim. P.
2. Rule 23(a), Fed. R. Crim. P. is constitutional -- defendant can have a bench trial with "the consent of the prosecuting attorney and the trial judge."
Singer v. United States, 380 U.S. 24, 36 (1965)
3. Dicta in *Singer*, 380 U.S. at 37, leaves door open for unique case:

We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the government's insistence on trial by jury would

result in the denial to a defendant of an impartial trial

4. At least two district courts have used the *Singer* dicta to deny the government's insistence on trial by a jury:

United States v. Braustein, 474 F. Supp. 1 (N.J. 1979) -- criminal tax case; government petition for mandamus on jury point became moot when all defendants entered guilty pleas

United States v. Panteleakis, 422 F. Supp. 247, 250 (R.I. 1976) -- bench trial ordered -- "the Court finds the government's refusal to grant consent unreasonable and arbitrary."

5. Jury or Not -- considerations -- *see*:

United States v. Moon, 718 F.2d 1210, 1217 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984)

United States v. Morlang, 531 F.2d 183, 186 (4th Cir. 1975)

United States v. Martin, 704 F.2d 267, 271 (6th Cir. 1983)

SELECTION OF JURORS

1. Secure jury panel list as soon as possible.
2. Check with other assistants, neighbors, friends, etc.
3. I.R.S. is authorized to tell you whether a prospective juror has or has not been the subject of any audit or other tax investigation by the Service, 26 U.S.C. § 6103(h)(5):
 - A. Request *must* be made in writing by an attorney for the Department of Justice or any person who is a party to such proceeding;
 - B. IRS reply must be limited to "yes" or "no" -- no details
4. Draft chart to use during jury selection.
5. Suggested *voir dire* questions include:
 - A. Have you, a close friend, or a relative, had any dealings with the I.R.S.? If yes -- were you satisfied with those dealings?
 - B. Have you studied accounting or law?
 - C. Will those of you who prepare your own tax returns please raise your hand?

OPENING STATEMENT -- LAW

1. Purpose "is to state what evidence will be presented to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole;

it is not an occasion for argument."

United States v. Helmsley, 941 F.2d 71 (2d Cir. 1991).

"To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct."

United States v. Dinitz, 424 U.S. 600, 612, (1976) (Burger, C.J. concurring)

2. Scope and extent of an opening is within the control of the trial court
3. Defense counsel can obtain permission to reserve opening until the government has rested:
Karikas v. United States, 296 F.2d 434, 438 (D.C. Cir. 1961), *cert. denied*, 372 U.S. 919 (1963)
4. BUT timing and making of opening statements is within the discretion of the trial judge.
United States v. Zielie, 734 F.2d 1447, 1455 (11th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985)

OPENING STATEMENT -- Pointers

1. "What I say, or defense attorney says, is not evidence" - preview of case
2. Never say -- "I believe", or "the government believes"
3. Can say -- "I suggest that" or "I submit"
4. Explain elements of crime -- briefly
5. Explain method of proof - don't use technical language
6. Point out necessity of documents
7. Paper may seem confusing - probably boring
8. See some exhibits during trial - all in jury room
9. Summary expert will put documents together for you
10. TELL JURY A STORY
11. Never -- Witness Jones or Smith will tell you . . .
 Rather -- Jones paid the defendant \$10,000 for lumber; Smith gave the bar receipts to the defendant
12. Chronological approach -- as much as possible
13. Be strong and definite but conservative -- otherwise you'll be sorry later

14. *Never, never, never* go beyond the evidence you have:

United States v. Dinitz, 424 U.S. 600, 612 (1976) (Burger, C.J. concurring)

15. Hit highlights, eliminate details

16. Get pre-trial, pre-opening ruling on any "hot" evidence that you want to cover

17. Conclusion: "will ask you for a verdict of guilty"

DOCUMENTS AT TRIAL GENERALLY

1. Many documents -- necessary for case but *no great persuasion weight*.
2. General rule -- no testimony or reference to contents of a document until it is admitted.
3. Lay foundation and move admission quickly is normally best.
4. Routine documents - get it over with, lead where possible.
5. Documents with color - slow down, labor foundation somewhat.

VOIR DIRE

1. Challenge to admissibility of document.
2. Discretionary with court to permit.
3. Preliminary examination of witness on apparent foundation.
4. *Voir dire* prior to ruling on admissibility.
5. Document is not what it appears to be, incompetent witness, etc.
6. No proper foundation for admission of document.
7. Note: *Only goes to matters that relate to foundation*.
8. *Should not be used to cross-examine witness on other matters*.

BUT defense will often seek to cross-examine under the guise of voir dire

9. *Do not* ask for voir dire unless there is a good chance the exhibit will be excluded

OBJECTIONS -- RULINGS ON EVIDENCE

Rule 103, Fed. R. Evid.

1. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

2. A timely objection or motion to strike appears of record, "stating the specific ground of objection, if the specific ground was not apparent from the context." Rule 103(a)(1), Fed. R. Evid.
3. "[I]n the absence of a specific objection on foundation grounds reversal is not required."

United States v. Wagoner, 713 F.2d 1371, 1377 (8th Cir. 1983)

INADMISSIBLE EVIDENCE

SUGGESTED TO JURY

Rule 103(c), Fed. R. Evid.

1. Jury case -- conduct trial so as to "prevent inadmissible evidence from being suggested to jury by any means." Rule 103(c), Fed. R. Evid.
2. Inadmissible evidence suggested by "any means such as *making statements* or offers of proof or *asking questions in the hearing of the jury*." Rule 103(c), Fed. R. Evid. (Emphasis supplied).

See United States v. Birges, 723 F.2d 666, 673 (9th Cir.), *cert. denied*, 104 S. Ct. 1926 (1984).

3. A rule that is often overlooked that can be most helpful when a party (or even the court) steps out of line.

INCOME TAX RETURNS

1. Usually first exhibit offered.
2. Can offer later but should be a good reason for delay in offer.
3. Return can be offered via witness or by offering certified copy.
4. Original returns should always be in the courtroom.
5. If original return is admitted, make motion to substitute a copy for original.

INCOME TAX RETURNS -- WITNESS

1. Witness - Representative of Internal Revenue Service Center.
2. Arrange for witness well in advance of trial.
3. Absolutely vital to review proposed testimony with witness.
4. *Foundation: essential to establish that witness is a "reader" and not a tax expert.*
5. Can make return live -- Example:

- Q. How much did the defendant report as Capital gains on Schedule D of his 1990 return?
- A. There are none reported.
- Q. How much did the defendant report as interest income?
- A. She reported \$300 in interest from the First National Bank.

INCOME TAX RETURNS -- CERTIFICATION

1. Not necessary to use a witness.
2. Use of reproductions -- 26 U.S.C. § 6103(p)(2)(C):

(C) Use of reproductions.--Any reproduction of any return, document, or other matter made in accordance with this paragraph shall have the same legal status as the original, and any such reproduction shall, *if properly authenticated, be admissible in evidence* in any judicial or administrative proceeding *as if it were the original*, whether or not the original is in existence. (Emphasis supplied)
3. Note -- takes care of authenticity -- *not* admissibility.
4. Certification -- District Directors and Directors of Service Centers have seals of office and can certify returns and other documents in their custody for any purpose where certification is required.
 - A. "Judicial notice shall be taken of any seal prescribed in accordance with this authority" 26 U.S.C. § 7514 (authority to prescribe or modify seals)
 - B. Treas. Reg. § 301.7514-1(c) (26 C.F.R.) (seal for authenticity)
5. Officer who had custody and transferred returns to Records Center can still certify, *e.g.*, return filed with District Director in pre-service center days and transferred to Federal Records Center.
 - A. 44 U.S.C. § 3104 -- Certifications and determinations on transferred documents
6. *Case examples:* prior to Federal Rules of Evidence but principles are still applicable.

United States v. Merrick, 464 F.2d 1087, 1092 (10th Cir.), *cert. denied*, 409 U.S. 1023 (1972)

Holland v. United States, 209 F.2d 516, 520 (10th Cir.), *aff'd*, 348 U.S. 121 (1954)

AUTHENTICITY VIA WITNESS ROUTE

1. *Repeat*: certification is not exclusive -- can call witness.
2. *Income tax return -- witness*: representative of Service Center or District Director.
3. Witness -- Advantages:
 - A. Can't get live mileage out of document
 - B. Provides explanations, *e.g.*, marks on return made during processing
 - C. Negative questions -- highlight failure to report item on the return
 - D. Return needed quickly in court -- bring in witness, no time to certify
4. Disadvantages:
 - A. Cross-examination problems
 - B. Takes up time in the courtroom
 - C. *Must* prepare witness -- time may be a problem
5. Certify return or other document even if witness used -- insurance.
6. Arrange for substitution of copies -- use copies if possible with originals available.
7. *BUT . . . always have the originals in the courtroom*

INCOME TAX RETURNS -- SIGNATURE -- TRIAL MILEAGE

1. *Self-authenticating* -- "Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic" does not require extrinsic evidence of authenticity.
 - A. Rule 902(10), Fed. R. Evid.
2. "The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him."
 - A. 26 U.S.C. § 6064
 - B. *United States v. Parsons*, 967 F.2d 452, 455 (10th Cir. 1992).
 - C. Devitt, Blackmar, & O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), § 56.15
 - D. Note that section 6064 is not limited to returns, but also applies to a "statement or other document."
3. Not conclusive -- still a jury question:

