Study K-201 October 30, 2003

Memorandum 2003-39

Conforming the Evidence Code to the Federal Rules of Evidence: Additional Hearsay Issues

The Commission is in the process of preparing a tentative recommendation proposing changes to the hearsay provisions of the Evidence Code to incorporate desirable aspects of the Federal Rules of Evidence and the Uniform Rules of Evidence. In conducting this study, the Commission has been proceeding through an analysis of the hearsay provisions prepared by the Commission's consultant, Professor Miguel Méndez of Stanford Law School. This memorandum discusses the following hearsay exceptions:

(1) Business record.
(2) Absence of a business record or an entry in a business record.
(3) Official record.
(4) Absence of an official record or an entry in an official record.

The hearsay analysis prepared by Prof. Méndez — Méndez, *Comparison of Evidence Code with Federal Rules: Part I. Hearsay and Its Exceptions* (May 2002) (hereafter, "Méndez Hearsay Analysis") — was attached to Memorandum 2002-41 and is available on the Commission's website at <www.clrc.ca.gov>. The analysis has also been published. See Méndez, *California Evidence Code — Federal Rules of Evidence, I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 351 (2003).

To facilitate differentiation between different phases of the Commission's study on conforming the Evidence Code to the Federal Rules of Evidence, we have assigned a new study number (Study K-201) to the Commission's work on the hearsay provisions. Previous staff memoranda relating to the hearsay provisions were issued using the study number for the overall project on conforming the Evidence Code to the Federal Rules of Evidence (Study K-200). See Memorandum 2002-41 and its First Supplement, Memorandum 2003-7 and its First Supplement, and Memorandum 2003-26 and its First Supplement.

Both the Evidence Code and the Federal Rules of Evidence include a business records exception to the hearsay rule. The provisions are similar but there are some important distinctions.

California Approach

The California hearsay exception for a business record is Evidence Code Section 1271, which provides:

> 1271. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
> (a) The writing was made in the regular course of a business;
> (b) The writing was made at or near the time of the act, condition, or event;
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

For purposes of this provision, "business" is broadly defined to include "every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not." Evid. Code § 1270.

Although the statute does not expressly require as much, the person who made the record must have had a business duty to observe and report the information. This is known as the business duty rule. "[I]f the evidence in the particular case discloses that the record was not based upon the report of an informant having the business duty to observe and report, then the record is not admissible under this exception, to show the truth of the matter reported." Evid. Code § 1271 Comment (internal quotation marks omitted); see also Méndez Hearsay Analysis at 19-20.

Federal Approach

The federal hearsay exception for a business record is Federal Rule of Evidence 803(6), which provides:

> 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> ….
> (6) **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, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Like the California provision, Rule 803(6) does not explicitly incorporate the business duty rule. But it is clear from the Advisory Committee's Note that a business duty is required; the person making the record must do so "under a duty of accuracy." See Méndez Hearsay Analysis at 19-20.

Basis for the Business Records Exception

The element of unusual reliability justifying a hearsay exception for business records "is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." Fed. R. Evid. 803 advisory committee's note. Of these justifications, perhaps the most persuasive is the reliance concept, the notion that "records that a business makes and relies upon are likely to be reliable in that the business would suffer if such documents were inaccurate." E. Scallen & G. Weissenberger, California Evidence: Courtroom Manual 1117 (2000).

A further rationale for the business records exception "is one of necessity; this exception avoids the problem of bringing in to court all of the individuals who have contributed to the making of a routine business document." *Id*. Under common law, the requirement of producing every witness who was involved in the production of a business record "had evolved as a burdensome and crippling aspect of using records of this type." Fed. R. Evid. 803 advisory committee's note. The business records exception was developed as a means of alleviating this problem. *Id*.

Multiple Hearsay

The introduction of a business record often involves issues of hearsay within hearsay. For example, a business record created by an employee pursuant to a business duty might reiterate a statement made to the employee by a nonemployee (e.g., a veterinary record saying that the owner of an injured animal reported that Teenager X deliberately struck the animal with a baseball bat). The nonemployee had no business duty to accurately report such an event, so the business records exception could not be invoked to allow the nonemployee's statement to be used to show the truth of the nonemployee's assertion (i.e., that Teenager X deliberately struck the animal in question). But the business records exception could be a basis for using the record to show that the nonemployee *made the statement*, and some other hearsay exception (e.g., the hearsay exception for a prior inconsistent statement) might be a basis for *using the nonemployee's statement to establish the truth of the matter asserted*. Under both the Evidence Code and the Federal Rules of Evidence, hearsay within hearsay is not subject to a hearsay objection so long as each part of the combined statements satisfies an exception to the hearsay rule. Evid. Code § 1201; Fed. R. Evid. 805.

Distinctions Between the California Approach and the Federal Approach

Although the Evidence Code and the Federal Rules of Evidence treat multiple hearsay and the business duty rule similarly, there are a number of differences in the way they treat business records. These relate to (1) whether it is necessary to show that it was the regular practice of the business to prepare the record in question, (2) whether the proponent of the evidence must establish that the business record is trustworthy, (3) whether the exception applies to an opinion or diagnosis, (4) whether a business record must have been made by, or from information transmitted by, a "person with knowledge" to satisfy the exception, and (5) use of certain certification procedures. Each of these points is discussed below.

Regular Practice of the Business

Under Evidence Code Section 1271(a), a business record is not admissible unless it "was made in the regular course of a business." Federal Rule of Evidence 803(6) incorporates the same requirement, but also includes an additional requirement along the same lines. As Prof. Méndez points out, Rule 803(6) "requires the proponent to show that it was the *regular practice of the*

business to create the record, not just that it was created in the course of regularly conducted business activity." Méndez Hearsay Analysis at 18 (footnote omitted) (emphasis added).

Thus, in a California state court a "special report, or record of a nonrecurring act or event, may be received if it was made in the course of business or professional duty." 1 B. Witkin, California Evidence *Hearsay* § 231, at 949 (2000); see also Scallen & Weissenberger, *supra*, at 1119. For example, in a case decided just before the Evidence Code was adopted, the court invoked the business records exception to the hearsay rule as a basis for admitting a letter written by a mayor to the Real Estate Commissioner regarding installation of water facilities in a particular subdivision. *Carruth v. City of Madera*, 233 Cal. App. 2d 688, 694-95, 43 Cal. Rptr. 855 (1965). Such a letter would not be admissible as a business record in federal court, because it is a unique document, not an example of a record created by a business as a regular practice.

As originally introduced in Congress, the proposed federal rule on business records did not require a showing that the record was created by a business as a regular practice. The House of Representatives added that requirement while the bill was pending. The House Judiciary Committee explained that "the additional requirement … that it must have been the regular practice of a business to make the record is a *necessary further assurance of its trustworthiness*." H.R. Rep. No. 93-650, at __ (1973) (emphasis added).

Should such a requirement be added to Evidence Code Section 1271, to help ensure that evidence admitted pursuant to that provision is trustworthy? Before answering that question, it is important to consider a distinction between Section 1271 and Rule 803(6) concerning proof of trustworthiness.

Proof of Trustworthiness

Both the Evidence Code and the Federal Rules of Evidence "give the judge the power to exclude a record otherwise satisfying the foundational requirements [for the business records exception] if the judge determines that the sources of information used to create the record or the method and circumstances of preparation indicate lack of trustworthiness." Méndez Hearsay Analysis at 18. In California, the proponent of the evidence bears the burden of showing that the evidence is sufficiently trustworthy to warrant admission. Evid. Code § 1271 & Comment; see also Evid. Code § 405 Comment. In federal court, however, the

opponent of the evidence bears the burden of showing that the evidence is too untrustworthy to admit. Fed. R. Evid. 803(6) & advisory committee's note.

