

REPORT ON LEGISLATION
COUNCIL ON CRIMINAL JUSTICE
COMMITTEE ON CRIMINAL JUSTICE OPERATIONS

A. 3640
S. 1977

M. of A. Nolan
Senator Volker

THE PROPOSED BILL IS CONDITIONALLY APPROVED

The Criminal Justice Council and the Committee on Criminal Justice Operations of the New York City Bar Association submit this memorandum in support of the amendment of Section 190.30 of the Criminal Procedure Law (CPL) adding subsection (8).

Section 190.30 is entitled rules “Grand Jury: Rules of Evidence,” and generally provides, in subsection (1), that the rules of evidence in criminal trials apply to the Grand Jury as well. Subsections (2) through (7) carve out certain exceptions to the general rule for purposes of the Grand Jury, allowing for certain types of out-of-court or hearsay evidence to be admitted.

Subsections (2) and (3) allow for the admission of out-of-court statements regarding certain types of forensic and scientific evidence, and regarding ownership and valuation of property. These exceptions sensibly allow the admission of sworn statements in lieu of live testimony with respect to the delineated types of statements.

Proposed subsection (8) would add an exception for documents that fit the existing definition of “business records” for hearsay purposes, thus permitting the admission of numerous documents to the Grand Jury without requiring the testimony of a live authenticating witness. This would be particularly helpful in the investigation of computer crimes, including those involving children, corporate corruption, medicare and medicaid fraud, corporate fraud, credit card fraud and identity theft, and many other crimes. Many times, these records are created and stored in numerous different states. The creation of this exception would allow for the admission of such records without the necessity and burden of having witnesses, many of whom travel from outside the county or the state simply to lay a foundation for the admissibility of documents whose admissibility is not seriously in issue. Both the prosecutorial agency serving as legal advisor to the Grand Jury and the putative witnesses would save a great deal of expense and time in lieu of giving rote and non-substantive testimony.

The bill proposed by State Senator Dale Volker of the 59th Senate District would read as follows.

8. Business records may be received at grand jury proceedings as evidence of the facts stated in such proceedings [the word “proceedings” should be changed to “records”], provided such records are accompanied by a written statement, under oath, of the record’s custodian or other qualified witness of the business. Such statement shall contain a list or description of the records attached and state in substance that the person is a duly authorized custodian of the records or other qualified witness with knowledge that such records were made in the regular course of business and that it was the regular course of such business to make such at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. Such written statement may also include a statement that the business does not possess a particular record or records, and such statement may be received at grand jury proceedings as evidence of the fact that the business does not possess such record or records. When it is necessary for the business whose records are being offered into evidence to submit a written statement under oath from more than one of its employees in order to comply with this subdivision, more than one written statement under oath may be attached to the records. *[For the purpose of this subdivision, the term “business” includes a business, profession, occupation and calling of every kind.]*

Our approval is conditioned on one change, which is bracketed above and italicized. We believe that that sentence should read as follows;

For the purpose of this subdivision the term “business” includes a business, profession, occupation and calling of every kind, except a law enforcement agency.

This modest change would prohibit the admission of documents or reports of police and other law enforcement agencies through the use of this exception. The reason for the change is to satisfy concerns that we had that the new subsection could be used to circumvent the need for law enforcement officials to testify, or even to admit reports that would otherwise be inadmissible even with a live witness.

The bill requires that documents be accompanied by a sworn statement laying the proper foundation. Nothing in this bill would allow for their admissibility at trial or impinge upon the pre-existing ability of defendants to challenge grand jury proceedings through pre-trial motions or otherwise.

Additionally, we believe that the Senate bill should allow for electronic transmission of these records similar to what is permitted pursuant to CPL Section 190.30

(2-a). This can be accomplished by adding a new subsection (8-a) to section 190.30, or amending section 190.30(2-a) to incorporate the new subsection 8.

In conclusion, the proposed legislation, with our suggested change, would simplify the process of admitting a discrete class of evidence before the Grand Jury. Most significantly, it would save a great deal of time and expense both on the part of law enforcement agencies and witnesses, while in no way compromising the rights of defendants.