

BUSINESS RECORDS AS EVIDENCE IN MISSOURI

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I. INTRODUCTION

In 1949 Missouri became the seventeenth state to adopt the Uniform Business Records as Evidence Law, when it was enacted by the State General Assembly.¹ The Uniform Law made obsolete most prior Missouri law applicable to the introduction of business entries, and its provisions immediately became the principal means of introducing business records into evidence in this state. Earlier common law and statutory provisions have largely been ignored since 1949.²

Historically, the law relating to the admissibility of business records into evidence was divided into two distinct rules.³ The "shop-book" rule concerned the admissibility of the business records made by a shop-keeper or tradesman who was a party to the action, and was principally of value because an interested party was disqualified as a witness. The rule made it possible for the shop-keeper who had no employees to bring suit upon his business accounts. The second rule related to book entries made in the regular course of business at the time of the transaction by third persons who had personal knowledge of the facts they were recording. Under this

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1. Mo. Laws 1949, at 275. Before the Uniform Law's effective date in Missouri, it was adopted by California (1941), Delaware (1945), Florida (1949), Idaho (1939), Minnesota (1939), Montana (1937), New Jersey (1949), New York (1928), North Dakota (1937), Ohio (1939), Oregon (1941), Pennsylvania (1939), South Dakota (1939), Vermont (1939), Washington (1947), and Wyoming (1941). In 1941 the Uniform Law was adopted by the Territory of Hawaii. Since 1949, the Act has been adopted by Arizona (1951), Georgia (1952), Nebraska (1951), Nevada (1951), New Hampshire (1953), Tennessee (1957), and Texas (1951); in 1957 it was adopted by the Virgin Islands.

Some eleven other states have adopted legislation similar to the model act proposed by the Commonwealth Fund Committee on Evidence in 1927. See MORGAN ET AL., *THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM* 63 (1927).

2. Prior to 1949, the principal statutory provision on business records generally was the account book statute, now Mo. REV. STAT. § 490.650 (1959). Other statutes dealt with official records, corporate records, and the records of religious societies. Hospital records were, before 1948, admitted as "official records" or records required by law to be kept; some doubt was thrown upon this basis for admission by the adoption in that year of the Uniform Vital Statistics Law, now Mo. REV. STAT. §§ 193.010-380. See Caruthers and Gilcrest, *Hospital Records and "The Business Records as Evidence Law,"* St. Louis B.J., Oct. 1955, p. 39.

3. The historical development of the "shop-book rule" and the "regular entries" rule is described fully in McCORMICK, *EVIDENCE* 597-606 (1954); MORGAN, *BASIC PROBLEMS OF EVIDENCE* 304-08 (1963); 5 WIGMORE, *EVIDENCE* § 1518 (3d ed. 1940).

rule, the person who made the record was required to testify, or it had to be established that the maker was dead, insane, or otherwise unavailable as a witness.⁴ Both rules, of course, operated as exceptions to the hearsay rule by making evidence admissible that otherwise would have been rejected on that ground.

In the first half of the twentieth century it became increasingly clear that the earlier rules relating to business entries were no longer adequate, and that substantial revision was necessary in order to avoid injustice in a large number of cases. In 1927 the Committee on Evidence appointed by the Commonwealth Fund reported that correspondence with manufacturers and wholesalers concerning their operations disclosed that "the number of operations required to complete a transaction and the record of it varies from two or three to twenty-six and involves from two to one hundred and two persons."⁵ Plainly in more complex transactions it was not reasonably possible to present the testimony of each person who had taken part, or to prove the unavailability of such persons as a witness. Again, in 1948 the Evidence Code Committee of The Missouri Bar called for a recognition of "the modern and more complicated methods of doing business and the resulting complications with regard to record entries in the regular course of business;"⁶ the committee proposed a statutory liberalization of the rule.⁷

The Missouri General Assembly responded to this growing criticism of the law by enacting the Uniform Business Records as Evidence Law in 1949, thus passing in substance to the courts the burden of further liberalization through interpretation of the Uniform Law.

The courts' initial response to the challenge was cautiously conservative, in keeping with more than a century of Missouri judicial tradition. Thus in 1952 the Missouri Supreme Court, in an en banc decision, acknowledged the legislative purpose: "The Uniform Business Records as Evidence Law . . . has the purpose of avoiding the many antiquated and technical rules of common law regarding the admissibility of business records as evidence."⁸ With the passage of time the decisions involving the Uniform Law have be-

4. Thus in *Missouri Forged Tool Co. v. St. Louis Car Co.*, 205 S.W.2d 298, 301 (Mo. Ct. App. 1947), the court stated, "Proof of such records by the persons who made them is necessary except where such persons are unavailable by reason of death, insanity, illness preventing attendance, or absence from the jurisdiction."

5. *MORGAN ET AL.*, *supra* note 1 at 61.

6. *EVIDENCE CODE COMM. OF THE MO. BAR, MISSOURI EVIDENCE CODE—PROPOSED* 153 (1948).

7. *Id.* at 152-54.

8. *Melton v. St. Louis Pub. Serv. Co.*, 363 Mo. 474, 485, 251 S.W.2d 663, 669 (1952) (en banc).

come increasingly liberal; in 1956 the supreme court tersely explained this policy: "To construe the act too strictly would be to repeal it."⁹

During the initial decade after the passage of the Uniform Law, however, it was uncertain to what degree the courts would throw off the shackles of the prior law; the decisions lacked a clear direction and at times appeared to restrict the general purpose of the act. Then in 1959, in *Rossomanno v. Laclede Cab Co.*,¹⁰ in an en banc decision, the Missouri Supreme Court firmly swept away the vestiges of prior law by giving full meaning to the language and intent of the Uniform Law. Subsequent opinions have followed the lead of the *Rossomanno* case and have brought Missouri's law relating to business records squarely into line with modern business practices and with the views of modern writers.¹¹

II. JUDICIAL INTERPRETATION OF THE UNIFORM LAW

A. *The Requirements of the Uniform Law*

The basic provisions of the Uniform Law, as they appear in the Missouri statutes, are as follows:¹²

§ 490.670. "Business" defined.—The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

§ 490.680. Records, competent evidence, when.—A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.¹³

Thus, under the express wording of the Uniform Law, the admissibility of business records into evidence requires that (1) the record has been

9. *Allen v. St. Louis Pub. Ser. Co.*, 365 Mo. 677, 285 S.W.2d 663, 666 (1956).

10. 328 S.W.2d 677 (Mo. 1959) (en banc).

11. See, e.g., *Tomlin v. Alford*, 351 S.W.2d 705 (Mo. 1961), where an official of the U.S. Army Records Center in St. Louis was permitted to qualify army medical records made elsewhere at a different date, while plaintiff was in military service, and with which the witness was unfamiliar. Under the prevailing rule before adoption of the Uniform Law, it would have been necessary to have called as a witness, or to have accounted for the absence of, every person who had participated in the making of those medical records before they could have been admitted into evidence.

12. Statutory references herein, unless otherwise specified, are to MO. REV. STAT. (1959).

13. The Law as enacted contains two other sections:

§ 490.660. Sections 490.660 to 490.690 may be cited as "The Uniform Business Records as Evidence Law."

§ 490.690. Sections 490.660 to 490.690 shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

made in the regular course of business; (2) the record has been made at or near the time of the act, condition or event recorded; (3) the custodian of the record or other qualified witness testify to its identity and the mode of its preparation; (4) the court find that the sources of information, method and time of preparation were such as to justify its admission; and (5) the record be relevant.

Each of the foregoing requirements gives rise to a number of problems of interpretation and application. In the fifteen years since the adoption of the Uniform Law, the courts have been called upon many times to construe the Law in the light of varying fact situations. The following pages contain a discussion of these Missouri cases.

At the outset, however, several distinctions should perhaps be drawn. The admission of business records into evidence falls under an exception to the hearsay rule; business records which otherwise would be excluded as hearsay are admitted because, being regularly kept and relied upon in business, they impart a circumstantial guarantee of trustworthiness. As such, evidence offered under the business records exception should be differentiated from writings or records which are used by a witness to refresh his recollection. In the latter case, the writing itself is not considered as evidence, but merely as an aid to the witness in giving his testimony. It is not the writing which the court or jury considers (at least in theory it is not),¹⁴ but it is the oral testimony of the witness, whose memory has been refreshed by the stimulus of the writing. Clearly a writing or record used to refresh recollection need not meet the standards of the Uniform Business Records as Evidence Law. This distinction has not always been observed with nicety in the heat of trial, and there appear to be cases in which a writing has been used by a witness for the express purpose of refreshment, and later offered and admitted into evidence as a business record.¹⁵

A second distinction should be drawn between business records and what Wigmore describes as "past recollection recorded"¹⁶—a writing which records facts of which the witness has no independent recollection, but which the witness earlier recognized as being a correct statement of the facts, when they were fresh in his mind. Here, the writing itself is the evidence, and the testimony of the witness verifying its initial correctness merely qualifies it, since the witness is unable at the time of testifying to recall the facts con-

14. Morgan points out the danger very succinctly: "But when the means is a writing asserting the very matter to be remembered, there is the clear danger that the imagination rather than the memory will be stimulated or that reconstruction will take the place of recollection." *BASIC PROBLEMS OF EVIDENCE* 61 (1963).

15. *Cf. King v. Furry*, 317 S.W.2d 690 (Mo. Ct. App. 1958).

16. 3 WIGMORE, *EVIDENCE* §§ 734-55 (3d ed. 1940).

tained therein. Wigmore points out that the admissibility of records of past recollection is not a hearsay rule exception, and therefore such records need not meet the qualifications of business records or other similar exceptions.¹⁷ Accordingly, when the maker of the record testifies that he correctly recorded the facts known to him when they were fresh in his mind, but now has no recollection of the facts, the record or writing need not be qualified under the Uniform Law, but is admissible as a past recollection recorded.¹⁸ But where the witness through whom the writing is offered had no knowledge of the facts at any time, it is clearly necessary to resort to the Uniform Law and to comply with its requirements.¹⁹ Concededly, there is some overlap between these areas, as there are cases in which a writing would be admissible under either theory.²⁰

Further, it should be noted that the Uniform Business Records as Evidence Law does not provide the exclusive avenue of admissibility for several classes of evidence which are the subject of special statutes, such as account books,²¹ acknowledged written instruments affecting real estate²² and records of religious societies.²³ Likewise, the Missouri Supreme Court recognized, prior to the adoption of the Uniform Law, that there exists a hearsay rule exception "admitting official reports made by an officer on the basis of his own personal investigation and knowledge, at least when required by statute, ordinance, rule or regulation."²⁴ Recent cases have reaffirmed the existence of this hearsay rule exception as to official written statements, pointing out that it is not necessary to qualify such statements under the Uniform Law.²⁵

B. *What Constitutes a "Business"?*

Section 490.670 defines "business" as including "every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not." The question of whether a particular enterprise is a

17. *Id.* § 737(2).