United States v. Cashio, 420 F.2d 1132, 1135 (5th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970)

United States v. Wainwright, 413 F.2d 796, 802 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970)

4. *Signature on return* -- inference proper that defendant had knowledge of contents of return:
 - United States v. Romanow*, 509 F.2d 26, 27 (1st Cir. 1975)
 - United States v. Ruffin*, 575 F.2d 346, 354-55 (2d Cir. 1978)
 - United States v. Mohney*, 949 F.2d 1397, 1407 (6th Cir. 1991)
 - United States v. Gaines*, 690 F.2d 849, 853-54 (11th Cir. 1982)
5. *Partnership return* -- signed by a partner, then "prima facie evidence that partner is authorized to sign the return on behalf of the partnership."
 - A. 26 U.S.C. § 6063 -- signing of partnership returns
6. *Corporate return* -- person's signature on return is prima facie evidence that individual was authorized to sign on behalf of the corporation:
 - A. 26 U.S.C. § 6062 -- signing of corporate returns
7. *Unsigned return* -- can still be a section 7201 charge:
 - A. *Moore v. United States*, 254 F.2d 213, 215 (5th Cir.), *cert. denied*, 357 U.S. 926 (1958)
 - B. No section 7206(1) charge -- subscribing is an element of offense

BUSINESS RECORDS

"RECORDS OF REGULARLY CONDUCTED ACTIVITY"

Rule 803(6), Fed. R. Evid.

1. "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 . . . all as shown by the testimony of the custodian or other qualified witness," unless the circumstances indicate lack of trustworthiness.
2. Basic statute for admission of business records -- derived from 28 U.S.C. § 1732:
 - A. Advisory Comm. Note to Rule 803(6), 51 F.R.D. 315, 426 (1971)

- B. Section 1732 now deals with the admissibility of *copies* of business records or government records made in the regular course of business where the original has been destroyed in the regular course of business
- C. Note that section 1732 provides for use of an enlargement of a copy
- 3. If record admitted as a business record, then test on appeal is limited to a review for abuse of discretion:
 - Rosenberg v. Collins*, 624 F.2d 659, 665 (5th Cir. 1980)
- 4. Eliminates need of calling a witness to the transaction even if witness is available.

TERM BUSINESS -- "CALLING OF EVERY KIND"

Rule 803(b), Fed. R. Evid.

- 1. Expressly defined to include "business, institution, association, profession, occupation, and calling of every kind, *whether or not conducted for profit.*"
- 2. Running accounts of illicit enterprises are business records:
 - United States v. Cooper*, 868 F.2d 1505 (6th Cir.), *cert. denied*, 490 U.S. 1094 (1989) (log book of forged prescriptions kept in "regular course" of business was admissible)
 - United States v. Foster*, 711 F.2d 871 (9th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984) (ledger containing running accounts of illegal drug dealing is admissible if kept in "regular course" of the business activity)
- 3. See *United States v. Diez*, 515 F.2d 892, 899 (5th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976):
 - A. Diez and Palori convicted of conspiracy and Palori convicted of four counts of evasion
 - B. Both arranged for income from real estate transactions to be improperly reported
 - C. Case has good examples of business records, accountant's records, lawyer's records, and a title company's records
- 5. *Foreign business records*: Rule 803(6) applies: *United States v. Sand*, 541 F.2d 1370, 1376-77 (9th Cir. 1976), *cert. denied sub nom. Scully v. United States*, 429 U.S. 1103 (1977) (Swiss bank records)

**"A MEMORANDUM, REPORT, RECORD,
OR DATA COMPILATION, IN ANY FORM"**

Rule 803(6), Fed. R. Evid.

1. Not limited to books of account:
 - United States v. McPartlin*, 595 F.2d 1321, 1347 (7th Cir.), (Sprecher, J., concurring), *cert. denied*, 444 U.S. 833 (1979) (desk calendar and appointment diaries)
2. Note that reports are included -- but must meet all tests same as any other document, *i.e.*, prepared in regular course of business activity, etc.
3. *Data compilation* is used to include any means of storing information such as computer storage of information, *i.e.*, "computer language" used.
4. *Record can be in any form* -- as long as made in the regular course of the business activity.
 - A. Pen, pencil, printed, written, on record paper, notebook paper -- makes no difference
 - B. See *United States v. Prevatt*, 526 F.2d 400, 403 (5th Cir. 1976) (secretary's notebook)
5. Letter from one party to another in the regular course of business can qualify as a business record

COMPUTER PRINTOUTS

Rule 803(6), Fed. R. Evid.

