#63.50 10/30/74

Memorandum 74-64

Subject: Study 63.50 - Admissibility of Copies of Business Records

Background

Attached are two copies of the Tentative Recommendation Relating to Admissibility of Copies of Business Records in Evidence. This was distributed for comment. Please mark your editorial changes on one copy to turn in to the staff at the November meeting.

General Reaction

We received a variety of comments on the tentative recommendation. Some were favorable, some objected because they believed the proposal would make it more difficult to admit evidence of business records, and others objected because they believed the proposal would make it easier for hearsay evidence to be admitted.

Analysis of Comments

Judge Jefferson (Exhibit I--pink) states he is "heartily in favor" of the tentative recommendation. He has one further suggestion, to be discussed later. Richard H. Keatinge (Exhibit II--yellow), former Chairman of the Law Revision Commission and an expert in evidence, also "strongly" recommends approval of the tentative recommendation. The Department of Transportation (Exhibit VIII--pink) favors the tentative recommendation, pointing out that "on a number of occasions attorneys anticipating objections from opposing counsel have required the personal attendance of the employee." I discussed the tentative recommendation with Professor Friedenthal, and he believes the Commission's analysis of the effect of Evidence Code Sections 1560-1566 and their interrelationship with Evidence Code Section 1271 is sound and that the Commission's proposed solution is sound. Jon Smock of the Judicial

Council called me and stated that he believes the Commission's analysis of existing law is sound, and he generally approves the proposed solution (with the qualification noted later in this memorandum).

The Office of the District Attorney of Los Angeles County (Exhibit III --green) forwards comments prepared by the Appellate Division of that office. The comments generally disagree with the Commission's analysis of the existing law. The writer of the comments concludes that "it is felt that the proposed recommendation is unnecessary, unworkable as presently drafted, and would probably operate to the detriment of its stated purposes. Furthermore, the comments to proposed section 712 and amended section 1562 misconceive the state and effect of the present law." The writer believes that the affidavit can include sufficient statements to satisfy all of the requirements for the hearsay exception under Section 1271. He fails to note the Legislative Committee Comment to Section 1562 (which has not been amended since its enactment in 1965), which states in part: "Section 1562 makes it clear, too, that the presumption relates only to the truthfulness of the matters required by Section 1561 to be stated in the affidavit." The presumption would not extend to any other statements in the affidavit and such other statements would be inadmissible hearsay. The writer further states "section 1562 reads that the records are admissible if in compliance with the requirements contemplated by that section." This is not what Section 1562 says; the section states: "The copy of the records is admissible in evidence to the same extent as though the original thereof were offered . . ." If the original were offered, the requirements of Section 1271 would have to be satisfied if an objection were made on the ground of hearsay. Without going into further discussion, the conclusions of the writer of the comments are contrary to the conclusions of other experts knowledgeable in the law

of evidence who agree with the Commission's analysis. As far as the practical effect of the recommended solution is concerned, knowledgeable persons (including the Department of Transportation) believe that the Commission's solution is sound.

The importance of the foundational requirement as to the trustworthiness of the records is indicated in the following portion of the Comment to Section 1271:

> Section 1271 is the business records exception to the hearsay rule. It is stated in language taken from the Uniform Business Records as 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 1963f, 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), as quoted in MacLean v. City & County of San Francisco, 151 Cal. App.2d 133, 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.

By way of contrast, Section 1280 (record by public employee) does not necessarily require a witness to testify as to the trustworthiness of the record. The official Comment to this section states in part:

> 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).

The Office of the District Attorney of the County of Sacramento (Exhibit IV--buff) also objects to the tentative recommendation. The basic objection is that the prosecution should not have to produce the custodian of the records, but an affidavit showing the foundational requirements of Section 1271 should be sufficient. The problem of bringing in the custodian is particularly significant in a criminal or civil action for child support where the records are held out of state. The conclusion of the district attorney is that the recommendation would subject the prosecution to an unnecessary burden. I wrote to the writer asking whether courts were now admitting business records under Section 1560 et seq. over a hearsay objection but received no response.

Mr. Kipperman (Exhibit V--blue) objects to the tentative recommendation because he does not believe that another hearsay exception should be created. Actually, our tentative recommendation does not create another hearsay exception. It provides in effect a waiver by failure to object. Mr. Kipperman believes our proposal will be unconstitutional as applied in a criminal case (an unsound objection in the opinion of the staff) and that it creates another "waiver trap." He believes that "The burden should be on the proponent of the evidence to get a pre-trial stipulation for the admissibility without a live witness rather than reversing the burden. In that way, if both sides are willing, the same result can be achieved as through your system and without the artificial time traps you have created." (Emphasis in original.) In a subsequent letter, also attached as a part of Exhibit V, Mr. Kipperman indicates that the only revision he could support would be one expressly stating that the best evidence statutes are not exceptions to the hearsay rule.