18. See, *e.g.*, *State v. Bradley*, 361 Mo. 267, 234 S.W.2d 556 (1950); *Millaway v. Brown*, 197 S.W.2d 987 (Mo. Ct. App. 1946).

19. *Cf. Wolf v. Mallinckrodt Chem. Works*, 336 Mo. 746, 81 S.W.2d 323 (1934).

20. See McCORMICK, EVIDENCE § 280 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 308-09 (1963).

21. MO. REV. STAT. § 490.650 (1959).

22. MO. REV. STAT. § 490.410 (1959).

23. MO. REV. STAT. § 490.260 (1959). Additional statutory provisions affecting other writings and records are found throughout MO. REV. STAT. ch. 490 (1959). See, *e.g.*, *State v. Edmonds*, 347 S.W.2d 158 (Mo. 1961), pointing out that the Uniform Law does not apply to records of judicial proceedings, which are governed by MO. REV. STAT. § 490.130 (1959).

24. *Snider v. Wimberly*, 357 Mo. 491, 495, 209 S.W.2d 239, 241 (1948).

25. *Capra v. Phillips Investment Co.*, 302 S.W.2d 924 (Mo. 1957) (*en banc*); *cf. State v. Washington*, 335 S.W.2d 23 (Mo. 1960).

business within the meaning of the Uniform Law has not often been directly raised. In the leading case of *Melton v. St. Louis Pub. Serv. Co.*,²⁶ it was contended that the Uniform Law did not apply to hospitals, but the supreme court held that hospitals were businesses within the meaning of the Law, although they were not specifically mentioned therein. And in a subsequent decision a contention that the Uniform Law did not apply to a pathology laboratory was rejected, the court pointing out that pathology is a profession.²⁷

The courts have decided numerous other cases, involving myriad classes of enterprises, in which the definition of "business" has not been directly in question. Such enterprises have included: a grocery store,²⁸ a feed store,²⁹ a plastering and construction business,³⁰ an automobile dealer,³¹ an implement dealer,³² a trucking company,³³ a railroad,³⁴ a manufacturing company,³⁵ a real estate dealer,³⁶ a loan company,³⁷ an insurance company,³⁸ an optometrist,³⁹ a physician,⁴⁰ a state mental hospital,⁴¹ a local chamber of commerce,⁴² the State Department of Public Health and Welfare⁴³ and the United States Army.⁴⁴

In view of the numerous classes which have been included, it appears that the statute will be construed to embrace almost any regular enterprise in which persons may engage. The only exception—and the courts have

26. 363 Mo. 474, 251 S.W.2d 663 (1952) (en banc).

27. *York v. Daniels*, 241 Mo. App. 809, 259 S.W.2d 109 (1953).

28. *Hancock v. Crouch*, 267 S.W.2d 36 (Mo. Ct. App. 1954).

29. *Boland v. Dehn*, 348 S.W.2d 603 (Mo. Ct. App. 1961).

30. *George F. Robertson Plastering Co. v. Magidson*, 271 S.W.2d 538 (Mo. 1954).

31. *Adler v. Ewing*, 347 S.W.2d 396 (Mo. Ct. App. 1961); *King v. Furry*, 317 S.W.2d 690 (Mo. Ct. App. 1958).

32. *Ellis v. Farmer*, 287 S.W.2d 840 (Mo. 1956).

33. *Voyles v. Columbia Terminals Co.*, 239 S.W.2d 559 (Mo. Ct. App. 1951).

34. *Caffey v. St. Louis-San Francisco Ry.*, 292 S.W.2d 611 (Mo. Ct. App. 1956).

35. *Happy v. Blanton*, 303 S.W.2d 633 (Mo. 1957).

36. *Sebree v. Rosen*, 374 S.W.2d 132 (Mo. 1964); *McLendon v. Leighty*, 320 S.W.2d 735 (Mo. Ct. App. 1959) (rental agent).

37. *Glynn v. Glynn*, 291 S.W.2d 190 (Mo. Ct. App. 1956).

38. *Randall v. Western Life Ins. Co.*, 336 S.W.2d 125 (Mo. Ct. App. 1960).

39. *Kitchen v. Wilson*, 335 S.W.2d 38 (Mo. 1960).

40. *Rossomanno v. Laclede Cab Co.*, 328 S.W.2d 677 (Mo. 1959) (en banc); *Fisher v. Gunn*, 270 S.W.2d 869 (Mo. 1954); *Rodenberg v. Nickels*, 357 S.W.2d 551, 556-57 (Mo. Ct. App. 1962): "These Missouri statutes include the medical profession as a 'business.'"

41. *State v. Stidham*, 305 S.W.2d 7 (Mo. 1957).

42. *Fredericktown Chamber of Commerce v. Chaney*, 250 S.W.2d 820 (Mo. Ct. App. 1952).

43. *Barnes v. State Dep't of Pub. Health & Welfare*, 320 S.W.2d 88 (Mo. Ct. App. 1959).

44. *Tomlin v. Alford*, 351 S.W.2d 705 (Mo. 1961).

not as yet been confronted with this problem—may lie in the area of casual enterprise which is of an occasional or intermittent nature, or in which the person keeping the records may engage in but a single isolated transaction.⁴⁵

C. *Regular Course of Business*

Section 490.680 requires that a record, to be admissible, must be “made in the regular course of business.” The courts have construed this to mean that the record must have a reasonably close relationship to the regular conduct of the business, keeping in mind the nature of the business enterprise and the normal practices employed in such enterprises. In looking at a particular business, it may also be important to ascertain the particular practices of that business in the past, as well as any regularized procedures or rules which employees must follow.

Clearly, where the content of the record indicates that the matter recorded is beyond the normal or lawful scope of the business, the record will have no standing as a “business record” under the Uniform Law. Thus in *Kitchen v. Wilson*,⁴⁶ an optometrist’s record of an office examination was held inadmissible when it contained statements that “the cervical sympathetic ganglia which affect the focusing of the vision was injured in a car wreck December 7, 1956,” and that the examination verified “the existence of a whiplash injury as the etiologic factor in the damage.”⁴⁷ The court indicated that the “primary utility” of the record “was in litigating, not in the practice of optometry,”⁴⁸ and went on to hold that since the statutory definition of optometry⁴⁹ did not embrace diagnosing “whiplash injuries” or the injury of cervical sympathetic ganglia, the record was not one made in the regular course of business.

Similarly, in *Voyles v. Columbia Terminals Co.*,⁵⁰ one of the first cases decided after the adoption of the Uniform Law, it was stated by way of dictum that accident reports made by a trucking company after an accident involving a company truck would not be “considered as records made in the usual course of business. They constitute nothing more than a narration

45. See *Hancock v. Crouch*, 267 S.W.2d 36 (Mo. Ct. App. 1954), where a personal record book kept by an employee to record moneys paid out for the benefit of the employer was held to be a business record.

46. 335 S.W.2d 38 (Mo. 1960).

47. *Id.* at 42.

48. *Id.* at 43, paraphrasing the leading case of *Palmer v. Hoffman*, 318 U.S. 109 (1943), which held that a railroad engineer’s written statements, made after the accident, were not in the regular course of business because the “primary utility” of the statements was in litigating, not in railroading.” 318 U.S. at 114.

49. MO. REV. STAT. § 336.010 (1959).

50. 239 S.W.2d 559 (Mo. Ct. App. 1951).

of past events strengthened in no way by the fact that they are in writing.”⁵¹

Whether or not a particular report or writing is required to be made by an employee may be of significance in determining whether it has been made in the regular course of business. Where the employee acts without authority in making a record, it may be rejected.⁵² On the other hand, where a report has been required by law or by some regulation connected with the employment, the courts have mentioned such fact favorably,⁵³ although there appears to be no Missouri decision in which admissibility under the Uniform Law turns solely upon the question of whether the record was required to be made by the agent or employee who made it.

The “regular course of business” involves not only the commercial or other transactions in which the business engages, but embraces all facets of the business activity. Thus, employment and personnel records kept by a concern fall within the regular course of business;⁵⁴ also included are any medical records kept by the employer which relate to the employees.⁵⁵

Office records made by a physician concerning the examination and treatment of his patients clearly are made within the regular course of his profession.⁵⁶ However, where an orthopedic physician, some three and a half months after examining a patient, wrote a letter to the patient’s attorney reporting on the examination, the letter did not qualify under the Uniform Law; nor did a copy of the letter sent to the referring physician qualify: “This proffered document was not a record ‘made in the regular course of business,’ by either of the doctors.”⁵⁷

Turning to hospital records, it has been held to be in the regular course of business to record the statements of a patient as to how he was injured, when such information is relevant and “helpful to or of aid in the diagnosis of the patient’s injury.”⁵⁸ On the other hand, where no connection is shown

51. *Id.* at 562.

52. *Cf.* *Ensminger v. Stout*, 287 S.W.2d 400 (Mo. Ct. App. 1956).

53. *Ryan v. Campbell “66” Express, Inc.*, 304 S.W.2d 825 (Mo. 1957) (en banc); *Capra v. Phillips Investment Co.*, 302 S.W.2d 924 (Mo. 1957) (en banc).

54. *Happy v. Blanton*, 303 S.W.2d 633 (Mo. 1957) (record included complaints made by employee’s husband after she was “discontinued as industrially unsuited [fired?]”); *Dickerson v. St. Louis Pub. Serv. Co.*, 365 Mo. 738, 286 S.W.2d 820 (Mo. 1956) (en banc).

55. *Cf.* *Tomlin v. Alford*, 351 S.W.2d 705 (Mo. 1961) (army medical records).

56. *Fisher v. Gunn*, 270 S.W.2d 869 (Mo. 1954).

57. *Rodenberg v. Nickels*, 357 S.W.2d 551, 557 (Mo. Ct. App. 1962).

58. *Melton v. St. Louis Pub. Serv. Co.*, 363 Mo. 474, 487, 251 S.W.2d, 663, 671 (1952) (en banc). This rule was somewhat expanded by dictum in the subsequent case of *Allen v. St. Louis Pub. Serv. Co.*, 365 Mo. 677, 682, 285 S.W.2d 663, 667 (1956), where it was said that the admissible part of a duly qualified hospital record should include “those parts of the patient’s history inherently necessary (or at least helpful) to the observation, diagnosis and treatment of the patient.”

between the course of the patient's treatment and the making of the record, it will be rejected. Thus, where it was sought to introduce a "narrative summary" dated two weeks after the patient had been admitted to the hospital and one day before his discharge, and which was apparently a compilation of the original hospital record entries, the court held that the narrative summary did not have "the status of a business entry within the meaning of the Act."⁵⁹

D. Time and Manner of Preparation and Sources of Information

Section 490.680 further requires that a business record, to be admissible, must have been made "at or near the time of the act, condition or event" recorded, and that the "sources of information, method and time of preparation" of the record must have been such, in the trial court's opinion, "as to justify its admission." These requirements give rise to questions as to how soon after the act, condition or event the record must have been made; what methods of preparation and sources of information are adequate in order to qualify records under the Uniform Law; whether only the original business record is admissible or if secondary records made therefrom may be qualified; and how proof of the time and method of preparation and the sources of information is to be made.

