

LEGISLATIVE PRIORITIES

New York State Law Enforcement Council

2008



NEW YORK STATE LAW ENFORCEMENT COUNCIL

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*New York State Sheriffs'
Association*

*Citizens Crime Commission
of New York City*



PREFACE

The New York State Law Enforcement Council was formed in 1982 as a legislative advocate for New York's law enforcement community. The Council's members represent the leading law enforcement professionals throughout the State, including the Attorney General of the State of New York, the New York State District Attorneys Association, the New York State Association of Chiefs of Police, the New York State Sheriffs' Association, the New York City Criminal Justice Coordinator, and the Citizens Crime Commission of New York City. Since its inception, the Council has been an active voice and participant in improving the quality of justice and in the continuing effort to provide for a safer New York.

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ENHANCE PROSECUTIONS AND DECREASE COSTS BY UPDATING GRAND JURY PROCEDURES RELATING TO BUSINESS RECORDS

The Law Enforcement Council supports a practical and cost-effective change to the Criminal Procedure Law that eliminates wasteful and outdated Grand Jury procedures. This proposal will eliminate unnecessary witness testimony in the Grand Jury when the witness's only role is to provide routine information regarding the origin of business records. The Council proposes that business records should be admissible in the Grand Jury when accompanied by a sworn statement attesting to the authenticity of the records. This would significantly improve the prosecution of

Requiring a live witness simply to introduce business records into the Grand Jury imposes an unnecessary burden and makes it increasingly difficult to prosecute serious cases.

many cases, including those involving identity theft, consumer fraud, insurance fraud, trademark counterfeiting, child pornography, and even sexual assault. In addition, local governments will save significant resources without compromising the rights of any defendants.

SAVE RESOURCES WITHOUT DIMINISHING DEFENDANTS' RIGHTS

The need to secure witnesses to introduce business records is an unnecessary expenditure of time and money for both prosecutors and the affected businesses, which are often located out-of-state. Travel of Grand Jury witnesses is typically arranged on short notice, and airfares typically exceed \$300 each. Even where the prosecutor is able to pay travel expenses, some businesses understandably refuse to send employees for this errand. Although prosecutors may make every effort to schedule testimony so as to minimize inconvenience to witnesses, they cannot always prevent witnesses from waiting for several hours. This unnecessary burden makes it increasingly difficult to prosecute serious cases, as defendants learn that they can get away with crime when it is simply too expensive to prosecute them.

The proposed change does not give prosecutors new powers in the Grand Jury and will not affect the rights of any defendants.

- Defense counsel will continue to have the right to contest, in pre-trial motions, the accuracy and authenticity of any and all evidence presented to the Grand Jury, including the business records.
- The proposed legislation in no way expands the prosecutor's authority to introduce business records that cannot currently be introduced into evidence.
- The sworn statement accompanying the business records would contain precisely the same information which, under current law, must be elicited through the testimony of live witnesses before the Grand Jury.

- Any explanation of the content of the records would continue to be provided to the Grand Jury by a live witness.
- This proposal does not affect the presentation of business records at trial. If a case proceeds to trial, a witness would authenticate the records in person as required under current law.

BUSINESS RECORDS ARE ESSENTIAL TO NEARLY EVERY KIND OF CASE

Problems securing testimony regarding business records arise in nearly every type of case, from white collar offenses to the most violent crimes. The types of business records covered by this proposal, which include bank records, credit card transactions, Internet service provider subscriber information, telephone or cell phone subscriber and toll records, and customer mail order and Internet purchases, are involved in virtually every type of criminal conduct. Though these records may simply list times and dates of business transactions, they can establish important facts related to a wide range of illegal activity.

For example, New York City prosecutors had to bring in numerous business records witnesses to secure the 2006 indictment of an international heroin organization based in the U.S. and Panama. Telephone company witnesses were needed to introduce the times and dates of wiretapped calls, and representatives from wire transfer services and airlines were needed to establish the movement of money and people around the world.