Mr. Dyer (Exhibit VI--white) also objects to the tentative recommendation. His objection is to the requirement that notice be given "not less than 20 days before trial." He suggests that it should be sufficient if the court finds that the notice was given at a time adequate to allow any objecting party to either require the appearance of the declarant for the purpose of cross-examination or compliance with the requirements of Section 1271. The notice he would give would be "that such records and the custodian's declaration will be produced at the hearing." Apparently, he would not provide a copy of the records with the notice.

Mr. Zepp (Exhibit VII--gold pages) agrees with the analysis of existing law but points out a number of deficiencies in the tentative recommendation. Most of these go to the amendments of Section 1562 to eliminate the language

of the existing section. The staff proposes below to correct this deficiency. Other suggestions of Mr. Zepp go to possible revisions in discovery procedure which we can consider when we consider that topic if it is authorized for study by the Legislature.

The Commission will recall that the tentative recommendation was drafted along the lines suggested by trial judges. Moreover, experts in the field of evidence approve the tentative recommendation. The objections, to a considerable extent, are based on a lack of understanding of the existing law or a general hostility to admitting hearsay evidence. Accordingly, the staff recommends approval of the tentative recommendation for printing (after the technical matters discussed below have been disposed of).

Revision of Section 1562

On page 8 of the tentative recommendation, it is proposed to eliminate the substance of existing Section 1562. Jon Smock objects to this. He points out that Section 1562 provides an exception to the best evidence rule and also a means of authenticating the copy and the original record. Professor Friedenthal also points out that Section 1562 serves as a means of authenticating the records. Mr. Zepp makes the same point in his letter (Exhibit VII). The staff believes that this is a sound objection, and we propose that Section 1562 should be left unchanged. (We will revise the preliminary portion of the tentative recommendation to note that Section 1562 also provides a means of authenticating both the original record and the copy.) This will eliminate the need to amend not only Section 1562 but also makes the amendment to Section 1561 unnecessary. This leaves only Section 712 for consideration.

Section 712

Both Judge Jefferson and Jon Smock are unable to see any reason which would cause the new section to be located in the chapter that deals with "Oath and Confrontation" of witnesses. Jon Smock suggests that the new section be inserted as Section 1562.5. Judge Jefferson also would relocate the section, but he would put it in a different part of the Evidence Code. The staff agrees that the new section should be located following Section 1562 (which will remain unchanged). The section and Comment should be revised as set out below.

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

An act to add Section 1562.5 to 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 1562.5 is added to the Evidence Code, to read:

1562.5. 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 to prove an act, condition, or event recorded if all of the following are established by the party offering the copy of the business records as evidence:

(a) The affidavit accompanying the copy of the records 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 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.

(c) The party offering the copy of the records as evidence has served on each adverse party, not less than 20 days prior to the date of the trial, a copy of the business records to be offered in evidence and a notice that such copy is a copy of business records that have been subpoenaed for trial in accordance with the procedure authorized pur-

suant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code and will be introduced in evidence pursuant to Section 1562.5 of the Evidence Code.

(d) The adverse party has not, within 10 days after being served with the notice referred to in subdivision (c), served on the party who served the notice a written demand for compliance with the requirements of Section 1271.

Comment. Section 1562.5 creates an exception to the hearsay rule (Section 1200) for a copy of business records subpoenaed under Sections 1560-1566 if the requirements of Section 1562.5 are satisfied. Section 1562 creates an exception to the best evidence rule (Section 1500) and provides the necessary preliminary showing of the 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 hearsay exception provided by Section 1271--the business records exception to the hearsay rule--because the affidavit does not contain the declarations required by Section 1271 concerning the mode of preparation of the records and their trustworthiness. See Recommendation Relating to Admissibility of Copies of Business Records in Evidence, 12 Cal. L. Revision Comm'n Reports (1974).

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 74-64 EXHIBIT I

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

TELEPHONE
(213) 974-1234

October 10, 1974

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

Dear Mr. DeMoully:

I am heartily in favor of the tentative recommendations of the Law Revision Commission relative to the problems raised by Evidence Code Sections 1560 to 1566 and their interrelationship with Evidence Code Section 1271.

