#63.50 8/29/75

Memorandum 75-64

Subject: Study 63.50 - Admissibility of Business Records

The Commission submitted a Recommendation Relating to Admissibility of Copies of Business Records in Evidence (January 1975)(copy attached) to the 1975 session and AB 974 was introduced to effectuate this recommendation. You should read the attached recommendation for background.

AB 974 was held in the Assembly Judiciary Committee. The committee took the view that the procedure proposed (involving a pretrial filing and notice and objection to admissibility prior to trial) was exceedingly complex and might result in an unwary party inadvertently waiving his right to object. Moreover, the committee strongly objected to applying the procedure to a defendant in a criminal case since the defendant would be required to make a pretrial affidavit stating he believed the record was untrustworthy and setting forth the precise facts on which this belief is based. Despite the fact that the bill was supported by the State Bar and with qualifications by the California Trial Lawyers Association, the committee unanimously voted against the bill.

The staff believes that some procedure should be provided for the admission of a copy of a business record in evidence without the need for the custodian to appear. We believe that the recommendation is sound. Nevertheless, it is apparent that some revision must be made in the recommendation if it is to have any change for legislative enactment.

The staff suggests that the Commission take the approach taken in its recommendation relating to the admissibility of duplicates. Specifically, we recommend legislation along the following lines:

Evidence Code § 1562. Admissibility of affidavit and copy of records

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) If the requirements of subdivision (c) are satisfied, the copy of the records is not made inadmissible by the hearsay rule when offered at the trial or other hearing to prove an act, condition, or event recorded unless (1) a genuine question is raised as to the accuracy of the record or (2) in the circumstances it would be unfair to admit the copy without requiring the personal attendance of the custodian or other qualified witness.

(c) The copy of the records is admissible under subdivision (b) only if all of the following are established by the party offering the copy as evidence:

(1) The copy was subpoenaed pursuant to subdivision (b) of Section 1560 and Sections 1561 and 1562.

(2) The affidavit accompanying the copy contains the statements required by subdivision (a) of Section 1561.

(3) The subpoena duces tecum served upon the custodian of records or other qualified witness for the production of the copy did not contain the clause set forth in Section 1564 requiring personal attendance of the custodian or other qualfied witness and the production of the original records.

(4) The party offering the copy of the records as evidence served on each party, not less than 10 days prior to the date of the trial or other hearing, a notice that a copy of the records described in the subpoena duces tecum have been subpoenaed for the trial or other hearing pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code, together with a copy of the subpoena duces tecum served upon the custodian of records or other qualified witness for the production of the copy.

This section will eliminate the need for the court to sustain a hearsay objection in a case where there is no controversy concerning the accuracy of the record. At the same time, it may satisfy those who are concerned about inadvertent waiver of a hearsay exception in a case where the accuracy of the record is in dispute and places no burden on the defendant in a criminal case. It does not, however, provide much assurance to the party offering the copy

of the record that it will be admitted unless he knows that the other party does not contest the accuracy of the record.

The proposed amendment does not deal with the problem how a party is to determine the contents of the copy of the record to be presented for admission at trial or other hearing. Section 1560 now provides that, unless the parties to the proceeding otherwise agree, the copy is to be retained in a sealed envelope to be opened only at the time of the trial or other hearing. The Commission may wish to include a provision to deal with this problem. The following is suggested.

Evidence Code § 1562.5. Examination of copy prior to trial

1562.5. The parties may agree that the copy of the records, and the affidavit described in Section 1561, delivered to the clerk, judge, or other person pursuant to Section 1560 be made available to the parties prior to the trial or other hearing for examination and copying under such terms and conditions as the parties specify in their agreement. If the parties are unable to agree, the court, for good cause shown, may order that the copy and affidavit be made available to the parties prior to the trial or other hearing for examination and copying under such terms and conditions as the court deems appropriate. The person to whom the copy and affidavit were delivered shall permit any party to inspect and make copies of the copy of the records and affidavit pursuant to such terms and conditions.

Respectfully submitted,

John H. DeMoully
Executive Secretary

AB 974

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Admissibility of Copies of Business Records in Evidence

January 1975

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

STATE OF CALIFORNIA EDMUND G. BROWN JR. *Governor*

CALIFORNIA LAW REVISION COMMISSION

STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305
(415) 497-1731

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January 31, 1975

To: THE HONORABLE EDMUND G BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Evidence Code was enacted in 1965 upon recommendation of the Law Revision Commission. Resolution Chapter 130 of the Statutes of 1965 directs the Commission to continue to study the law relating to evidence. Pursuant to this directive, the Commission has undertaken a continuing study of the Evidence Code to determine whether any substantive, technical, or clarifying changes are needed.

