person.[22] Under American law, conduct in the regular course of the business is required instead.[23]

How far Rule 803(6) goes in requiring not only that the record must be made in the regular course of a business, but that it "be the regular practice of that business to make the memorandum" is disputed. What might be termed nonroutine records, which are nevertheless made in the course of regularly conducted activities, are the focus of concern here. Unusual records, often outside the expertise assured by a business routine, are properly excluded for that reason.[24] Other records of this type will be properly excluded because of motivational concerns arising from the fact they were generated for litigation purposes, discussed immediately below. While an occasional court has focused on the apparent intention of Congress as reflected in the wording of the rule that the making of the memorandum be the "regular practice,"[25] the general focus is much more on whether the basic concern of trustworthiness is met for nonroutine records.[26]

An important set of concerns revolves around the purpose of the report and the circumstances of its preparation, particularly reports of accidents. The seminal case is Palmer v. Hoffman,[27] a suit against railroad trustees arising out of an accident at a railroad crossing. The engineer of the train involved was interviewed two days after the accident by a representative of the railroad and a representative of the

22. Tapper, Cross & Tapper on Evidence 715 (8th ed. 1995).

23. LeBrun v. Boston & Maine R.R., 142 A. 128 (N.H.1928) (dictum); Hutchins v. Berry, 75 A. 650 (N.H.1910). See generally, 5 Wigmore, Evidence, § 1524 (Chadbourn rev. 1974). See infra § 290.

24. See 4 Mueller & Kirkpatrick, Federal Evidence § 445, at 494 (2d ed. 1994).

25. The language of the rule requiring that it be the "regular practice of the business to make the memorandum" was not part of the rule as submitted to Congress by the Supreme Court. This provision, which was part of the earlier federal statute, was added by the House Judiciary Committee. H.R.Rep.No. 650, 93d Cong., 1st Sess. 14 (1973), reprinted in 1974 U.S.Code Cong. & Admin.News 7075, 7087–88. In United States v. Freidin, 849 F.2d 716, 723 (2d Cir.1988), the court excluded a nonroutine, albeit apparently trustworthy record, because it did not meet the requirements of the rule, the court giving deference to the apparent legislative intent in adding the requirement. See Graham, Federal Practice and Procedure: Evidence § 7047, at 417 n.25 (2000) (arguing that in interpreting regularity of the activity, it should be determined with more emphasis on whether the activity was part of ordinary business rather than whether it occurred frequently).

26. See 5 Weinstein's Federal Evidence § 803.08[2] (2d ed. 2005) (arguing that the nonroutine-ness of the making of the record does not require exclusion, and that if made in the course of a regularly conducted business, the records should be admitted unless circumstances indicate unreliability); Kassel v. Gannett Co., 875 F.2d 935, 945 (1st Cir. 1989) (allowing some nonroutine-ness or selectivity in recording particular events); United States v. Strother, 49 F.3d 869, 875–76 (2d Cir.1995) (placing the above interpretation of Weinstein's treatise on circuit's earlier *Freidin* opinion and excluding reports given entrants' possible motive to be less than accurate); Sana v. Hawaiian Cruises, Ltd., 181 F.3d 1041, 1047 (9th Cir. 1999) (concluding that while the investigation of seaman's injuries did not occur routinely, it was in the regular course of business in the sense that it was part of the duty of the maritime industry which has unique responsibility for maintenance and cure of injured workers);United States v. Jacoby, 955 F.2d 1527, 1537–38 (11th Cir. 1992) (memorandum to file prepared by bank's outside counsel, although nonroutine, was as part of "regular practice" of business and admissible).

27. 318 U.S. 109 (1943).

state public utilities commission and signed a statement giving his version of the incident. He died before trial, and the statement was offered by the defendants, who contended that the railroad obtained such statements in the regular course of its business. Affirming the trial court's exclusion of the report, the Supreme Court stated:

> [The report] is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls * * * Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary use is in litigating, not in railroading.[28]

Consequently, the report was held not to have been made "in the regular course" of the business within the meaning of the federal statute then providing for the admissibility of business records.[29]

While *Palmer* has been subject to various interpretations,[30] the most reasonable reading is that it did not create a blanket rule of exclusion for accident reports or similar records kept by businesses. Rather, it recognized a discretionary power in the trial court to exclude evidence which meets the letter of the exception, but which under the circumstances appears to lack the reliability business records are assumed ordinarily to have. The existence of a motive and opportunity to falsify the record, especially in the absence of any countervailing factors, is of principal concern.[31]

The Federal Rule incorporates this reading of *Palmer* by permitting admission of reports that otherwise comply with the requirements of the rule, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."[32] The structure of the

28. Id. at 113–14.

29. Id. at 114–15.

30. Compare Laughlin, Business Entries and the Like, 46 Iowa L.Rev. 276, 289 (1961) with Comment, 43 Colum.L.Rev. 392 (1943).

31. Thus, where the only function that the report serves is to assist in litigation or its preparation, many of the normal checks upon the accuracy of business records are not operative. Reliance upon the report's accuracy in the day-to-day operation of the business is significant.