Thus, the Code is more cautious than the Rules with regard to proof that a record is trustworthy, but less cautious with regard to proof that a record was generated pursuant to a regular business practice. The Code's approach affords flexibility to admit a record that is generated in only one instance, provided there are sufficient indicia of reliability. The federal approach would not admit such a record, due to the lack of a regular business practice. By taking a firm position on records of this nature, the federal approach provides greater certainty than the California approach.

One could perhaps say that the federal requirement of a regular business practice serves as a proxy for the proof of trustworthiness that is required in California under Section 1271. As a commentator puts it, even though Section 1271 does not require proof that the record was generated pursuant to a regular business practice, "a showing of regularity will help to show the trustworthiness of the document, required under Section 1271; prudent counsel will provide such foundation where possible." Scallen & Weissenberger, *supra*, at 1119.

Which approach is preferable is debatable, and the staff does not have a strong view on the matter. If the Commission believes that one of the approaches is clearly superior to the other, it should act accordingly. A further option would be to amend Section 1271 to incorporate the federal requirement of a regular business practice, while retaining the current requirement of showing trustworthiness. If the Commission does not have a strong preference between these alternatives, we suggest **conforming Section 1271 to the federal approach, in the interest of uniformity.** That could be done by amending the provision along the following lines:

> **Evid. Code § 1271 (amended). Business record**
>
> SEC. ____. Section 1271 of the Evidence Code is amended to read:
>
> 1271. ~~Evidence~~ (a) Subject to subdivision (b), evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
>
> ~~(a)~~ (1) The writing was made in the regular course of a business;
>
> (2) It was the regular practice of that business to make the writing;
>
> ~~(b)~~ (3) The writing was made at or near the time of the act, condition, or event; and

~~(c)~~ (4) The custodian or other qualified witness testifies to its identity and the mode of its preparation~~; and~~.

~~(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness~~ (b) Evidence of a writing is inadmissible under this section if the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Comment. Section 1271 is amended to require the proponent of a business record to show that the record was prepared pursuant to a regular practice of the business. This conforms to the federal approach. See Fed. R. Evid. 803(6); H.R. Rep. No. 93-650, at __ (1973) ("the additional requirement … that it must have been the regular practice of a business to make the record is a necessary further assurance of its trustworthiness.").

Section 1271 is also amended to require the party opposing admission of a business record to show that the record is untrustworthy, instead of requiring the party proffering the record to show that the record is trustworthy. This conforms to the federal approach. See Fed. R. Evid. 803(6) & advisory committee's note.

Opinion or Diagnosis

The federal and California hearsay exceptions for a business record differ in their treatment of a business record that includes an opinion or diagnosis (e.g., a medical record). The federal and California approaches to this type of record are described below.

Federal Approach

Rule 803(6) applies to a "memorandum, report, record, or data compilation, in any form, of acts, events, conditions, *opinions, or diagnoses* …." (Emphasis added.) "[T]he rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries." Fed. R. Evid. 803 advisory committee's note. It is thus clear that in federal court a business record may satisfy the business records exception to the hearsay rule even if it includes an opinion or diagnosis.

This does not mean, however, that every opinion or diagnosis in a business record is admissible. "The fact that Federal Rule of Evidence 803(6) includes 'opinions' and 'diagnoses' among the matters that are admissible in business records does not mean that in fact they must be admitted in a given record." Méndez Hearsay Analysis (as corrected Oct. 2003), at 19 n.137.

Rather, whether a particular opinion in a business record is admissible "depends in the first instance on whether it would be admissible through the hearsay declarant if the declarant testified at the hearing." *Id*. at 19. "[N]othing in the exception for business records favors or disfavors opinions." *Id*.

Thus, the opinion of a lay witness in a business record, like the opinion of a lay witness testifying in court, would generally be inadmissible "unless the opinion is rationally based on the witness's perception and is helpful to a clear understanding of the witness's testimony. " *Id*. For example, an opinion that "the child was running fast" or "the man was standing close to the desk" would be admissible in a business record, just as it would be if a lay witness testified to it on the stand. B. Witkin, *supra*, *Opinion Evidence* § 10, at 539-40.

Likewise, the opinion of an expert witness in a business record would be admissible only if it satisfies the requirements for admission of an expert's opinion in court. The expert must be qualified to give the opinion and the factfinder must need the opinion for purposes of resolving important factual issues. Fed. R. Evid. 702; Méndez Hearsay Analysis at 19.

California Approach

California's approach to an opinion or diagnosis in a business record is more restrictive than the federal approach. Section 1271 applies to "[e]vidence of a writing made as a record of an *act, condition, or event* …." (Emphasis added.) Under this approach, "[o]pinions in business records should be limited to readily observable acts, events, or conditions." Méndez Hearsay Analysis at 19.

As the California Supreme Court recently explained, "to be admissible under the business records exception, the evidence '… must be a record of an act, condition or event; a conclusion is neither an act, condition or event; it may or may not be based upon conditions, acts or events observed by the person drawing the conclusion ….'" *People v. Beeler*, 9 Cal. 4th 953, 980, 39 Cal. Rptr. 2d 607, 891 P.2d 153 (1995), *quoting People v. Terrell*, 138 Cal. App. 2d 35, 57, 291 P.2d 155 (1955). But "'some diagnoses are a statement of a fact or a condition, for example, a diagnosis that a man has suffered a compound fracture of the femur is a record of what the person making the diagnosis has seen but this is not true where the diagnosis is but the reasoning of the person making it arrived at from the consideration of many different factors.'" *Beeler*, 9 Cal. 4th at 980-81, *quoting Terrell*, 138 Cal. App. 2d at 58.

For instance, in *People v. Reyes*, 12 Cal. 3d 486, 502-04, 526 P.2d 225, 116 Cal. Rptr. 217 (1974), the Court upheld the exclusion of a diagnosis of "Alcoholism with sexual psychopathy" in a psychiatric report, because the diagnosis was "based upon the thought process of the psychiatrist expressing the conclusion." Similarly, the exclusion of psychiatric records on hearsay grounds was upheld in *People v. Young*, 189 Cal. App. 3d 891, 912, 234 Cal. Rptr. 819 (1987). The court explained that "psychiatric records "tend to be opinions, rather than the record 'of an act, condition or event' which is admissible under Evidence Code section 1271." *Id*. Along the same lines, a probation report "d[id] not qualify as a business or official record" in *People v. Campos*, 32 Cal. App. 4th 304, 307-08, 38 Cal. Rptr. 2d 113 (1995), and a doctor's opinion regarding the cause of a patient's headaches constituted inadmissible hearsay in *Godfrey v. Steinpress,* 128 Cal. App. 3d 154, 184, 180 Cal. Rptr. 95 (1982).

Comparison of the Federal and California Approaches

Both the federal approach and the California approach to a diagnosis or opinion in a business record have advantages and disadvantages. An advantage of the federal approach is simplicity. The standard for admitting an opinion in a business record is the same as the standard for admitting an opinion of a testifying witness; cases concerning opinion testimony can serve as guidance in deciding whether to admit an opinion in a business record. In contrast, application of the California provision requires assessment of whether an opinion in a business record amounts to "a record of an act, condition or event." That is different from the standard for admission of opinion testimony, so case law regarding admission of opinion testimony is of limited use in determining whether to admit an opinion in a business record.

A benefit of the California approach is that it helps to preclude admission of hearsay evidence where it might be useful to be able to cross-examine the declarant. For example, excluding a diagnosis like the one in the psychiatric record in *Reyes* provides an incentive to call the psychiatrist to testify to the diagnosis. That would afford the opposing party an opportunity to cross-examine the psychiatrist regarding the diagnosis.

Prof. Méndez regards this as a key reason for retaining the California approach:

> It seems to me that findings drawn by experts as a result of investigations or hearings should be subjected to cross-

> examination. The expert should be required to appear to be cross-examined on his or her qualifications and the methodology used to reach the "finding" or opinion. *Reyes* gives the California opponent an opportunity to make this case.