It is quite clear from the language of the Uniform Law that some showing must be made as to the time and manner of preparation and the sources of information from which the record was derived, and the Missouri courts have repeatedly so held.⁶⁰ The appellate courts have upheld the rejection by the trial courts of records where no such showing was made;⁶¹ and one decision was reversed because of the admission of hospital records when the time and manner of their preparation had not been shown.⁶²

Records which are made at the very time of the act, condition or event which they record are admissible under the statute. Thus, a record consisting of observations dictated by a pathologist to his laboratory technician during the course of a post-mortem examination was properly qualified as

59. *Gray v. St. Louis-San Francisco Ry.*, 363 Mo. 864, 871, 254 S.W.2d 577, 580 (1953).

60. See, *e.g.*, *Ellis v. State Dep't of Pub. Health & Welfare*, 365 Mo. 614, 624, 285 S.W.2d 634, 641 (1955) (en banc).

61. *State v. Stidham*, 305 S.W.2d 7 (Mo. 1957); *Conser v. Atchison, T. & S.F. Ry.*, 266 S.W.2d 587 (Mo. 1954), *cert. denied*, 348 U.S. 848 (1954); *State v. McCormack*, 263 S.W. 2d 344 (Mo. 1954).

62. *Lockhart v. St. Louis Pub. Serv. Co.*, 318 S.W.2d 177 (Mo. 1958). Although the ruling in this case was partially overruled in *Rossomanno v. Laclede Cab Co.*, 328 S.W.2d 677 (Mo. 1959) (en banc), it appears that under the *Rossomanno* ruling at least *some* showing as to the time of preparation must be made.

to time,⁶³ as would be a record of a condition or event made by a mechanical recording device, such as a speed tape from a railroad locomotive.⁶⁴

On the other hand, where a considerable time interval has elapsed between the act or event and the making of the record, the record will be rejected as not complying with the statute. Thus, as mentioned above, where a hospital record containing findings of a physical examination connected with a patient's admission was not made until two weeks after the admission, the record was plainly not made "at or near" the time of the examination.⁶⁵

No reported Missouri decisions have involved close or difficult questions as to whether the time at which a particular record was prepared was or was not "at or near the time of the act, condition or event." Of necessity, then, any discussion of the problem involves an element of speculation. Undoubtedly, however, the determination in the first analysis will be left to the discretion of the trial court, and the appellate courts will interfere only in the event of an abuse of such discretion. Among the factors which might well be considered by an appellate court, in addition to the actual amount of elapsed time between the event and preparation of the record, are the nature and complexity of the information recorded, the training and skill of the person who made the record, whether the record was in fact made at the first reasonable opportunity, and the normal practices followed in the particular business as to the time of making records.

In this connection, Wigmore stresses that the entry should have been made at or near the time of the event, "not merely . . . to assure a fairly accurate recollection of the matter, but because any trustworthy habit of making regular business records will ordinarily involve the making of the record contemporaneously."⁶⁶

It is essential that the party seeking to introduce a business record offer some evidence as to the preparation of the record. While it may not be necessary to describe the preparation in great detail, nevertheless some showing thereof should be made; otherwise the court may, in its discretion, reject the record. Thus, where the custodian of a hospital record merely "identified" the record, the propriety of its admission into evidence was questionable.⁶⁷

63. *York v. Daniels*, 241 Mo. App. 809, 259 S.W.2d 109 (1953).

64. See *Caffey v. St. Louis-San Francisco Ry.*, 292 S.W.2d 611 (Mo. Ct. App. 1956).

65. *Gray v. St. Louis-San Francisco Ry.*, 363 Mo. 864, 254 S.W.2d 577 (1953). See also *Holloway v. Shepardson*, 364 Mo. 14, 258 S.W.2d 656 (1953), involving the admissibility of a monthly statement mailed out by a lumber yard; the statement, which was prepared from original sales tickets and the journal and ledger of the lumber business, was held inadmissible because it was not a business record but a narrative of past events.

66. 5 WIGMORE, EVIDENCE § 1526 (3d ed. 1940).

67. *Lang v. St. Louis-San Francisco Ry.*, 364 Mo. 1147, 273 S.W.2d 270 (1954).

Interestingly, the qualifications of the person who actually made the record have seldom been questioned. For example, a hospital record generally consists of entries by a number of persons, who in theory at least are highly skilled, ranging from physicians to licensed practical nurses. It is also possible, of course, for relatively unskilled persons such as hospital aides to participate in the making of a hospital record. Yet when the hospital record is produced at trial by a medical records librarian or other custodian, it may not be possible to identify the maker of any particular part of the record, much less submit him to cross examination or challenge his professional competency.⁶⁸

On the other hand, it is clear that the person who made the record must ordinarily have had some personal knowledge of what was being recorded, or must have been furnished such information in the regular course of business by a person who had personal knowledge of the facts recorded. This requirement is discussed under part *G*, *infra*.

A primitive, irregular or unusual method of record keeping will not affect the admissibility of a business record if the other statutory qualifications are met, although the weight to be given such a record is for the jury to determine. Thus, where a store clerk was requested by his employers to keep a record of disbursements made personally by him on their behalf, the fact that his "account book was kept in crude form and that his 'bookkeeping' was of the most elementary character" did not preclude its admission in an action by him to recover such advances.⁶⁹ Nor was it significant in this case that it was somewhat unconventional to keep records for this purpose; there was a sufficient connection between the store business and the records to bring them within the scope of the Uniform Law. And in a subsequent case where the only account records kept by a feed store consisted of original sales tickets which, after delivery of the merchandise, were placed under the customer's name in a steel filing cabinet, the court conceded that the "method of bookkeeping was certainly unusual," but held that the records were adequate under the Uniform Law.⁷⁰

The sources of information from which the record was prepared must have been adequate to justify admission of the record. Normally, the nature of the business and the regular practices of employees and others will pro-

68. In this connection, some consideration should perhaps be given to whether the anonymous entrant is more likely to be believed by the jury than is a witness who appears in court and is subjected to the jury's scrutiny as to his appearance and manner, and to cross examination by opposing counsel. This problem may become salient when one's witness is of particularly unattractive disposition or unconvincing manner and appearance.

69. *Hancock v. Crouch*, 267 S.W.2d 36 (Mo. Ct. App. 1954).

70. *Boland v. Dehn*, 348 S.W.2d 603 (Mo. Ct. App. 1961).

vide ample basis for a finding that the sources of information for the business records were adequate. Where, however, it appears from additional evidence that the sources of information were inadequate, the business record based thereon will be rejected. An almost classical example appears in *Kraus v. Kansas City Pub. Serv. Co.*,⁷¹ where the proffered hospital record recited, "This patient was first seen in the Emergency Room on the evening of February 13 with the history of having fainted when she attempted to get on a bus. Fell backwards, striking her head on the pavement."⁷² Other evidence, however, established that the patient had been rendered unconscious by the fall, and remained in that state until after she reached the hospital. The supreme court held that the trial court properly rejected the hospital record, since it was justified in finding that the patient could not have given the history attributed to her.⁷³

Need a business record be an "original entry" in order to be admissible? In the regular course of a business, original sales tickets may be recorded in an account book or on some other form of credit record, and the original tickets destroyed. If only the original entry is admissible, will the account book or other credit record in such a case qualify? The common law view as stated by Wigmore was that where the original sales tickets have been accounted for "as lost or otherwise unavailable," the records made from the tickets will be admissible.⁷⁴

Under the Uniform Law it is not clear whether the original sales tickets or other memoranda must be accounted for before a secondary record will be admissible. In cases where the secondary record offered in evidence has been made a substantial time after the act or event recorded, and there is no showing that the original record was unavailable, the secondary record has been rejected.⁷⁵ And in *George F. Robertson Plastering Co. v. Magidson*,⁷⁶

71. 269 S.W.2d 743 (Mo. 1954).

72. *Id.* at 746.

73. See also *Glynn v. Glynn*, 291 S.W.2d 190, 196 (Mo. Ct. App. 1956), where the court, considering the admissibility of business records purporting to show the manner of indorsement of a lost note, said: "The determination of whether a satisfactory foundation has been laid for the admission of the record in this case or the reading of the record into the evidence is for the trial court."

74. 5 WIGMORE, EVIDENCE § 1532 (3d ed. 1940).

75. See, e.g., *Holloway v. Shepardson*, 364 Mo. 14, 258 S.W.2d 656 (1953); *Gray v. St. Louis-San Francisco Ry.* 363 Mo. 864, 254 S.W.2d 577 (1953). Compare *Douglas v. Farrow*, 334 S.W.2d 234 (Mo. 1960).

76. 271 S.W.2d 538 (Mo. 1954). Adherence to the common law approach is also found in *O'Connor v. Egan*, 274 S.W.2d 334, 337 (Mo. Ct. App. 1955), where reference was made to § 490.650 (the account book statute), and the court said: "Under the law record testimony offered to establish the account sued upon must be an original book of entry, and the entries must have been shown to have been correctly made contemporaneously with the transaction."

a secondary record was admitted where the dray tickets and other memoranda from which it was made were destroyed after being recorded. However, in *Fredericktown Chamber of Commerce v. Chaney*,⁷⁷ it was held that a ledger into which information concerning subscription pledges was copied was admissible as evidence of such pledges even though the original pledges themselves were apparently available; the ledger itself was said to be an "original record" prepared in the regular course of business.

Passing reference should be made to the admissibility of photostatic copies of business records. The recent case of *Thomas v. Wade*⁷⁸ indicates that there may be some doubt as to the admissibility of such photostatic copies when the original has not been produced, although in that case the problem was solved by an express waiver by the objecting party as to the authenticity of the record. However, it appears that the court may well have overlooked sections 109.120 and 109.130, MO. REV. STAT. 1959, which provide that any business records may be "photographed, microphotographed, photostated or reproduced on film," and that such reproduction "shall be deemed to be an original record for all purposes, and shall be admissible in evidence in all courts or administrative agencies."

How is the party offering a business record in evidence to prove that it was made "at or near the time of the act, condition or even recorded"? Obviously, if this requirement is to be strictly enforced, the proponent must call as a witness the person who made the record, or some other person who was present when the record was made. But such strict construction of the statute would have the effect of defeating the purposes for which the Uniform Law was adopted.