This recommendation is submitted as a result of this continuing review. It deals with the admissibility of copies of business records in evidence.

Respectfully submitted,
MARC SANDSTROM
Chairman

BACKGROUND

Before a business record may be admitted into evidence several requirements must be satisfied. First, as is true of any document, the record must be authenticated.[1] Second, either the original record must be produced or a copy must be shown to fall within an exception to the best evidence rule.[2] Third, if the record is offered to prove the truth of statements which it contains, the statements must be shown to fall within one of the exceptions to the hearsay rule[3]—normally the business records exception.[4]

The requirement of authentication can be met by calling the custodian of the record as a witness. However, in the vast majority of situations, and in light of the perfunctory nature of the testimony to be elicited, the cost of calling such a witness to trial, or of taking his deposition,[5] is wasteful and burdensome on persons, such as custodians of

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[1] Evidence Code Sections 1400 and 1401 provide:

1400. Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.

1401. (a) Authentication of a writing is required before it may be received in evidence.

(b) Authentication of a writing is required before secondary evidence of its content may be received in evidence.

[2] The best evidence is defined by Evidence Code Section 1500 as follows:

1500. 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.

[3] Evidence Code Section 1200 contains the definition of hearsay as follows:

1200. (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.

[4] Evidence Code Section 1271 provides:

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.

[5] In civil matters in which the custodian's residence is beyond the scope of a subpoena, his deposition may be taken and introduced in lieu of his testimony. Code Civ. Proc. §§ 2019(b), 2020, and 2016(d)(3). In criminal matters, Penal Code Section 1330 provides a procedure by which a witness, who resides within the state but beyond the normal distance for a subpoena, may nevertheless be subpoenaed if a judge finds his attendance at the examination, trial, or hearing is material and necessary. Penal Code Section 1334.3, a reciprocal statute, provides a procedure whereby a witness may be brought from another state if the court finds that he is material and necessary. In addition, Penal Code Sections 1335-1345 provide a means of taking pretrial testimony of a material witness who is about to leave the state or who is too sick or infirm to attend the trial. Penal Code Sections 1349-1362 provide the defendant—but not the prosecution—with a method of taking a deposition of a material witness who resides out of the state; the deposition may be read in evidence upon a court finding that the witness is unavailable within the meaning of Evidence Code Section 240.

hospital records, whose normal duties are to care for such records. Similarly, strict adherence to the requirements of the best evidence rule with respect to business records normally serves little useful purpose. There seems little reason to demand production of an original record if a copy is certified by the custodian to be identical to the original.

Evidence Code Sections 1560-1566, applicable to copies of business records,[6] provide clear exceptions to the normal requirements of authentication and to the best evidence rule. These sections apply only in an action in which the business is neither a party nor the place where the cause of action is alleged to have arisen and permit compliance with a subpoena duces tecum for business records by sending a copy of the subpoenaed business record to the court in a sealed envelope accompanied by the affidavit of the custodian or other qualified witness, pursuant to Section 1561, certifying 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.

Evidence Code Section 1562 provides in part as follows:

> 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. . . .

Thus, under this procedure, a copy of a business record is admissible without the necessity of satisfying the requirements of the best evidence rule or the rules of authentication; the fact that the document offered is a copy rather than the original is disregarded, and the matters stated in the affidavit are given the same force as if the custodian had appeared and testified. This procedure serves a most useful purpose in a case where the content of the business record will not be challenged for the truth of statements therein.

It has been brought to the attention of the Commission, however, that some attorneys and judges take the view that

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[6] The legislation was originally enacted as Code of Civil Procedure Sections 1998-1998.5 and as such applied exclusively to hospital records. In 1965, the provisions were recodified as Evidence Code Sections 1560-1566 without substantive change. The sections were amended in 1969 to make the provisions applicable to "every kind of business described in [Evidence Code] Section 1270." Cal. Stats. 1969, Ch. 199, §§ 1-4.

an affidavit complying with Section 1561 is sufficient to assure the admission in evidence of a 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.[7]

The argument that the requirements of the hearsay exception are satisfied by following the procedure under Sections 1560-1566 is based upon two considerations. First, Section 1562 provides that the statements in the affidavit accompanying the record are presumed true, without denoting any specific evidentiary purpose. Second, the required statements in the affidavit under Section 1561 in some respects parallel the required showing needed for the application of the business records exception to the hearsay rule under Section 1271. However, Section 1271 includes

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[7] 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.
>
> 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.
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> 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. . . .
>
> 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 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.

