#63 2/26/74

Memorandum 74-8

Subject: Study 63 - Evidence (Evidence Code Sections 1271 and 1561)

Judge Herbert S. Herlands (Exhibit I) brings to our attention a problem involving the interplay of Sections 1271 and 1561 of the Evidence Code. You should read Exhibits I and II for an explanation of the problem. The text of the relevant sections of the Evidence Code is found in Exhibit III (green pages).

Basically the problem arises because Sections 1560-1566 provide a procedure for authenticating a copy of a business record mailed to court pursuant to a subpoena authorizing such mailing. Section 1271 provides a hearsay exception for business records. The affidavit of the custodian or other qualified witness--required under Sections 1560-1566--omits one of the requirements for the hearsay exception--proof that "The sources of information and method and time of preparation were such as to indicate its trustworthiness."

Some lawyers apparently assume that the affidavit under Sections 1560-1566 is sufficient to warrant introduction of the records under the hearsay exception provided by Section 1271 without further proof of the trustworthiness of the records. As Judge Jefferson points out, this is not the case.

The staff can understand that the existing statutory scheme is a possible source of confusion. Moreover, we believe that the situation is one that merits Commission attention and justifies the preparation of a tentative recommendation. We suggest that the staff prepare a tentative recommendation to clarify the situation (along the lines suggested by Judge Jefferson; see Exhibit II, paragraph beginning at the bottom of page 2) and present the tentative recommendation for Commission consideration at a future meeting. We

will solicit the suggestions of Judge Jefferson concerning the form of the proposed legislation if the Commission decides to go ahead on this matter.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 74-8 EXHIBIT I

Superior Court of the State of California
County of Orange
Santa Ana, California

September 26, 1973

Chambers of
HERBERT B. HERLANDS
Judge of Superior Court

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

Dear Mr. DeMoully:

I think I see a problem involving the interplay of Sections 1271 and 1561 of the Evidence Code.

Most lawyers who practice in my Court assume that an affidavit which sets forth what is contained in subparagraphs (1), (2), and (3) of Paragraph (a) of Section 1561 states a foundation sufficient to warrant introduction of the subpoenaed records under Section 1271. It seems to me that it probably was the intention of the Law Revision Commission that an affidavit complying with Section 1561 would be sufficient to lay the foundation required by Section 1271. A careful examination of the two Sections, however, suggests to me that the affidavit under 1561 is not sufficient unless additional statements are added to it.

Section 1271 requires, inter alia, that a witness qualified to do so testify to the identity of the record, the mode of its preparation and the sources of the information. The affidavit described in Section 1561 refers in the introductory portion of Paragraph (a) to a "qualified witness," but the only thing that he is apparently supposed to be qualified to do is to state that the records are true copies of the subpoenaed documents and that they were prepared in the ordinary course of business at or near the time of the act, condition or event. Nowhere is there a requirement in Section 1561 that the affiant discuss the identity of the record, the mode of its preparation and the sources of the information. Without a sworn statement regarding the sources

of information and the method of preparation, how can the trial court make the finding that the records are trustworthy?

I wonder why, when Section 1561 was drafted, it did not require the affidavit to state, with regard to the records subpoenaed, the facts needed to show compliance with subparagraphs (a) through (d) of Section 1271. Perhaps it was because, before the 1969 Amendments, Section 1561 was limited to hospitals; but, even so, I think the Section 1561 affidavit would have been inadequate under the criteria of Section 1271.

If you think this is a matter worthy of the Commission's attention and want anything further from me on the subject, please let me know. Meanwhile, I think it is extremely tough on a lawyer appearing in my Court to find that, although businesses upon whom he has served subpoenas duces tecum have sent in records with affidavits complying with Section 1561 of the Evidence Code, the trial judge will not admit the records for the reason that the affidavit required by Section 1561 does not lay the foundation required by Section 1271. Of course, if you think I am wrong in my view, I should appreciate being enlightened.

With kindest personal regards,

Herbert S. Herlands

Herbert S. Herlands

HSH:m

cc: Judge Bernard Jefferson
Los Angeles Superior Court

Memo 74-8 EXHIBIT II

CHAMBERS OF
The Superior Court
LOS ANGELES, CALIFORNIA 90012
BERNARD S. JEFFERSON, JUDGE

TELEPHONE
(213) 625-3414

September 28, 1973

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

Dear Mr. DeMoully:

I have just received a copy of Judge Herlands' letter to you regarding Evidence Code Sections 1271 and 1561. I agree with Judge Herlands that Sections 1560 through 1566 may lead some lawyers to believe that copies of business records mailed to the court in accordance with those sections automatically become admissible in evidence.

