

## First Supplement to Memorandum 2003-39

**Conforming the Evidence Code to the Federal Rules of Evidence:  
Comments of Professor Méndez**

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Among the reforms discussed in Memorandum 2003-39 is the possibility of amending Evidence Code Section 1271 (the business records exception to the hearsay rule) 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. The corresponding federal rule already includes language along those lines. See Memorandum 2003-39, pp. 11-14.

Prof. Méndez urges the Commission to make clear that such an amendment “is not intended to relax the business duty rule” — i.e., the requirement that the source of the information had a business duty to observe and report the information. Exhibit p. 1. He suggests adding some language on this to the proposed Comment:

If you opt to adopt the personal knowledge provision of the federal rule, the new comment should make clear that the adoption is not intended to withdraw from judges the authority to rule a record inadmissible on grounds of unreliability because of the proponent’s failure to provide evidence that the informant was under a duty to transmit the information.

*Id.* at 2.

The staff agrees that it is important to make clear that the business duty rule remains intact. As Prof. Méndez suggests, that could be done by adding some language to the proposed Comment, as shown in italics below:

**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).

*The amendment is not intended to relax or otherwise impinge on the business duty rule, which is implicit both in Section 1271 and in the corresponding federal rule. See Section 1271 Comment (1965); Fed. R. Evid. 803 advisory committee's note. As before, a court may exclude a business record if the source of the information in the record had no business duty to observe and report the information. M. Méndez, Evidence: The California Code and the Federal Rules § 10.02, at 253 (2d ed. 1999).*

Another possibility would be to expressly incorporate the business duty rule into Section 1271, along the lines shown in italics below:

**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, and a business duty to observe and report the information.

(e) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) (f) 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 personal knowledge requirement 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).

*Section 1271 is also amended to expressly incorporate the business duty rule. This is not a substantive change. See Section 1271 Comment (1965). The business duty rule is also implicit (but not explicit) in the corresponding federal rule. See Fed. R. Evid. 803 advisory committee's note; M. Méndez, Evidence: The California Code and the Federal Rules § 10.02, at 253 (2d ed. 1999).*

**The staff prefers this approach because we believe it would be most clear.**

Respectfully submitted,

Barbara Gaal  
Staff Counsel

Exhibit

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**EMAIL FROM PROF. MENDEZ (OCT. 30, 2003)**

To: Barbara Gaal <bgaal@clrc.ca.gov>  
From: Miguel Mendez <MMendez@law.stanford.edu>  
Date: Oct. 30, 2003

Barbara, I looked at pages 11-12. The comment to the code makes it clear that the information must be provided by someone who has personal knowledge. The comment also makes clear, however, that such information will not satisfy the exception for business records unless that person also had a duty to provide the information. This is why information provided to the police by a bystander with personal knowledge is still excluded under the California and federal provisions. Your proposed comment should incorporate part of the old comment and in addition make clear that the explicit adoption of the personal knowledge requirement is not intended to relax the business duty rule. You might want to check the chapter in my book on business and official records.

**EMAIL FROM PROF. MENDEZ (OCT. 31, 2003)**

To: Barbara Gaal <bgaal@clrc.ca.gov>  
From: Miguel Mendez <MMendez@law.stanford.edu>  
Date: Oct. 31, 2003

One of the things I say in my book is that the explicit authority given to the judge to exclude untrustworthy records or parts of records embraces the business duty rule. It also embraces the personal knowledge requirement. If the first person in the chain who brings information that is ultimately recorded does not have personal knowledge of the information, then the information is unlikely to be reliable. One can achieve the same result simply by stating that the exception for business and official records does not relax the personal knowledge requirement. Thus, if the issue is whether the defendant had the red light, that proposition cannot be proved through the record (in the absence of other hearsay exceptions) if the first person in the chain reporting the information did not see the defendant run the light.

A bystander might have seen the defendant run the light and later reported his observation to the officer investigating the accident. But unless the bystander had a business duty to report that information, then it cannot be offered in the record to prove that the defendant had the red light. As I say in my book, "Where the entry is based on information supplied by others, scrupulous accuracy in recording the information cannot vouch for the reliability of the information. In these circumstances, the proponent of the

record must show that the information was imparted by persons with firsthand knowledge and who were under a duty to transmit their observations to the entrant (or someone with a duty to transmit the information to the entrant).” Section 10.02.

If you opt to adopt the personal knowledge provision of the federal rule, the new comment should make clear that the adoption is not intended to withdraw from judges the authority to rule a record inadmissible on grounds of unreliability because of the proponent’s failure to provide evidence that the informant was under a duty to transmit the information. The current comment to Section 1271 states that the intent of the framers is to continue the law developed in the cases dealing with the personal knowledge requirement and the business duty rule, and to allow judges to take those principles into account in determining whether “the sources of information” were such as to indicate the record’s trustworthiness.