1. *Computer printouts* are admissible -- but must lay foundation that standard equipment properly operated was used:
 - United States v. Sanders*, 749 F.2d 195, 198 (5th Cir. 1984) -- BUT must meet requirements of Rule 803(6)
 - United States v. Russo*, 480 F.2d 1228, 1240 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974), also a case under former 28 U.S.C. § 1732
 - United States v. Croft*, 750 F.2d 1354, 1364 (7th Cir. 1984)
 - United States v. DeGeorgia*, 420 F.2d 889, 893 (9th Cir. 1969)
2. BUT NOT necessary for computer programmer to testify to authenticate computer generated records -- nor is it necessary to call the person who actually prepared the record - - one who has knowledge of record system is sufficient:
 - United States v. Moore*, 923 F.2d 910 (1st Cir. 1991) (computer-generated loan histories in bank fraud case -- not necessary that computers be tested for programming errors before admitting computer records)
 - United States v. Miller*, 771 F.2d 1219, 1237 (9th Cir. 1985)

3. Accurate printout of data stored in a computer is an original -- Rule 1001(3), Fed.R.Evid.

BANK MICROFILM ADMISSIBLE

1. *United States v. Kelly*, 349 F.2d 720, 771 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966)
2. *Williams v. United States*, 404 F.2d 1372, 1373 (5th Cir. 1968), *cert. denied*, 394 U.S. 992 (1969)
3. *United States v. Keane*, 522 F.2d 534, 557 (7th Cir. 1975)
4. *United States v. Saputski*, 496 F.2d 140, 142 (9th Cir. 1974) -- 28 U.S.C. § 1732(b), now 28 U.S.C. § 1732
5. *Grummons v. Zollinger*, 240 F. Supp 63, 69 (N.D. Ind. 1964), *aff'd*, 341 F.2d 464 (7th Cir. 1965)
6. Records that can come in under Rule 803(6), IF other tests met:
 - Business records -- payroll records, invoices, ledgers
 - Bank records -- bank statements, loan records, checks, etc.
 - School records, *e.g.*, attendance records
 - Church records, *e.g.*, pledge fund records
 - Prison -- deemed a business, *Stone v. Morris*, 546 F.2d 730, 738 (7th Cir. 1976)
 - Hospitals
 - Civic associations
 - Parent-Teachers associations
 - Little league sports associations
 - Sunday school records of attendance
 - Neighborhood cooperative
7. See P.L. 93-595 Conference Report No. 93-1597, 93rd Cong., 2d Sess. United States Code Congressional & Administrative News (1974), p. 7104

"MADE AT OR NEAR THE TIME"

Rule 803(6), Fed. R. Evid.

1. This is the old requirement that record be made *contemporaneously* or reasonable time thereafter.
2. Not determined by arbitrary or artificial time limits measured by hours or days or even weeks -- depends on nature of information, reliability of source, etc.
 - Seattle-First National Bank v. Randall*, 532 F.2d 1291, 1296 (9th Cir. 1976) --

timeliness requirement is satisfied if record is made at "a reasonable time thereafter"

3. Computer printout prepared 11 months after close of year held contemporaneous:

United States v. Russo, 480 F.2d 1228, 1240 (6th Cir. 1973) (case under former 28 U.S.C. § 1732(a))

4. *Issue is*: was data put in computer or recorded contemporaneously?

**"MADE . . . BY, OR FROM INFORMATION TRANSMITTED
BY, A PERSON WITH KNOWLEDGE"**

Rule 803(6), Fed. R. Evid.

1. This refers to source of information, NOT to custodian or sponsor witness.
2. Note that *person making record need not have personal knowledge, i.e.*, information can be transmitted to him by one who has knowledge.
3. Person with knowledge *does not mean that person with knowledge has to be produced*
 - A. Do not even have to identify person with knowledge -- may be unknown

White v. Cessna Aircraft Co., 611 F. Supp. 1049, 1059 (W.D. Mo. 1985)
 - B. Advisory Comm. Note to Rule 803
 - C. Merely have to show regular practice of activity to *base record upon information received from a person with knowledge*
4. Person with knowledge -- AN INFORMANT WITH KNOWLEDGE ACTING IN THE COURSE OF A REGULARLY CONDUCTED ACTIVITY -- someone responsible to the organization on whom reliance is placed:
 - A. S. Report No. 93-1227, 93rd Cong., 2d Sess.
 - B. United States Code Congressional & Administrative News (1974), pp. 7051, 7063

**"MADE" -- CAN ADOPT RECORD
OF ANOTHER**

Rule 803(6), Fed. R. Evid.