The uncertainty as to the scope of these sections as reported by Judge Herlands is not new. In 1959, when the legislation was first adopted (limited to hospital records), the State Bar Journal discussed the new provisions as if they could satisfy the business records exception as well as the best evidence rule. The Journal comment stated, however, that the trial judge could refuse to admit copies of the records sent to the court, pursuant to the statute, if upon examination the court determined that the admission was not "justified," citing Code of Civil Procedure Section 1953f, which at the time contained the business records exception to the hearsay rule, now codified as Evidence Code Section 1271. 34 Cal. S.B.J. 668-669 (1959).

requirements not satisfied by an affidavit submitted pursuant to Section 1561.[8] The business records exception to the hearsay rule provided for in Section 1271 applies only if:

> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
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> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Moreover, there is an important difference between a rule involving a showing of authenticity or specially providing for admission of a copy into evidence and one which admits records for the truth of the statements contained therein based upon a showing of trustworthiness in sources and preparation. A document can be an authentic original and nevertheless contain unreliable or untrue information. Thus, greater safeguards are needed to satisfy a hearsay exception than are needed for the best evidence rule or the rules regarding authentication. This is particularly true in criminal actions where a defendant, as a matter of policy, is afforded the right to confront witnesses whose testimony is material even when not constitutionally required.[9]

RECOMMENDATIONS

The uncertainty regarding the relationship between Sections 1560-1566, on the one hand, and Section 1271, on the other, could be clarified in several different ways. Section 1562 could be amended to provide that the affidavit submitted under Section 1561 also satisfies the requirements of Section 1271. This solution would be indefensible from a logical standpoint since it would make copies of business records admissible without any showing as to the trustworthiness of the records—a showing that would be required if the original of the records were offered in evidence. Alternatively, the requirements specified in Section 1561 for the affidavit accompanying a copy of subpoenaed business records could be expanded to include the additional matters which must be shown under

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[8] Note that the Comment to Section 1562 by the Assembly Committee on Judiciary states that the presumption created by Section 1562 "relates only to the truthfulness of the matters required by Section 1561 to be stated in the affidavit."

[9] In several cases, the United States Supreme Court has held that the admission of evidence under one of the exceptions to the hearsay rule did not violate the defendant's constitutional right of confrontation. See California v. Green, 399 U.S. 149 (1970) (prior inconsistent statement made exception to hearsay rule by Cal. Evid. Code § 1235); Dutton v. Evans, 400 U.S. 74 (1970) (declaration of co-conspirator during pendancy of criminal project made exception to hearsay rule by Ga. Code Ann. § 38-306 (1954 rev.)); see also Read, *The New Confrontation—Hearsay Dilemma*, 45 So. Cal. L. Rev. 1 (1972).

Section 1271 to satisfy the business records exception to the hearsay rule—*i.e.*, the statute could provide that, if the affidavit shows that the mode of preparation of the records and the sources of information and method and time of preparation were such as to indicate its trustworthiness, the record be admitted without further requirements. The Commission believes that this solution would be undesirable, however, since it would place the burden upon the opposing party to subpoena the custodian-affiant in order to exercise his right of cross-examination. Additionally, the drafting of such an affidavit often would be extremely difficult since the information required varies with each case, and neither the custodian nor the proponent of the evidence could be certain what information would be satisfactory to the court. Another alternative would be to provide expressly that Sections 1560-1566 do not satisfy the business records exception to the hearsay rule. However, the Commission believes that this solution is too drastic.

The salutary purposes of Sections 1560-1566—to minimize the demands of time and expense imposed upon third persons by the trial process and to save the time of courts and litigants in establishing matters which many times are not contested—would be served by providing a procedure which would allow copies of business records to be admitted into evidence despite the requirements of Section 1271 unless an opposing party notifies the subpoenaing party of his hearsay objection to the records 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 subdivisions (c) and (d) of Section 1271. To make such a provision operate effectively, it is necessary to insure that the opposing party will not automatically demand the presence of the custodian in every case. Thus, whenever such a demand is made, it should be supported by an affidavit setting forth specific facts showing the necessity for requiring the custodian to be produced at trial. Appropriate sanctions should be available in the event that the court finds that such an affidavit is made without substantial justification.