Email from M. Méndez to B. Gaal (Oct. 9, 2003). Prof. Méndez further explains that the California approach "offers a limiting principle that appears to be sound, especially if my hunch is right: parties do not approach opinions in records with the same skepticism they show when the expert is called to testify by the opposing party." *Id*. He cautions that the "magic of business and official records should not mislead parties about the admissibility of opinion found in those records." *Id*.

Of course, the California approach may also result in exclusion of relevant evidence, hampering the factfinder's search for the truth. That is less likely to happen under the federal approach. For instance, suppose the psychiatrist who made the diagnosis in *Reyes* is unavailable to testify, but evidence that the psychiatrist was qualified to render such a diagnosis is at hand. As we understand the rules, the diagnosis in the psychiatric record would be admissible in federal court, but not in state court.

We leave it to the Commission to resolve which approach is better policy, although we are inclined to agree with Prof. Méndez that the caution inherent in the California approach is desirable. If the Commission prefers the federal approach, or does not have a clear preference, we suggest conforming Section 1271 to the federal approach, in the interest of uniformity. That could be done by amending the provision along the following lines:

> **Evid. Code § 1271 (amended). Business record**
>
> SEC. ____. Section 1271 of the Evidence Code is amended to read:
>
> 1271. Evidence of a writing made as a record of an act, condition, ~~or~~ event, opinion, or diagnosis is not made inadmissible by the hearsay rule when offered to prove the act, condition, ~~or~~ event, opinion, or diagnosis if:
>
> (a) The writing was made in the regular course of a business;
>
> (b) The writing was made at or near the time of the act, condition, ~~or~~ event, opinion, or diagnosis;
>
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
>
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

> **Comment.** Section 1271 is amended to apply to an opinion or a diagnosis in a business record. This conforms to the federal approach. See Fed. R. Evid. 803(6) & advisory committee's note. Under the provision as amended, whether a particular opinion in a business record is admissible depends on whether it would be admissible through the hearsay declarant if the declarant testified in court. For the basic requirements for admission of an opinion of a lay witness, see Section 800 & Comment. For the basic requirements for admission of an opinion of an expert witness, see Section 801 & Comment.

Record Made By, or From Information Transmitted By, a "Person with Knowledge"

Rule 803(6) applies to 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* …. (Emphasis added.) The Senate Judiciary Committee offered the following explanation of this requirement:

> It is the understanding of the committee that the use of the phrase "person with knowledge" is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record, or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of a computer printout, upon a report from the company's computer programmer or one who has knowledge of the particular record system. In short, the scope of the phrase "person with knowledge" is meant to be coterminous with the custodian of the evidence or other qualified witness. The committee believes this represents the desired rule in light of the complex nature of modern business organizations.

S. Rep. No. 93-1277, at __ (1974).

The text of the corresponding California provision includes no language comparable to the federal reference to a "person with knowledge." But the Comment to Section 1271 explains:

> "The chief foundation of the special reliability of business records is the requirement that they must be based upon the *first-hand observation* of someone whose job it is to know the facts recorded.… But if the evidence in the particular case discloses that the record was not based upon the report of an informant having the business duty to observe and report, then the record is not admissible under this exception, to show the truth of the matter reporter to the recorder." [Citations omitted.]
>
> Applying this standard, the cases have rejected a variety of business records on the ground that they were *not based on the personal knowledge* of the recorder or of someone with a business duty to report to the recorder. Police and accident and arrest reports are usually held inadmissible because they are based on the narrations of persons who have no business duty to report to the police. [Citations omitted.] They are admissible, however, to prove the fact of the arrest. [Citation omitted.] Similar investigative reports on the origin of fires have been held inadmissible because they were *not based on personal knowledge*. [Citation omitted.]
>
> Section 1271 will continue the law developed in these cases that a business report is admissible *only if the sources of information and the time and method of preparation are such as to indicate its trustworthiness.*

(Emphasis added.)

The Comment essentially indicates that a business record will not be sufficiently trustworthy to satisfy the requirements of Section 1271(d) unless it was prepared by, or from information transmitted by, a person with firsthand knowledge of the matters recorded. As Justice Jefferson explains in his well-known treatise:

> One important test to determine the reliability of the sources of information for a business record is whether the facts in the written record are based on the personal knowledge of the recorder or writer as the owner or employee of the business, or on the personal knowledge of some other employee of the business who has a business duty to observe facts accurately and report them accurately to the recorder-employee who makes the entries in the record. *Generally, if this is not the case, the business record involved is not considered trustworthy hearsay and is not admissible under the business-records exception to the hearsay rule.*

1 Jefferson's California Evidence Benchbook, *Business Records* § 4.9, at 115 (3d ed. 2003) (hereafter, "Jefferson"); *see also* E. Imwinkelried & T. Hallahan, Imwinkelried and Hallahan's California Evidence Code Annotated 239 (1995)

("when the record indicates that the source lacked personal knowledge, the California cases tend to exclude the exhibit as unreliable under § 1271(d).").

Although the result is generally the same under the federal approach and the California approach, the clarity of the federal approach regarding the requirement of personal knowledge is preferable to the less explicit California provision. **Section 1271 should be amended to expressly require a showing that the business record was made by, or from information transmitted by, a person with personal knowledge of the acts, events, or conditions recorded.** That could be accomplished by amending the provision along the following lines:

> **Evid. Code § 1271 (amended). Business record**
>
> SEC. ____. Section 1271 of the Evidence Code is amended to read:
>
> 1271. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
>
> (a) The writing was made in the regular course of a business;
>
> (b) The writing was made at or near the time of the act, condition, or event;
>
> (c) The writing was made by, or from information transmitted by, a person with personal knowledge of the acts, events, or conditions recorded.
>
> (d) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
>
> ~~(d)~~ (e) The sources of information and method and time of preparation were such as to indicate its trustworthiness.
>
> **Comment.** Section 1271 is amended to make clear that a business record is admissible under this hearsay exception only if it was made by, or from information transmitted by, a person with firsthand knowledge of the acts, events, or conditions recorded. This conforms to the federal approach. See Fed. R. Evid. 803(6); see also S. Rep. No. 93-1277, at __ (1974) (party proffering business record need not produce, or even identify, each individual upon whose firsthand knowledge record was based; party need only show that it was regular practice of business to base such records on transmission from person with knowledge). The amendment is also consistent with existing interpretations of the statute. See Section 1271 Comment (1965); see also 1 Jefferson's California Evidence Benchbook, *Business Records* § 4.9, at 115 (3d ed. 2003); E. Imwinkelried & T. Hallahan, Imwinkelried and Hallahan's California Evidence Code Annotated 239 (1995).

Such a revision would be particularly important if the Commission decides to switch the burden of proof regarding trustworthiness to the party opposing introduction of the business record, as discussed under "Trustworthiness" *supra*.

Certification

Under Rule 803(6), the requirements for admission of a business record are to be "shown by the testimony of the custodian or other qualified witness, *or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification* …." (Emphasis added.) Unlike the federal rule, Section 1271 does not mention any exceptions to the requirement that the custodian or other qualified witness testify to identity and mode of preparation of the business record. But there are a number of circumstances in which a business record can be used without such testimony. See Sections 712, 1560-1566, 1567; Méndez Hearsay Analysis at 18 & n. 131. **The distinctions between the federal and the California procedures are beyond the scope of this memorandum on hearsay issues, but we plan to address them later in this study.**

ABSENCE OF A BUSINESS RECORD OR AN ENTRY IN A BUSINESS RECORD

"Just as entries in business records may be used to prove the occurrence of an act or event, or the existence of a condition, the absence of such entries may be offered to prove their nonoccurrence or nonexistence." Méndez Hearsay Analysis at 20. "Technically, evidence of the absence of a record may not be hearsay." Evid. Code § 1272 Comment; Méndez Hearsay Analysis at 20. Nonetheless, to eliminate any uncertainty about the matter, "the Law Revision Commission and the framers of the Federal Rules opted for creating a hearsay exception for the absence of entries." *Id.*; see Evid. Code § 1272 & Comment; Fed. R. Evid. 803(7) & advisory committee's note.