1. *Invoices* received by company that were prepared by sending Company -- held admissible on testimony of receiving company -- no testimony by company that prepared invoices, *United States v. Flom*, 558 F.2d 1179, 1182 (5th Cir. 1977):
 - A. Trustworthiness demonstrated -- then may not be necessary for one who kept record or had supervision over the preparation to testify
 - B. Important concept -- often records received and made record of company in regular

course of business but not prepared by receiving company

2. Freight bill admitted upon testimony of receiving company in possession of stolen goods conviction -- freight bill adopted and relied on by receiving company:

United States v. Carranco, 551 F.2d 1197, 1200 (10th Cir. 1977)

3. Note information is received from person with knowledge, *i.e.*, sending company doing business with receiving company and both companies check each other
4. Inventory schedule and manufacturer's statement of origin prepared by Ford Motor Company introduced by general manager of Lincoln Mercury Agency to establish car was stolen by the defendant:

United States v. Ullrich, 580 F.2d 765, 771-72 (5th Cir. 1978)

**EXAMPLES -- PERSON
WITH KNOWLEDGE
Rule 803(6), Fed. R. Evid.**

1. Police report of information obtained by bystander -- officer is acting in regular course of activity, BUT the informant is not.
2. Compare, *United States v. Smith*, 521 F.2d 957, 962 (C.A. D.C. 1975) -- police report held to be a business record and policeman's account of what complaining witness said to him held admissible (by defense not government) when offered to impeach testimony of complaining witness

3. Statements in complaints filed with Post Office by private citizens held admissible:

United States v. Lange, 466 F.2d 1021, 1024 (9th Cir. 1972) (case under former 28 U.S.C. §1732)

4. Envelopes in administrative file admissible to show mailing and date sent to addressees.

United States v. Pent-R Books, Inc., 538 F.2d 519, 528 (2d Cir. 1976), *cert. denied*, 430 U.S. 906 (1977)

**"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"**

Rule 803(6), Fed. R. Evid.

1. Standard -- KEPT in course of regular business activity and,

2. Standard -- regular practice of business to *make* record
3. Note foundation must be laid on two points:
 - A. Record of a regularly conducted activity
 - B. Regular practice to make record in issue
 - United States v. Pelullo*, 964 F.2d 193, 200 (3d Cir. 1992)
 - United States v. Lawrence*, 934 F.2d 868, 870 (7th Cir. 1991)
 - C. *Example*: Bank loan money -- "regular activity"
4. Accident report by deceased railroad engineer offered by railroad trustees in collision case held *NOT* admissible
 - Palmer v. Hoffman*, 318 U.S. 109 (1943)
 - A. Business was railroading -- not making accident report, *i.e.*, not regular course of business to make accident reports
 - B. Report was prepared for litigation, *NOT* railroading
 - C. *Motivation*: Not record of routine operations -- goes to motivation of engineer
5. Verified statement by supervisor of market value of stolen trailer made three years after trailer was stolen was not made in course of regularly conducted business practice, but for use at trial and was not a business record for purposes of Rule 803(6)
 - United States v. Williams*, 661 F.2d 528, 530 (5th Cir. 1981)

**EXAMPLES - REGULAR PRACTICE
TO MAKE RECORD OR REPORT**

1. *Notation on records* such as "did not report for work," or initials of teller on bank record, is qualified if made in course of business activity -- otherwise not.
2. *Notation in Selective Service file* -- admissible, ordinary course of business to write "did not report" on Selective Service form:
 - LaPorte v. United States*, 300 F.2d 878, 880 (9th Cir. 1962) (decided under 28 U.S.C. § 1732, but same principles apply)
3. *Tax conviction*: admitted, corporate reports filed with state corporation commission:
 - United States v. Ragano*, 520 F.2d 1191, 1200 (5th Cir. 1975), *cert. denied*, 427 U.S. 905 (1976) (decided under former 28 U.S.C. § 1732(a), but principles are applicable under Federal Rules of Evidence)

4. *Statutory notice of deficiency* -- sent by certified mail and Post Office Form 3877 stating statutory notices for 1959-1961 and 1962 had been sent to defendant and attorney held admissible. *United States v. Ahrens*, 530 F.2d 781, 784 (8th Cir. 1976) (28 U.S.C. § 1732(a) case, but would now be admissible under Rule 803(6), Fed. R. Evid.).
5. Regular practice -- occasionally *not* followed or errors occasionally made, not enough to take documents out of Rule 803(6):
 - United States v. McGill*, 953 F.2d 10, 15 (1st Cir. 1992)
 - United States v. Patterson*, 644 F.2d 890, 900-01 (1st Cir. 1981)
6. Incomplete record -- Fact ledger was an incomplete record of drug dealings and contained several blank pages and unrelated entries did not render the ledger inadmissible:
 - United States v. Foster*, 711 F.2d 871, 882 (9th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984)
7. *Notation in police report* -- NOT admissible -- "police records are business records" BUT a note on letter of resignation in file *not identified* and not shown to be in regular course of business or contemporaneously made:
 - United States v. Halperin*, 441 F.2d 612, 618 (5th Cir. 1971)

