#63.50 4/24/75

Memorandum 75-35

Subject: Study 63.50 - Admissibility of Business Records

In a letter to the Commission, Bruce I. Cornblum, Chairman of the California Trial Lawyers Association Committee on Law Revision, points out that the proposed statute dealing with admissibility of business records may pose a problem for the attorney who, at a time later than 20 days before the trial or other hearing determines that he wants to offer as evidence business records without the testimony of the custodian or who opposes the introduction of the records without the testimony of the custodian but fails to file his opposition and accompanying affidavit within 10 days after being served. The proposed statute, in Section 1562.5, contains a specific procedure which allows the party to obtain an ex parte order shortening time for the service of the notices required by subdivisions (c) and (d) of Section 1562.3. This would seem to provide a solution superior to a motion to relieve from default or a request for continuance which would otherwise be the remedy for the errant party. If there is good cause, the parties could proceed as scheduled. If no good cause can be shown, relief from default, a continuance, or a possible appeal on this ground would not be justified in any event.

Mr. Cornblum suggested that the pretrial rules be amended to include a specification of records which would be included according to the procedure under Section 1562.3 et seq. Initially, it should be noted that the Pretrial Conference Rules are promulgated by the Judicial Council. The Commission is thus not specifically empowered to recommend the amendment of such rules. However, the Commission can recommend to the Judicial Council that these rules be amended where appropriate. Mr. Cornblum suggests that it would assist attorneys to have a provision which would alert the parties to the question of possible use of business records without the requirement of the custodian.

Such a procedure would seem helpful, although the addition should be kept quite general in conformity with the general nature of the rest of the Rule. An addition could be suggested to Rule 212(4) and Rule 220.2(b) as follows:

> "whether the notices required for admission of business records . . . have been sent"

or

> whether the procedure for admission of copies of business records under Evidence Code Sections 1560-1566 has been followed.

Attached hereto are Exhibit I (Mr. Cornblum's letter)and Exhibit II (Rules 212 and 220.2 California Rules of Court).

Respectfully submitted,

Jo Anne Friedenthal
Legal Counsel

Memorandum 75-35

Law Office of

EXHIBIT I

BRUCE I. CORNBLUM

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February 14, 1975

John H. DeMoully, Executive Secretary
California Law Revision Commission
School of Law
Stanford, CA 94305

Re: Admissability of Business Records

Dear John:

This letter is a follow-up to our telephone conversation, February 11, 1975. I expressed to you my concern about the possibility of having a lawyer in default by either not sending out a notice twenty days prior to trial itemizing records, or the lawyer failing to object to records ten days prior to trial. I recognize that this may not be a serious defect in most trials, etc., but still it poses the problem of potential default. Lawyers are busy, etc., and it always happens that the lawyer is preparing his case the "week before trial."

If a lawyer has "good cause" for not doing what these statutes require (which, basically, I agree with, i.e., having a procedure to prevent wasting time and money for custodians), they can always be allowed to cure the defect by a motion to relieve default, etc., and could involve at that time a continuance, or, possibly, an appeal.

It would seem to me that, to prevent this issue of "oversight" etc., perhaps the itemization of records could be handled routinely at every trial setting or pre-trial by having the judge inquire, as part of their standard questions, as to what records will be submitted without a custodian. For pre-trials, this could be accomplished by amending Rule 212 (the pre-trial conference) requiring specification of records. Also, Rule 220 could be amended (trial setting conferences).

This way, an attorney will have at least thirty to ninety days before time of trial should he change his mind or discover an oversight. He could always then amend in accordance with CCP 576.

Very truly yours,

BRUCE I. CORNBLUM

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EXHIBIT II

[California Rules of Court]

Rule 212. The Pretrial Conference

(a) At the pretrial conference, whether in the courtroom or in chambers, the judge, without adjudicating controverted facts, may consider and act upon the following matters:

(1) The written statements submitted under rule 210, and the statements of the factual and legal contentions made as to the issues remaining in dispute;

(2) Any amendments to the pleadings to be made by consent or by order of the judge upon application of a party at such conference in respect to any amendment to the pleadings not previously passed upon by any judge, and fixing the time within which amended pleadings shall be filed;

(3) Simplification of the factual and legal issues involved;

(4) Admissions of fact, and of documents, as will avoid unnecessary proof;

(5) References to a referee, commissioner, or other person, as now or hereafter provided by law;

(6) Whether the court has jurisdiction to act in the case as now or hereafter provided by law and, if not, by consent to transfer or to dismiss the case accordingly;

(7) Whether the depositions, inspection of writings and other discovery proceedings, and the physical examinations, if any, have been completed under rule 210; and, if not, subject to rule 222, the fixing of time limits therefor;

(8) Whether a trial brief or memorandum of points and authorities shall be required; and, if so, the fixing of the time of the service and filing thereof;

(9) Re-estimating the time for trial after inquiry whether a jury trial is to be had; and

(10) Assigning the date and place of the trial in accordance with rule 219.

As amended, eff. Sept. 1, 1967.

Rule 220.2 Duties of Attorneys in Respect to Trial Setting Conferences

(a) Each party appearing in any case shall attend the trial setting conference in person or by counsel. The persons so attending shall have sufficient knowledge of the case to represent to the court that the case is or is not ready for setting and to furnish sufficient information to the court concerning the case to permit the court to determine if the case is in fact ready to be assigned a definite trial date.

(b) Each party shall be prepared to inform the court as to what discovery has been completed, what further discovery may be required and when such discovery can be completed.

Added, eff. Sept. 1, 1967.