California Approach

The California provision is Evidence Code Section 1272, which provides:

> 1272. Evidence of the absence from the records of a business of a record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the nonoccurrence of the act or event, or the nonexistence of the condition, if:

(a) It was the regular course of that business to make records of all such acts, conditions, or events at or near the time of the act, condition, or event and to preserve them; and

(b) The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist.

Federal Approach

The corresponding federal provision is Federal Rule of Evidence 803(7), which states:

> 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ….
>
> (7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

Distinctions Between the California Approach and the Federal Approach

The most obvious difference between the California and federal provisions on absence of a business record concerns proof of trustworthiness. As with the hearsay exception for a business record, in California it is the proponent of the evidence who must show that the "sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event *is a trustworthy indication* that the act or event did not occur or the condition did not exist." Evid. Code § 1272(b) (emphasis added). In contrast, under the federal provision evidence of the absence of a business record is admissible "*unless* the sources of information or other circumstances *indicate lack of trustworthiness*." Fed. R. Evid. 803(7) (emphasis added).

Two other distinctions between the California and federal provisions on absence of a business record stem from incorporation in Rule 803(7) of the requirements stated in Rule 803(6) for preparation of a business record. By virtue

of that incorporation, Rule 803(7) extends to evidence of the absence of an opinion or diagnosis, whereas Section 1272 pertains only to nonoccurrence of an act or event, or nonexistence of a condition. Similarly, because it incorporates the requirements of Rule 803(6), Rule 803(7) calls for a showing that the recordkeeping system in question consisted of records made by, or from information transmitted by, a "person with knowledge." Section 1272 does not expressly require such a showing.

Each of these distinctions — (1) proof of trustworthiness, (2) application to an opinion or diagnosis, and (3) proof that a record was made by, or from information transmitted by, a "person with knowledge" — was previously discussed in the context of the hearsay exception for a business record. **Whatever approach the Commission adopts in that context should also be used in the provision on absence of a business record or an entry in a business record** (Evid. Code § 1272).

Proof of the Absence of a Business Record or Entry in a Business Record By Affidavit

As mentioned in the discussion of "Certification," Evidence Code Sections 1560-1566 set forth a procedure for subpoenaing and using a business record without requiring the custodian of the record to testify in person. The text of those provisions is attached as Exhibit pages 1-5 . The procedure may be used in either a civil or a criminal case. Evid. Code § 1560(b). When a person produces business records pursuant to this procedure, the records must be accompanied by an affidavit executed by the custodian of the records or other qualified witness, attesting to the authenticity of the records, affirming that the records were "prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event," and describing the mode of preparation of the records. Evid. Code § 1561(a). If the business has none of the records described in the subpoena, or only some of those records, "the custodian or other qualified witness shall so state in the affidavit, and deliver the affidavit and those records that are available in one of the manners provided in Section 1560." Evid. Code § 1561(b).

Evidence Code Section 1562 provides for admissibility of business records produced in accordance with this procedure:

> 1562. If the original records would be admissible in evidence if the custodian or other qualified witness had been present and

> testified to the matters stated in the affidavit, and if the requirements of Section 1271 have been met, the copy of the records is admissible in evidence. The affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the matters so stated are presumed true. When more than one person has knowledge of the facts, more than one affidavit may be made. The presumption established by this section is a presumption affecting the burden of producing evidence.

This provision makes clear that such records are not admissible unless they satisfy the requirements of the hearsay exception for a business record (Section 1271). What is unclear, however, is whether the provision is a basis for admitting evidence of the *absence* of a business record or an entry in a business record.

Further, the hearsay exception for absence of a business record or an entry in a business record (Section 1272) is also ambiguous on this point: It "does not … specify in what form evidence of the absence may be admitted; for example, by testimony of a witness, by the admission of the records, or by affidavit." *People v. Dickinson*, 59 Cal. App. 3d 314, 319, 130 Cal. Rptr. 561 (1976) (footnote omitted). In contrast, Uniform Rule of Evidence 803(7) expressly permits use of statutory certification procedures to prove the absence of an entry in a business record. A treatise on California law reports that there is "no known case" expressly holding that evidence of the absence of a business record can be by affidavit. W. Wegner, R. Fairbank & N. Epstein, California Practice Guide: Civil Trials and Evidence, *Evidence* ¶ 8:1664 (Rutter Group, 2002). Moreover, affidavits ordinarily may not be used in evidence unless permitted by statute. *Dickinson*, 59 Cal. App. 3d at 319.

In fact, when the court of appeal in *Dickinson* considered the admissibility of a custodian's affidavit regarding the absence of a business record, it concluded that "in criminal proceedings such evidence would violate the defendant's right to confront witnesses against him guaranteed by the Sixth Amendment of the federal Constitution and by article I, section 15, of the California Constitution." *Id*. That assertion seems overbroad, however, because it overlooks the possibility that the defendant might proffer such an affidavit in a criminal case, rather than the prosecution. In addition, *Dickinson* predates *Ohio v. Roberts*, 448 U.S. 56 (1980), in which the United States Supreme Court determined that introduction of hearsay evidence against a criminal defendant does not violate the constitutional right of confrontation if either (1) the declarant is unavailable to testify and the hearsay statement has sufficient "indicia of reliability," *id*. at 65-66, or (2) the declarant is available but calling and cross-examining the declarant is unlikely to

further the search for the truth, *id*. at 65 n.7; *see also* McLain, *Self-Authentication of Certified Copies of Business Records*, 24 U. Balt. L. Rev. 27, 63 & n. 159 (1994).

Thus, we would not wholly preclude use of the affidavit procedure set forth in Sections 1560-1566 to prove the absence of a business record in a criminal case. Rather, we suggest amending Section 1562 to make clear that subject to the constitutional right of confrontation, an affidavit complying with Section 1561 may be used to prove the absence of a business record (not just the existence or content of a business record) in either a criminal or a civil case. Specifically, we suggest that **Section 1562 be amended along the following lines:**

> **Evid. Code § 1562 (amended). Admissibility of affidavit of custodian or other qualified witness**
>
> SEC. ____. Section 1562 of the Evidence Code is amended to read:
>
> 1562. ~~If~~ (a) If (i) a copy of a business record is produced under Section 1560 together with an affidavit complying with Section 1561, (ii) the requirements of Section 1271 have been met, and (iii) the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, ~~and if the requirements of Section 1271 have been met,~~ the copy of the records is admissible in evidence. The affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the matters so stated are presumed true.
>
> (b) If (i) an affidavit under Section 1561 states that the business has none of the records described, or only part thereof, and (ii) the requirements of Section 1272 have been met, the affidavit is admissible as evidence of the absence of the records sought and the matters stated in it are presumed true.
>
> (c) When more than one person has knowledge of the facts, more than one affidavit under Section 1561 may be made. ~~The~~
>
> (d) Each presumption established by this section is a presumption affecting the burden of producing evidence.
>
> **Comment.** Section 1562 is amended to make clear that an affidavit of a custodian or other qualified witness under Section 1561 may be used to prove the absence of a business record or entry therein, not just the existence or content of a business record. For a similar rule, see Unif. R. Evid. 803(7) & Comment.
>
> Importantly, however, such an affidavit is not admissible if its use would violate a criminal defendant's state or federal constitutional right to cross-examine the prosecution witnesses. See U.S. Const. amend. VI; Cal. Const. art. I, § 15; People v. Dickinson, 59 Cal. App. 3d 314, 318-20, 130 Cal. Rptr. 561 (1976) ("in criminal

proceedings such evidence would violate the defendant's right to confront witnesses against him guaranteed by the Sixth Amendment of the federal Constitution and by article I, section 15, of the California Constitution"); but see Ohio v. Roberts, 448 U.S. 56, 65-66 & n.7 (1980) (hearsay evidence against criminal defendant does not violate constitutional right of confrontation if declarant is unavailable to testify and hearsay statement has sufficient "indicia of reliability" or declarant is available but calling and cross-examining declarant is unlikely to further search for truth); see also People v. Aguilar, 16 Cal. App. 3d 1001, 94 Cal. Rptr. 492 (1971) (admission of business records did not violate defendant's constitutional right of confrontation); People v. Gambos, 5 Cal. App. 3d 187, 194, 84 Cal. Rptr. 908 (1970) (Sections 1270-1272 "*when properly applied* are without constitutional fault") (emphasis in original).