THIRD PARTY DOCUMENTS

1. *Third-party documents* collected in file not enough -- must show that document *made* in regular course of business, *e.g.*, letters received from third parties routinely kept in file not enough:
 - United States v. Rosenstein*, 474 F.2d 705, 710 (2d Cir. 1973)
 - United States v. Yates*, 553 F.2d 518, 521 (6th Cir. 1977) -- postscript to letter not admissible, statement outside the scope of the business
 - Phillips v. United States*, 356 F.2d 297, 307 (9th Cir. 1965), *cert. denied sub nom. Walker v. United States*, 384 U.S. 952 (1966) -- BUT admissible for limited purpose of showing defendant knew statements had been made
2. BUT letters can be admissible as business records:
 - United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966)
 - See also United States v. Flom*, 558 F.2d 1179, 1182 (5th Cir. 1977)
 - United States v. Keane*, 522 F.2d 534, 557 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976)

**"ALL AS SHOWN BY THE TESTIMONY OF THE
CUSTODIAN OR OTHER QUALIFIED WITNESS"
Rule 803(6), Fed. R. Evid.**

1. Witness must be able to testify:
 - A. Record of regularly conducted activity
 - B. Kept in regular course of business activity
 - C. Regular practice of business to make record
 - D. Record made at or near time of event -- by person with knowledge or information from person with knowledge
2. Can compel custodian of records to identify and authenticate the documents produced for admission into evidence:

In re Custodian of Records of Variety Distributing, 927 F.2d 244, 249 (6th Cir. 1991)

3. *Sponsor with knowledge* would seem to be enough, *i.e.*, not necessarily custodian as such -- "qualified witness" -- *someone in the activity* because of her position or activities has reason to know about the records and business practice of the firm:

United States v. Hathaway, 798 F.2d 902, 906 (6th Cir. 1986) (government agent properly laid the foundation for admitting records -- all that is required is that the witness be familiar with the record keeping system)

4. Business records admitted upon testimony that records "kept under his direction by his assistant in the usual course of business":

United States v. Beathune, 527 F.2d 696, 700 (10th Cir. 1975), *cert. denied*, 425 U.S. 996 (1976)

5. Company records admitted as business records: (1) Transcript of SEC testimony of deceased bookkeeper identifying records and manner of keeping records admissible under Rule 801(d)(2)(D); (2) testimony of two former employees that deceased accountant maintained records; (3) admission of defendant that deceased bookkeeper maintained books; and (4) testimony of CPA that records checked out as accurate

United States v. Chappell, 698 F.2d 308, 311 (7th Cir.), *cert. denied*, 461 U.S. 931 (1983)

PREPARER NOT NECESSARY

1. Witness does *not* have to be preparer; *DOES NOT EVEN HAVE TO HAVE BEEN AN EMPLOYEE OF COMPANY WHEN RECORD MADE* as long as witness can testify to the

nature of the records:

United States v. McGill, 953 F.2d 10, 14-15 (1st Cir. 1992)

United States v. Lieberman, 637 F.2d 95, 100 (2d Cir. 1980)

United States v. Pellulo, 964 F.2d 193, 201 (3d Cir. 1992) (government agent may provide the foundation where the agent is familiar with the record-keeping system)

United States v. Scallion, 533 F.2d 903, 914-15 (5th Cir. 1976), *cert. denied sub nom. Jenkins v. United States*, 429 U.S. 1079 (1977)

United States v. Fendley, 522 F.2d 181, 185 (5th Cir. 1975)

United States v. Lawrence, 934 F.2d 868, 870-71 (7th Cir. 1991)

United States v. Pfeiffer, 539 F.2d 668, 670-71 (8th Cir. 1976)

United States v. Woods, 518 F.2d 696, 698 (8th Cir. 1975) (Texaco credit card investigator testified as to Texaco invoice allegedly signed by defendant)

United States v. Bowers, 593 F.2d 376, 380 (10th Cir.), *cert. denied*, 444 U.S. 852 (1979)

2. Not necessary for witness to identify maker of entries as long as foundation is laid as in No. 1 above:

Matador Drilling Co., Inc. v. Post, 662 F.2d 1190, 1199 (5th Cir. 1981)

3. *BUT* -- records inadmissible because witness did not know of own personal knowledge records were kept in office, no testimony that it was practice of business to keep such records, etc.

