

Memorandum 74-20

Subject: Study 63 - Evidence (Evidence Code Sections 1271 and 1561)

You will recall that at the last meeting the Commission discussed the problem involving the interplay of Sections 1271 and 1561 of the Evidence Code. Basically the problem arises because Sections 1560-1566 provide a procedure for authenticating a copy of a business record mailed to court pursuant to a subpoena authorizing such mailing. Section 1271 provides a hearsay exception for business records. The affidavit of the custodian or other qualified witness--required under Sections 1560-1566--omits one of the requirements for the hearsay exception, i.e., proof that "the sources of information and method and time of preparation were such as to indicate its trustworthiness."

Some lawyers have mistakenly assumed that the affidavit under Sections 1560-1566 is sufficient to warrant introduction of the records under the hearsay exception provided by Section 1271 without further proof of the trustworthiness of the records.

The Commission directed the staff to write to Judge Jefferson and request that he provide a draft indicating the needed revisions of the Evidence Code to deal with the problem. Judge Jefferson has responded with a letter outlining his suggested revisions and including a draft of the needed revisions. See Exhibit I attached. The staff has incorporated the substance of his revisions in Exhibit II attached. We suggest you direct your attention first to his letter, then to pages 1 (bottom) and 2 of the draft set out as Exhibit II. We have followed closely the draft provided by Judge Jefferson; the only significant change we have made is to include a reference to Evidence Code Section 1272 as well as Section 1271.

The full text of all relevant Evidence Code sections is set out in Exhibit II even though only Sections 1561 and 1562 need revision. The staff recommends approval of these revisions. (The text of Sections 1270-1272 is found on pages 4-5 of Exhibit II.)

Respectfully submitted,

John H. DeMouilly
Executive Secretary



Memo 74-20

EXHIBIT I

CHAMBERS OF
The Superior Court
LOS ANGELES, CALIFORNIA 90012
BERNARD S. JEFFERSON, JUDGE

TELEPHONE
(213) 974-1234

April 11, 1974

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California 94305

Dear Mr. DeMouilly:

I am enclosing a copy of my suggestions for amending sections 1561 and 1562 to remove the problems that now exist between those sections and section 1271 of the Evidence Code.

My suggestion for amending section 1561 is that of adding a sentence which now appears in section 1562 and which more appropriately belongs in section 1561.

I believe that my suggested amendment of section 1562 would be fair to all parties to the litigation. If the party desires to use a copy of business records without producing a witness to testify concerning those records, he should be required to notify the adverse party in order to give the adverse party an opportunity to object to admissibility without the production of a witness to satisfy the requirements of section 1271. If the adverse party does object, it would then be up to the party desiring to use the business records to produce the custodian, or other witness, to enable the trial judge to make a determination of whether the business records are admissible under section 1271.

I believe that my suggested amendment has the merit that if the adverse party does not make an objection by written demand, as I have indicated, the copy of the subpoenaed records would become admissible automatically insofar as the hearsay exception of 1271 is concerned. Other objections, such as privileged matter or a violation of other exclusionary rules, would still be applicable.

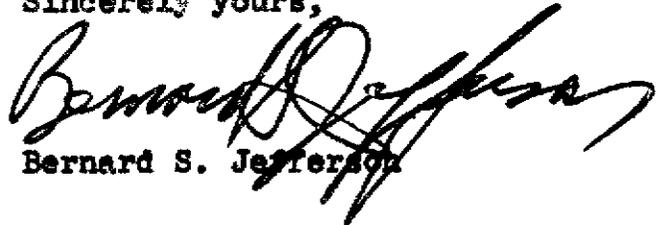
Under the present provisions of section 1562, the presumption as to the truth of the matters contained in the affidavit places an unfair burden on the adverse party since he would not even be aware, in many instances, of the records having been subpoenaed until the day of trial. The burden of establishing

Mr. John H. DeMouilly
April 11, 1974
Page 2

compliance with an appropriate hearsay exception belongs on the party seeking to use the exception and this is the party who has subpoenaed the business records.

I will be gone from court during the week of April 15th, but will be returning on April 22nd. I hope that my suggestions will reach you in time for you to include them with the materials you are providing the Commission for study prior to the meeting.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Bernard S. Jefferson".