OFFICIAL RECORD

Both the Evidence Code and the Federal Rules of Evidence include a hearsay exception for an official record (i.e., a record made by a public employee in the scope of employment). These exceptions are grounded on the assumption that a public employee properly performs official duties as assigned, and the "unlikelihood" that such an employee will remember details independently of the record. Fed. R. Evid. 803 advisory committee's note. In addition, "public functions could not be conveniently performed if officers and deputies were constantly called as witnesses to testify to the matters covered by official records." B. Witkin, *supra*, *Hearsay* § 244, at 962.

"Although the Code and the Rules create a hearsay exception for official records, each takes a radically different approach to their admissibility." Méndez Hearsay Analysis at 20. The Uniform Rules of Evidence provide a third variation. The text of these provisions is set out below, followed by an analysis of the differences among them.

California Approach

California's hearsay exception for an official record is Evidence Code Section 1280, which provides:

> 1280. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:

(a) The writing was made by and within the scope of duty of a public employee.

(b) The writing was made at or near the time of the act, condition, or event.

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

This provision is quite similar to California's hearsay exception for a business record (Section 1271).

Federal Approach

The federal hearsay exception for an official record is more complicated than the corresponding California provision. It divides official records into three categories: (1) a record of the activities of a public entity, (2) a record of matters observed and recorded pursuant to a public duty, and (3) a "factual finding" resulting from an official investigation. Each category is treated differently:

> 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ….
>
> (8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Thus, a record of the *activities of a public entity* is exempt from the hearsay rule, unless it is shown to be untrustworthy. A record of *matters observed and recorded pursuant to a public duty* is also exempt from the hearsay rule, unless it is shown to be untrustworthy. But this rule is subject to an exception: A record of matters observed by a law enforcement officer is not exempt from the hearsay rule in a criminal case. "Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases." S. Rep. No. 93-1277, at __ (1974).

Finally, a record of a *"factual finding" resulting from an official investigation* is exempt from the hearsay rule, unless it is shown to be untrustworthy. But this is only true in a civil case or if the defendant proffers the record in a criminal case. If the prosecution proffers the record in a criminal case, it is inadmissible hearsay.

Uniform Rule of Evidence

Uniform Rule of Evidence 803(8) provides yet another, even more complex, model:

> RULE 803. HEARSAY EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL. The following are not excluded by the hearsay rule, even if the declarant is available as a witness:
>
> ….
>
> (8) **Record or report of public office.** Unless the sources of information or other circumstances indicate lack of trustworthiness, a record of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:
>
> (A) an investigative report by police and other law enforcement personnel, except when offered by an accused in a criminal case;
>
> (B) an investigative report prepared by or for a government, public office, or agency when offered by it in a case in which it is a party;
>
> (C) factual findings offered by the government in criminal cases; and
>
> (D) factual findings resulting from special investigation of a particular complaint, case, or incident, unless offered by an accused in a criminal case.

This provision establishes a general proposition that the hearsay rule is inapplicable to a record of a public entity setting forth its regularly conducted and recorded activities, matters observed and recorded pursuant to a public duty, or factual findings resulting from an official investigation. The general proposition does not apply, however, if the record is shown to be untrustworthy, or if the record falls in one of the four categories listed in Rule 803(8)(A)-(D), two of which — (A) and (D) — are subject to their own exceptions.

Application to a Criminal Case

The federal hearsay exception for an official record limits the admissibility of such a record in a criminal case, while the corresponding California exception does not. Specifically, under Rule 803(8)(B), a record of matters observed by a law enforcement officer is inadmissible hearsay in a criminal case. Under Rule 803(8)(C), a record of a "factual finding" resulting from an official investigation is inadmissible hearsay if offered against the accused in a criminal case. According to the House Judiciary Committee, this limitation is appropriate "in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case." H.R. Rep. No. 93-650, at __ (1973). Uniform Rule of Evidence 803(8) incorporates similar but not identical limitations.

In contrast, Section 1280 "is devoid of any language limiting the use of the records when offered against the accused." Méndez Hearsay Analysis at 22. In fact, the provision was amended in 1996 to make explicit that it applies "in any civil or criminal proceeding." 1996 Cal. Stat. ch. 642, § 4.

This does not mean, however, that the provision conflicts with the federal or state constitutional right of confrontation. All Section 1280 does is to *preclude a hearsay objection* to evidence of an official record. The defendant can still object to the evidence on other grounds, such as the federal or state constitutional right of confrontation.

Thus, under the California approach, evidence of an official record is inadmissible against the defendant in a criminal case if admission of the evidence would violate the defendant's federal or state constitutional right of confrontation and the defendant objects on that basis. Under the federal approach, evidence of an official record would also be inadmissible in those circumstances, *but would in addition be inadmissible under the hearsay rule* (Fed. R. Evid. 802) if the defendant objected on that basis and the record was a record of matters observed by a law enforcement officer or a record of a "factual finding" resulting from an official investigation. Moreover, such evidence might be inadmissible under the hearsay rule *even though it does not violate* the defendant's federal or state constitutional right of confrontation. For example, the use of hearsay evidence against a criminal defendant is permissible under the federal Confrontation Clause if the declarant is unavailable to testify and the hearsay statement has sufficient "indicia of reliability." *Ohio v. Roberts*, 448 U.S. at 65-66 & n.7. But Rule 803(8)(B)-(C) establish a flat ban on use of specified records against

the defendant in a criminal case, regardless of whether the declarant is unavailable to testify and the hearsay statement has sufficient "indicia of reliability."

In short, the California approach tracks the limitations of the federal and state constitutional rights of confrontation, while the federal approach creates an additional barrier to admissibility of some official records against the defendant in a criminal case. Because the purpose of that additional barrier is to protect against "collision with confrontation rights," Fed. R. Evid. 803 advisory committee's note, we are not convinced it is necessary. We would **retain the current California approach on this point, instead of revising Section 1280 to limit its applicability in a criminal case.**

Conclusion or Opinion

A second important distinction between the federal and the California approaches to official records is that "the Rules expand the admissibility of reports containing opinions in civil cases and in criminal cases when offered against the government." Méndez Hearsay Analysis at 21. In particular, Rule 803(8)(C), creating a hearsay exception for a record of a "factual finding" resulting from an official investigation, encompasses a conclusion or opinion based on a factual investigation. The United States Supreme Court made this clear in a case involving a report on an airplane crash, which described the facts of the incident in detail and indicated that pilot error was the most likely cause of the crash. The Court held that

> portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report.

Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 170 (1988) (footnote omitted).