The early Missouri cases decided under the Uniform Law indicated that a substantial showing had to be made as to the time and manner of preparation of a record before it would be admitted in evidence. Thus in *Conser v. Atchison, T. & S. F. Ry.*,⁷⁹ it was held error to admit Veterans' Administration hospital records from Wichita, Kansas, solely upon the highly equivocal testimony of a custodian who was an attorney and examiner for the St. Louis V.A. Regional Office. In its opinion the court emphasized that "the witness was not in the hospital department, had nothing to do with keeping the record and had no personal knowledge about that."⁸⁰ Likewise in *Lang*

77. 250 S.W.2d 820 (Mo. Ct. App. 1952). See also *York v. Daniels*, 241 Mo. App. 309, 259 S.W.2d 109 (1953), where the record was originally made in longhand on a yellow pad and subsequently transcribed; the record as transcribed was held admissible although the original notes were available.

78. 361 S.W.2d 671 (Mo. 1962) (en banc).

79. 266 S.W.2d 587 (Mo. 1954), cert. denied, 348 U.S. 828 (1954).

80. *Id.* at 592.

v. St. Louis-San Francisco Ry.,⁸¹ where a hospital record librarian merely “identified” certain records in her custody, the court intimated that there was some doubt as to the admissibility of the records, but did not find it necessary to decide that question because the records were not otherwise prejudicial.

It was clear, however, that although some evidence of the time and manner of preparation of the record was necessary, it was not necessary for the qualifying witness to have *personal* knowledge or recollection as to the making of the record in question. Thus in *Fisher v. Gunn*,⁸² the witness was a secretary in the physician’s office where the record was prepared, and had been employed there at the time it was made. She described the normal office procedure for making records of the examinations of patients, but admitted that she had no memory as to the preparation of the particular record. Holding that the medical record was properly admitted, the court said:

A qualified witness testified as to the mode of the record’s preparation, and that it was made in the regular course of business. We do not think it was essential that the custodian have had personal knowledge or recollection that these particular entries were made “at or near the time of the act, condition, or event” so long as she had personal knowledge that all like entries were made, in the regular course of business of that particular office, at the time of the “act, condition or event.” This unless there was other evidence which indicated or tended to show that the regular course of business was not followed with reference to the entries on the particular record.⁸³

Likewise, in a subsequent decision, *Allen v. St. Louis Pub. Serv. Co.*, the records were held admissible where their “temporary custodian” admitted he had no knowledge as to the preparation of the particular records, but “related in detail the practice in the particular office in question in the preparation of such records, both as to mode and time.”⁸⁴

Although it was apparently not necessary for the making of the particular record to be detailed, testimony as to the time and mode of preparation was still essential. Thus in *Lockhart v. St. Louis Pub. Serv. Co.*,⁸⁵ the custodian of hospital records testified that the records were “made and kept during the general course of the business” of the hospital, but did not, apparently, refer to the time or method of preparation. The Missouri Supreme Court held that the trial court improperly admitted this record, stressing that

81. 364 Mo. 1147, 273 S.W.2d 270 (1954).

82. 270 S.W.2d 869 (Mo. 1954).

83. *Id.* at 878.

84. 365 Mo. 677, 685, 285 S.W.2d 663, 669 (1956).

85. 318 S.W.2d 177 (Mo. 1958).

unless there is proof . . . as to "the mode of its preparation" and that it was made "at or near the time of the act, condition or event" it is not shown to be a business entry and hence is hearsay and inadmissible. . . . It is obvious that plaintiff failed to make the required proof as to the records in question and it therefore follows that they were inadmissible.⁸⁶

The *Lockhart* decision was succeeded within a year by the leading case of *Rossomanno v. Laclede Cab Co.*,⁸⁷ in which a physician's office record was admitted into evidence after having been qualified by an employee of the physician who could not testify from her own knowledge as to the time and manner of preparation of the record because she was a new employee and had not been employed in the office at the time the record was made. The Missouri Supreme Court, in an opinion by Judge Storckman, affirmed the action of the trial court, emphasizing the "presumption of regularity" which arose when the source of the records was shown. The opinion pointed out that "The testimony of the witness as to the 'mode of preparation' need not be based on personal knowledge."⁸⁸ Regarding the requirement that the time of preparation be shown, Judge Storckman suggested parenthetically that the courts might take judicial notice of the fact that physicians keep records of their patients, and that such records are made contemporaneously with the observation of the patient by the physician. In view of the nature of the records and the testimony presented by the witness, it could not be said as a matter of law that the trial court had abused its discretion in admitting the physician's record. The *Lockhart* decision was expressly overruled insofar as it conflicted with the *Rossomanno* holding.

The *Rossomanno* decision appears to have extended the "circumstantial probability of trustworthiness"⁸⁹ of business records—which is perhaps the principal reason for allowing their admissibility as a hearsay rule exception—to the qualification of the records themselves. Although the case does not suggest that no testimony whatever need be presented, or even that mere "identification" is sufficient, it does indicate that only a minimum of qualifying testimony is required. The determination is largely within the discretion of the trial court, and the nature of the records in question may supply a major part of the foundation required for admissibility.

86. *Id.* at 179.

87. 328 S.W.2d 677 (Mo. 1959) (en banc).

88. *Id.* at 683.

89. See 5 WIGMORE, EVIDENCE § 1522 (3d ed. 1940). Earlier Missouri decisions under the Uniform Law had referred to the "circumstantial guarantee of trustworthiness" furnished by the fact that the records were kept in the regular course of business, but none had applied this principle to the testimony required to qualify the records. See, e.g., *Hancock v. Crouch*, 267 S.W.2d 36 (Mo. Ct. App. 1954).

E. Custodian or Other Qualified Witness

The Uniform Law requires that the "custodian or other qualified witness" testify to the identity and the mode of preparation of the record in order to qualify it for admission. It should be noted that this requirement is separate from the necessary finding by the court that "the sources of information, method and time of preparation were such as to justify" admission of the record. Of course, in the ordinary case the custodian or other qualified witness will supply the necessary facts from which the court's finding as to sources of information and method and time of preparation will be made.

From the statutory language, either the custodian of the records or some other qualified witness may be called to establish the identity and mode of preparation of the records. This has been construed by the courts to mean that either the person in whose custody the records are normally kept, or any other person who is competent to identify the records and describe the mode of their preparation, may be called as a witness to qualify the records for admission.⁹⁰

In a number of reported Missouri decisions, the witness offered as the "custodian or other qualified witness" has been the person who prepared the record, in whole or in part.⁹¹ In these instances the witness has clearly been able to identify the record and to testify as to the mode of preparation of the particular record, and the requirements of the Uniform Law have unquestionably been satisfied thereby.

Another group of cases have involved a witness who did not participate in making the record, but who was employed in the business at the time the record was made, and who could testify from his own immediate knowledge and observation as to the mode of preparation of the records.⁹² Such witness may or may not have been the custodian of the records, but in all cases has been able to furnish the requisite identification of the records as being those of the business in question. It has consistently been held that such witnesses

90. See, *e.g.*, *State v. Redding*, 357 S.W.2d 103 (Mo. 1962); *Allen v. St. Louis Pub. Serv. Co.*, 365 Mo. 677, 285 S.W.2d 663 (1956); *Conser v. Atchison, T. & S. F. Ry.*, 266 S.W.2d 587 (Mo. 1954), *cert. denied*, 348 U.S. 828 (1954).

91. See, *e.g.*, *Kitchen v. Wilson*, 335 S.W.2d 38 (Mo. 1960); *Fisher v. Gunn*, 270 S.W.2d 869 (Mo. 1954); *Boland v. Dehn*, 348 S.W.2d 603 (Mo. Ct. App. 1961); *York v. Daniels*, 241 Mo. App. 809, 259 S.W.2d 109 (1953).

92. *Allen v. St. Louis Pub. Serv. Co.*, 365 Mo. 677, 285 S.W.2d 663 (1956); *Hermann v. St. Louis Pub. Serv. Co.*, 345 S.W.2d 399 (Mo. Ct. App. 1961); *cf. Caffey v. St. Louis-San Francisco Ry.* 292 S.W.2d 611 (Mo. Ct. App. 1956). In a number of reported decisions it was not indicated whether the witness had been associated with the business at the time the record was made, but the question was not raised as to whether this was necessary. See, *e.g.*, *Happy v. Blanton*, 303 S.W.2d 633 (Mo. 1957); *State v. Churchill*, 299 S.W.2d 475 (Mo. 1957).

are competent to qualify the records for admission under the Uniform Law, although they admittedly have no personal knowledge of the preparation of the records; it is required only that the general method of preparation of such records be established. Thus, in *Ellis v. State Dep't of Pub. Health and Welfare*,⁹³ the Missouri Supreme Court explained that it was not necessary to produce as a witness the person who prepared the report:

Of course, the report must be identified by someone before it is admissible and Section 490.680 makes sufficient the identification by a custodian or other qualified witness who testifies to its identity and mode of its preparation; and it is then only necessary also to show that it was made in the regular course of business at or near the time of the examination. Certainly this does not require the doctor who made the report to be a witness, as provision is specifically made for any qualified witness to testify to the essential facts⁹⁴

A third class of cases has presented a somewhat more difficult problem. Here, the witness has been able to identify the records as being those of the business, but has not been able to furnish much competent evidence as to the mode of preparation. Although the earlier cases tended to reject records which had only been "identified,"⁹⁵ recent cases have not laid down any firm rule, but have largely left to the discretion of the trial court the determination of whether the mode of preparation has been adequately established. Thus in *Rossomanno v. Laclede Cab Co.*,⁹⁶ where a physician's office records had been made a half-dozen years previously, but the witness had only been employed in the office for one month at the time of her testimony, it was clear that the witness could not of her own knowledge testify to the mode of preparation of the records in question. The witness's only sources of information concerning the mode of preparation were the office practices followed during the short period of her employment, which were of doubtful probative value, and what she had been told by others as to earlier practices, which was clearly hearsay. Nevertheless, the Missouri Supreme Court held that the admission of the records into evidence was properly within the discretion of the trial court, pointing out that the evidence as to the source of the records raised a presumption as to their regularity.⁹⁷

93. 365 Mo. 614, 285 S.W.2d 634 (1955) (en banc).

94. *Id.* at 624, 285 S.W.2d at 641-42.

95. See, e.g., *Lang v. St. Louis-San Francisco Ry.*, 364 Mo. 1147, 273 S.W.2d 270 (Mo. 1954); *Conser v. Atchison, T. & S.F. Ry.*, 266 S.W.2d 587 (Mo. 1954), *cert. denied*, 348 U.S. 828 (1954).

96. 328 S.W.2d 677 (Mo. 1959) (en banc).

97. *Id.* at 682, quoting from 20 Am. JUR. *Evidence* § 1043 (1959 Supp.). In support of its holding the court cited *Allen v. St. Louis Pub. Serv. Co.*, 365 Mo. 677, 285 S.W.2d 663 (1956); but it should be pointed out that the witnesses in the *Allen* case were em-

A different phase of the problem was involved in *Tomlin v. Alford*,⁹⁸ where the St. Louis custodian of U. S. Army medical records possessed no knowledge of the actual conditions under which the records were made, but was permitted to qualify the records by testifying from his personal knowledge as to the army regulations under which such records were required to be made and kept, and that the particular records complied with the regulations. In upholding the admission of the records into evidence, the supreme court stressed the practical impossibility of establishing in any other way the mode of preparing the records.