Basically, I consider these sections as providing a method of authenticating an original document and providing an exception to the best evidence rule. I do not see these sections as creating an entirely separate hearsay exception for business-record documents produced in compliance with these sections. Section 1562 deals with the admissibility of a copy of the business record and the affidavit accompanying such copy mailed to the court. However, Section 1562 provides only that the copy is admissible to the extent, and only to the extent, that the original would be admissible if the custodian had been present and testified to the matter stated in the affidavit required by Section 1561. Perhaps this is the misleading feature of the section.

As Judge Herlands points out, the affidavit required by Section 1561 does not provide for any statement complying with Evidence Code Section 1271(c) that a custodian or other qualified witness testify to the identity of the business record and the mode of its preparation. The most important part of Section 1271 is this requirement that a qualified witness testify to (1) the identity of the proffered document as a business record, and (2) the mode of its preparation. It is primarily from such testimony that the proponent must satisfy the requirements of Section 1271(d) that the sources of the information contained in the document and the method and time of its preparation were such as to indicate trustworthiness.

I do not see how a form-type affidavit could be included in Section 1561 to satisfy the requirements of Section 1271(c) and (d). Sections 1560 through 1566 have value in many situations in which there is no dispute about the fact of the existence of a document which all parties agree complies with the requirements of the business-record hearsay exception. These sections save the time of a custodian or other witness coming to court and producing the original. But in the event an adversary raises an objection of insufficient foundation for the document to meet the requirements of the business-records hearsay exception, compliance with Sections 1560 and 1561 does not meet the foundation required by Section 1271.

There are many records which are records prepared by the personnel of a business in the ordinary course of business and are records made in the regular course of business. But not all such records become admissible in evidence under Section 1271.

Thus, many records made by the personnel of a business and made at or near the time of an act or event do not have the indicia of trustworthiness because the sources of information for the facts recorded may well be hearsay from persons who have no business duty, or other duty, to observe and report accurately to the personnel of the business who prepare the record. A good example is a police arrest record. Such a record is made by police officers as employees of a police department. Some matters recorded in such a record may be reliable matters which the police officers have personally observed. But, frequently, such arrest records include matters reported by citizens and not observed by the police. Only such portions of the arrest record which constitute the observations of the police officer employee become admissible under Section 1271. Other portions of the arrest report are inadmissible because the sources of information are not such as to indicate trustworthiness.

I discuss such records in some detail in Section 4.5 of my California Evidence Benchbook. The illustrations given are taken from reported cases. Compliance with Sections 1560 and 1561 would not, and should not, make such business records admissible under the business-records hearsay exception of Section 1271. I have not given any serious consideration as to how Sections 1561 and 1562 might be amended to give warning to attorneys that compliance with these sections does not render Section 1271 inoperative. One possible solution would be to amend Section 1562 to require the proponent of the evidence to notify adverse parties in writing a certain number of days before trial that certain described business records would be produced in accordance with Article 4; that if a foundational objection to admissibility is to be made, the adverse party must advise the

proponent of this fact in writing so many days before the trial; that upon being so advised, the proponent is required to comply with Section 1271 to obtain admissibility of the records.

I am convinced, however, that Sections 1561 and 1562 should not be amended so as to weaken the requirements of Section 1271. I concur with Judge Herlands that the present wording of Sections 1561 and 1562 might mislead some attorneys into believing that compliance with those sections makes a mailed-in business record automatically admissible in evidence. This should not be true, however, if an attorney is familiar with Section 1271. He should readily perceive that the affidavit required by Section 1561 does not include the matter required by Section 1271(c) and that Section 1562 does not dispense with this requirement for admissibility. Any amendment to these sections, if such is deemed desirable, should, at best, only alert the proponent that he may be faced with a good objection that the custodian or other qualified witness is required to testify to the mode of preparation of the business record so that the trial judge may make the necessary determination of admissibility as required by Section 1271(c) and (d).

If it is felt that these sections should be amended, I shall be glad to give further thought to this matter and recommend appropriate language to achieve the desired result.

Sincerely yours,

Bernard S. Jefferson

BSJ:ks

cc: Honorable Herbert S. Herlands
Judge of the Superior Court
County of Orange
700 Civic Center Dr. West
Santa Ana, California 92701

EVIDENCE CODE PROVISIONS

§ 1271. Business record. 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. (Stats.1965, c. 299, § 1271.)