Bernard S. Jefferson

BSJ:ks
Enc.

SUGGESTIONS FOR AMENDMENTS TO
EVIDENCE CODE SECTIONS 1561 AND 1562

1. Amend Section 1561 to add a paragraph (c) as follows:

Section 1561 . . .

(c) When more than one person has knowledge of the facts, more than one affidavit may be made.

2. Amend Section 1562 to read as follows:

Section 1562. Admissibility of copy of records and accompanying affidavit. The copy of the records is admissible in evidence as though the original thereof were offered and complied with the provisions of Section 1271, if:

- (a) The affidavit accompanying the copy of the records complies with the provisions of Section 1561;
- (b) The subpoena duces tecum served upon the custodian of records or other qualified witness for the production of a copy of the records did not contain the clause set forth in Section 1564 requiring personal attendance of the custodian or other qualified witness and the production of the original records;
- (c) The party causing such subpoena duces tecum to be issued and served has given each

adverse party a notice in writing not less than 20 days prior to the date of trial that a copy of such business records was being subpoenaed for the trial in accordance with Article 4; and

(d) ~~(b)~~ The adverse party served with a written notice as required by paragraph (c) has not, within 10 days after being served with such notice, served a written demand for production of the original records and compliance with the provisions of Section 1271 upon the party causing the subpoena duces tecum to be issued and served upon the custodian of records or other qualified witness of a business.

ARTICLE 4. PRODUCTION OF BUSINESS RECORDS

§ 1560. Compliance with subpoena duces tecum for business records

(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 such 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 such 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 such subpoena, delivers by mail or otherwise a true, legible, and durable copy of all the records described in such subpoena to the clerk of court or to the judge if there be no clerk or to such other person as described in subdivision (a) of Section 2013 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, directed as follows:

(1) If the subpoena directs attendance in court, to the clerk of such 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 his 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 such trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received.

(Amended by Stats.1969, c. 190, p. 484, § 2.)

§ 1561. Affidavit accompanying records

(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.

(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.

(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 such records as are available in the manner provided in Section 1560.

(c) When more than one person has knowledge of the facts, more than one affidavit may be made.

> new material to be added

§ 1562. Admissibility of affidavit and copy of records. The copy of the records is admissible in evidence to the same extent as though the original thereof were offered and the ~~custodian had been present~~ and testified to the matters stated in the affidavit. 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.~~ complied

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with the requirements of Section 1271 or 1272, as the case may be, if:

- (a) The affidavit accompanying the copy of the records complies with the requirements of Section 1561;
- (b) The subpoena duces tecum served upon the custodian of records or other qualified witness for the production of a copy of the records did not contain the ~~clause~~ set forth in Section 1564 requiring personal attendance of the custodian or other qualified witness and the production of the original records;
- (c) The party causing such subpoena duces tecum to be issued and served has given each adverse party a notice in writing, not less than 20 days prior to the date of trial, that a copy of such business records was being subpoenaed for trial in accordance with the procedure authorized pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code; and
- (d) The adverse party served with a written notice as required by subdivision (c) has not, within 10 days after being served with such notice, served a written demand for production of the original records and compliance with the requirements of Section 1271 or 1272, as the case may be, upon the party causing the subpoena duces tecum to be issued and served upon the custodian of records or other qualified witness of the business.

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§ 1563. One witness and mileage fee

(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 unless there is an agreement to the contrary.

(b) Where the business records described in a subpoena issued pursuant to Section 1560 are patient records of a public or licensed hospital or of a physician and surgeon, osteopath, or dentist licensed to practice in this state, or a group of such practitioners, and the personal attendance of the custodian of such records or other qualified witness is not required, the sole fee for complying with such subpoena is twelve dollars (\$12).

(c) When the personal attendance of the custodian of a record or other qualified witness is required pursuant to Section 1564, he shall be entitled to 20 cents (\$0.20) a mile for mileage actually traveled, one way only, and to twelve dollars (\$12) for each day of actual attendance.