Although the courts have thus taken a liberal attitude toward the statutory requirement that testimony be adduced as to the identity and mode of preparation of the record, it is clear that some minimum standards remain which must be met. Thus in the recent case of *Olsten v. Susman*,⁹⁹ where a police report was sought to be introduced, and the officer through whom the record was offered testified that he had no personal knowledge of the report or of its preparation, his testimony was insufficient to qualify the report for admission in evidence.

F. Discretion of the Trial Court

One of the conditions set forth in the Uniform Law for admission of a business record into evidence is that "in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." This provision places in the trial court a sizable element of discretion in determining whether a business record has been properly qualified under the Uniform Law. The Missouri appellate courts have continually stressed this element of discretion in dealing with questions of admissibility under the Law.

Clearly, it has been recognized that it is the function of the trial court to determine whether a satisfactory foundation has been laid for the admission of a business record into evidence.¹⁰⁰ In this connection, it is for the court to determine admissibility of the record in the first instance, while the jury

employees of the businesses involved at the time the records were made, and could therefore testify from their own knowledge as to the mode of preparation. The *Rossomanno* case represents a substantial departure from earlier decisions such as *Gray v. St. Louis-San Francisco Ry.*, 363 Mo. 864, 872, 254 S.W.2d 577, 580 (1953), where one of the reasons given for rejecting an "identified" hospital record was that "No testimony was offered to show the 'mode of its preparation.'"

98. 351 S.W.2d 705 (Mo. 1961). See also *State v. Redding*, 357 S.W.2d 103 (Mo. 1962).

99. 362 S.W.2d 612 (Mo. 1962).

100. *Glynn v. Glynn*, 291 S.W.2d 190 (Mo. Ct. App. 1956).

determines the "weight and value" to be given a record once it has been admitted.¹⁰¹

In the early cases decided under the Uniform Law, there appeared to be some tendency to minimize the trial court's discretion in the admission of business records. Thus in the 1953 case of *Gray v. St. Louis-San Francisco Ry.*,¹⁰² where the trial court had granted a new trial on the basis that it had erroneously excluded a hospital record offered by plaintiff, the supreme court said: "In the instant case, whether the hospital record was admissible was a question of law. There is no discretion as to matters of law."¹⁰³ A year later, in *Fisher v. Gunn*,¹⁰⁴ the wide discretion of the trial court was emphasized—but it was held that the court had erred in excluding an exhibit.

Since then the appellate courts have continued to place emphasis upon the broad degree of discretion possessed by the trial court under the Uniform Law; and in addition they have in almost every case upheld the action of the trial court in admitting or excluding a business record offered under the Law.¹⁰⁵ Thus in *Allen v. St. Louis Pub. Serv. Co.*, the court said in upholding the trial court's admission of a hospital record, "Much discretion must remain in the trial court . . ."¹⁰⁶ In *Dickerson v. St. Louis Pub. Serv. Co.*, affirming the action of the trial court rejecting an employment record of a physical examination, it was stated that "the court is expressly given much discretion under the very wording of that statute."¹⁰⁷ And, in *Rossmanno v. Laclede Cab Co.*, the supreme court said, "The trial court must of necessity be given a large discretion in his determination of whether the statutory requirements for admission of the business record have been satisfactorily complied with."¹⁰⁸

101. *Hancock v. Crouch*, 267 S.W.2d 36 (Mo. Ct. App. 1954). See also *State v. Stidham*, 305 S.W.2d 7, 13 (Mo. 1957): "[I]t was the court's function, and not the function of the jury, to pass on the competency of the witness." And compare *Adler v. Ewing*, 347 S.W.2d 396, 401 (Mo. Ct. App. 1961): "Moreover, a determination of the admissibility of such evidence by the trial court will not be disturbed if supported by substantial, although conflicting, inferences therefrom."

102. 363 Mo. 864, 254 S.W.2d 577 (1953). The trial court's function was apparently recognized, however, in *Kraus v. Kansas City Pub. Serv. Co.*, 269 S.W.2d 743 (Mo. 1954).

103. *Id.* at 872, 254 S.W.2d at 580.

104. 270 S.W.2d 869 (Mo. 1954).

105. The notable exception is *Lockhart v. St. Louis Pub. Serv. Co.*, 318 S.W.2d 177 (Mo. 1958), which was overruled at least in part by *Rossmanno v. Laclede Cab Co.*, 328 S.W.2d 677 (Mo. 1959) (en banc).

106. 365 Mo. 677, 683, 285 S.W.2d 663, 667 (1956).

107. 365 Mo. 738, 750, 286 S.W.2d 820, 827 (1956) (en banc).

108. 328 S.W.2d 677, 683 (Mo. 1959) (en banc). *Hermann v. St. Louis Pub. Serv. Co.*, 345 S.W.2d 399, 405 (Mo. Ct. App. 1961), contains much the same language. See also *State v. Weindorf*, 361 S.W.2d 806, 811 (Mo. 1962).

However, it must be pointed out that the discretion in the trial court is not boundless; it is necessary that the requirements of the statute be satisfied to some degree before a business record will be admissible.¹⁰⁹

In deferring strongly to the trial court's discretion, the Missouri appellate courts have unquestionably reinforced to a substantial degree their efforts to effect a broad and liberal judicial interpretation of the Uniform Law. For were the upper courts to restrict this discretion, it is very likely that the lower courts would in response place a narrower interpretation upon the Law, and thereby defeat its purpose at least in part. Instead, the supreme court and courts of appeals have wisely chosen to *lead* rather than to *drive* the trial courts to an interpretation and application of the Uniform Law which is consonant with the legislative intent.

G. Content of Record

Where a record has been qualified under the Uniform Law in regard to identification and the time and manner of preparation, the record must be shown to contain relevant and competent evidence in order to be admissible. The Uniform Law requires that the record be relevant; and the courts have imposed further requirements in order to exclude records which, although made in the regular course of business, contain incompetent or prejudicial evidence.

Where the content of the record is self-serving, in that the maker is now a party to the action in court, and has made the record at least partially in contemplation of litigation, the record may be rejected. This rule would apply, for example, to accident reports made by a trucking company.¹¹⁰ Of course, any record made by a party is somewhat suspect, but where a copy of the record has been furnished to the adversary party,¹¹¹ or where the adversary party had a right to inspect the record,¹¹² the danger of misrepresentation is minimized. Further, the fact that the maker used and relied upon the record in his business, and that its sole purpose was not for litigation, is of importance.¹¹³ Where the record has been made by a third person, not a party to the litigation, the self-serving objection may not be appli-

109. Cf. *State v. Winn*, 324 S.W.2d 637 (Mo. 1959).

110. Cf. *Voyles v. Columbia Terminals Co.*, 239 S.W.2d 559 (Mo. Ct. App. 1951). The leading case in this area is *Palmer v. Hoffman*, 318 U.S. 109 (1943), dealing with the federal act. See also *Kitchen v. Wilson*, 335 S.W.2d 38 (Mo. 1960) (if made for self-serving purpose of use in litigation, records are inadmissible).

111. *George F. Robertson Plastering Co. v. Magidson*, 271 S.W.2d 538 (Mo. 1954).

112. *Hancock v. Crouch*, 267 S.W.2d 36 (Mo. Ct. App. 1954).

113. *George F. Robertson Plastering Co. v. Magidson*, 271 S.W.2d 538 (Mo. 1954) (plaintiff used records "for its social security and other taxes").

cable,¹¹⁴ but this is not true where the record, although made by a third person, contains self-serving declarations of one of the parties. Thus, in *Terrell v. Missouri-Kansas-Texas R.R.*,¹¹⁵ that portion of a hospital record containing plaintiff's statement as to how he was injured was held inadmissible because self-serving.

Hospital records constitute one of the principal classes of records sought to be introduced under the Uniform Law, and pose numerous problems because of the many kinds of information that may be recorded in them. The leading Missouri case is *Allen v. St. Louis Pub. Serv. Co.*,¹¹⁶ in which the court laid down the following general rule:

It would seem that the following parts of a duly authenticated and qualified hospital record should be admissible, unless subject to specific objections such as irrelevancy, inadequate sources of information, as being self-serving, as going beyond the bounds of legitimate expert opinion, or on similar substantive grounds: the physical examination findings, the patient's symptoms and complaints, treatment and progress records, diagnoses by those qualified to make them, the results of analyses and laboratory tests, X-rays, the behavior of the patient, and those parts of the patient's history inherently necessary (or at least helpful) to the observation, diagnosis and treatment of the patient¹¹⁷

In this connection, a question arises as to the admissibility of expert opinion which is contained in a medical or other business record. The *Allen* case held that expert medical opinion contained in a hospital record should "be accorded dignity equal to that of a similar opinion from the witness stand."¹¹⁸ There, it was shown by testimony in court that the source of the expert opinion was a resident physician at the hospital, and the court said "from this we may presume his qualifications." However, it should be added that in every case some showing should be made as to the qualifications of the person who delivered the expert opinion; and in the absence of such showing, the trial court clearly has discretion to reject the record.¹¹⁹ Such qualification may, it would seem, be established either by testimony in court, or by facts appearing from the record itself.

114. Cf. *Fisher v. Gunn*, 270 S.W.2d 869 (Mo. 1954).

115. 327 S.W. 2d 230 (Mo. 1959).

116. 365 Mo. 677, 285 S.W.2d 663 (1956). As to hospital records generally, see Caruthers and Gilcrest, *Hospital Records and "The Business Records as Evidence Law,"* St. Louis B.J., Oct. 1955, p. 39; Comment, "Admissibility of Hospital Records as Evidence in Missouri," 24 Mo. L. REV. 51 (1959).

117. 365 Mo. 682, 285 S.W.2d at 667.

118. *Ibid.*

119. See *Dickerson v. St. Louis Pub. Serv. Co.*, 365 Mo. 738, 286 S.W.2d 820 (1956) (en banc), where the court indicated that *some* identification of the purported expert who made the record should be furnished, at least by the record itself.

Although the hearsay objection to business records is obviated by the Uniform Law, it is clear that the record itself must not contain hearsay. Thus in *Ryan v. Campbell "66" Express, Inc.*, the court said that the Uniform Law "eliminates the hearsay objection when such a record is properly qualified thereunder, but it does not make admissible any evidence which would be incompetent if offered in person."¹²⁰ Does this mean that the maker of the record must have had *personal knowledge* as to the facts recorded? The cases are not altogether clear; those involving police reports have stressed the need for personal knowledge on the part of the reporting officer.¹²¹ On the other hand, it is clear in the normal course of business that the entrant very often does not possess personal knowledge of the facts he is recording. Thus, where goods are delivered by a truck driver, that fact may be orally reported to a clerk or bookkeeper, who makes an appropriate business record entry. In such cases, the record is clearly admissible although the maker had no personal knowledge.¹²² Only where it appears that neither the entrant nor any employee who had a duty to report to the entrant had any knowledge of the facts will the record be rejected.¹²³ Clearly this is in accord with established business practices and with the basic purpose of the Uniform Law.