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For Indictment of Vast Identity Theft and Counterfeit Credit Card Ring, Business Records Costs Approach \$14,000 and Exceed 100 Work Hours:

In 2008, Queens prosecutors announced the indictment of more than three dozen defendants on charges including identity theft, criminal possession of a forged instrument, and grand larceny. The defendants were accused of having manufactured forged credit and identification cards using fraudulently obtained account numbers. The forged cards were then used for shopping sprees in more than three states, defrauding consumers and financial institutions of over \$1,000,000. Many of the purchases, which included electronics, handbags, and jewelry, were subsequently resold over the Internet.

For the Grand Jury presentation of this large-scale operation, the Queens County District Attorney's Office paid \$13,916 to fly in and house twenty-one bank representatives from Nebraska, Texas, Maryland, Michigan, and other states. Several representatives also appeared from local businesses. None of these witnesses was needed for anything other than the routine process of entering business records into evidence. A team of three paralegals spent over 100 hours scheduling business records witnesses; related tasks included sending subpoenas to banks, ensuring that representatives were available, negotiating appropriate dates and times for witnesses to appear, and scheduling and rescheduling flights and hotel rooms.

Even though the DA's office paid for witnesses' transportation and lodging, a few out-of-state banks refused to send witnesses because they could not afford to spare employees for a day or two of travel. Without these business records, prosecutors could not bring charges for the

amounts stolen from these banks. *People v. Chow, et al, Queens County*

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MANY RECORDS CUSTODIANS MUST TRAVEL BY AIR

With the growth of technology, businesses that provide local services, such as banks, telephone companies, and Internet service providers, are increasingly maintaining centralized records outside of the state. When the Criminal Procedure Law was adopted in 1971, records were kept on paper and stored locally. Now business records typically consist of computerized data and are often maintained in centralized databases, which can be situated anywhere across the country. For example, all of the major Internet service providers are located outside of New York State. As a result, a prosecutor must often introduce business records and secure witnesses from several different states to indict a single case involving a defendant's Internet activity. Considering how many defendants rely upon the Internet to further their criminal activities, this is an especially troubling problem.

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Unavailability of Virginia Credit Card Representative Prevents Prosecution of \$6500 Identity Theft Count:

The defendant fraudulently opened credit card accounts in the victim's name with Chase, Discover, GM/Household Finance, and Capital One. Over the course of a year, she completed nearly \$14,000 worth of fraudulent charges and balance transfers, and attempted to take almost \$5000 more. Prosecutors had to indict the defendant twice be-

cause Discover and GM/Household Finance representatives were unavailable for the first Grand Jury presentation. The Capital One fraud — which involved the greatest amount of money and linked the stolen funds directly to the defendant’s personal credit account — could not be indicted at all, due to the prohibitive cost of flying in a representative from Virginia. The court denied the prosecution’s motion to admit evidence of the uncharged Capital One crime at trial, meaning that a jury could not consider this significant evidence merely because a business records witness had been unavailable for the Grand Jury presentation. Fortunately, the defendant pleaded guilty to Identity Theft in the First Degree. *People v. Tillman, New York County*

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BUSINESSES SUPPORT THIS PROPOSAL

Local and out-of-state businesses alike suffer losses in productivity when they are required to send business records custodians to appear in person before the Grand Jury. Even when witnesses from local companies have to travel only several miles to get to the Grand Jury presentation, they can easily spend half a day or more waiting for the chance to give five minutes of routine business records testimony.

