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By M. J. Bruckner*

Nebraska Records Exception Said Preferable to Federal Proposal

I. INTRODUCTION

It is well known "black-letter" law that hearsay evidence is inadmissible. Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.¹ The hearsay rule is in reality composed of exceptions to this prohibition which allow the admission of hearsay under certain circumstances.

This article will consider the business records exception to the hearsay rule, its present status under Nebraska and federal statutes and its possible future under the Proposed Nebraska Rules of Evidence (hereinafter "Nebraska Rule[s]," "Nebraska proposal" or "Rule[s]") and the Proposed Federal Rules of Evidence (hereinafter "Federal Rule[s]" or "federal proposal").

In both the Nebraska and federal proposals, the phrase "records of regularly conducted activity" rather than "the business records exception" is used, but the latter will be employed throughout this article since the present Nebraska and federal statutes use this terminology.

Federal Rule 803 (6)'s business records exception provides that the following would not be excluded by the hearsay rule, even though the declarant is available as a witness:

Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

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1. PROP. NEB. R. EVID. 801 (c) [hereinafter cited as RULE].

The Nebraska business records exception proposal is also designated as Rule 803(6). It provides that certain evidence would not be excluded by the hearsay rule even though the declarant is available. The proposal provides:

Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, other than opinions or diagnoses, made at or near the time of such acts, events or conditions, in the course of a regularly conducted activity, if it was the regular course of such activity to make such memorandum, report, record, or data compilation at the time of such act, event, or condition, or within a reasonable time thereafter, as shown by the testimony of the custodian or other qualified witness unless the source of information or method or circumstances of preparation indicate lack of trustworthiness. The circumstances of the making of such memorandum, report, record, or data compilation, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight.

At this point, *Palmer v. Hoffman*² should be discussed, as this case provides the basic foundation for any understanding of the business records exception to the hearsay rule. The case involved a railroad crossing accident. The engineer, who died before the trial, had made a written statement about the accident's occurrence two days after the accident to the railroad's assistant superintendent and to a Massachusetts Public Utilities Commission representative. At trial, the statement was offered by the railroad company to prove how the accident occurred. The United States Court of Appeals sustained an objection to the report's admissibility,³ and the United States Supreme Court affirmed in a unanimous opinion by Justice Douglas. The Supreme Court referred to the common law rule restricting the use of business records and noted that the rule had given impetus to legislation allowing the admissions of business records upon limited foundational grounds.

Justice Douglas found that the engineer's statement was not a business record as it was not made "for the systematic conduct of the business as a business," and that such accident reports, although they may be routinely prepared, have their primary utility in litigating, not railroading.⁴ The Court made it clear that the type of business records admissible under the exception were those made systematically or as a matter of routine, and such records had the probability of trustworthiness "because they were routine reflections of the day to day operations of a business."⁵

The most effective method of analyzing the Nebraska and fed-

2. 318 U.S. 109 (1943).

3. 129 F.2d 976 (2d Cir. 1942).

4. 318 U.S. at 113.

5. *Id.* at 114.

eral proposals is to examine the present statutes and cases and to determine what changes the proposals would cause.

II. PRESENT NEBRASKA RULE

The present Nebraska statute, enacted in 1951 as the Uniform Business Records as Evidence Act,⁶ provides:

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; *Provided*, that all hospital records shall be considered business records for the purposes of sections 25-12,108 to 25-12,111.

The first decision applying the statute was *Hamilton County v. Thomson*.⁷ In *Thomson*, the county brought a reimbursement action against a husband for the per capita cost of maintaining his wife in the state hospital for the mentally ill. The primary issue was the rate to be charged the husband. The county used copies of a resolution adopted by the State Board of Control and foundational testimony from the Board of Control secretary. The foundation was that the exhibits were regular Board of Control meeting minutes at which maintenance rates were fixed. The offer of the minutes was objected to for lack of foundation. The Supreme Court simply held that the exhibit was a business record and, therefore, admissible.