In contrast, Section 1280 refers to "a record of an act, condition, or event." That is the same language as in the hearsay exception for a business record (Section 1271). As in that context, it seems likely that the California Supreme Court would "favor a rule limiting opinions in records to readily observable acts, events, or conditions." Méndez Hearsay Analysis at 24; *see generally People v. Martinez*, 22 Cal. 4th 106. 137, 990 P.2d 563, 91 Cal. Rptr. 2d 687 (2000) (noting that report admitted under Section 1280 included no information reflecting

opinion or conclusion of reporting employees); *Ellsworth v. Beech Aircraft Corp.*, 37 Cal. 3d 540, 553, 208 Cal. Rptr. 874, 691 P.2d 630 (1984) (trial court properly excluded untrustworthy official record including opinion); *Reyes*, 12 Cal. 3d at 502-04 (exclusion of a diagnosis in business record was proper because diagnosis was "based upon the thought process of the psychiatrist expressing the conclusion"); *People v. Campos*, 32 Cal. App. 4th 304, 307-08, 38 Cal. Rptr. 2d 113 (1995) (exclusion of probation report was proper for same reasons as in *Reyes*); *People v. Dunlap*, 16 Cal. App. 4th 204, 223 Cal. Rptr. 2d 204 (1993) (same as *Martinez*); *but see In re Jacqueline H.*, 94 Cal. App. 3d 808, 815, 156 Cal. Rptr. 765 (1979) (inclusion of conclusions and opinions in official record does not affect admissibility); *People v. Flaxman*, 74 Cal. App. 3d Supp. 16, 20, 141 Cal. Rptr. 799 (1977) ("inclusion of conclusions and opinions in a record does not render it inadmissible per se").

The pros and cons of extending the official records exception to a conclusion or an opinion (other than an opinion regarding a readily observable matter, such as whether it is a hot day) are much the same as the pros and cons of extending the business records exception to such evidence. See the discussion of "Opinion or Diagnosis" *supra*. As in that context, Prof. Méndez recommends sticking with the current California approach. Email from M. Méndez to B. Gaal (Oct. 9, 2003). We tend to agree, but it is up to the Commission to weigh the competing policy considerations. It seems advisable, however, to **take the same approach in this context as in the context of a business record.** We do not discern a convincing justification for differentiating between the two contexts.

Proof of Trustworthiness

As with the business records exception, the Evidence Code and the Federal Rules of Evidence take different approaches with regard to proof that an official record is trustworthy. In California, the party proffering an official record bears the burden of showing that the record is sufficiently trustworthy to warrant admission. Evid. Code § 1280(c) & Comment; see also Evid. Code § 405 Comment. In federal court, however, the opponent of the evidence bears the burden of showing that the evidence is too untrustworthy to admit. Fed. R. Evid. 803(8).

An earlier section of this memorandum discusses whether to revise the business records exception to track the federal approach on this point. See "Proof

of Trustworthiness" under "Business Record" *supra*. There are similarities but also important differences between the two contexts.

In particular, "Section 1271 requires a witness to testify as to the identity of the record and its mode of preparation in every instance." Evid. Code § 1280 Comment. In contrast, Section 1280 "permits the court to admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation if the court takes judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness." *Id.*; *see also* Jefferson, *supra*, *Official Records and Writings* § 5.3, at 130-31.

Further, Evidence Code Section 664 establishes a presumption that an official duty "has been regularly performed." This presumption affects the burden of proof, "meaning that the party against whom it operates … has 'the burden of proof as to the nonexistence of the presumed fact.'" *Martinez*, 22 Cal. 4th at 125, *quoting* Evid. Code § 606. "California courts have applied this presumption in finding that proffered evidence satisfies the foundational requirements of the official records exception." *Martinez*, 22 Cal. 4th at 125. This helps ease the admissibility of an official record under the official records exception to the hearsay rule. *See, e.g.*, *id.* at 126 (CLETS printout satisfied first requirement of official records exception because it is presumed that official duties were properly performed and defendant offered no contrary evidence).

Thus, the California requirements for admission of an official record are less rigorous than the requirements for admission of a business record. Regardless of what the Commission decides to do in the context of a business record, **it seems inadvisable to relax the burden of proof regarding trustworthiness of an official record.** Section 1280 should be left as, instead of being conformed to the federal approach in this regard.

Overlap of the Hearsay Exceptions for a Business Record and an Official Record

Under the Federal Rules of Evidence and the Uniform Rules of Evidence, the hearsay exception for official records is narrower in some respects than the hearsay exception for business records. That creates an issue of whether a record that fails to satisfy the requirements of the official records exception (e.g., a report of a police officer's observations, offered in a criminal case) would nonetheless be

admissible under the business records exception. See Friedenthal Analysis at 61; Méndez Analysis at 22.

The Uniform Rules of Evidence address this point: The business records exception expressly states that a "public record inadmissible under paragraph (8) [i.e., the official records exception] is inadmissible under this exception." Unif. R. Evid. 803(6) & Comment; Unif. R. Evid. 803(8) Comment. The Federal Rules of Evidence do not contain comparable language, so the courts have had to grapple with the issue, with varying results. *See, e.g.*, *United States v. Baker*, 855 F.2d 1353 (8th Cir. 1988); *United States v. Metzger*, 778 F.2d 1195, 1201-02 (1st Cir. 1985); *United States v. Yabakov*, 712 F.2d 20, 25-27 (2d Cir. 1983); *United States v. Cain*, 615 F.2d 380 (5th Cir. 1980); *United States v. King*, 613 F.2d 670 (7th Cir. 1980); *United States v. Oates*, 560 F.2d 45, 84 (2d Cir. 1977).

The same problem does not arise under California law, because the official records exception (Section 1280) is as broad as the business records exception (Section 1271), and in fact broader because it does not require a witness to testify in each instance. There is no need to invoke the business records exception instead of the official records exception. Moreover, it is clear that the business records exception is meant to extend to official records, because the definition of "business" includes every kind of governmental activity, whether carried on for profit or not. Evid. Code § 1270; *see also Fisk v. Department of Motor Vehicles*, 127 Cal. App. 3d 72, 79 n.1, 179 Cal. Rptr. 379 (1981).

Thus, California law adequately deals with the potential for overlap between the business records exception and the official records exception. **There is no need to make any changes in this regard,** unless for some reason the Commission proposes to make the official records exception narrower than the business records exception.

Record Made By, or From Information Transmitted By, a "Person with Knowledge"

As previously discussed, the federal exception for a business record specifies that the record must have been "made … by, or from information transmitted by, a person with knowledge …." Fed. R. Evid. 803(6). The federal exception for an official record does not include such language, although one of its three categories (Fed. R. Evid. 803(8)(B)) refers to "matters observed." The corresponding Uniform Rule is similar.

Likewise, the California exception for an official record does not expressly require that the record have been made by, or from information transmitted by, a person with firsthand knowledge of the matters recorded. But the "general tendency of the courts is to exclude matters that would not be permitted as testimony if the official were appearing personally." B. Witkin, *supra*, *Hearsay* § 249, at 968. "Although there is no express requirement of first-hand knowledge of the subject of the reports, a central element of trustworthiness is that the original source of the information must have personal knowledge of the event or condition described in the report, even if the maker of the public record does not." Scallen & Weissenberger, *supra*, at 1128.

Earlier in this memorandum, we suggested the possibility of amending the business records exception to expressly require a showing that the business record was made by, or from information transmitted by, a person with personal knowledge of the acts, events, or conditions recorded. See discussion of "Record Made By, or From Information Transmitted By, a "Person with Knowledge" under "Business Record" *supra*. **If the Commission takes that step, it would also be advisable to add such language to the official records exception,** to prevent an unintended inference that personal knowledge is unnecessary in that context. Section 1280 could be amended along the following lines:

> **Evid. Code § 1280 (amended). Official record**
>
> SEC. ____. Section 1280 of the Evidence Code is amended to read:
>
> 1280. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:
>
> (a) The writing was made by and within the scope of duty of a public employee.
>
> (b) The writing was made at or near the time of the act, condition, or event.
>
> (c) <u>The writing was made by, or from information transmitted by, a person with personal knowledge of the acts, events, or conditions recorded.</u>
>
> <u>(d)</u> The sources of information and method and time of preparation were such as to indicate its trustworthiness.
>
> **Comment.** Section 1280 is amended to make clear that an official record is admissible under this hearsay exception only if it was made by, or from information transmitted by, a person with firsthand knowledge of the acts, events, or conditions recorded. This is consistent with existing interpretations of the statute. See 1

B. Witkin, California Evidence *Hearsay* § 249, at 968 (2000); Scallen & G. Weissenberger, California Evidence: Courtroom Manual 1128 (2000); [insert additional cites]. See also Section 1271 & Comment (business record).