Comment—Law Revision Commission

Section 1271 is the business records exception to the hearsay rule. Evidence Act (Sections 1953e-1953h of the Code of Civil Procedure) and from Rule 63(13) of the Uniform Rules of Evidence.

Section 1271 requires the judge to find that the sources of information and the method and time of preparation of the record "were such as to indicate its trustworthiness." Under the language of Code of Civil Procedure Section 1953f, the judge must determine that the sources of information and method and time of preparation "were such as to justify its admission." The language of Section 1271 is more accurate, for the cases hold that admission of a business record is not justified when there is no preliminary showing that the record is reliable or trustworthy. *E. g.*, People v. Grayson, 172 Cal. App.2d 372, 341 P.2d 820 (1959) (hotel register rejected because "not shown to be true and complete").

"The chief foundation of the special reliability of business records is the requirement that they must be based upon the first-hand observation of someone whose job it is to know the facts recorded. . . . But if the evidence in the particular case discloses that the record was not based upon the report of an informant having the business duty to observe and report, then the record is not admissible under this exception, to show the truth of the matter reported to the recorder." McCormick, Evidence § 286 at 602 (1954). It is stated in language taken from the Uniform Business Records as as quoted in MacLean v. City & County of San Francisco, 151 Cal. App.2d 138, 143, 311 P.2d 158, 164 (1957).

Applying this standard, the cases have rejected a variety of business records on the ground that they were not based on the personal knowledge of the recorder or of someone with a business duty to report to the recorder. Police accident and arrest reports are usually held inadmissible because they are based on the narrations of persons who have no business duty to report to the police. MacLean v. City & County of San Francisco, 151 Cal.App.2d 133, 311 P.2d 158 (1957); Hoel v. City of Los Angeles, 136 Cal.App.2d 295, 288 P. 2d 989 (1955). They are admissible, however, to prove the fact of the arrest. Harris v. Alcoholic Bev. Con. Appeals Bd., 212 Cal.App.2d 106, 23 Cal.Rptr. 74 (1963). Similar investigative reports on the origin of fires have been held inadmissible because they were not based on personal knowledge. Behr v. County of Santa Cruz, 172 Cal.App.2d 697, 342 P.2d 987 (1959); Harrigan v. Chaperon, 118 Cal.App.2d 167, 257 P.2d 716 (1953).

Section 1271 will continue the law developed in these cases that a business report is admissible only if the sources of information and the time and method of preparation are such as to indicate its trustworthiness.

§ 1272. Absence of entry in business records. Evidence of the absence from the records of a business of a record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the nonoccurrence of the act or event, or the nonexistence of the condition, if:

(a) It was the regular course of that business to make records of all such acts, conditions, or events at or near the time of the act, condition, or event and to preserve them; and

(b) The 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. (Stats. 1965, c. 299, § 1272.)

Comment—Law Revision Commission

Technically, evidence of the absence of a record may not be hearsay. Section 1272 removes any doubt that might otherwise exist concerning the admissibility of such evidence under the hearsay rule. It codifies existing case law. People v. Torres, 201 Cal.App.2d 290, 20 Cal. Rptr. 315 (1962).

§ 1280. Record by public employee. 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 by and within the scope of duty of a public employee;

(b) The writing was made at or near the time of the act, condition, or event; and

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness. (Stats.1965, c. 299, § 1280.)

Comment—Law Revision Commission

Section 1280 restates the substance of and supersedes Sections 1920 and 1926 of the Code of Civil Procedure. Although Sections 1920 and 1926 declare unequivocally that entries in public records are prima facie evidence of the facts stated, "it has been held repeatedly that those sections cannot have universal literal application." Chandler v. Hibberd, 165 Cal.App.2d 33, 65, 332 P.2d 133, 149 (1958). In fact, the cases require the same showing of trustworthiness in regard to an official record as is required under the business records exception. Behr v. County of Santa Cruz, 172 Cal.App. 2d 697, 342 P.2d 987 (1959); Hoel v. City of Los Angeles, 136 Cal.App. 2d 295, 288 P.2d 989 (1955). Section 1280 continues the law declared in these cases by explicitly requiring the same showing of trustworthiness that is required in Section 1271. See the Comment to Section 1271.