The court next considered the statute in *Higgins v. Loup River Public Power District*⁸ which was an action to condemn land for an easement. In such an action, it was necessary to prove the condemning public power district had attempted to negotiate with the landowner prior to filing suit. To prove this, the power district offered the statement of Mr. Lusienki, head of its right of way department, who was mentally and physically incapacitated at the time of trial. The statement was Lusienki's recollection of his visit to the Higgins farm and conversation with Mrs. Higgins where a threat had supposedly been made to shoot anyone coming onto the farm. The foundational evidence revealed that Lusienki was not required to make such a report, but he had done so and placed it in the file regarding the case. The power district attempted to admit the report under the business records exception

6. NEB. REV. STAT. § 25-12,109 (Cum. Supp. 1972).

7. 158 Neb. 254, 63 N.W.2d 168 (1954).

8. 159 Neb. 549, 68 N.W.2d 170 (1955).

to the hearsay rule. The court held that the Business Records as Evidence Act had the purpose of avoiding common law rules regarding the admissibility of business records, and when a document did not reach the business record status, it was relegated to hearsay and was inadmissible. The court found that no use for Lusienski's report had been suggested other than for litigation. The court held the report to be self-serving hearsay and inadmissible, reasoning that

[t]he rule contemplates that certain events are regularly recorded as routine reflections of the day to day operations of a business so that the character of the records and their earmarks of reliability import trustworthiness, thus the recordation becomes a reliable recitation of fact. The preparation and maintenance of notations of events outside the operation of the business are not the recordations contemplated.⁹

Palmer was cited by the court and the decision in *Higgins* is obviously similar in reasoning and result.

*Fries v. Goldby*¹⁰ closely touched an area which will be extensively considered later in this article—medical records. In this personal injury action, the plaintiff used a chiropractor as an expert. The chiropractor's notes and records concerning his treatment of the plaintiff were identified as exhibits, and he used them extensively to refresh his memory. At the conclusion of the chiropractor's testimony, the plaintiff offered the notes and records in evidence and argued that they were admissible under the Nebraska business records exception to the hearsay rule. The trial court refused to receive the exhibits and, on appeal to the Nebraska Supreme Court, the lower court was affirmed. The Supreme Court found *Higgins* to be the controlling authority. The court said the chiropractor could refresh his memory with the exhibits, but to allow their admission into evidence would simply be cumulative. It should be noted that *Fries* did not consider directly the admission of diagnoses and opinions contained in hospital records or medical reports.

In *S. A. Sorenson Construction Co. v. Broyhill*,¹¹ a suit to foreclose a mechanic's lien, the office records on cost of labor performed were offered and received in evidence. On appeal to the Supreme Court, it was found that they had been properly received under the business records statute, and the court indicated that proper foundation had been laid for the offer:

9. 159 Neb. at 557-58, 68 N.W.2d at 176, quoting *Clainos v. United States*, 163 F.2d 593, 596 (1947).

10. 163 Neb. 424, 80 N.W.2d 171 (1956).

11. 165 Neb. 397, 85 N.W.2d 898 (1957).

[T]he plaintiff offered in evidence its permanent records as to the amount of work performed under the agreement in question and the charges therefor without a need. These records were properly identified, the mode of preparation was described, and a qualified witness testified that they were made in the regular course of business near the time that the work was performed.¹²

*Transport Indemnity Co. v. Seib*¹³ recognized the arrival of the computer age and demonstrated the Nebraska Supreme Court's flexibility in applying the presently effective business records exception statute to modern commercial transactions. The case involved an action by an insurer to collect premiums earned under an insurance contract. The particular exhibit in question was a data recording of accidents, dates, losses and premiums. The foundation was provided by the insurer's director of accounting who testified on the exhibit's preparation. It was clear that the exhibit was prepared for litigation since it was a retrieval of information from other taped records. The court held the exhibit admissible under the statute. The court explained that where taped records were prepared and stored by electronic equipment and the information and calculations were made in the usual course of business, the fact the exhibit involved was made by a retrieval of the taped records for trial purposes did not render the exhibit inadmissible. Speaking generally, the court rationalized that:

No particular mode or form of record is required. The statute was intended to bring the realities of business and professional practice into the courtroom and the statutes should not be interpreted narrowly to destroy its obvious usefulness.¹⁴

