

#63

6/5/74

Memorandum 74-35

Subject: Study 63 - Evidence (Admissibility of Evidence of Business
Records)

Attached to this memorandum are two copies of a staff draft of a tentative recommendation relating to admissibility of evidence of Business records which implements decisions made at the first May meeting. The staff hopes to be able to distribute this recommendation for comment after the June meeting. Please make your suggested editorial changes on one copy and give it to the staff at the June meeting.

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

TENTATIVE RECOMMENDATION

relating to

ADMISSIBILITY OF EVIDENCE OF BUSINESS RECORDS

Before a copy of business records may be admitted in evidence, it must satisfy two rules: the best evidence rule¹ and the hearsay rule.²

Evidence Code Sections 1560-1566 provide an exception to the best evidence rule for copies of business records. Section 1561 prescribes the contents of the affidavit which the custodian or other qualified witness must prepare to accompany a copy of business records produced in compliance with a subpoena duces tecum.³ The affidavit must state that the affiant is the custodian of the records or some other qualified witness, that the copy is a true copy of the subpoenaed records, and that 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." Section 1562 provides in part as follows:

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.

1. Section 1500 provides:

Except as otherwise provided by statute, no evidence other than the writing itself is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.

2. Section 1200 provides:

(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

(b) Except as provided by law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule.

3. Section 1560(b) provides that, unless the subpoena duces tecum is accompanied by the notice set out in Section 1564 to the effect that the personal attendance of the custodian of the records is

In substance, this sentence of Section 1562 provides only that a copy, as distinct from an original, is admissible despite the best evidence rule; the fact that the record is a copy rather than the original may be disregarded, and the matters stated in the affidavit are given the same force as if the custodian had appeared and testified. But the hearsay rule also must be satisfied; the copy of the business records must satisfy the requirements stated in Evidence Code Section 1271 for the business records exception to the hearsay rule. Section 1271 provides:

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.

The affidavit under Section 1561 satisfies the requirements of subdivisions (a) and (b) of Section 1271 but does not satisfy the requirements of subdivisions (c) and (d).⁴

A proper analysis shows that Sections 1561 and 1271 perform different functions and should not be confused. Sections 1560-1566 provide

required, the custodian, within five days after receipt of the subpoena, must deliver the subpoenaed copy of business records by mail or otherwise to the clerk of court or the judge if there is no clerk.

4. Nor does the Section 1561 affidavit satisfy the requirements of Section 1272 concerning the admissibility of evidence of the absence from business records of an asserted act, condition, or event since Section 1272(b) also requires that "[t]he 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."

an exception to the best evidence rule whereas Sections 1270-1272 provide an exception to the hearsay rule. Satisfying the exception to the best evidence rule does not necessarily satisfy the exception to the hearsay rule. However, some lawyers mistakenly assume that an affidavit which satisfies Section 1561 accompanying copies of subpoenaed business records will at the same time satisfy the admissibility requirements of Section 1271. Alternatively, some lawyers may assume that Sections 1561 and 1562 are, in effect, an exception to the requirements of Section 1271.

The confusion arising from the interplay of Sections 1561 and 1562 and Section 1271 could be remedied by amending Section 1561 to make the requirements for the affidavit accompanying subpoenaed business records the same as the matters which must be shown under Section 1271 to satisfy the business records exception to the hearsay rule--i.e., the affidavit could be required to show the identity and mode of preparation of the records and their trustworthiness. Disregarding the difficulty of showing trustworthiness by affidavit, the Commission believes that this solution to the problem is undesirable because the adverse party would have no chance to cross-examine the custodian-affiant concerning these matters and because a copy of business records would be made more easily admissible than the original records under such a procedure.

It would also be possible to specifically require that the custodian appear to testify in every case as to the matters of mode of preparation and trustworthiness. However, the Commission finds such a procedure unnecessarily burdensome since in many cases, if given a chance, the adverse party would permit the copy to be admitted based on the affidavit provided by Section 1561 without requiring testimony concerning the additional factors of mode of preparation and trustworthiness.

In the interest of saving time and money for the custodian and the party subpoenaing business records, the Commission has concluded that the best alternative is to provide a flexible procedure which would allow the adverse party to notify the subpoenaing party of his hearsay objection at a time sufficiently before trial so that the custodian may be produced at the trial to testify as to the additional matters required under Section 1271. Accordingly, the Commission recommends that provisions be enacted to provide:

(1) If a copy of business records subpoenaed under Sections 1560-1566 is to be offered as evidence at a trial without producing a witness to testify concerning the additional matters provided in Section 1271 or 1272, the party who intends to offer the records as evidence must give notice to the adverse party of that intention not less than 20 days before the trial.

(2) If the adverse party objects within 10 days after receiving notice, the party who offers the copy of business records as evidence must produce the custodian or other qualified witness in order to satisfy the requirements of Section 1271 or 1272.

(3) If the adverse party does not object within 10 days after receiving notice, the copy of business records satisfying the requirements of Sections 1561 and 1562 is admissible notwithstanding the requirements of Section 1271 or 1272.⁵

5. The proposed procedure is designed to satisfy only the requirements of Section 1271 or 1272; the copy of business records must also satisfy any other requirements of or objections to admissibility.

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to amend Sections 1561 and 1562 of the Evidence Code, relating to admissibility of evidence of business records.

The people of the State of California do enact as follows:

Section 1. Section 1561 of the Evidence Code is amended to read:

1561. (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.

Comment. Subdivision (c) is added to Section 1561 to continue what formerly was the third sentence of Section 1562.

Sec. 2. Section 1562 of the Evidence Code is amended to read:

1562. 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 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 .

Comment. Section 1562 is amended to provide a notice procedure whereby, if the adverse party does not object in writing within the allotted time, a copy of subpoenaed business records may be admitted without compliance with Section 1271 or 1272. Under prior law, the affidavit provided by Section 1561 could not satisfy the requirements of admissibility provided by the business records exception to the hearsay rule (Sections 1270-1272). See Recommendation Relating to Admissibility of Evidence of Business Records, 12 Cal. L. Revision Comm'n Reports (1974). The provision concerning multiple affidavits has been reenacted in Section 1561. The former provisions that matters stated in the affidavit given under Section 1561 are presumed true has been repealed because it is replaced by the notice procedure.