(Amended by Stats.1962, c. 286, p. 1 - 1)

§ 1564. Personal attendance of custodian and production of original records. The personal attendance of the custodian or other qualified witness and the production of the original records is required if 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 is 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." (Stats. 1965, c. 299, § 1564.)

§ 1565. Service of more than one subpoena duces tecum

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.

(Amended by Stats.1963, c. 199, p. 453, § 4.)

§ 1566. Applicability of article. This article applies in any proceeding in which testimony can be compelled. (Stats.1965, c. 299, § 1566.)

Article 7

BUSINESS RECORDS

Section

1270. "A business."

1271. Business record.

1272. Absence of entry in business records.

§ 1270. "A business". As used in this article, "a business" includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not. (Stats.1965, c. 299, § 1270.)

Comment--Law Revision Commission

This article restates and supersedes the Uniform Business Records as Evidence Act appearing in Sections 1953e through 1953h of the Code of Civil Procedure. The definition of "a business" in Section 1270 is substantially the same as that appearing in Code of Civil Procedure Section 1953e. A reference to "governmental activity" has been added to the Evidence Code definition to codify the decisions in cases holding the Uniform Act applicable to governmental records. See, e. g.,

Nichols v. McCoy, 38 Cal.2d 447, 240 P.2d 169 (1952); Fox v. San Francisco Unified School Dist., 111 Cal. App.2d 886, 245 P.2d 603 (1952).

The definition is sufficiently broad to encompass institutions not customarily thought of as businesses. For example, the baptismal and wedding records of a church would be admissible under the section to prove the events recorded. 5 Wigmore, Evidence § 1523 (3d ed. 1940). Cf. Evidence Code § 1815.

§ 1271. Business record. 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. (Stats.1965, c. 299, § 1271.)

Comment--Law Revision Commission

Section 1271 is the business records exception to the hearsay rule. It is stated in language taken from the Uniform Business Records as Evidence Act (Sections 1953e-1953h of the Code of Civil Procedure) and from Rule 63(13) of the Uniform Rules of Evidence.

Section 1271 requires the judge to find that the sources of information and the method and time of preparation of the record "were such as to indicate its trustworthiness." Under the language of Code of Civil Procedure Section 1953f, the judge must determine that the sources of

information and method and time of preparation "were such as to justify its admission." The language of Section 1271 is more accurate, for the cases hold that admission of a business record is not justified when there is no preliminary showing that the record is reliable or trustworthy. E. g., People v. Grayson, 172 Cal. App.2d 372, 341 P.2d 329 (1959) (hotel register rejected because "not shown to be true and complete").

"The chief foundation of the special reliability of business records is the requirement that they must be based upon the first-hand observa-

tion 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 reported to the recorder." *McCormick*, Evidence § 285 at 602 (1954), as quoted in *Maclean v. City & County of San Francisco*, 151 Cal. App.2d 133, 143, 311 P.2d 158, 164 (1957).

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 accident and arrest reports are usually held inadmissible because they are based on the narrations of persons who have no busi-

ness duty to report to the police. *Maclean v. City & County of San Francisco*, 151 Cal.App.2d 133, 311 P.2d 158 (1957); *Hoei v. City of Los Angeles*, 116 Cal.App.2d 295, 238 P.2d 925 (1955). They are admissible, however, to prove the fact of the arrest. *Harris v. Alcoholic Bev. Con. Appeal Bd.*, 219 Cal.App.2d 106, 23 Cal.Rptr. 71 (1963). Similar investigative reports on the origin of fires have been held inadmissible because they were not based on personal knowledge. *Behr v. County of Santa Cruz*, 172 Cal.App.2d 697, 342 P.2d 937 (1959); *Harrigan v. Chapman*, 118 Cal.App.2d 167, 257 P.2d 716 (1953).

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.

§ 1272. Absence of entry in business records. 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. (Stats. 1965, c. 299, § 1272.)

Comment—Law Revision Commission

Technically, evidence of the absence of a record may not be hearsay. Section 1272 removes any doubt that might otherwise exist concerning the admissibility of such

evidence under the hearsay rule. It codifies existing case law. *People v. Torres*, 201 Cal.App.2d 290, 26 Cal. Rptr. 315 (1962).