*Metropolitan Protection Service, Inc. v. Tanner*¹⁵ clearly indicated that if the elements are lacking which in theory give rise to trustworthiness and reliability, the evidence does not qualify for admission under the business records exception. In this case, the exhibit offered for admission was purportedly prepared on September 6 and reflected surveillance services performed by the plaintiff and its employees from May 18 to September 2. The trial court admitted the exhibit into evidence. This ruling was overturned by the Supreme Court on the rationale that the business records exception is premised upon the belief that any trustworthy habit of making regular records will ordinarily involve the making of the record contemporaneously. The court listed three circumstances affecting admissibility: the complexity of the information in the record, the training and skill of the persons recording the informa-

12. *Id.* at 405, 85 N.W.2d at 903.

13. 178 Neb. 253, 132 N.W.2d 871 (1965).

14. *Id.* at 259, 132 N.W.2d at 875.

15. 182 Neb. 507, 155 N.W.2d 803 (1968).

tion and the reasonableness of the time elapsed between the event and its recordation. Obviously, the evidence in this case failed on the last mentioned ground.

The foregoing Nebraska cases give some indication of the variety of evidence which can be admitted under the business records exception. The cases also give an indication that the Nebraska Supreme Court will liberally construe the present statute. But when the circumstances of the making of the record indicate that the basic elements importing reliability and trustworthiness are lacking, the evidence cannot be admitted under the business records exception.

III. PRESENT FEDERAL BUSINESS RECORDS STATUTE

The present federal statute on business records, Title 28 of the United States Code, section 1732, is somewhat different than the present Nebraska Business Records as Evidence Act. The federal statute provides, as far as relevant to this article:

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind.¹⁶

The federal statute provides that the circumstances of the making of the records, such as personal knowledge or lack thereof, shall affect the evidence's weight and not its admissibility. In contrast, the Nebraska statute provides that the court must make a preliminary determination as to whether "the sources of information, method, and time of preparation were such as to justify its admission."¹⁷ The Nebraska statute also expressly provides that "all hospital records shall be considered business records,"¹⁸ whereas the

16. 28 U.S.C. § 1732 (1964).

17. NEB. REV. STAT. § 25-12,109 (Cum. Supp. 1972).

18. *Id.*

federal statute does not contain such an express provision. This aspect of the business records exception to the hearsay rule will be discussed later in this article in greater detail.

The federal courts have allowed the admission of a wide variety of records and documents under the auspices of section 1732. The following are examples of the items admitted as business records prepared in the regular course of business under the federal statute: a police report prepared by a police officer on standard forms;¹⁹ a bank department's records for such days as the defendant was charged with embezzlement;²⁰ a bill of lading on a stolen automobile to prove that it was removed from the manufacturer's lot without authorization;²¹ a computer printout;²² a baggage strap tag and claim check admitted in a prosecution for the theft of suitcases from a bus line;²³ a credit report made by a credit bureau;²⁴ a death certificate, although the court held that the coroner's finding as to the cause of death was not binding on the trier of fact;²⁵ election records;²⁶ an inventory report of damaged items prepared by a salvage company employed by the plaintiff's insurance company;²⁷ an inventor's private diary or notebook;²⁸ a sales report.²⁹ All of the foregoing items have been admitted as business records prepared in the regular course of business.

It has been cogently stated that the purpose of section 1732 is to permit the introduction into evidence of reports in substitution for the actual testimony in court of the persons making those re-