The solution suggested appears reasonable and fair to both the proponent of the business record copy and to the adverse party.

I particularly like the provision contained in proposed Evidence Code Section 712 to require the proponent to serve on the adverse party a copy of the business records which he seeks to offer in evidence. In many instances such records will contain no objectionable features and the opponent will be in a position to waive the requirements of Section 1271 by not giving the proponent the 10-day notice as set forth in proposed Evidence Code Section 712(d). In view of the available discovery procedures, the proponent should have no difficulty in obtaining a copy of the business records he wants so that he will be able to comply with proposed Evidence Code Section 712.

I am curious as to why you decided upon Section 712 to be the new section. As Section 712, the proposed provisions will come under Chapter 2 of Division 6 of the Evidence Code entitled "Oath and Confrontation." In my opinion, the provisions of proposed Section 712 would be better placed in Division 9 of the Evidence Code entitled "Evidence Affected or Excluded By Extrinsic Policies." A new Section 1159 in Chapter 2 of Division 9 appears to me to be more appropriate for the proposed provisions of an added section than Section 712. Chapter 2 of Division 9 is entitled "Other Evidence Affected or Excluded By Extrinsic Policies." I assume that you had a reason for making the new section, Section 712. But it just appears to me to be out of place in a chapter that deals with the "Oath and Confrontation" of witnesses.

I certainly hope that you will receive sufficient favorable comments to the proposal so that the Commission will decide to make a recommendation to the 1975 session of the Legislature.

Sincerely yours,

Bernard S. Jefferson

BSJ:ks

Memo 74-64 EXHIBIT II

LAW OFFICES OF
KEATINGE, LIBOTT, BATES & PASTOR
THE SIXTH FLOOR · BROADWAY PLAZA
700 SOUTH FLOWER STREET
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CABLE ADDRESS KEARN
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OUR FILE NUMBER

October 1, 1974

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

Dear John:

I would like to commend the Commission on the excellent job it has done with regard to its recommendations on the admissibility of copies of business records in evidence. I strongly recommend their approval.

Best regards.

Sincerely,

Richard H. Keatinge

RHK:md

Memo 74-64 EXHIBIT III

COUNTY OF LOS ANGELES

OFFICE OF THE DISTRICT ATTORNEY
BUREAU OF SPECIAL OPERATIONS
CRIMINAL COURTS BUILDING
210 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012

JOSEPH P. BUSCH, DISTRICT ATTORNEY
JOHN E. HOWARD, CHIEF DEPUTY DISTRICT ATTORNEY
GORDON JACOBSON, ASSISTANT DISTRICT ATTORNEY

RICHARD W. HECHT, DIRECTOR

October 10, 1974

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

Dear Mr. DeMoully:

You recently sent to me, in my capacity as Adjunct Professor of Law at Southwestern University the Tentative Recommendation Relating to the Admissibility of Copies of Business Records in Evidence, which was prepared by the California Law Revision Commission.

Due to my concern over any significant change in existing law regarding the business record exception to the hearsay rule, I invited comments from the Appellate Division of my office. I am submitting a copy of those comments to the Commission through you.

I trust you understand that because it appears that time is of the essence, I am submitting these comments to you in the exact form in which they were submitted to me; i.e., as a memorandum.

Very truly yours,

JOSEPH P. BUSCH
District Attorney

By

RICHARD W. HECHT
Director

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Enclosure

MEMORANDUM

TO: RICHARD W. HECHT, Director
Bureau of Special Operations

FROM: APPELLATE DIVISION

SUBJECT: CALIFORNIA LAW REVISION COMMISSION'S TENTATIVE RECOMMENDATION RELATING TO ADMISSIBILITY OF COPIES OF BUSINESS RECORDS IN EVIDENCE

DATE: OCTOBER 9, 1974

Submitted herewith are the comments you requested in connection with the above matter.

THE CALIFORNIA LAW REVISION COMMISSION'S TENTATIVE RECOMMENDATION RELATING TO ADMISSIBILITY OF COPIES OF BUSINESS RECORDS IN EVIDENCE

INTRODUCTION

Although laudible in its purposes, the tentative recommendation of the California Law Revision Commission[1] suffers from a confusion of two separate issues and a misconstruction of present law, all of which are revealed in the discussion upon which it is predicated.