Where the record contains hearsay, it may nevertheless be admissible under an established hearsay rule exception, such as that relating to admissions by a party-opponent. Cases involving admissibility of admissions contained in business records have dealt most often with statements contained in medical records made by the patient as to the cause of his injury or as to his medical history.¹²⁴

Finally, the record itself may contain abbreviations, technical expressions and other data which need interpretation or translation in order to be intelligible to the court or jury. The presence of such terms in a business record does not make it inadmissible, but the custodian or some other witness will be allowed to explain the meaning of the symbols or terms used.¹²⁵

120. 304 S.W.2d 825, 828 (Mo. 1957) (en banc).

121. See, e.g., *Winterton v. Van Zandt*, 351 S.W.2d 696 (Mo. 1961); *Ryan v. Campbell "66" Express, Inc.*, 304 S.W.2d 825 (Mo. 1957) (en banc); *Ensminger v. Stout*, 287 S.W.2d 400 (Mo. Ct. App. 1956). See also *Capra v. Phillips Investment Co.*, 302 S.W.2d 924 (Mo. 1957) (en banc), involving a fire department report.

122. *Boland v. Dehn*, 348 S.W.2d 603 (Mo. Ct. App. 1961).

123. Cf. *Kansas City Stock Yards Co. v. A. Reich & Sons, Inc.*, 365 Mo. 682, 250 S.W.2d 692 (Mo. 1952).

124. See, e.g., *Baugh v. Life & Cas. Ins. Co.*, 307 S.W.2d 660 (Mo. 1957); *Fisher v. Gunn*, 270 S.W.2d 869 (Mo. 1954); *Melton v. St. Louis Pub. Serv. Co.*, 363 Mo. 474, 251 S.W.2d 663 (1952) (en banc). Cf. *Douglas v. Farrow*, 334 S.W.2d 234 (Mo. 1960).

125. *State v. Cheatham*, 340 S.W.2d 16 (Mo. 1960) (interpretation of terms contained in pathologist's report); *Fisher v. Gunn*, 270 S.W.2d 869 (Mo. 1954) (abbrevia-

H. *The Element of Necessity*

At common law a requisite element of the admissibility of business records was necessity. That is to say, it was necessary to admit the records as evidence of the facts contained because it was not otherwise possible to prove those facts. If the facts could be established by the testimony of the person who made the record, and such person was available as a witness, then there was no necessity for the records and they would be excluded.¹²⁶ As pointed out by Wigmore,¹²⁷ there were instances of absolute impossibility of establishing the facts without using the record because the witnesses who might have testified were dead, insane, too ill to testify, or absent from the jurisdiction; and there were also instances of practical impossibility, where it would have been extremely difficult to produce all of the clerks, salesmen, or other employees who had participated in making the record. As late as 1947 Missouri recognized the requirement of necessity in *Missouri Forged Tool Co. v. St. Louis Car Co.*,¹²⁸ where business records were rejected in the absence of a showing that the persons who made the records were unavailable.

The Uniform Business Records as Evidence Law makes no reference to the principle of necessity; it does not appear from the statute that the admissibility of business records is predicated upon either the absolute or practical impossibility of producing as witnesses the person or persons who made the record. This is understandable, since one of the basic reasons for the form of the Uniform Law was the difficulty of proving that the person who made the record was unavailable.

It is true that in several reported Missouri decisions under the Uniform Law the maker of the record has been unavailable, because of illness or death.¹²⁹ However, it is quite clear from other decisions that the factor of unavailability is not to be considered in determining the admissibility of business records. The outstanding case may be *Rossomanno v. Laclede Cab Co.*,¹³⁰ where a physician's office records were admitted by the court through

tions in physician's records); *Caffey v. St. Louis San-Francisco Ry.*, 292 S.W.2d 611 (Mo. Ct. App. 1956) (railroad speed tape). Compare *Boland v. Dehn*, 348 S.W.2d 603 (Mo. Ct. App. 1961), wherein the qualifying witness was permitted to explain the unorthodox business record system used by the feed store which employed her.

126. This principle would seem to have been generally applicable both to regular entries and to parties' account books.

127. 5 WIGMORE, EVIDENCE § 1521 (1940); see also § 1537.

128. 205 S.W.2d 298 (Mo. Ct. App. 1947).

129. See, e.g., *State v. Cheatham*, 340 S.W.2d 16 (Mo. 1960) (pathologist dead who made post-mortem examination); *Kitchen v. Wilson*, 335 S.W.2d 38 (Mo. 1960) (optometrist who made record ill and unable to attend court); *York v. Daniels*, 241 Mo. App. 809, 259 S.W.2d 109 (1953) (pathologist dead who made post-mortem examination).

130. 328 S.W.2d 677 (Mo. 1959) (en banc).

the testimony of a newly-hired office girl, although the physician who prepared the records was, according to the girl's testimony, in his office at the time. The Missouri Supreme Court observed that "Even though he was available, the testimony of the doctor was not necessary to render the record admissible in evidence. . . . The law recognizes that records made and relied upon in the regular course of business may be regarded as trustworthy without verification of all persons who contributed to them."¹³¹

Although the clear import, then, of the Uniform Law is that it is not necessary to account for the absence of the person who made the record, some question may nevertheless be raised as to the practical wisdom of the rule in all cases. For example, in a personal injury action the plaintiff might well introduce only the physician's office records under the Uniform Law, and not call the physician as a witness at all; plaintiff might rely solely upon the testimony of other physicians who had examined him, or indeed, introduce no medical testimony other than the records. Defendant would thereby be deprived of an opportunity to cross-examine the plaintiff's physician.

The immediate answers to this objection are twofold: defendant could resort to discovery procedures and take the physician's deposition, or could subpoena the physician as a witness. A deposition, of course, might be useless if the plaintiff asserted the physician-patient privilege; in such case the defendant could only wait until trial and hope that the physician testified, or subpoena him to testify. But assuming that a deposition is taken and that the physician's testimony in his deposition is damaging to defendant but less damaging than the physician's office records, the defendant's path may not yet be clear. How is he to get this before the jury? The deposition cannot be read in evidence unless the physician is shown to be unavailable; however, he is not unavailable, but is within the reach of judicial process.

The only answer may be to subpoena the physician. But if defendant does subpoena him, whose witness will he be? Certainly his testimony will have to be offered as a part of defendant's case—and its content may be unfavorable to defendant. Further, defendant will be forced to examine the physician on direct, and will not have available the devices of cross-examination to assist him. The upshot may be that, as a practical matter, defendant will be unable, or at best only able after much struggle, to disclose to the jury the fact that the office record is more favorable to plaintiff than the actual facts warrant.

The solution to this problem—if it is a problem of any substance—is not apparent. Certainly under the express language of the Uniform Law the

131. *Id.* at 681-82. See also *State v. Payne*, 342 S.W.2d 950 (Mo. 1961), where the physician who made the record was not shown to have been unavailable.

absence of the maker of the record need not be accounted for.¹³² And yet to hold that the record is admissible when the maker is plainly available appears to be unrealistic, and to savor of injustice. Is it not possible to achieve some middle ground?

I. *Weight to be Given Records*

Business records are to be considered by the trier of fact along with all the other evidence in the case, oral or written, and do not occupy any privileged or superior status. Certainly business records cannot be said to be "conclusive" evidence of the facts they contain.

For a period in recent years, the Kansas City Court of Appeals repeatedly held that hospital records, unless contradicted or impeached, were conclusive as to the facts stated therein.¹³³ However, in *Baugh v. Life & Cas. Ins. Co.*,¹³⁴ the Missouri Supreme Court held that hospital records have no conclusive effect, their advantage over oral testimony being merely that they can be considered "more reliable" because reduced to writing at or near the time of the event recorded therein. Earlier, the supreme court had held in an en banc decision that a physician's "certificate of physical capacity" based upon a medical examination was not conclusive upon that question in an action for aid to dependent children benefits.¹³⁵

J. *Absence of Record*

If the admissibility of business records depends upon the circumstantial guarantee of their trustworthiness, because they are kept in the regular course of a business and are relied upon for business purposes, it would seem in a

132. Yet the necessity basis for admission of business records has not been completely ignored by the Missouri courts under the Uniform Act. Thus in *Thomas v. Wade*, 361 S.W.2d 671, 677 (Mo. 1962) (en banc), the court said: "One purpose of the Uniform Business Records Act is to make such record evidence admissible (assuming the making of the record of such act, condition or event meets the minimum requirements) when the person cannot testify personally because he is unavailable, or as in this case has no personal recollection of the act."

133. See, e.g., *Goodwin v. Kansas City Life Ins. Co.*, 279 S.W.2d 542 (Mo. Ct. App. 1955); *Hendricks v. National Life & Acc. Ins. Co.*, 240 Mo. App. 557, 210 S.W.2d 706 (1948). The St. Louis Court of Appeals adopted this view in *Russell v. Missouri Ins. Co.*, 232 S.W.2d 812 (Mo. Ct. App. 1950), but reversed itself in *Baugh v. Life & Cas. Ins. Co.*, 299 S.W.2d 554 (Mo. Ct. App. 1957), which was certified to the supreme court because of conflict with the Kansas City court's decisions.

134. 307 S.W.2d 660 (Mo. 1957). But compare *Randall v. Western Life Ins. Co.*, 336 S.W.2d 125, 130 (Mo. Ct. App. 1960), where a death certificate was said to have "conclusively established the cause of insured's death"

135. *Ellis v. State Dept. of Pub. Health & Welfare*, 365 Mo. 674, 285 S.W.2d 634 (1954) (en banc).

given situation that either the presence or absence of a business entry should be of probative value. In other words, if business records are of sufficient integrity that they are admissible as evidence of the existence of facts reported in them, they should be evidence of the non-existence of facts not reported in them, if it would have been within the regular course of business to record such facts.

The Uniform Business Records as Evidence Law makes no reference to the probative weight, if any, to be afforded a record containing no entry where one might be expected under the adversary's theory of the case; and there seem to be no Missouri cases dealing with the point. It should be noted, however, that both Rule 63(14) of the Uniform Rules of Evidence and the 1948 Missouri Proposed Code of Evidence¹³⁶ make explicit provision for the admissibility of evidence of the absence of an entry. Moreover, if the issue were raised before a Missouri appellate court under the Uniform Law, it is very likely that under the broad and meaningful interpretation given the Law by our courts, it would be held that evidence of a record's absence is admissible where properly qualified, although the Uniform Law itself speaks only of "a record of an act."