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19. *Juaire v. Nardin*, 395 F.2d 373 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968). However, the police report generally has been held inadmissible where information has been supplied to the officer from a bystander. *Gencarella v. Fyfe*, 171 F.2d 419 (1st Cir. 1948).
 20. *United States v. Currier*, 454 F.2d 835 (1st Cir. 1972).
 21. *United States v. Lipscomb*, 435 F.2d 795 (5th Cir. 1970), *cert. denied*, 401 U.S. 980 (1971).
 22. *Olympic Ins. Co. v. H.D. Harrison, Inc.*, 418 F.2d 669 (5th Cir. 1969).
 23. *Rice v. United States*, 411 F.2d 485 (8th Cir. 1969).
 24. *United States v. DeFrisco*, 441 F.2d 137 (5th Cir. 1971).
 25. *Smith v. John Hancock Mut. Life Ins. Co.*, 254 F. Supp. 622 (W.D. Pa. 1966).
 26. *Kennedy v. Lynd*, 306 F.2d 222 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). See also *Klein v. United States*, 176 F.2d 184 (8th Cir.), *cert. denied*, 338 U.S. 870 (1949).
 27. *H.K. Porter Co. v. Halperin*, 297 F.2d 442 (7th Cir. 1961).
 28. *Aluminum Co. of America v. Sperry Prods., Inc.*, 285 F.2d 911 (6th Cir. 1960), *cert. denied*, 368 U.S. 890 (1961). However, see *Buckley v. Altheimer*, 152 F.2d 502 (7th Cir. 1945), where similar evidence was denied admission as not being a business record.
 29. *Southard v. United States*, 218 F.2d 943 (9th Cir. 1955); *Spear v. United States*, 216 F.2d 185 (4th Cir. 1954). However, such evidence was denied admission under the business records exception to the hearsay rule in *Matthew v. United States*, 217 F.2d 409 (5th Cir. 1954).

ports,³⁰ and the foregoing examples readily show that the federal courts have used the present federal statute to fulfill that purpose. Obviously, the presentation of such evidence in the form of written or printed business records makes the evidence more readily understood and eliminates the calling of witnesses, resulting in a reduction of actual trial time and a probable savings in litigation expense. Of course, it is necessary to have the proper foundation provided by the custodian of the records or any other competent witness in order for business records to be admitted. The foundational requirements are set forth in section 1732, to-wit: that the record was made in the regular course of business; that it was the regular practice of such business to make a record or memorandum at the time of the occurrence or within a reasonable time thereafter.

IV. NEBRASKA, FEDERAL PROPOSALS EXAMINED

The Nebraska proposal³¹ relating to records of regularly conducted activity is similar in some respects to the federal proposal.³² Initially, the similarities will be discussed in general terms, the proposals having been set forth in their entirety previously. It seems that both proposals have common foundational grounds for the admission of records, and it would be incumbent upon the proponent of the evidence to establish these foundational grounds to the satisfaction of the particular court. Although the language may be slightly different in each proposal, the final effect seems to be the same.

The common foundational grounds would be that the recordation had been made in the course of a regularly conducted activity; it be the regular course of such activity to so record; it be done at the time of the event or within a reasonable time thereafter; and the record be by or from information transmitted by a person with knowledge. Under both the federal and Nebraska proposals, all of the above foundational grounds apparently would be established by the proponent of the evidence, using either the custodian of the records or other qualified persons as his witnesses.

Both proposals then turn to the province of the opponent of the evidence by stating in effect that the evidence is admissible under the exception, unless the source of information or method or circumstances of preparation indicate a lack of trustworthiness. To inquire into these items to show a lack of trustworthiness, so as

30. *Shultz v. Corning Glass Works*, 319 F. Supp. 1161 (W.D.N.Y. 1970).

31. *RULE 803(6)*.

32. *PROP. FED. R. EVID. 803(6)*.

to allow the court to refuse the admission based on lack of trustworthiness, seems to be the opponent's area of operation. Having stated the foregoing, it then appears that the two proposals begin to differ at least in language.

The Nebraska proposal provides that the circumstances of the making of the record, including lack of personal knowledge by the maker or entrant, may be shown to affect its weight. This would appear to give the opponent of the evidence the right to an instruction to this effect, thereby allowing a jury to reduce the weight of the evidence, even though that court had examined these same factors on the issue of admissibility and admitted the evidence. However, the federal proposal conspicuously omits this provision. This omission is particularly interesting since the present section 1732 contains such a provision.

The effect of the federal proposal's omission of such a provision is uncertain. A court applying the federal proposal might find that because of the provision in former section 1732, it is implied that even if the evidence were admitted, the opponent of the evidence is entitled to an instruction that the circumstances of the making and the knowledge of the maker or entrant can be considered by the jury in weighing the evidence. No compelling reason appears for eliminating this opportunity of the opponent of the evidence.