In order for an adverse party to have a realistic opportunity to determine whether or not to demand the presence of the custodian of the records, he should be supplied with a copy of the records or he should have access to a copy if supplying a copy to him would constitute a substantial burden on the party offering the copy in evidence. In the ordinary case, providing copies of the records to the other parties would not be a substantial burden on the party who seeks to introduce the copy in evidence since he will normally have obtained a copy of the

records through usual investigation. Custodians would have a strong incentive to cooperate in providing copies of records in order to avoid the inconvenience of being required to attend trial in actions in which they are not parties and have no interest.[10] In the event that the custodian resists voluntary disclosure in a civil case, copies of such records may be obtained through the process of pretrial discovery.[11]

Specifically, the Commission recommends that legislation be enacted to provide:

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

(2) In those cases where numerous parties are involved, or where the records are voluminous, it may not be practical to require the party seeking to introduce the evidence to serve on each party a copy of the records to be offered in evidence.[12] In such a case, the court would be authorized to permit the offering party to deposit a copy of the records with the clerk of the court to be available for examination and copying by the other parties under such terms and conditions as the court deems appropriate.[13]

(3) If no party objects within 10 days after receiving notice, the copy of business records would be admissible, notwithstanding the requirements of the hearsay rule.

(4) If a party, within 10 days after receiving notice, serves on the party seeking to introduce the copy of the records

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[10] It was the California Hospital Association which initially sponsored the legislation allowing the custodian to supply a copy of the records in lieu of personal appearance. 34 Cal. S.B.J. 668 (1959). Sections 1560-1566 apply only "in an action in which the business is neither a party nor the place where any cause of action is alleged to have arisen." See Section 1560.

[11] *E.g.*, Code Civ. Proc. § 1985.

[12] In the case of voluminous records, Evidence Code Section 1509 provides a procedure for offering a written or oral summary of the records. However, this section only overcomes the best evidence rule. If the original records are hearsay or not properly authenticated, the summary is not admissible. People v. Doble, 203 Cal. 510, 265 P. 181 (1928). See B. Witkin, *California Evidence* § 698 (2d ed. 1966). Additionally, Section 1509 permits the court to require production of the original records for inspection by the adverse party. See Exclusive Florists v. Kahn, 17 Cal. App.3d 711, 95 Cal. Rptr. 325 (1971).

[13] This recommendation is in accord with the observation of the California Supreme Court in *Vasquez v. Superior Court*, 4 Cal.3d 800, 820, 484 P.2d 964, 977, 94 Cal. Rptr. 796, 809 (1971), with regard to adoption of procedures for class actions: "pragmatic procedural devices will be required to simplify the potentially complex litigation while at the same time protecting the rights of all the parties." Compare the procedure for establishment of central depositories for inspection and copying of documents in federal multidistrict litigation. *Manual for Complex and Multidistrict Litigation* § 2.5 (1970).

into evidence a written demand that the requirements of subdivisions (c) and (d) of Section 1271 be satisfied, together with a supporting affidavit, then the party who offers the copy of the business records as evidence must produce the custodian or other qualified witness in order to satisfy the requirements of Section 1271(d). In his supporting affidavit, the adverse party must state that he has good reason to believe that the requirements of Section 1271 cannot be satisfied and must set forth the precise facts on which this belief is based.

(5) Upon a showing of good cause, the court would be authorized to make an ex parte order shortening the time for service of the required notices.

(6) In a case where a party has demanded that the requirements of Section 1271 be satisfied and has served the required affidavit, and where thereafter the evidence has been admitted on the testimony of the custodian or other qualified witness, the court may—if it finds that the party who opposed the introduction of the copy of the records did not have substantial justification for believing that the records did not satisfy the requirement for admissibility of Section 1271—require the party who opposed the introduction of the copy to pay the party offering the copy as evidence the expenses of obtaining the testimony of the custodian or other qualified witness, including reasonable attorney's fees.

