#63.50 8/6/74

Memorandum 74-48

Subject: Study 63.50 - Evidence (Admissibility of Copies of Business Records)

Some time ago, the Commission approved for distribution a tentative recommendation relating to the admissibility of copies of business records. Commissioner Stanton has suggested that the tentative recommendation be substantially revised and that it be reviewed by the Commission before it is distributed for comment.

The staff itself has had some concern about the tentative recommendation. We think that it needs to be made clearer that the provision we are adding is an exception to the hearsay rule for copies of business records produced pursuant to Evidence Code Sections 1560-1566. Also, we have been concerned that the adverse party may not object to the admission of the copy of the business records generally but, upon examining the sealed records, will discover some statement or entry he believes is untrustworthy. Accordingly, we have prepared a revised tentative recommendation. Two copies are attached. Please mark your editorial changes on one copy to return to the staff at the meeting.

Your attention is directed to subdivision (c) which would be added to Section 1562 by the proposed legislation. See page 7 of the tentative recommendation. This subdivision could be omitted, but the staff presents it for your consideration. In effect, the subdivision gives a party (who did not give notice that the custodian must be brought to the trial to testify concerning the trustworthiness of the records) an opportunity to produce evidence that an entry in the record is inadmissible hearsay on the ground that the sources of information or method or time of preparation were such

as to indicate its lack of trustworthiness. There are a number of similar qualifications of hearsay exceptions which are cited in both the text of the tentative recommendation and in the Comment to amended Section 1562.

Respectfully submitted,

John H. DeMoully
Executive Secretary

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE

RECOMMENDATION

relating to

EVIDENCE

Admissibility of Copies of Business Records

August 1974

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

IMPORTANT NOTE: This tentative recommendation is being distributed to state [illegible] will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments should be sent to the Commission not later than October 1, 1974.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation [illegible]

404-341

TENTATIVE RECOMMENDATION

relating to

EVIDENCE

Admissibility of Copies of Business Records

Before a copy of business records may be admitted in evidence, it must satisfy two rules: the best evidence rule[1] 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

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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 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.

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.

Thus, under Section 1562, a copy of a business record is admissible despite the best evidence rule; the fact that the document offered 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.

Before the copy may be received in evidence to prove the act, condition, or event recorded, however, the hearsay rule must also be satisfied; the record itself must satisfy the following requirements stated in Evidence Code Section 1271:

> 1271. 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).

Sections 1561 and 1271 perform different functions and should not be confused. Satisfying the exception to the best evidence rule does not satisfy the exception to the hearsay rule. The Commission is advised, however, that some lawyers have mistakenly assumed that an affidavit complying with Section 1561 is sufficient to assure the admission

in evidence of the copy of a business record notwithstanding a hearsay objection, possibly on the theory that Sections 1561 and 1562, in effect, provide an exception to the requirements of Section 1271.[4]

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4. Judge Herbert S. Herlands, Judge of Superior Court, Orange County, reports the situation in a letter to the Law Revision Commission, dated July 8, 1974, as follows:

> I have been discussing, with some of my colleagues, the problem about which I wrote to you some time ago involving Sections 1271 and 1561 of the Evidence Code.
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> Judge Robert A. Banyard of the Orange County Superior Court has made the point that, prior to the 1969 amendments to the Evidence Code, attorneys specializing in personal injury defense work believed that Sections 1560, 1561, and 1562 constituted an exception to the requirements of Section 1271, in that they allowed hospital records to go in with less of a foundation than that required for the records of other businesses. Apparently, it was believed, before 1969, that the attorneys for plaintiffs and defendants in personal injury cases both wanted hospital records to be admitted on the basis of the affidavit described in Section 1561, in the belief that the very nature of hospital work and hospital record-keeping established sufficient authenticity to warrant admission of the records into evidence. Judge Banyard has further suggested that, while there may have been a good factual reason for differentiating between hospital records and the records of all other businesses, the amendments in 1969 eliminated whatever exception existed for hospital records and created an apparent inconsistency between Sections 1560, 1561, and 1562, on the one hand, and Section 1271, on the other.
>
> I still adhere to the view that, on their face, Sections 1560, 1561, and 1562 are not in conflict with Section 1271, and that documents which comply with Sections 1560, 1561, and 1562 do not qualify for admission into evidence unless the requirements of Section 1271 are also met. I believe that it is unreasonable to say that the Legislature would require less of a foundation when the authenticating witness is represented only by his declaration made under Section 1561 than when he is present in court for oral examination under Section 1271. The fact, however, that Judge Banyard, one of the most respected and prominent members of the trial bar before his elevation to the Bench, would appear to take such an unreasonable view, indicates to me the necessity of clarifying the subject.
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> Of course, in most cases, both sides want the records in evidence and, therefore, do not object, or counsel on both sides assume that the affidavit under Section 1561 constitutes