Another possible interpretation is that by omitting the provision, it is intended that no such instruction be given and the opponent of the evidence is limited to inquiring about circumstances of preparation and knowledge of the maker with regard to admissibility of the evidence. In other words, the opponent's inquiry into these areas is to convince the trial judge that trustworthiness is lacking and, therefore, the evidence should not be admitted. If the opponent fails in this regard, however, he may not, under the federal proposal, get an instruction on the weight to be given the evidence. The Advisory Committee Note is little help although by implication this latter view seems to be supported. The note states:

[T]he rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness."³³

It should be noted that both the Nebraska and federal proposals speak in terms of "records of regularly conducted activity," whereas both the present federal and Nebraska statutes use the term "regular course of business." Clearly, the proposals contem-

33. *Id.*, Advisory Committee's Note.

plate using the exception in areas other than business records and, therefore, an increased application has been proposed.

The final area of difference between the Nebraska and federal proposals is in the area of opinion and diagnosis. The federal proposal expressly speaks of "report, record . . . in any form . . . opinions or diagnoses." Generally this is in accord with the manner in which the present federal statute has been interpreted.³⁴ The Nebraska proposal, however, expressly excludes opinions and diagnoses. The proposal includes "[a] memorandum, report, record . . . in any form, of facts, events, or conditions, other than opinions or diagnoses . . ." This is a clear and substantial departure from the federal proposal, as well as a major change in existing Nebraska law. The present Nebraska statute states, by virtue of a 1969 amendment, "that all hospital records shall be considered business records . . ."³⁵ Because the present Nebraska statute speaks in terms of hospital records being business records, and it is common knowledge that hospital records are primarily composed of opinion and diagnosis, the following discussion of the change between the current statute and the proposed rule will concentrate on hospital records.

V. HOSPITAL RECORDS AS BUSINESS RECORDS

The federal proposal expressly includes "opinions and diagnoses" within its terms, and the Advisory Committee Notes make it clear that it is intended that the proposal include such items as hospital records.³⁶

The Nebraska proposal expressly excludes "opinions and diagnoses." However, the comments provide little help in determining the rationale behind this departure from both the federal proposal and the present Nebraska statute.³⁷ The Comment merely inserts the Federal Advisory Committee Notes. The only statement in the Comment which resembles a reason for the change provides:

[O]ther statutes declared certain hospital records privileged information and therefore inadmissible. See section 25-12,120, R.R.S. Neb. (reports to hospital medical staff for the purpose of evaluating hospital care); section 71-3401, R.R.S. Neb. (hospital reports furnished to State Board of Health). . . . The privileged character of these documents is not affected by the present exception, which concerns only the hearsay aspects of business records.³⁸

34. See Annot., 9 A.L.R. FED. 457 (1971).

35. NEB. REV. STAT. § 25-12,109 (Cum. Supp. 1972).

36. PROP. FED. R. EVID. 803(6) Advisory Committee's Note.

37. Rule 803(6), Comment.

38. *Id.*

The Comment also notes that the present statute is changed and should be repealed.

The Comment states that the proposal contains the desirable portions of the prior Nebraska and federal statutes relating to business records. Therefore, the drafters must have found the prior Nebraska and federal statutes and decisions which would have admitted diagnosis and opinion in hospital records "undesirable." The question of "why" seems to go unanswered. Perhaps, an examination of prior Nebraska and federal decisions on the hospital records will shed some light on the question.

The only Nebraska case concerned with this issue is *Anderson v. Evans*³⁹ where it was contended that the trial court had erred in admitting hospital records containing nurses' opinions about a patient's pain and suffering. The court made it clear, however, that the admissibility of hospital records generally was not in question. The nurses' notes were read to the jury and the plaintiff had used the assistant medical records librarian for foundational purposes. The librarian testified that the nurses' notes were normal, regular business records of the hospital assembled in the records office after compilation on the floors. However, there was nothing in her testimony to identify the persons who made the notes. The Supreme Court noted that the only previous precedent⁴⁰ in Nebraska merely indicated that hospital records were inadmissible without foundation.