32. See Sana v. Hawaiian Cruises, Ltd., 181 F.3d 1041, 1046–47 (9th Cir.1999) (finding countervailing trustworthiness guarantees where document, which had some of the appearances of a litigation record, was prepared by defendant's insurer, who had no incentive to gather evidence regarding plaintiff's illness, and the duty of some preparing the report to develop an accurate report regarding the claim and the treatment of the illness); Owens–Illinois, Inc. v. Armstrong, 604 A.2d 47, 50–51 (Md.1992) (despite meeting general requirements of business record, asbestos exposure report properly excluded based on combination of factors indicating lack of trustworthiness). Courts occasionally require declarants to testify as a condition of admissibility. See Muzzleman v. National Rail Passenger Corp., 839 F.Supp. 1094, 1099 (D.Del.1993) (railroad accident report admissible provided members of investigative committee are available for cross-examination).

rule places the initial burden on the proponent of the document's admission to show that it meets the basic requirements of the rule, and the "unless" clause then gives the opponent the opportunity to challenge admissibility, albeit now bearing the burden of showing a reason for exclusion.[33] When records are prepared in anticipation of litigation, they will often,[34] but not always,[35] demonstrate that lack of trustworthiness.

Police reports and records can, of course, meet the requirements for the regularly kept records exception to the hearsay rule, but they also qualify under the hearsay exception for public records and reports.[36] Federal Rule 803(8) contains certain restrictions upon the use of police reports in criminal cases, and the question has arisen whether those restrictions can be avoided by offering police reports under the regularly kept records exception, which imposes no such limitations. The answer, while complicated, is generally "no."[37] This subject is discussed in greater detail in § 296 infra.

33. See Shelton v. Consumer Prods. Safety Comm'n, 277 F.3d 998, 1010 (8th Cir.2002) (following the same analysis as for the similar provision in Rule 803(8)).

34. United States v. Casoni, 950 F.2d 893, 912 (3d Cir.1991) (attorney's proffer for client seeking immunity lacked trustworthiness in that it was advocate's document not routine record of fact); Certain Underwriters at Lloyd's, London v. Sinkovich, 232 F.3d 200, 204–05 (4th Cir.2000) (finding inadmissible incident report prepared in anticipation of litigation by outside investigator who regularly prepared such reports as part of its business, court concluding motivational problems in preparing the report in the first place could not be cured by simply hiring an outside party); Paddack v. Dave Christensen, Inc., 745 F.2d 1254 (9th Cir.1984) (audit reports ordered by trustees of trust account only upon suspicion of deficiency were prepared for litigation and lacked trustworthiness); Echo Acceptance Corp. v. Household Retail Servs., Inc., 267 F.3d 1068, 1090–91 (10th Cir. 2001) (excluding business correspondence that district court found constituted legal posturing drafted by lawyers in anticipation of litigation); Timberlake Constr. Co. v. U.S. Fidelity & Guar. Co., 71 F.3d 335, 342 (10th Cir.1995) (letters involving construction dispute had earmarks of being motivated by litigation, which was not far away, were therefore not admissible); Peat, Inc. v. Vanguard Research, Inc., 378 F.3d 1154, 1159–61 (11th Cir.2004) (excluding document prepared in response to discovery request by party to identify trade secrets allegedly misappropriated because prepared not in the regular course of business but for litigation).

35. See Lewis v. Baker, 526 F.2d 470 (2d Cir.1975) (railroad accident report made pursuant to railroad and I.C.C. rules held admissible); Wheeler v. Sims, 951 F.2d 796 (7th Cir.1992) (prison medical director's report regarding prisoner's medical condition not inadmissible as report prepared in anticipation of litigation because reasonable person could well believe it fulfilled preparer's responsibilities for prisoners' medical needs); State v. Quincy, 95 P.3d 353, 355–56 (Wash.App.2004) (ruling that computerized price records of stolen items were admissible as business record despite being records of shoplifting arrests prepared for litigation because they were created in the regular course of business and the trial court found them trustworthy).

36. See generally infra Ch. 30.

37. See United States v. Blackburn, 992 F.2d 666, 670–71 (7th Cir.1993) (describing conflict between United States v. Oates, 560 F.2d 45, 67 (2d Cir.1977) (no) and United States v. Baker, 855 F.2d 1353, 1359 (8th Cir.1988) (yes) regarding admissibility of government laboratory analysis as business records); United States v. Orellana-Blanco, 294 F.3d 1143, 1149 (9th Cir.2002) (stating that because the evidence is being used against a defendant in a criminal prosecution, government agent's interview report could not be admitted under Rule 803(6) and the public records exception was the exclusive applicable exception); Air Land Forwarders, Inc. v. United States, 172 F.3d 1338, 1344–45 (Fed.Cir.1999) (arguing that "incorporation" theory whereby retaining and relying on records by one entity renders the records of another entity admissible could not be used by law enforcement agents to achieve admissibility of criminal