K. *Applicability of Uniform Law to Criminal Proceedings*

The language of the Uniform Business Records as Evidence Law is silent as to whether the Law is applicable only in civil cases, or whether it applies to criminal cases as well. The Missouri courts have held, consistently with courts in other jurisdictions which have adopted the Uniform Law or similar legislation,¹³⁷ that the Law applies to criminal cases.¹³⁸ In fact, defendants,

136. EVIDENCE CODE COMMITTEE OF THE MISSOURI BAR, MISSOURI EVIDENCE CODE PROPOSED § 11.09 (1948).

137. See, e.g., *United States v. Leathers*, 135 F.2d 507, 511 (2d Cir. 1943), holding that the federal act, now 28 U.S.C.A. § 1732 (Supp. 1963), is applicable to criminal cases and does not thereby violate the sixth amendment; in partial justification the court observed, "We think that business records kept as a matter of ordinary routine are often likely to be more reliable than dying declarations," which were a recognized hearsay exception.

138. In the following Missouri cases the Uniform Law has been used by the state: *State v. Weindorf*, 361 S.W.2d 806 (Mo. 1962); *State v. Brown*, 360 S.W.2d 618 (Mo. 1962); *State v. Redding*, 357 S.W.2d 103 (Mo. 1962); *State v. Payne*, 342 S.W.2d 950 (Mo. 1961); *State v. Cheatham*, 340 S.W.2d 16 (Mo. 1960); *State v. Lunsford*, 338 S.W.2d 868 (Mo. 1960); *State v. Tolia*, 326 S.W.2d 329 (Mo. 1959); *State v. Churchill*, 299 S.W.2d 475 (Mo. 1957); *State v. Baker*, 276 S.W.2d 131 (Mo. 1955); *State v. Rohman*, 261 S.W.2d 69 (Mo. 1953). Cf. *State v. Winn*, 324 S.W.2d 637 (Mo. 1959); *State v. Johnson*, 286 S.W.2d 787 (Mo. 1956); *State v. Hampton*, 275 S.W.2d 356 (Mo. 1955) (en banc).

as well as the state, have sought to avail themselves of the Law's provisions.¹³⁹

Perhaps the most immediate objection to the extension of the Uniform Law to criminal cases lies in its possible conflict with the Missouri constitutional provision "that in criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . ."¹⁴⁰ However, in the only case in which the constitutional question was squarely raised, *State v. Lunsford*, the supreme court tersely answered:

As to the contention that this record was hearsay, depriving defendant of his right of cross-examination, it is sufficient to say this was admissible under the Business Records as Evidence Law. . . .¹⁴¹

Conceding, then, that the Uniform Law is applicable to criminal proceedings, the further question arises, whether the Law should be applied as liberally in criminal cases as it is in civil cases, in view of the constitutional provision and the higher standards of proof which have traditionally been required in criminal prosecutions. Significantly, the Missouri courts have not discussed the issue, and a reading of the reported decisions would seem to indicate that the appellate courts, at least, have not differentiated in any noticeable degree between civil and criminal cases. Still, the constitutional question lurks in the background, since, as Judge Augustus Hand noted in *United States v. Leathers*, "the permissible extension" of hearsay rule exceptions in the light of the constitutional provision probably "is a question of degree."¹⁴²

Viewed in terms of justice for the accused, and considering such matters as the requirement that material witnesses for the prosecution be indorsed upon the information, the protection accorded the accused through the presumption of innocence and the higher standard of proof, and the general feeling that the defendant should not be subjected to undue surprise in the course of the trial, it may be that the full implications of the *Rossomanno* case and subsequent civil decisions should not be extended to criminal cases; in short, that the courts ought to create different standards for criminal cases. Certainly where the maker of a record is not unavailable, there are cogent reasons for requiring his appearance as a witness—and these reasons are stronger in a criminal than in a civil case.

139. *State v. Stidham*, 305 S.W.2d 7 (Mo. 1957); *State v. McCormack*, 263 S.W.2d 344 (Mo. 1954). Interestingly, in neither of these cases did the defendant sufficiently qualify the proffered business records, and the trial court's action in rejecting the records was upheld.

140. Mo. CONST. art. I, § 18(a).

141. 338 S.W.2d 868, 873 (Mo. 1960).

142. 135 F.2d 507, 511 (2d Cir. 1943).

Examine, for example, the 1961 decision in *State v. Payne*,¹⁴³ a homicide prosecution, where the record of the post-mortem examination of the victim was produced by the chief clerk for the coroner's office. The physician who made the examination did not testify, and there is no showing in the opinion, at least, that he was unavailable. The record was held admissible, and *Rossomanno* was cited as authority therefor.

It does not appear from the opinion whether the trial court made any effort to ascertain if the physician who made the examination was unavailable; but from other decisions under the Law, it seems clear that the trial court had no discretion in the matter: as long as the records were produced by a custodian or other qualified witness and properly qualified under the Law, the state was entitled to have them admitted. It would have made no difference if the physician who made the examination had been a spectator in the courtroom; he would not have been required as a witness. Of course, it is true that the defendant might have subpoenaed the physician as a witness. But it is equally true that the physician was more "available" and probably more friendly to the state, that the defendant's right to discovery—to ascertain in advance what the physician knew or would testify to—was not as broad as in civil cases, that the defendant's possible indigence might have limited his effective pretrial representation and that the defendant should not have been forced to call one of the state's principal witnesses as his own merely to seek to place the whole story of the prosecution's case before the jury.¹⁴⁴

In short, it may be well and good in mercantile and similar civil cases to obviate the requirement that the maker of a business record must be shown to be unavailable before the record may be admitted without his testimony. Judicial and commercial convenience may so dictate. But in criminal cases where life or liberty is at stake, convenience should be secondary. For this reason, it is believed that in criminal cases the trial court should be given the power to require that the makers of business records, if available, be produced as witnesses; to require the very *best* evidence that the state can produce in order to guarantee the fairest trial possible for the accused.

L. Practice Under the Uniform Law: Some Suggestions

Properly understood and properly applied, the Uniform Business Records as Evidence Law can be of substantial assistance to trial counsel both in

143. 342 S.W.2d 950 (Mo. 1961).

144. Contrast *State v. Brown*, 360 S.W.2d 618 (Mo. 1962), where the business records were admitted not in the state's case-in-chief, but in rebuttal, in order to overcome evidence adduced by the defendant. Here, where defendant in effect invited the use of the records, was a valid place for a liberal application of the Uniform Law.

securing the admission of helpful business records into evidence and in aiding in the rejection of unqualified records and writings. A review of the reported Missouri decisions, however, leads to the conclusion that all too often trial counsel have not properly understood or properly applied the Uniform Law; in a number of cases inadequate objections and offers of proof have failed to preserve the alleged errors of the trial court for review by the appellate court.

One of the basic errors which trial counsel have made in this area is the failure to state fully or correctly the grounds for objection to the introduction of a business record. Thus in *Happy v. Blanton*,¹⁴⁵ counsel made a general objection to the admissibility of an employment record, stating in part that "This is hearsay and is not admissible in total, if admissible in part, and we object because it is hearsay." The Missouri Supreme Court upheld the action of the trial court admitting the record:

If any part or parts of the respective exhibits were admissible, the objection as to that exhibit was properly overruled . . . Portions of each exhibit were clearly admissible.¹⁴⁶

Likewise in *Allen v. St. Louis Pub. Serv. Co.*,¹⁴⁷ a "blanket objection" directed to the whole of a hospital record was held inadequate because a part of the record was admissible; clearly it is only when *all parts* of the record are inadmissible that a general objection can be used.

An objection to business records because they are "hearsay" is plainly insufficient. It has been pointed out in many Missouri cases that while business records are hearsay, the purpose of the Uniform Law has been to make such records admissible, and therefore business records which qualify under the Law are no longer objectionable because they are hearsay, but some other ground for exclusion must be stated.¹⁴⁸ As recently as 1962 the supreme court stated in *State v. Weindorf*:

There is no merit to the objection that records were hearsay. The purpose and effect of the Uniform Business Records as Evidence Law was to make admissible records or other entries which would be hearsay and inadmissible without the law.¹⁴⁹

Accordingly, where the objection relates to the fact that the business records as offered constitutes multiple hearsay or "hearsay twice removed," counsel

145. 303 S.W.2d 633, 641 (Mo. 1957).

146. *Id.* at 641.

147. 365 Mo. 677, 285 S.W.2d 663 (1956).

148. See, *e.g.*, *Thomas v. Wade*, 361 S.W.2d 671 (Mo. 1962) (en banc); *Rossmanno v. Laclede Cab Co.*, 328 S.W.2d 677 (Mo. 1959) (en banc); *Allen v. St. Louis Pub. Serv. Co.*, 365 Mo. 677, 285 S.W.2d 663 (1956); *State v. Hampton*, 275 S.W.2d 356 (Mo. 1955) (en banc); *Hermann v. St. Louis Pub. Serv. Co.*, 345 S.W.2d 399 (Mo. Ct. App. 1961).

149. 361 S.W.2d 806, 810-11 (Mo. 1962).

should not frame his objection simply in terms of "hearsay," but should carefully point out that the record is objectionable because it contains hearsay, and the nature of such hearsay should be stated.

In several instances the objections made during trial were clearly insufficient, and the parties sought to enlarge upon the objection by supplying additional reasons in the new trial motion¹⁵⁰ or on appeal¹⁵¹ as to why the record should not have been admitted. The Missouri Supreme Court's rejoinder in *Thomas v. Wade* is noteworthy: the "trial court is not to be convicted of error in the admission of evidence for reasons not presented to it at the time."¹⁵² And certainly where there has been no objection whatever raised at trial, it is too late to argue the question of admissibility when the case is before the appellate court.¹⁵³

Where counsel offers a business record into evidence but it is rejected by the court, it is necessary that an adequate offer of proof be made for the record, indicating the nature and content of the proffered record. Thus in *State v. McCormack* an offer of proof as to a hospital record was held insufficient to preserve the point for appellate consideration where the offer failed "to indicate the contents of the excluded records, or what, if anything, they would reveal in connection with the subjects of which they treat. . . ."¹⁵⁴

In other cases, perhaps unintentionally, counsel have admitted in open court that a record sought to be introduced by the opposing side was regular or authentic;¹⁵⁵ such concessions leave counsel in no position to urge in new trial motions or on appeal that the record was not regular or authentic.¹⁵⁶ This does not mean that counsel should never stipulate the ad-

150. *State v. Weindorf*, 361 S.W.2d 806 (Mo. 1962); *State v. Brown*, 360 S.W.2d 618 (Mo. 1962); *State v. Payne*, 342 S.W.2d 950 (Mo. 1961); *State v. Churchill*, 299 S.W.2d 475 (Mo. 1957).

151. *Thomas v. Wade*, 361 S.W.2d 671 (Mo. 1962) (en banc); *Hermann v. St. Louis Pub. Serv. Co.*, 345 S.W.2d 399 (Mo. Ct. App. 1961).