The court in *Anderson* then set forth the foundational requirements for admission of the nurses' notes: the custody from which they came; that they were prepared in due course of hospital work; the identity of the persons making them; how the maker obtained the information; information as to accuracy; identification of the records by the persons who made them or, if such persons were unavailable, the reasons for their unavailability. The court found these foundational requirements lacking. In response to the plaintiff's contention that they were admissible under the Business Records as Evidence Act, the court held that the foundation under the Act was lacking and, in addition, that the notes were not business records. As a result, the trial court's ruling was reversed and the case remanded for a new trial.

The Business Records as Evidence Act was amended after this decision to include hospital records as business records. Therefore, it would seem that the Legislature intended to overrule this decision, as it is clear that nurses' notes are an integral part of hospital

39. 164 Neb. 599, 83 N.W.2d 59 (1957).

40. *Willis v. Order of R.R. Telegraphers*, 139 Neb. 46, 296 N.W. 443 (1941).

records. The nurse makes notations throughout the patient's stay at the hospital on various aspects of his condition, and the physician uses the nurse's notes to determine the patient's progress. It has been recognized that the safeguards for trustworthiness of a modern hospital's records are at least as substantial as the guarantees of reliability of a business establishment's records.⁴¹ The nurse's motivation for accuracy in making such notes, for example, is at least as great as that of an accountant making entries in a ledger.

Although numerous federal cases have uniformly allowed their admission under the present section 1732, the admission of hospital records may result in possible prejudice to the opponent of the evidence. These federal decisions illustrate the potential problems and possibility of prejudice in admitting hospital records with the limited foundation required by the federal rules.

When a hospital record is offered in evidence, the standard objection is that it deprives the opponent of the opportunity to cross-examine the persons making the entry. This is particularly true where the hospital record contains the doctor's diagnosis, opinion or prognosis. However, the federal courts operating under section 1732, have usually admitted the records, conclusions and opinions notwithstanding. Perhaps the leading case is *Reed v. Order of United Commercial Travelers*⁴² where a hospital record entry stated that the plaintiff was "still apparently well under the influence of alcohol." The court reversed the trial court which had excluded the record, and further pointed out that there was no significant difference between a "diagnosis" and an "observation."

*Thomas v. Hogan*⁴³ also involved intoxication and the issue of whether the results of scientific tests were admissible under section 1732. The court held that it made no difference whether the record reflected expression of medical opinion or an observation of an objective fact. Hospital records were admissible, the court stated, so long as the record was made in the regular course of business and it was the regular course of business to make the record at the time or within a reasonable time thereafter. The court found that under the federal statute, the proper foundation for the admission of the results of an intoxication test had been laid.

41. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 609 (1st ed. 1954).

42. 123 F.2d 252 (2d Cir. 1941).

43. 308 F.2d 355 (4th Cir. 1962).

In *Glawe v. Rulon*⁴⁴ the eighth circuit considered a case where the defendant offered the plaintiff's hospital records in evidence. The plaintiff objected to two pages thereof because they contained opinions, and the doctors rendering those opinions were not present in court for cross-examination. The court held that it was not error to receive the entire records saying: "To have received the record without the pages objected to, would have been the substantial equivalent of receiving the records without their contents."⁴⁵

There are other federal court decisions which allow the admission of hospital records under the business records exception, despite the fact that they contain conclusive material and opinions.⁴⁶ It is clear that the federal proposal adheres to the above line of cases.

There are previous federal decisions excluding hospital records, and the leading decision would appear to be *New York Life Insurance Co. v. Taylor*⁴⁷ which was an action to collect the double indemnity benefits of a life insurance policy for an accidental death. To support its denial of payment, the insurer attempted to introduce hospital records indicating a diagnosis of definite suicidal tendencies of the deceased. The trial court rejected the records and the appellate court upheld this ruling saying that the entries were not the kind contemplated under section 1732, as their accuracy was not guaranteed by automatic reflection of observations. The court concluded that the diagnosis of psychiatric condition involved conjecture and opinion and, therefore, must be subject to cross-examination.