Regular Practice of the Public Entity

The federal exception for a business record also requires a showing that it was the "regular practice" of the business to make the type of record in question. Fed. R. Evid. 803(6). The federal exception for an official record does not include comparable language. Among the records covered under the corresponding Uniform Rule, however, are "a record of a public office or agency setting forth its *regularly conducted and regularly recorded* activities." Unif. R. Evid. 803(8) (emphasis added).

Like the federal rule, the California exception for an official record does not require a showing that the public entity maintained the record as a regular practice. Whether such a requirement is appropriate is debatable. See the discussions of "Regular Practice of the Business" and "Proof of Trustworthiness" under "Business Record" *supra*.

If the Commission decides to add such a requirement in the context of a business record, it should also look closely at the possibility of adding such a requirement in the context of an official record. There might, however, be persuasive reasons for treating the two contexts differently.

For example, one could argue that such a requirement is unnecessary with regard to an official record, because a record generated by a public servant warrants a greater degree of confidence than a record generated by a profit-motivated private entrepreneur. Or one could argue that a court should have greater flexibility to admit an official record than a business record, because the disruption of calling a public employee to testify is more harmful to the public than the disruption of calling a private individual to testify.

The Commission needs to assess the merits of these policy arguments and the ones discussed in connection with the business records exception. If the Commission decides that an official record should be admissible hearsay only if it is prepared pursuant to a regular practice, we suggest the following amendment of Section 1280:

Evid. Code § 1280 (amended). Official record

SEC. ____. Section 1280 of the Evidence Code is amended to read:

1280. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:

(a) The writing was made by and within the scope of duty of a public employee, pursuant to a regular practice.

(b) The writing was made at or near the time of the act, condition, or event.

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Comment. Section 1280 is amended to require the proponent of an official record to show that the record was prepared pursuant to a regular practice of the public entity that prepared the record. This requirement was drawn from Federal Rule of Evidence 803(6), which requires the proponent of a business record to show that the record was prepared pursuant to a regular practice of the business that prepared the record. [Insert cross-reference to Section 1271 (business record), if that provision is amended to conform to the federal approach.]

ABSENCE OF AN OFFICIAL RECORD OR AN ENTRY IN AN OFFICIAL RECORD

Both the Evidence Code and the Federal Rules of Evidence recognize a hearsay exception based on the absence of an official record. The provisions are similar but a few differences warrant discussion.

California Approach

The California provision is Evidence Code Section 1284, which provides:

> 1284. Evidence of a writing made by the public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record, is not made inadmissible by the hearsay rule when offered to prove the absence of a record in that office.

"The exception is justified by the likelihood that such a statement made by the custodian of the records is accurate and by the necessity for providing a simple and inexpensive method of proving the absence of a public record." Evid. Code § 1284 Comment. The writing made by the official custodian, attesting to the absence of the record, "must, of course, be properly authenticated." *Id.* Several

presumptions ease authentication of an official record: the presumption that an official seal is genuine and authorized (Evid. Code § 1452), the presumption that a signature of a domestic public employee is genuine and authorized (Evid. Code § 1453), and the presumption, under specified circumstances, that a signature of a foreign official is genuine and authorized (Evid. Code § 1454).

Federal Approach

The corresponding federal provision is Federal Rule of Evidence 803(10), which provides:

> 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ….
>
> (10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

Uniform Rule of Evidence 803(10) is essentially the same.

Unlike the California provision, Rule 803(10) expressly extends not only to proof of the absence of a record, but also to proof of the "nonoccurrence or nonexistence of a matter of which a record … was regularly made and preserved by a public office or agency …." In addition, the rule expressly permits the use of either a certificate or testimony, whereas the California provision "does not expressly authorize the use of testimony, but neither does it prohibit its use." Méndez Hearsay Analysis at 37.

Recommendation

Prof. Méndez recommends amending the California provision "to allow for the proof of the nonoccurrence of an event by the absence of an entry in a public record if such entries were regularly made and preserved by the public office." *Id*. at 38. The staff agrees that this would be a useful addition, and also recommends revising the statute to say that either testimony or a writing is acceptable. **We suggest an amendment along the following lines:**

Evid. Code § 1284 (amended). Absence of an official record

SEC. ____. Section 1284 of the Evidence Code is amended to read:

1284. Evidence of a writing made by the public employee who is the official custodian of the records in a public office, or testimony by the official custodian, reciting diligent search and failure to find a record, is not made inadmissible by the hearsay rule when offered to prove the absence of a record in that office, or the nonoccurrence or nonexistence of a matter of which a record was regularly made and preserved by the office.

Comment. Section 1284 is amended to make clear that it extends not only to proof of the absence of a record, but also to proof of the nonoccurrence or nonexistence of a matter that is regularly recorded and preserved by a public office. This conforms to the federal approach. See Fed. R. Evid. 803(10).

Section 1284 is also amended to make clear that either a writing or testimony of the official custodian is acceptable. This conforms to the federal approach. See Fed. R. Evid. 803(10).

"RECORD" TERMINOLOGY

In the Uniform Rules of Evidence, the hearsay exceptions for a business record, absence of a business record, an official record, and absence of an official record (Unif. R. Evid. 803(6), (7), (8), (10)) refer to a "record," rather than to a "writing" as in the California provisions for a business record and an official record (Evid. Code §§ 1271, 1280), or to a "memorandum, report, record, or data compilation, in any form," as in the corresponding federal provisions (Fed. R. Evid. 803(6), (7), (8), (10)). The use of "record" terminology was part of a comprehensive effort to revise the Uniform Rules of Evidence to reflect modern recordkeeping practices. See Unif. R. Evid. 101 Comment. In several other contexts, the Commission has considered whether to use that terminology in the Evidence Code, but has decided against it because the broad definition of "writing" in Evidence Code Section 250 seems sufficient to account for modern recordkeeping practices.

The staff recommends the same decision in this context. **Unless someone raises the issue, we do not plan to discuss it at the meeting or to mention it again in other contexts.**

IMPACT OF THE TRUTH-IN-EVIDENCE PROVISION

The Truth-in-Evidence provision of the California Constitution provides:

> (d) Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

Cal. Const. art. I, § 28(d). As the Commission has previously discussed, this provision probably will have an impact on a proposed hearsay reform only if the reform (1) narrows the admissibility of evidence, (2) was enacted by less than a two-thirds vote in the Assembly or Senate or both, and (3) is applied in a criminal case. Of the reforms discussed in this memorandum, the one most likely to be regarded as narrowing admissibility is the concept of revising the business records and official records exceptions to expressly require a showing that the record was prepared pursuant to a regular practice. The Commission should bear this in mind in determining whether to pursue that concept.

Respectfully submitted,

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Staff Counsel

Exhibit

PRODUCTION OF BUSINESS RECORDS (EVID. CODE §§ 1560-1566)

Evid. Code § 1560. Compliance with subpoena duces tecum for production of business records

1560. (a) As used in this article:

(1) "Business" includes every kind of business described in Section 1270.

(2) "Record" includes every kind of record maintained by a business.

(b) Except as provided in Section 1564, when a subpoena duces tecum is served upon the custodian of records or other qualified witness of a business in an action in which the business is neither a party nor the place where any cause of action is alleged to have arisen, and the subpoena requires the production of all or any part of the records of the business, it is sufficient compliance therewith if the custodian or other qualified witness, within five days after the receipt of the subpoena in any criminal action or within the time agreed upon by the party who served the subpoena and the custodian or other qualified witness, or within 15 days after the receipt of the subpoena in any civil action or within the time agreed upon by the party who served the subpoena and the custodian or other qualified witness, delivers by mail or otherwise a true, legible, and durable copy of all the records described in the subpoena to the clerk of the court or to the judge if there be no clerk or to another person described in subdivision (c) of Section 2026 of the Code of Civil Procedure, together with the affidavit described in Section 1561.

