



The price of admission

The Business Records Exception



Cooper

BY MILES B. COOPER

The defendant's key witness, who said in a police report that our client had crossed the street during a red light, disappeared into the ether before a deposition was ever taken. Our client said green. The defendant said red. A classic red light/green light case with the added joy of a problem witness. But absent a live witness, the statement was hearsay. When we raised the issue during negotiations, the defense said, "No problem. It's in a police report. We'll get it in through the Business Records Exception."

The Business Records Exception, or BRE, is a hearsay exception that allows you to get documents admitted as trial evidence. It is codified as California Evid. Code § 1271 (if you're in federal court see FRE 803; elsewhere consult a practice guide.) Under Cal. Evid. Code § 1271, the writing must be: made in the regular course of business; made at or near the time of the act, condition, or event; identified by a custodian or other qualified witness who describes the preparation; and deemed trustworthy based on the source of information and method and time prepared. A business "includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not." Cal. Evid. Code § 1270.

But not everything in a business record is admissible

Great. So you can establish that the document was a business record. Does that mean everything in that document comes in? Absolutely not. Many documents are double-hearsay. Establishing it is a BRE gets you over the first hurdle but not the second. A witness statement in a police report is a classic example of double hearsay. Made by a party, it is admissible as the statement of a party opponent. By a third party? More difficult — you'll need to look to prior consistent/inconsistent statement rules. A common issue in death cases is a decedent's statement in a medical record — trouble for you or for the defense, depending on the objective.

Thinking ahead: lay the foundation in deposition

Sometimes the best evidence in a case is the defendant's own documents. Or those of a witness who may later be unavailable — out of state, disappeared or otherwise. It takes no time at all to lay the BRE foundation in deposition. And you profit in two ways. First, you can use the documents as summary judgment opposition exhibits (remember: the only evidence the court can

consider is admissible evidence.) The second is that if the witness's trial availability is uncertain, you'll be able to admit the documents with the deposition testimony.

In many situations, laying the foundation for the BRE is straightforward. But you need a witness, typically a custodian (but note that anyone at the business with knowledge, like the doctor, will do.) Extra witnesses are time-consuming and costly. Most experienced lawyers will stipulate to the BRE elements. But be careful of that double-hearsay issue. To do that you'll need clarity in your stipulation. In one case, during a pretrial discussion with a trustworthy opponent, we agreed that the medical records were BREs to save time. At the end of the trial, defense counsel was upset when we objected that some of the statements in the records themselves were hearsay. The lesson? Make it clear that if you are stipulating to BRE admissibility, you are not stipulating that *everything* in the document is admissible.

Strategy question: do you really want it in evidence?

The more evidence in a jury room, the longer jurors usually take. Giving them a six-inch stack of medical records, some of which may contain variations on how your client described the incident (given how health care providers take notes) can be counterproductive. Consider the issue carefully. Does the jury really need all those documents?

So it's not a BRE—is there another way?

There are some documents you may want to admit which are not business records. Say someone hired your client to perform work and wrote a nice letter after. Unlikely that it is a business record. How do you get it before the jury? First, bring the witness in. Second, introduce and identify the letter through the witness. Third, try going through the BRE elements just for giggles. Fourth, ask the witness, who then has authenticated the letter, if the witness had occasion to comment on your client's abilities and what those comments were. What happens next is that the letter is typically read, without objection, to the jury. Fifth, request that it be admitted. When the defendant objects it confirms the content of the letter and suggests the defense has something to hide.

The missing witness

Much to the chagrin of the defense in our case, they learned the witness statement was not coming into evidence. As a result, the jury would never hear that someone, aside from the driver,



MARCH 2012

thought our client was in the wrong. The result? A victory for our client, in no small part due to familiarity with the BRE.

Miles B. Cooper is a partner at Rouda Feder Tietjen & McGuinn. He represents people with catastrophic injury and death claims. In addition to preparing his own cases, he associates in as trial

counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat and schlepper over his career and is a member of the American Board of Trial Advocates. Cooper's focus beyond litigation includes trial presentation technology. When not working on injury or death cases, he volunteers with the Volunteer Legal Services' pro bono programs.