United States v. Rosenstein, 474 F.2d 705, 709 (2d Cir. 1973) (28 U.S.C. § 1732)

"UNLESS THE SOURCE OF INFORMATION OR THE METHOD OF CIRCUMSTANCES OR PREPARATION INDICATE LACK OF TRUSTWORTHINESS"

Rule 803(6), Fed. R. Evid.

1. *Approach*: Records made in course of regular activity are admissible -- *BUT* subject to exclusion if not trustworthy.
2. Escape clause for excluding records where *motive or accuracy of informant* is subject to question.
3. Court can exclude records, IF source of information or other circumstances make the record suspect.

4. *Example* -- records prepared in anticipation of litigation are suspect and not within Rule 803(6):

Palmer v. Hoffman, 318 U.S. 109, 111 (1943)

United States v. Williams, 661 F.2d 528, 531 (5th Cir. 1981)

Paddack v. Christensen, 745 F.2d 1254, 1258 (9th Cir. 1984)

5. Type of record, how made, motivation in making record, and which party is offering the record all bear on question of trustworthiness and hence admissibility.
6. *However*, once the defendant voluntarily produces business records (*i.e.*, in response to government summonses and subpoenas) and implicitly represents the records to be company records, defendant cannot later complain that documents did not originate from the company:

United States v. Lawrence, 934 F.2d 868, 871 (7th Cir. 1991)

**DEFENDANT'S BOOKS AND RECORDS
ACCOUNTANT'S WORKPAPERS**

1. Prepared by defendant's accountant or bookkeeper.
2. Could be admissible under Rule 803(6) as a business record.
3. Could be admissible as an admission -- statement by an authorized person, under Rule 801(d)(2)(C).
4. *Example* -- Defendant says, talk to my accountant, he can show you the books -- accountant's statements are admissions as to defendant:

United States v. Diez, 515 F.2d 892, 896 n.4 (5th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976)

5. Could be admissible as an admission -- statement by agent (bookkeeper) concerning matter within scope of his employment made while still working for defendant -- Rule 801(d)(2)(D):
 - A. Must be matter concerning bookkeeper's duties *and* bookkeeper must still be working for defendant
 - B. Makes no difference that bookkeeper is not authorized to make disclosures.
 - C. Transcript of SEC testimony of deceased bookkeeper, re: keeping company's books and records admissible as an admission under Rule 801(d)(2)(D), Fed.R.Evid.

United States v. Chappell, 698 F.2d 308, 311 (7th Cir.), *cert. denied*, 461 U.S. 931

(1983) (admission through an agent, *i.e.*, bookkeeper for the company)

6. If the accountant-bookkeeper is *NOT* authorized to make a disclosure the statement is *still admissible* as long as the statement is one made within the scope of the witness employment while the witness is still "working" for the defendant, Rule 801(d)(2)(D), Fed. R. Evid.
7. Authorization to speak is *not* a requirement of Rule 801(d)(2)(D):
 - A. Rule 801(d)(2)(C), unlike 801(d)(2)(D), requires that a statement be "by a person authorized by the party to make a statement concerning the subject."
 - B. Rule 801(d)(2)(D), however, says nothing about an agent having authority to make a statement on a particular subject. After an agency is established, Rule 801(d)(2)(D) requires only that the statement concern "a matter within the scope of the agency or employment, made during the existence of the relationship."
8. *Example*: Bookkeeper who works for the defendant gives an IRS agent a copy of the defendant's records and explains which are personal and which are business expenditures -- both books and statements made to agent are admissible even though not authorized by the defendant

Nekolny v. Painter, 653 F.2d 1164, 1171 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982)

Cf. *United States v. Ojala*, 544 F.2d 940, 945-46 (8th Cir. 1976)

FOREIGN BUSINESS RECORDS

18 U.S.C. § 3505

1. Criminal case -- foreign business record or copy authenticated and admissible if foreign certification attests that:
 - A. Record was made at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters
 - B. Record kept in course of a regularly conducted business activity
 - C. Regular practice to make such record
 - D. If record is not the original, such record is a duplicate of the original

United States v. Sturman, 951 F.2d 1466, 1489-90 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992)
2. Admissible unless source of information or preparation is untrustworthy.

3. Must give notice to other party.
4. Terms defined, 18 U.S.C. § 3505(c) -- "foreign record of regularly conducted activity," "foreign certification," and "business."
5. Applies only to foreign records, no certification as to domestic records.

***PROOF OF NEGATIVE
"BUSINESS RECORDS"
Rule 803(7), Fed R. Evid.***

1. Rule 803(7) is limited to records that qualify as records of regularly conducted activity under Rule 803(6).
2. Must lay foundation that entry not appearing in records is the kind that would be recorded, *i.e.* same foundation you lay for the admission of a business record under Rule 803(6).
3. Foundation laid then absence of entry is evidence of the non-occurrence or non-existence of the matter, act, or event:

See United States v. Zeidman, 540 F.2d 314 (7th Cir. 1976) (manager testified that his supervisor made search)
4. *Note*: Rule applies to report, record, or data compilations -- same as Rule 803(6).
5. *Escape clause*: unless sources of information or other circumstances indicate a lack of trustworthiness.