Local and national entities, including Amazon.com, Discover Financial Services, eBay, Independence Community Bank, J.P. Morgan Chase & Co., MBNA America, the Recording Industry Association of America, and Time Warner Cable of New York City, have expressed support in writing for this proposal to the Law Enforcement Council. Significantly, the admission of business records by sworn statement in

criminal proceedings is already allowed by the federal government and in other states, including Alaska, Florida, Hawaii, Idaho, Michigan, Missouri, and Tennessee.¹

Thirty-Eight Business Records Witnesses Testify Before a Special Grand Jury: Over the course of 2005 and 2006, a Special Grand Jury in Manhattan was periodically empanelled to investigate several individuals for insurance fraud and tax evasion. The defendants, who owned various medical management, billing, or supply companies, committed insurance fraud by presenting grossly inflated bills to insurance companies for reimbursement. They further avoided personal income taxes by claiming personal expenses as business-related, and disguising payments to themselves as payments to suppliers.

When the case was presented to the Grand Jury, thirty-eight witnesses were called solely to introduce business records. The record custodians came from insurance companies, banks, credit card companies, utilities, check cashers, and other merchants who had done business with the companies in question. Cost and scheduling problems prevented the DA from scheduling additional records custodians from Florida. Jurors were forced to sit through an estimated twelve hours of testimony by records custodians, each answering the same three questions. Nearly every one of the witnesses asked the prosecutor why he could not submit a written certification, as is routinely done for federal and other states’ prosecutions, instead of appearing personally. *People v. Vetukh; People v. Khalavsky and Khalavsky; People v. Kagan; People v. Rey; New York County*

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¹ FED. R. EVID. 803(6), 902(II); ALASKA R. EVID. 902; FLA. STAT. § 90.803(6); HAW. REV. STAT. §§ 803(b)(6), 902(II); IDAHO R. EVID. 902(II); MICH. R. EVID. 803(6), 902(II); MO. REV. STAT. § 490.692; TENN. R. EVID. 803(6), 902(II).

**THIS PROPOSAL FITS SQUARELY WITHIN
CURRENT NEW YORK LAW**

*Written Authentication Is Already Used in the
Grand Jury*

The proposal endorsed by the Council would allow the witness to swear to the authentication information in writing rather than travel in person to answer the same questions. This is already authorized for other types of documents. Fingerprint and ballistics reports, valuation of property, and a victim’s “permission and authority statement” can all be admitted to the Grand Jury without the testimony of a live witness.² The sworn written statement would only be used to establish that the records are authentic and are produced regularly in the course of business. If any contents of the records require explanation, or if the grand jurors have questions about the authenticity of the records as asserted in the sworn statement, a witness would of course appear to provide this explanation.

*Grand Jury Rules Have Been Modified to
Accommodate Technology*

This proposed change follows a precedent set by the Legislature in recognizing that changes in technology can affect Grand Jury proceedings. For instance, in 1984 the Legislature authorized the Grand Jury to hear examination of child witnesses via closed-circuit television.³ In 1987, the Legislature accommodated changes in technology by allowing the electronic transmission of a document to be presented to the Grand Jury.⁴

*Civil Litigation Allows Written Authentication at the
Trial Level*

Business records unaccompanied by live witnesses are admitted in civil trials already.⁵ In addition, in 2004 the Legislature expanded the ability to introduce certain medical test evidence under a physician’s affidavit. In passing this expansion, the Legislature expressed its recognition of the waste inherent in calling certain witnesses to perform the “ministerial function” of attesting that a piece of evidence is a business record.⁶ As explained above, the Council’s proposal does not even go as far as extending this rule to the trial level, but rather only seeks it for the Grand Jury. Amending the Criminal Procedure Law as recommended here is a straightforward extension of the same logic that is applied in the Civil Practice Law and Rules.

²
N.Y. CRIM. PROC. LAW
§ 190.30.

³
N.Y. CRIM. PROC. LAW
§ 190.30(4).

⁴
N.Y. CRIM. PROC. LAW
§ 190.30(2-a).

⁵
N.Y. C.P.L.R. 4518.

⁶
Memorandum of
Senator John A.
DeFrancisco, ch.
375, 2004 N.Y. LAWS
(expanding admis-
sibility of medical test
evidence).