(c) The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness, and date of subpoena clearly inscribed thereon; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and directed as follows:

(1) If the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there be no clerk.

(2) If the subpoena directs attendance at a deposition, to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business.

(3) In other cases, to the officer, body, or tribunal conducting the hearing, at a like address.

(d) Unless the parties to the proceeding otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, officer, body, or

tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are original documents and which are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received. Records which are copies may be destroyed.

(e) As an alternative to the procedures described in subdivisions (b), (c), and (d), the subpoenaing party may direct the witness to make the records available for inspection or copying by the party's attorney, the attorney's representative, or deposition officer as described in paragraph (3) of subdivision (d) of Section 2020 of the Code of Civil Procedure, at the witness' business address under reasonable conditions during normal business hours. Normal business hours, as used in this subdivision, means those hours that the business of the witness is normally open for business to the public. When provided with at least five business days' advance notice by the party's attorney, attorney's representative, or deposition officer, the witness shall designate a time period of not less than six continuous hours on a date certain for copying of records subject to the subpoena by the party's attorney, attorney's representative or deposition officer. It shall be the responsibility of the attorney's representative to deliver any copy of the records as directed in the subpoena. Disobedience to the deposition subpoena issued pursuant to this subdivision is punishable as provided in subdivision (h) of Section 2020 of the Code of Civil Procedure.

Evid. Code § 1561. Affidavit of custodian or other qualified witness

1561. (a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

(1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records.

(2) The copy is a true copy of all the records described in the subpoena duces tecum, or pursuant to subdivision (e) of Section 1560 the records were delivered to the attorney, the attorney's representative, or deposition officer for copying at the custodian's or witness' place of business, as the case may be.

(3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.

(4) The identity of the records.

(5) A description of the mode of preparation of the records.

(b) If the business has none of the records described, or only part thereof, the custodian or other qualified witness shall so state in the affidavit, and deliver the affidavit and those records that are available in one of the manners provided in Section 1560.

(c) Where the records described in the subpoena were delivered to the attorney or his or her representative or deposition officer for copying at the custodian's or witness' place of business, in addition to the affidavit required by subdivision (a), the records shall be accompanied by an affidavit by the attorney or his or her

representative or deposition officer stating that the copy is a true copy of all the records delivered to the attorney or his or her representative or deposition officer for copying.

Evid. Code § 1562. Admissibility of affidavit and copy of records

1562. If the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, and if the requirements of Section 1271 have been met, the copy of the records is admissible in evidence. The affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the matters so stated are presumed true. When more than one person has knowledge of the facts, more than one affidavit may be made. The presumption established by this section is a presumption affecting the burden of producing evidence.

Evid. Code § 1563. Witness and mileage fee

1563. (a) This article shall not be interpreted to require tender or payment of more than one witness fee and one mileage fee or other charge, to a witness or witness' business, unless there is an agreement to the contrary between the witness and the requesting party.

(b) All reasonable costs incurred in a civil proceeding by any witness which is not a party with respect to the production of all or any part of business records the production of which is requested pursuant to a subpoena duces tecum may be charged against the party serving the subpoena duces tecum.

(1) " Reasonable cost," as used in this section, shall include, but not be limited to, the following specific costs: ten cents ($0.10) per page for standard reproduction of documents of a size 8 1/2 by 14 inches or less; twenty cents ($0.20) per page for copying of documents from microfilm; actual costs for the reproduction of oversize documents or the reproduction of documents requiring special processing which are made in response to a subpoena; reasonable clerical costs incurred in locating and making the records available to be billed at the maximum rate of twenty-four dollars ($24) per hour per person, computed on the basis of six dollars ($6) per quarter hour or fraction thereof; actual postage charges; and the actual cost, if any, charged to the witness by a third person for the retrieval and return of records held offsite by that third person.

(2) The requesting party, or the requesting party's deposition officer, shall not be required to pay those costs or any estimate thereof prior to the time the records are available for delivery pursuant to the subpoena, but the witness may demand payment of costs pursuant to this section simultaneous with actual delivery of the subpoenaed records, and until payment is made, is under no obligation to deliver the records.

(3) The witness shall submit an itemized statement for the costs to the requesting party, or the requesting party's deposition officer, setting forth the reproduction and clerical costs incurred by the witness. Should the costs exceed those

authorized in paragraph (1), or the witness refuses to produce an itemized statement of costs as required by paragraph (3), upon demand by the requesting party, or the requesting party's deposition officer, the witness shall furnish a statement setting forth the actions taken by the witness in justification of the costs.

(4) The requesting party may petition the court in which the action is pending to recover from the witness all or a part of the costs paid to the witness, or to reduce all or a part of the costs charged by the witness, pursuant to this subdivision, on the grounds that those costs were excessive. Upon the filing of the petition the court shall issue an order to show cause and from the time the order is served on the witness the court has jurisdiction over the witness. The court may hear testimony on the order to show cause and if it finds that the costs demanded and collected, or charged but not collected, exceed the amount authorized by this subdivision, it shall order the witness to remit to the requesting party, or reduce its charge to the requesting party by an amount equal to, the amount of the excess. In the event that the court finds the costs excessive and charged in bad faith by the witness, the court shall order the witness to remit the full amount of the costs demanded and collected, or excuse the requesting party from any payment of costs charged but not collected, and the court shall also order the witness to pay the requesting party the amount of the reasonable expenses incurred in obtaining the order including attorney's fees. If the court finds the costs were not excessive, the court shall order the requesting party to pay the witness the amount of the reasonable expenses incurred in defending the petition, including attorney's fees.

(5) If a subpoena is served to compel the production of business records and is subsequently withdrawn, or is quashed, modified or limited on a motion made other than by the witness, the witness shall be entitled to reimbursement pursuant to paragraph (1) for all costs incurred in compliance with the subpoena to the time that the requesting party has notified the witness that the subpoena has been withdrawn or quashed, modified or limited. In the event the subpoena is withdrawn or quashed, if those costs are not paid within 30 days after demand therefor, the witness may file a motion in the court in which the action is pending for an order requiring payment, and the court shall award the payment of expenses and attorney's fees in the manner set forth in paragraph (4).

(6) Where the records are delivered to the attorney, the attorney's representative, or the deposition officer for inspection or photocopying at the witness' place of business, the only fee for complying with the subpoena shall not exceed fifteen dollars ($15), plus the actual cost, if any, charged to the witness by a third person for retrieval and return of records held offsite by that third person. If the records are retrieved from microfilm, the reasonable cost, as defined in paragraph (1), shall also apply.

(c) When the personal attendance of the custodian of a record or other qualified witness is required pursuant to Section 1564, in a civil proceeding, he or she shall be entitled to the same witness fees and mileage permitted in a case where the subpoena requires the witness to attend and testify before a court in which the

action or proceeding is pending and to any additional costs incurred as provided by subdivision (b).

Evid. Code § 1564. Personal attendance of custodian and production of original records

1564. The personal attendance of the custodian or other qualified witness and the production of the original records is not required unless, at the discretion of the requesting party, the subpoena duces tecum contains a clause which reads:

"The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena."

Evid. Code § 1565. Service of more than one subpoena duces tecum

1565. If more than one subpoena duces tecum is served upon the custodian of records or other qualified witness and the personal attendance of the custodian or other qualified witness is required pursuant to Section 1564, the witness shall be deemed to be the witness of the party serving the first such subpoena duces tecum.

Evid. Code § 1566. Service of more than one subpoena duces tecum

1566. This article applies in any proceeding in which testimony can be compelled.