(7) In a criminal action for failure to support under Penal Code Sections 270, 270a, or 270c or in a civil proceeding under the Uniform Civil Liability for Support Act (Civil Code § 241 *et seq.*), a copy of the business records of an employer dealing with the employment and earnings of an employee would not be made inadmissible by the hearsay rule if the affidavit of the custodian or other qualified witness satisfies the requirements of Evidence Code Section 1561 and if a notice of the intention to introduce the records together with a copy of the records is served on the parties not less than 10 days prior to trial. This hearsay exception is justified by the large volume of support cases, a significant number of which concern distant or out-of-state employers, by the routine and normally accurate nature of the records involved, and by the ability of the employee to prove any inaccuracy in the record by his own testimony and other sources of evidence.

(8) The recommended new provisions would affect only the manner in which a copy of business records is admitted in evidence. They would not affect the weight to be given to the record as evidence of the act, condition, or event recorded, nor would they foreclose a party from presenting evidence to disprove such act, condition, or event.

PROPOSED LEGISLATION

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

An act to add Section 250.5 to the Civil Code, to add Sections 1562.3, 1562.4, 1562.5, 1562.6, and 1562.7 to the Evidence Code, and to add Section 270i to the Penal Code, relating to the admissibility of business records in evidence.

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

Civil Code § 250.5 (new)

SECTION 1. Section 250.5 is added to the Civil Code, to read:

250.5. (a) In any proceeding to enforce a duty of support under this title, evidence of the employment and earnings of an employee in the form of a copy of the business records of his employer subpoenaed pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code is not made inadmissible by the hearsay rule when offered at the trial or other hearing to prove such employment or earnings, or both, if all of the following are established by the party offering the copy as evidence:

(1) The affidavit accompanying the copy contains the statements required by subdivision (a) of Section 1561 of the Evidence Code.

(2) The subpoena duces tecum served upon the custodian of records or other qualified witness for the production of the copy did not contain the clause set forth in Section 1564 of the Evidence Code requiring personal attendance of the custodian or other qualified witness and the production of the original records.

(3) The party offering the copy as evidence has served on each party, not less than 10 days prior to the date of the trial or other hearing, both of the following:

(i) A notice that a copy of the business records has been subpoenaed for trial or other hearing in accordance with the procedure authorized pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code and will be offered in evidence pursuant to Section 250.5 of the Civil Code.

(ii) A copy of the business records to be offered in evidence.

(b) The admission into evidence of a copy of a business record pursuant to this section shall not affect the right of a party to offer evidence to disprove the employment or earnings recorded in such record.

Comment. Section 250.5 creates an exception to the hearsay rule (Evid. Code § 1200) for a copy of business records subpoenaed pursuant to Evidence Code Sections 1560-1566 if the requirements of Section 250.5 are satisfied. It should be noted that Section 1562 of the Evidence Code creates an exception to the best evidence rule (Evid. Code § 1500) and provides the necessary preliminary showing of authenticity of both the copy and the original record (Evid. Code § 1401).

Section 250.5 is similar to Section 1562.3 of the Evidence Code which creates a general hearsay exception for copies of business records subpoenaed pursuant to Evidence Code Sections 1560-1566 if the requirements of Section 1562.3 are satisfied. However, Section 250.5 does not include a provision similar to subdivision (d) of Section 1562.3, which permits a party to demand that the custodian or other qualified witness be produced at the trial or other hearing. The hearsay exception provided by Section 250.5 is justified by the large volume of failure to support cases, a significant number of which concern distant or out-of-state employers, by the routine and normally accurate nature of the records involved, and by the ability of the employee to prove any inaccuracy in the record by his own testimony and other sources of evidence.

Subdivision (b) makes clear that Section 250.5 does not preclude any party from offering evidence at the trial or other hearing to prove that the records are not accurate. For a comparable provision, see Evid. Code § 1562.7.

Section 250.5 applies in an action under the Uniform Civil Liability for Support Act. For a comparable provision applicable to criminal actions for failure to support, see Penal Code § 270i.

Evidence Code § 1562.3 (new)

SEC. 2. Section 1562.3 is added to the Evidence Code, to read:

1562.3. A copy of the business records subpoenaed pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, is not made inadmissible by the hearsay rule when offered at the trial or other hearing to prove an act, condition, or event recorded if all of the following are established by the party offering the copy as evidence:

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

(b) The subpoena duces tecum served upon the custodian of records or other qualified witness for the production of the copy 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 offering the copy as evidence has served on each party, not less than 20 days prior to the date of trial or other hearing, both of the following:

(1) A notice that a copy of the business records has been subpoenaed for trial or other hearing in accordance with the procedure authorized pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code and will be offered in evidence pursuant to Section 1562.3 of the Evidence Code.