The evidence that is admissible under this section is also admissible under Section 1271, the business records exception. However, Section 1271 requires a witness to testify as to the identity of the record and its mode of preparation in every instance. In contrast, Section 1280, as does existing law, permits the court to admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation if the court takes judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness. See, *e. g.*, People v. Williams, 64 Cal. 87, 27 Pac. 939 (1883) (census report admitted, the court judicially noticing the statutes prescribing the method of preparing the report); Vallejo etc. R.R. v. Reed Orchard Co., 169 Cal. 545, 571, 147 Pac. 238, 250 (1915) (statistical report of state agency admitted, the court judicially noticing the statutory duty to prepare the report).

ARTICLE 4. * * * PRODUCTION OF BUSINESS RECORDS

Article heading amended by Stats.1969, c. 199, p. 483, § 1.

§ 1560. Compliance with subpoena duces tecum for business records

(a) As used in this article * * *:

(1) "Business" includes every kind of business described in Section 1270.

(2) "Record" includes every kind of record maintained by such a business.

(b) Except as provided in Section 1564, when a subpoena duces tecum is served upon the custodian of records or other qualified witness * * * of a business in an action in which the * * * business is neither a party nor the place where any cause of action is alleged to have arisen, and such subpoena requires the production of all or any part of the records of the * * * business, it is sufficient compliance therewith if the custodian or other * * * qualified witness, within five days after the receipt of such subpoena, delivers by mail or otherwise a true, legible, and * * * durable copy * * * of all the records described in such subpoena to the clerk of court or to the * * * judge if there be no clerk or to such other person as described in subdivision (a) of Section 2018 of the Code of Civil Procedure, together with the affidavit described in Section 1561.

(c) The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness, and date of subpoena clearly inscribed thereon; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, directed as follows:

(1) If the subpoena directs attendance in court, to the clerk of such court, or to the judge thereof if there be no clerk.

(2) If the subpoena directs attendance at a deposition, * * * to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition or at his place of business.

(3) In other cases, to the officer, body, or tribunal conducting the hearing, at a like address.

(d) Unless the parties to the proceeding otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at such trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received.

(Amended by Stats.1969, c. 199, p. 484, § 2.)

§ 1561. Affidavit accompanying records

(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.

(Amended by Stats.1969, c. 199, p. 484, § 3.)

§ 1562. Admissibility of affidavit and copy of records. 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. (Stats.1965, c. 299, § 1562.)

§ 1563. One witness and mileage fee

(a) This article shall not be interpreted to require tender or payment of more than one witness fee and one mileage fee or other charge unless there is an agreement to the contrary.

(b) Where the business records described in a subpoena issued pursuant to Section 1560 are patient records of a public or licensed hospital or of a physician and surgeon, osteopath, or dentist licensed to practice in this state, or a group of such practitioners, and the personal attendance of the custodian of such records or other qualified witness is not required, the sole fee for complying with such subpoena is twelve dollars ($12).

(c) When the personal attendance of the custodian of a record or other qualified witness is required pursuant to Section 1564, he shall be entitled to 20 cents ($0.20) a mile for mileage actually traveled, one way only, and to twelve dollars ($12) for each day of actual attendance.

(Amended by Stats.1972, c. 396, p. —, § 1.)

§ 1564. Personal attendance of custodian and production of original records. The personal attendance of the custodian or other qualified witness and the production of the original records is required if the subpoena duces tecum contains a clause which reads:

"The personal attendance of the custodian or other qualified witness and the production of the original records is required by this subpoena. The procedure authorized pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena." (Stats. 1965, c. 299, § 1564.)

§ 1565. Service of more than one subpoena duces tecum

If more than one subpoena duces tecum is served upon the custodian of records or other qualified witness * * * and the personal attendance of the custodian or other qualified witness is required pursuant to Section 1564, the witness shall be deemed to be the witness of the party serving the first such subpoena duces tecum.

(Amended by Stats.1969, c. 199, p. 485, § 4.)

§ 1565. Service of more than one subpoena duces tecum. If more than one subpoena duces tecum is served upon the custodian of records or other qualified witness from a hospital and the personal attendance of the custodian or other qualified witness is required pursuant to Section 1564, the witness shall be deemed to be the witness of the party serving the first such subpoena duces tecum. (Stats.1965, c. 299, § 1565.)

§ 1566. Applicability of article. This article applies in any proceeding in which testimony can be compelled. (Stats.1965, c. 299, § 1566.)