The relationship between Sections 1561 and 1562, on the one hand, and Section 1271, on the other, could be clarified by expanding the requirements stated in Section 1561 for the affidavit accompanying a copy of subpoenaed business records to include the matters which must be shown under Section 1271 to satisfy the 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. The Commission believes that this solution would be undesirable, however, since it would place the burden upon the adverse party to subpoena the custodian-affiant in order to exercise his right of cross-examination, and it would make a copy of a business record more easily admissible than the original record itself.

Sections 1561 and 1562 serve the important purpose of minimizing the demand of time and expense imposed upon third persons by the trial process and of saving the time of courts and litigants in establishing matters which many times are not contested. These purposes would be further served by providing a 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 Evidence Code Section 1562 be amended 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, 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.

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an adequate foundation. Yet, only last week in my own court, an objection was voiced, and the proponent had to bring in the authenticating witness to lay the necessary foundation under Section 1271. The problem, therefore, is still with us in a sporadic sort of way.

(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.[5] However, in such case, the evidence of an entry in the records should be excluded if the adverse party proves that the sources of information or method or time of preparation were such as to indicate its lack of trustworthiness.[6]

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

6. For comparable provisions qualifying hearsay exceptions, see, e.g., Evid. Code §§ 1252, 1260, 1261, 1310, 1311, 1323.

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

An act to amend Section 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 1562 of the Evidence Code is amended to read:

1562. (a) 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.

(b) The copy of the records is not made inadmissible by the hearsay rule when offered to prove an act, condition, or event recorded if:

(1) The affidavit accompanying the copy of the records contains the statements required by subdivision (a) of Section 1561;

(2) The subpoena duces tecum served upon the custodian of records or other qualified witness for the production of the 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;

(3) 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

(4) The adverse party served with a written notice as required by paragraph (3) 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 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.

(c) Evidence of an entry in the records is inadmissible under subdivision (b) if the sources of information or method or time of preparation were such as to indicate its lack of trustworthiness.

Comment. Subdivision (a) of Section 1562 continues the former language of the section which created an exception to the best evidence rule.

Subdivision (b) has been added to provide an exception to the hearsay rule; if the adverse party does not object in writing within the allotted time, a copy of the subpoenaed business records may be admitted without compliance with the requirements of Section 1271 (hearsay exception for business records). 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 (Section 1271). See Recommendation Relating to Admissibility of Copies of Business Records, 12 Cal. L. Revision Comm'n Reports 1974). If the adverse party does not object in writing within the allotted time, the copy of the subpoenaed business records is admissible notwithstanding the hearsay rule unless such party can establish that the sources of

information or method or time of preparation were such as to indicate its lack of trustworthiness. See subdivision (c). For provisions comparable to subdivision (c), see e.g., Sections 1252, 1260, 1261, 1310, 1311, 1323. Thus, although subdivision (b) does not require a preliminary showing that the record is trustworthy in order to avoid the hearsay rule, the adverse party may have the record excluded under subdivision (c) if he shows, for example, that it was not based on the personal knowledge of the recorder or of someone with a business duty to report to the recorder. See discussion in the Comment to Section 1271.