(2) A copy of the business records to be offered in evidence or a notice that a copy of the business records has been deposited with the clerk of the court in accordance with Section 1562.4.

(d) No party has, within 10 days after being served with the notice referred to in subdivision (c), served on the party seeking to introduce the record both of the following:

(1) A written demand that the requirements of subdivisions (c) and (d) of Section 1271 be satisfied before the copy of the record is admitted in evidence.

(2) An affidavit of such party stating that he has good reason to believe that the copy of the business records, or a specific portion thereof, served on him, or in the custody of the clerk, does not satisfy the requirement of subdivision (d) of Section 1271 and setting forth the precise facts upon which this belief is based.

Comment. Section 1562.3 creates an exception to the hearsay rule (Section 1200) for a copy of business records subpoenaed pursuant to Sections 1560-1566 if the requirements of Section 1562.3 are satisfied. Section 1562 creates an exception to the best evidence rule (Section 1500) and provides the necessary preliminary showing of authenticity of both the copy and the original record (Section 1401). However, the affidavit of the custodian of records or other qualified witness under Section 1561 does not satisfy the requirements of the hearsay exception provided by Section 1271—the business records exception to the hearsay rule—because the affidavit does not contain statements sufficient to satisfy the requirements of subdivision (d) of Section 1271 ("The sources of information and method and time of preparation were such as to indicate its trustworthiness."). See *Recommendation Relating to Admissibility of Copies of Business Records in Evidence* (January 1975).

Subdivision (d) provides the method by which the adverse party may demand testimony by the custodian of the records or other qualified witness before the copy of the records can be admitted into evidence. Subdivision (d) (2) is designed to assure that a party will not make such a demand automatically and without substantial justification. Under subdivision (d), the party who opposes the introduction of the record, or a portion thereof, must not only state under oath that he has good reason to believe that the copy of the record, or a portion thereof, is inadmissible because the requirements of subdivision (d) of Section 1271 cannot be satisfied, but he must also state specific facts upon which the belief is based. This places a burden on the party who

opposes the introduction of the copy of the records to investigate a situation in which he lacks knowledge of the facts sought to be proved. In such a case, the party may support his statement of belief with facts showing that the record is in fact inaccurate or that the sources of information or method of preparation of the records are such as to render the records untrustworthy. Failure to object does not preclude a party from offering evidence at trial to show that the records are in fact incorrect. See Section 1562.7.

Evidence Code § 1562.4 (new)

SEC. 3. Section 1562.4 is added to the Evidence Code, to read:

1562.4. In an action in which there are numerous parties or a party seeks to have a copy of a voluminous business record admitted into evidence under the provisions of Section 1562.3, the court may make an ex parte order permitting the party, in lieu of serving the copy of the record on all parties as required by subdivision (c) of Section 1562.3, to deposit a copy of the business records with the clerk of the court for examination and copying by the other parties under such terms and conditions as the court deems appropriate. A copy of the order of the court shall be served together with the notices required by Section 1562.3.

Comment. Section 1562.4 authorizes the court to issue an ex parte order permitting deposit of a copy of business records with the clerk of the court in an action in which there are numerous parties or in which a party seeks to have a copy of a voluminous business record admitted into evidence. This avoids the need to serve a copy of the records on each party and offers a practical solution to the procedural problems, raised by complex multiparty litigation or voluminous records, where the cost of reproduction would be a substantial burden on the party offering the copy of the record as evidence.

Evidence Code § 1562.5 (new)

SEC. 4. Section 1562.5 is added to the Evidence Code, to read:

1562.5. A party who seeks to introduce a copy of business records pursuant to Section 1562.3 may, upon a showing of good cause therefor and in the discretion of the court, obtain an ex parte order shortening the time for service of the notices required by subdivisions (c) and (d) of Section 1562.3.

Comment. Section 1562.5 provides flexibility in those circumstances where a party wishes to use the procedure provided by Section 1562.3 but where the time limitations otherwise would preclude use of the procedure. The court is given discretion so that such an order will not be granted where

it would be prejudicial to the other parties to the action. Primarily, the provision is intended to aid in the use of this procedure in criminal actions which are required to be brought to trial within strict time limits.