***PROOF OF NEGATIVE
PUBLIC RECORD OR ENTRY
Rule 803(10), Fed. R. Evid.***

1. Rule 803(10) applies to absence of an entry in a public record, report, statement or data compilation; OR to the nonexistence of a matter of which a record would have been made.
2. Proof of negative -- two ways available:
 - A. *Certification* of absence of entry under Rule 902
 - OR
 - B. *Testimony* that "*diligent search*" did not disclose the record, entry, report, etc.
3. Neither procedure is given priority under Rule 803(10) -- can certify or produce witness, or do both.

CERTIFICATION PROCEDURE

Rule 803(10), Fed. R. Evid.

1. Examples:

United States v. Spine, 945 F.2d 143, 148-49 (6th Cir. 1991) (certificate that no tax return was filed by taxpayer)

United States v. Yakobov, 712 F.2d 20, 23-24 (2d Cir. 1983) (certificate that no firearm license was issued to defendant)

2. Certification procedure is *only available* in case of public records; *not* available as to private records

3. Certification procedure is handy and often sufficient unless:

A. Explanatory testimony is needed

B. Witness can add color

WITNESS PROCEDURE

Rule 803(10), Fed. R. Evid.

1. Witness route -- must testify that a diligent search was made:

United States v. Robinson, 544 F.2d 110, 113 (2d Cir. 1976), *cert. denied*, 434 F.2d 1050 (1978)

United States v. Bowers, 920 F.2d 220, 223 (4th Cir. 1990)

United States v. Rich, 580 F.2d 929, 938 (9th Cir. 1978)

Cf. United States v. Martinez, 700 F.2d 1358, 1365 (11th Cir. 1983)

2. No testimony required as to the nature of the record keeping, *i.e.* not necessary to lay any business records foundation under Rule 803(10) as you must when proceeding under Rule 803(6) and Rule 803(7):

United States v. Regner, 677 F.2d 754, 757-58 (9th Cir. 1982) (dissent)

United States v. Farris, 517 F.2d 226, 229, n. 2 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975) (case under former 28 U.S.C. § 1733(a), BUT same principles apply to Rule 803(10) -- Court pointed out what is now Rule 803(6) foundation is superfluous)

3. BUT must establish no entry in record "regularly made and preserved by a public office or agency." Rule 803(10), Fed. R. Evid.

CASE EXAMPLES

1. Criminal failure to file case -- certified statement that search of master files indicated no returns filed:

United States v. Cepeoa Penes, 577 F.2d 754, 760 (1st Cir. 1978) (testimony and certification that no return filed)

United States v. Liebert, 519 F.2d 542 (3d Cir.), *cert denied*, 423 U.S. 985 (1975)

United States v. Bowers, 920 F.2d 220, 223 (4th Cir. 1990)

United States v. Johnson, 577 F.2d 1304, 1312 (5th Cir. 1978) (testimony by IRS employee that there was no record of filing a return)

United States v. Spine, 945 F.2d 143, 148-49 (6th Cir. 1991)

United States v. Farris, 517 F.2d 226, 227, (7th Cir.), *cert. denied*, 423 U.S. 892 (1975) (certification of failure to file)

2. Certificate of non-registration of firearms.

United States v. Cruz, 492 F.2d 217, 220 (2d Cir.), *cert. denied*, 417 U.S. 935 (1974)

3. Rejected -- testimony failed to show records were complete and a *casual or partial search* does not justify a conclusion of no records:

United States v. Robinson, 544 F.2d 110, 113-114 (2d Cir. 1976), *cert. denied*, 434 F.2d 1050 (1978) (witness should testify that agency regularly made and preserved records of unemployment payments and that a diligent search of those records failed to disclose any record of a payment to alibi witness)

4. *Bank robbery case*: FBI agent testified to examination of police records, sheriff's records, etc., disclosed to Dale Anderson who allegedly borrowed defendant's car -- testimony proper as to business records; harmless error as to public records because no objection by defense, BUT agent should have testified record search was conducted in a *diligent manner*):

United States v. Rich, 580 F.2d 929, 937 (9th Cir. 1978)

IRS CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Rule 803(10) -- To Prove Failure to File

1. *United States v. Neff*, 615 F.2d 1235, 1241 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980) (tax protestor failure-to-file case; great discussion of the law in this area)
2. Can obtain from Service Center an IRS Certificate of Assessments and Payments, Form

4340, that will "report" whether returns filed or not.