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Price of Admission

Getting Medical Records Into Evidence

Taggart v. Super Seer Corp., 33 Cal.App.4th 6097 (1995), has reduced to black-letter law a view long held by Bernard Jefferson and other commentators on evidence: Hospital and other business records are not necessarily admissible simply because a custodian provides a proper foundational declaration under California Evidence Code Section 1561. To get past the hearsay objection, the records must also satisfy the additional requirements of Evidence Code Section 1271, the business records exception.

The business-records exception requires a showing of the "identity" and "mode of preparation" of the records, whereas a Section 1561 affidavit merely requires averments of "authorized custodian," "true copy" and "prepared in the ordinary course of business, at or near the time of the act, condition or event."

Records delivered under seal from a custodian making a Section 1561 declaration do not necessarily get the records past the hearsay objection, because the Section 1561 affidavit does not have to state the records' identity or mode of preparation. Thus, it cannot show that the sources of information and method and time of preparation are such as to indicate the records' trustworthiness.

It all seems pretty straightforward: The business-records *hearsay* exception of Section 1271 is more stringent than the *foundation* exception (to the best-evidence rule) found at Section 1561. The problem is that many practitioners treat medical records that arrive in court under seal as thereby becoming automatically admissible, and this is simply not so.

The problem in *Taggart* arose when Taggart sued a helmet manufacturer for head injuries after he was thrown from a motorcycle. Taggart subpoenaed helmet impact tests, reports and records from a testing laboratory. The laboratory eventually produced the test reports in a sealed envelope with a proper custodian declaration pursuant to Section 1561.

At trial, the court granted the manufacturer's motion in limine to exclude test reports (which theoretically showed that the helmet was defective) and most of the rest of the subpoenaed material, but the court did allow selected test results to come into evidence. In so holding, the trial court stated that the custodian's declaration satisfied the business-records exception, and on that basis, decided that several of the test results would be allowed into evidence. However, at the close of trial, the court refused to allow any of the subpoenaed records into the jury room. The court did not base that decision on admissibility, but instead made a fairness call based on what kind of written evidence had been allowed into the jury room on the defendant's behalf.

Taggart appealed, claiming among other things that the subpoenaed records were admissible, and that the custodian's declaration under Section 1561 satisfied all of the requirements for the business-records exception to the hearsay rule.

The business-records hearsay exception is more stringent than the foundation exception to the best-evidence rule.

The California Court of Appeal, 4th District, affirmed the judge's refusal to allow the records into evidence, holding that a custodian's declaration under Section 1561 does not necessarily satisfy the business-records exception of Section 1271. The purpose of Section 1561 is simply to bypass certain foundational problems, not to make records automatically admissible. Tellingly, Section 1562 specifically provides that "if the original records would be admissible in evidence if the custodian had been present ... and if the requirements of Section 1271 had been met, a copy of the records is admissible in evidence." Section 1271 thus red-flags the fact that a Section 1561 custodian's affidavit does not necessarily satisfy the business-records exception.

According to *Taggart*, the case of *In re Troy D.*, 215 Cal.App.3d 889 (1989), which held that a custodian's Section 1561 declaration does satisfy the business-records exception, is no longer good law. At the time *Troy D.* was authored, Section 1562 did not specify that records were admissible only "if the requirements of Section 1271 have been met."

Just as a Section 1561 best-evidence affidavit will not necessarily qualify the hearsay records for admission under the business-records exception of Section 1271, so a showing that the documents are in fact business records will not automatically get all of the records' *contents* past other objections, including privacy, privilege or multiple hearsay. Each of these objections, and each level of hearsay, must be addressed separately.

Suppose, for instance, that hospital records are subpoenaed to trial under a Section 1561 best-evidence affidavit (alleging authorized custodian, true and correct copies and records prepared in the ordinary course of business, at or near the time of the act, condition or event) that also alleges the additional requirements of the business-records exception of Section 1271 (identity of records, method and time of preparation and general indications of trustworthiness).

If the records contain diagnoses or other expert opinions by someone not yet qualified as an expert, the opinion portions of the records will still be inadmissible. *Hutton v. Brookside Hosp.*, 213 Cal.App.2d 350 (1963). Even if the person who made the statement has been qualified as an expert, plain opinions and conclusions can be excluded as not falling within the business-records exception because such conclusions are not records of an "act, condition or event." *People v. Reyes*, 12 Cal.3d 486, 502 (1974). Similarly, a patient's description of the accident is not admissible merely because it is contained within hospital records that are otherwise admissible under the business-records exception. That is because the plaintiff's statement to the doctor, which is being offered to prove how the accident occurred, was not usually made at or near the time of the accident by one under a business duty to record the accident. Instead, the plaintiff's description of the accident must come under some other exception, such as a prior consistent or inconsistent statement, or must be offered for a nonhearsay purpose, such as to show the basis for the doctor's opinion or diagnosis. *People v. Williams*, 187 Cal.App.2d 355 (1960).

In short, the basic rule is that even if subpoenaed records have a proper best-evidence foundation under the custodian's Section 1561 affidavit, and even if the affidavit further appears to satisfy the business-records exception, such a preliminary foundation "does not change the rules of competency or relevancy with respect to recorded facts. [The business-records exception] does not make that proof which is not proof. It merely provides a method of proof of an *admissible* act, condition or event. It does not make the record admissible when oral testimony of the same facts would be inadmissible." *McGowan v. City of Los Angeles*, 100 Cal.App.2d 386, 392 (1950).

The moral of *Taggart* is that it is still very easy for practitioners to overlook the need to carefully satisfy evidence requirements in layers, one after the other, until every part of every piece of evidence offered has satisfied every objection that could be raised against it, from relevancy to foundation to ultimate admissibility, with each being considered individually and independently.

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