Evidence Code § 1562.6 (new)

SEC. 5. Section 1562.6 is added to the Evidence Code, to read:

1562.6. If a party serves a demand and supporting affidavit as provided in subdivision (d) of Section 1562.3 and if the party offering the copy of the business records as evidence satisfies the requirements of Section 1271 and the copy of the record is admitted into evidence, the latter party may apply to the court in the same action for an order requiring the party who served the demand to pay him the expenses of satisfying the requirements of Section 1271, including the cost of obtaining the testimony of the custodian or other qualified witness and reasonable attorney's fees. The court in its discretion may enter such order upon a finding that the party serving the demand had no substantial justification for believing that the business record was not admissible under Section 1271.

Comment. Section 1562.6 provides a means by which the court can protect against unjustified demands under Section 1562.3(d) for compliance with the requirements of Section 1271. The section gives the court discretion to order the party who requires the testimony of the custodian or other qualified witness under the procedure set out in Section 1562.3 to pay the expenses of obtaining such testimony including reasonable attorney's fees if the court finds that the demand was made without substantial justification.

Evidence Code § 1562.7 (new)

SEC. 6. Section 1562.7 is added to the Evidence Code, to read:

1562.7. The admission into evidence of a copy of a business record pursuant to Section 1562.3 shall not affect the right of a party to offer evidence to disprove an act, condition, or event recorded in such record.

Comment. Section 1562.7 makes clear that a copy of a business record admitted into evidence under the procedure specified in Section 1562.3 is not conclusive evidence of the facts sought to be proved. The adverse party has the right to offer evidence to disprove any act, condition, or event recorded.

Penal Code § 270i (new)

SEC. 7. Section 270i is added to the Penal Code, to read:

270i. (a) In any prosecution for failure to support brought under Section 270, 270a, or 270c, evidence of the employment and earnings of an employee in the form of a

copy of the business records of his employer subpoenaed pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code is not made inadmissible by the hearsay rule when offered at the trial or other hearing to prove such employment or earnings, or both, if all of the following are established by the party offering the copy as evidence:

(1) The affidavit accompanying the copy contains the statements required by subdivision (a) of Section 1561 of the Evidence Code.

(2) The subpoena duces tecum served upon the custodian of records or other qualified witness for the production of the copy did not contain the clause set forth in Section 1564 of the Evidence Code requiring personal attendance of the custodian or other qualified witness and the production of the original records.

(3) The party offering the copy as evidence has served on each party, not less than 10 days prior to the date of the trial or other hearing, both of the following:

(i) A notice that a copy of the business records has been subpoenaed for trial or other hearing in accordance with the procedure authorized pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code and will be introduced in evidence pursuant to Section 270i of the Penal Code.

(ii) A copy of the business records to be offered in evidence.

(b) The admission into evidence of a copy of a business record pursuant to this section shall not affect the right of a party to offer evidence to disprove the employment or earnings recorded in such record.

Comment. Section 270i creates an exception to the hearsay rule (Evid. Code § 1200) for a copy of business records subpoenaed pursuant to Evidence Code Sections 1560-1566 if the requirements of Section 270i are satisfied. It should be noted that Section 1562 of the Evidence Code creates an exception to the best evidence rule (Evid. Code § 1500) and provides the necessary preliminary showing of authenticity of both the copy and the original record (Evid. Code § 1401).

Section 270i is similar to Section 1562.3 of the Evidence Code which creates a general hearsay exception for copies of business records subpoenaed pursuant to Evidence Code Sections 1560-1566 if the requirements of Section 1562.3 are satisfied. However, Section 270i does not include a provision similar to subdivision (d) of Section 1562.3, which permits a party to demand that the custodian or other qualified witness be produced at the trial or other hearing. The hearsay exception provided by Section 270i is justified by the large volume of failure to support cases, a significant number of which concern distant or out-of-state employers, by the routine and normally accurate

nature of the records involved, and by the ability of the employee to prove an inaccuracy in the record by his own testimony and other sources of evidence.

Subdivision (b) makes clear that Section 270i does not preclude any party from offering evidence at the trial or other hearing to prove that the records are not accurate. For a comparable provision, see Evid. Code § 1562.7.

Section 270i applies in a criminal action for support. For a comparable provision applicable to actions for failure to support under the Uniform Civil Liability for Support Act, see Civil Code § 250.5.