152. 361 S.W.2d 671, 675 (Mo. 1962) (en banc).

153. *State ex rel. State Highway Comm'n v. Cone*, 338 S.W.2d 22 (Mo. 1960). See also *Boehm v. St. Louis Pub. Serv. Co.*, 368 S.W.2d 361 (Mo. 1963), where defendant's hospital admission record showing "alcoholic breath" was admitted at trial; it was held to be too late on appeal to raise for the first time the objection that the record contained a privileged communication. But this does not mean that where part of a record has been admitted without objection, an objection to another part will not be sustained. *Dickerson v. St. Louis Pub. Serv. Co.*, 365 Mo. 738, 286 S.W.2d 820 (1956) (en banc).

154. 263 S.W.2d 344, 347 (Mo. 1954).

155. *Melton v. St. Louis Pub. Serv. Co.*, 363 Mo. 474, 251 S.W.2d 663 (1952) (en banc); cf. *Conser v. Atchison T. & S.F. Ry.*, 266 S.W.2d 588 (Mo. 1954), cert. denied, 348 U.S. 828 (1954).

156. Thus in *Thomas v. Wade*, 361 S.W.2d 671, 675 (Mo. 1962) (en banc), plaintiff's counsel said, after examining police department records offered by defendant, "I

missibility of non-controversial records; clearly in many instances common sense will dictate that expense and valuable time be saved through such stipulations.¹⁵⁷

Reference should also be made to the doctrine of curative admissibility as it applies to business records. In *Dorn v. St. Louis Pub. Serv. Co.*,¹⁵⁸ respondent had introduced in evidence parts of a hospital record without properly qualifying it under the Uniform Law; when appellant offered other parts of the same record, respondent objected because of failure to comply with the Law. The appellate court held that it was error to sustain respondent's objection, since by having originally offered the record, "respondent so far affirmed the admissibility of the records as to preclude him from objecting to appellant's offer of the remaining portions of the record An objection to the admissibility of evidence is waived where the same or similar evidence has been adduced by the party rejecting."¹⁵⁹

It has been pointed out above that under the Uniform Law the trial court possesses considerable discretion in whether or not to admit a particular record, and that the trial court's action in this regard will very likely be upheld by an appellate court. Further, in keeping with the purposes of the Law, the appellate courts have given some indication that they look with favor upon a liberal exercise of this discretion by the trial courts. On the other hand, counsel cannot safely assume that the trial court will exercise a broad discretion in his favor and thereby reduce the showing which must be made to qualify a record; moreover, in a given case, strenuous objection by opposing counsel may impel the trial court to require strict compliance with

don't think they are proper records, but I will withdraw an objection to these records as such. As to the contents thereof, certain portions may or may not be objectionable. I will waive the objection as to their authenticity." On appeal it was held that this express waiver precluded any argument by plaintiff that the records were improperly admitted because they were photostatic copies. In this connection, compare Mo. Rev. STAT. §§ 109.120, .130 (1959).

157. See, e.g., *Forshey v. Universal Atlas Cement Co.*, 337 S.W.2d 544 (Mo. Ct. App. 1960), a workmen's compensation proceeding in which it was agreed by the parties that hospital and medical records could be admitted without the testimony of a custodian or other qualified witness.

158. 250 S.W.2d 859 (Mo. Ct. App. 1952).

159. *Id.* at 865. See also *Thomas v. Wade*, 361 S.W.2d 671, 676 (Mo. 1962) (en banc), where the court said that plaintiff "cannot treat the records as qualifying under the Uniform Business Records Act for matters therein she wants to place before the jury, and deny they are so qualified for matters therein the defendant wants to present." Compare *Dickerson v. St. Louis Pub. Serv. Co.*, 365 Mo. 738, 286 S.W.2d 820 (1956) (en banc), where it was held that plaintiff's counsel's failure to object and subsequent cross-examination as to the part of an employment record dealing with salary, ability and commencement and termination of employment did not render admissible under the *Dorn* rule another part of the same employment record relating to a medical examination when plaintiff's counsel made a proper objection thereto.

the requirements of the Uniform Law. Therefore, in the absence of a stipulation or other agreement as to the admissibility of particular records, it is strongly advisable that counsel be prepared in every case to meet the full requirements of the Uniform Law. But not only should counsel be *prepared* to meet the requirements of the Law; to avoid possible prejudice to his case counsel should *actually* meet these requirements fully in offering the records in evidence, even if the trial court has not insisted upon complete compliance. The best example of the need to qualify business records completely is found in the *Rossomanno* case,¹⁶⁰ where plaintiff's objection to the admission of medical records into evidence had been overruled by the trial court; on appeal the Missouri Supreme Court, justifying the trial court's action, said in part:

The plaintiff himself introduced in evidence the records of two hospitals and the file of an insurance company. While the defendant did not object, it is significant that the plaintiff did not attempt to qualify his identifying witnesses according to the standards he seeks to impose on the defendant; for instance, the only qualification shown by the witness who produced the insurance company's file was that he was "connected with" the insurance company.¹⁶¹

Thus, because plaintiff had not qualified his records fully under the Uniform Law—perhaps due to the failure of the defendant to object or to an easy-going attitude on the part of the trial court—plaintiff lost his right to complain when defendant did not comply with the Law and the trial court admitted defendant's evidence over plaintiff's objection.

One final problem: where, as in the *Rossomanno* case, business records are offered and received in evidence through the testimony of a custodian, and the person who made the records, although not shown to be unavailable, is not called as a witness, may opposing counsel argue to the jury that an unfavorable inference should be drawn because of the maker's failure to testify? This question has arisen only once in connection with the Uniform Law. In *Caffey v. St. Louis-San Francisco Ry.*,¹⁶² a railroad equipment foreman produced a speed tape from defendant's locomotive, and the tape was admitted into evidence, although the foreman was not the custodian and had no knowledge as to who had written certain identifying data on the tape. Plaintiff's counsel argued to the jury the failure of defendant to call as a witness the person who had written upon the tape; it was held in view of the general inadequacy of the testimony offered by defendant to qualify the speed tape, that plaintiff's argument was justified. It is somewhat doubt-

160. *Rossomanno v. Laclede Cab Co.*, 328 S.W.2d 677 (Mo. 1959) (en banc).

161. *Id.* at 683.

162. 292 S.W.2d 611 (Mo. Ct. App. 1956).

ful whether the *Caffey* decision is of much assistance in dealing with the general problem, both because of the narrow scope of the facts there involved, and because the *Caffey* case was decided before *Rossomanno*.

Generally, where a witness is "more available" to one party than to his opponent, and that witness has knowledge superior to other evidence adduced, but the party does not call him to testify, the opponent may argue to the jury that an unfavorable inference should be drawn because the witness was not called; that is to say, that had the witness been called, his testimony would have been less favorable than the other evidence offered.¹⁶³ Thus there are three elements: (1) that the witness be "peculiarly available" to the party; (2) that the witness have superior knowledge as to some relevant fact; and (3) that the party not call the witness to testify. The third element is not difficult to define, and the first has been the subject of a good deal of judicial commentary in Missouri, some of it quite recent.¹⁶⁴ But in the context of the *Rossomanno* case, the second element may prove troublesome.

It has been said that the "unfavorable inference may not be drawn where the witnesses produced had equal or superior knowledge to those not produced."¹⁶⁵ Consequently, the question is whether it can be said that the business record produced contained knowledge or factual matter equal or superior to that possessed by the person who made the record and who did not testify. If so, then the unfavorable inference cannot properly be drawn.

The language of the *Rossomanno* case would seem to indicate that the inference should not be drawn under these circumstances, because the record is at least equal to the memory of the person who made it, particularly in view of the trustworthiness of business records. As the court said in answer to the argument that the physician who made part of the record should have been called as a witness, "it is inconceivable that a busy medical practitioner would have an independent recollection of each entry made in his business records and be able to testify from personal recollection as to when and by whom all entries were made."¹⁶⁶ Clearly the court did not find as a matter of law that the record contained equal or superior information; nor was the question raised as to whether the inference could properly be argued. But the seeds of such a holding are in the opinion.

163. See, e.g., *Russell v. St. Louis Pub. Serv. Co.*, 251 S.W.2d 595 (Mo. 1952); *Wilson v. Miss Hullings Cafeterias*, 360 Mo. 559, 229 S.W.2d 556 (1950).

164. *Bartlett v. Cain*, 366 S.W.2d 491 (Mo. Ct. App. 1963); *Adam Hat Stores, Inc. v. Kansas City*, 307 S.W.2d 36 (Mo. Ct. App. 1957); Comment, 22 U. KAN. CITY L. REV. 95 (1953).

165. *Wilson v. Miss Hullings Cafeteria*, 360 Mo. 559, 570, 229 S.W.2d 556, 562 (1950).

166. *Rossomanno v. Laclede Cab Co.*, 328 S.W.2d 677, 681-82 (Mo. 1959) (en banc).

Nevertheless, it is submitted that when the maker is available as a witness, but only the record itself is produced through some other witness, it should be permissible for opposing counsel to argue that the maker's testimony would have been less favorable than the record itself.¹⁶⁷ This argument should be permitted to offset, at least in part, the fact that the record itself cannot be cross-examined; the fact that the record may very possibly be more complete and certainly less equivocal than the testimony of a witness; the tendency on the part of the jury to give more weight to written than to oral evidence; the ability of the jury to take the written records into the jury room with them, if the discretion of the trial court allows; and last, but not least, the very real possibility that the reason the maker was not called as a witness was because his testimony would have been less favorable than the written record.

CONCLUSION

In conclusion it appears that over the past fifteen years the Missouri courts have had a great deal of experience with the Uniform Business Records as Evidence Law, and that they have been required to construe and apply its provisions in many varied fact situations. In applying the Uniform Law, the Missouri appellate courts have continually sought to realize the purposes for which the Law was adopted: to cast off the harsh and unreasonable common law restrictions relating to business records, and to bring the law into line with modern business experience and practice. As pointed out in the foregoing pages, a liberal construction of the Law has now been achieved, partly through the holdings and dictum of the appellate courts, and partly through the steady emphasis by those courts upon the fact that the trial court possesses a broad discretion in determining the admissibility of business records under the Uniform Law, and that the exercise of that discretion will seldom be interfered with by the appellate courts. It is perhaps true that in relation to certain proceedings, such as criminal prosecutions, the requirements of the Uniform Law should be more strictly applied; but it is likewise highly probable that as a matter of actual practice the trial courts tend to exercise a tighter discretion over the admission of business records in criminal prosecutions, from the very nature of these proceedings and the higher burden of proof traditionally involved. Therefore, only time will tell whether the appellate courts will retrench somewhat upon the present liberal construction of the Law, or whether further broadening will occur in the Law's application.

167. This assumes, of course, that the maker is not equally available to both parties, but is "peculiarly available" to the party offering the record.