Of similar import is *Lyles v. United States*⁴⁸ where the defendant in a criminal prosecution sought to establish a pattern of mental disease by hospital records. However, the court held them inadmissible since the admission of a written opinion containing a psychiatrist's naked conclusion, without his being present for cross-examination as to the foundation of the opinion, was not warranted by the language or history of section 1732. The court pointed out that to submit such opinions to the jury, without cross-

44. 284 F.2d 495 (8th Cir. 1960).

45. *Id.* at 498.

46. *Kissinger v. Frankhouser*, 308 F.2d 348 (4th Cir. 1962), *cert. denied*, 372 U.S. 908 (1963); *Medina v. Erickson*, 226 F.2d 475 (9th Cir. 1955), *cert. denied*, 351 U.S. 912 (1956); *Buckminster's Estate v. Commissioner*, 147 F.2d 331 (2d Cir. 1944).

47. 147 F.2d 297 (D.C. Cir. 1944).

48. 254 F.2d 725 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 961 (1958).

examination of the physician, would be to give the opinions the status of fact and prejudice could easily result.

There are other cases⁴⁹ which express a particularly serious objection to admitting hospital records containing diagnosis of mental illness or psychiatric conditions, obviously because of the inexact nature of psychiatry. This has been particularly true in criminal cases where the defendant's sanity is involved. The Advisory Committee's Note states that these decisions excluding conclusory language and opinions in hospital records were grounded in the narrow language of section 1732 referring to "act, transaction, occurrence, or event," and that this line of cases refusing to admit such evidence is rejected by the express inclusion of the terms "opinion and diagnosis" in the federal proposal.⁵⁰

Therefore, it would appear that the drafters of the Nebraska proposal chose to follow the lead of *Taylor*. The question which was previously posed in this article as to why the Nebraska proposal excludes diagnosis and opinion seems to find its answer in those federal cases rejecting hospital records containing conclusions and opinions. The answer appears to be that the drafters felt it was important to preserve the right to cross-examine the person who enters an opinion or diagnosis on a "business record."

VI. CONCLUSION

The present Nebraska and federal statutes containing the business records exception to the hearsay rule have been detailed. The Nebraska and federal proposals in the area have been examined and compared, and previous decisions of the Nebraska Supreme Court and the federal courts have been discussed. By way of a conclusion, the author's opinion as a practicing trial lawyer is offered. The Nebraska Rule 803(6) is preferred over the Federal Rule 803(6) on the basis of their differing treatment of opinion and diagnosis, primarily with reference to hospital records. It has been the author's experience that the medical opinions contained in hospital records are generally there for a very limited purpose; for example, to support a doctor's order for admission, tests, medicine or drugs and surgery or discharge. Therefore, these opinions are often inadequate and can be misleading to a jury of laymen unless explained and amplified by the physician's testimony in

49. *Otney v. United States*, 340 F.2d 696 (10th Cir. 1965); *Mullican v. United States*, 252 F.2d 398 (5th Cir. 1958); *England v. United States*, 174 F.2d 466 (5th Cir. 1949); *Polisnik v. United States*, 259 F.2d 951 (D.C. Cir. 1958).

50. PROP. FED. R. EVID. 803(6), Advisory Committee's Note.

court. Secondly, such opinions can be based upon other hearsay; for example, from the patient, X-ray technicians, nurses and other doctors. Also, since such opinions are usually expressed in technical terms, interpretation or explanation is often required. Therefore, the basis of the opinion as well as the opinion itself should be explored to avoid prejudice to the opponent of the evidence. In other words, the right to cross-examine doctors who insert opinions and conclusions in medical records should be preserved.

In the author's opinion, it is the factor of cross-examination which makes the Nebraska proposal particularly preferable to the federal proposal. When the physician is present and testifies in court, the jury takes the doctor's opinion to the jury room after it has been explored and probed by cross-examination for foundational grounds, for bias, for weakness and for its strength. As a result, the jury is not forced to accept the opinion in a medical record as a proven fact simply because it is in "black and white," but can consider that opinion for what it is really worth in view of the cross-examination. By preserving cross-examination of the doctor's opinion, the jury's understanding is enhanced, the proponent of the evidence presents his case in the most effective manner, the opponent of the evidence is protected from possible prejudice, and the ultimate search for the truth is better served.