#63.50 11/1/74

First Supplement to Memorandum 74-64

Subject: Study 63.50 - Admissibility of Copies of Business Records

Attached (Exhibit I) is a letter from the Office of the District Attorney of the County of Sacramento responding to the letter I wrote him concerning his objections to the Tentative Recommendation Relating to Admissibility of Copies of Business Records in Evidence.

The letter makes several points. First, it refers to two cases (copies of opinions in these cases are attached as Exhibits II and III). Neither case discusses the precise problem involved in the tentative recommendation, but one case contains a statement that can be read as indicating that Sections 1560-1566 create a hearsay exception (or at least did before the act was extended beyond hospital records). The other case has no relevance to the problem. These cases do not cause the staff to doubt the soundness of the analysis of existing law in the recommendation.

The letter next notes Section 1280 (public records) and notes that testimony by the custodian is not necessarily required under this section. This is true. The relevant portion of the Comment to Section 1280 is set out in Memorandum 74-64. The situation under that section is quite different than the situation under Section 1271 (as the Comment points out).

The letter states that the major problem with the Commission's recommendation is that the defendant in a child support case can object to the business record of the employer which states the earnings of the defendant and thereby require the prosecution to bring in the keeper of the records, even when the defendant does not dispute the accuracy of the record as to his earnings. This objection has considerable appeal. The staff recommends that Section 1562.5 on pages 8-9 of Memorandum 74-64 be revised to add the substance of the following at the end of subdivision (d):

> In a civil or criminal action to enforce the duty of the defendant to support a child or other person, if the business record to be offered as evidence concerns only the defendant's employment, earnings, and related matters, the written demand for compliance with the requirements of Section 1271 is ineffective for the purposes of this section unless it is accompanied by an affidavit of the defendant stating precisely in what respect the defendant believes the copy of the record served on him is inaccurate.

Also, we suggest that the following additional provision be added to Section 1562.5:

> Nothing in this section affects the right of a party to offer evidence to disprove an act, condition, or event recorded in a record admitted in evidence under this section.

The staff believes that the proposed revision will preclude the defendant from keeping out a record of his earnings unless it is not accurate. The defendant will not want to make a false affidavit. I discussed the proposed revision with Professor Kaplan--an evidence expert. He likes the idea but sees no reason to restrict the provision to support cases.

Respectfully submitted,

John H. DeMoully
Executive Secretary

First Supp. Memo 74-64 EXHIBIT I

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October 28, 1974

California Law Revision Commission
School of Law
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RE: Your letter of September 30, 1974

Dear Sir:

In reference to the proposed revision of Section 1560 et seq., I wish to call People vs Blagg 267 CA2d 598 to your attention. While that case concerned itself with hospital records, it covered in substance Section 1560 as presently written. Further, it should be noted that a second case, People vs. Moore 5CA3rd 486 also discussed Evidence Code 1560 in regards to hospital records only. Finally, I hope that in regard to the issue of confrontation of witnesses, the Law Revision Commission has reviewed Section 1280 of the Evidence Code which permits government records to be introduced without actual confrontation. Also in regard to this issue it should be noted that Texas has a statute similar to Section 1560 et seq. of our Evidence Code, Section 3737A V.C.S.

The Texas scheme provides that the records attached to the affidavit must be sealed and filed in the manner of depositions, fourteen days prior to the date the jury is impanel or fourteen days prior to the date the court shall begin hearing testimony. I submit that a scheme that would require that we serve on opposing counsel within a reasonable time, for the purpose of raising any objections before the trial is commenced, would, I think, substantially protect the defendant's rights. Our biggest problem is that we do not want to be compelled, in child support cases, to bring a keeper of the records back across state lines solely for testimony that could easily be secured by affidavit, an activity that the defence could, by your proposed statue, compel solely as a form of obstruction to the prosecution.

The proposed statute, opening such records to the defence prior to trial to insure that substantial compliance with Section 1271 of the Evidence Code has occurred, creates no problem for us provided the time limits set forth therein are such as to not impair the defendant's right to a speedy trial. I think the problem lies in the proposed Section 2 of your new Section 712. I shall be interested in seeing what your organization produces.

Please feel free to call on us for any further help you desire.

Very truly yours,

Michael E. Barber,
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Family Support Council

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