The discussion of Evidence Code §§ 1560-1564 confuses the separate and distinct issues of (1) what declarations are required for admissibility, and (2) whether such declarations should be presented by testimony or affidavit. The discussion also assumes (without apparent support) that (1) admissibility under section 1562 applies only to objections predicated upon the Best Evidence Rule and that (2) section 1562 provides for admissibility without including in the Evidence Code § 1561 affidavit the additional declarations specified in section 1251.

The confusion noted results in part from the aforesaid oversimplified assumptions, for if Evidence Code § 1562 contemplates only the declarations specified in section 1561, there would

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1. Unless otherwise indicated, page references hereinafter are to the tentative recommendation and discussion contained therein.

be an apparent literal conflict with section 1271 as to what declarations are required for admissibility. Furthermore, the issue is not, as stated by the commission, (see its discussion at p. 5) whether the custodian should be present to testify as to "the additional matters required under Section 1271",[2] but whether the entire foundations required respectively under Evidence Code §§ 1561 and 1271 should be presented by testimony or affidavit. If testimony (rather than mere affidavit) is important, it is unclear why the requirement should extend only to "the additional matters required under Section 1271" and not to the matters uniquely specified under section 1561 as well as to the overlap of the two sections.

PRESENT LAW

General Application of Evidence Code § 1562

Generally, exceptions to the hearsay and best-evidence rules are couched in language stating that the proposed evidence is not made inadmissible by reason of said rules. In contrast, section 1562 reads that the records are admissible if in compliance with the requirements contemplated by that section.

Relation Criteria Sections 1271 and 1562

Section 1271 sets forth criteria for an exception to the hearsay rule. Similarly, sections 1560, 1561, and 1562 collectively set forth criteria for an exception to the best-evidence rule. Nevertheless, section 1562 seems to contemplate that admissibility thereunder is also subject to the criteria of other parts of the code relating to admissibility (including, of course, that of section 1271). Hence, the language making such copy "admissible in evidence to the same extent as though the original thereof were offered [i.e., thus removing the best evidence problem] and the custodian had been present and testified to the matters stated in the affidavit [i.e., matters relevant to introduction of the original record, inferentially contemplating section 1271 criteria relating to the business records exception to the hearsay rule]" (emphasis added).

Although it is arguably possible to read the next sentence in section 1562 as restricting the contents of said affidavit to "the matters stated therein pursuant to Section 1561" (as opposed to any other section), a more natural reading is that

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2. We note that the first paragraph of proposed section 712 does not even expressly provide for admissibility without testimony of the custodian or other qualified witness (see p. 6). Yet, the intent is apparently to so provide (see commission's discussion at p. 5).

the phrase "pursuant to section 1561" merely reflects the fact that the affidavit itself is authorized by such section. This sentence therefore does not prevent us from concluding that the section holds no impediment to incorporation of sufficient matter in the affidavit to satisfy Evidence Code § 1271.

In any event, even assuming arguendo that "bare compliance" with section 1561 would not satisfy section 1271, an affidavit could be prepared which without straying from the course of meeting the requirements of section 1561, would also satisfy section 1271 (in that the criteria of section 1561 could be reflected in a narrative describing the mode of preparation).

The commission assumes that section 1561 omits the declarations required by section 1271 (c) and (d). However, nonconclusory testimony pursuant to section 1271 (a) and (b) (or counterpart provisions of section 1562) would ordinarily satisfy section 1271 (c) and (d). Such nonconclusory testimony would not be in four separate fragments each relating to a different subsection of 1271, but a single narrative reflecting the interrelated character of all those requirements. Thus section 1561 specifies an affidavit "stating in substance each of the following" requirements (emphasis added), and the only mention of testimony in section 1271 occurs in subsection (c) which seems to contemplate that all these points be covered in a narrative directed to "identity and mode of . . . preparation".

Finally, even apart from the affidavit, the mode of preparation might be apparent from the records themselves (e.g., hospital records identifying by dated signatures of those who make entries [the treating physician, attending nurse, supervising physicians] who tend to be the same persons who performed the work reflected in the entries).

Affidavit As Substitute For Testimony Under 1271

Although section 1271 (a) refers to testimony, section 1562 makes a qualifying affidavit a substitute for such testimony, the copy of the records being "admissible . . . to the same extent as though . . . the custodian had been present and testified to the matters stated in the affidavit." Thus under 1562 an affidavit containing the declarations required under 1271 will have the effect of being as if the aforesaid matters had been orally testified to.

THE COMMISSION'S PROPOSAL

In light of the preceding analysis, there is no necessity to amend the code in order to make Evidence Code § 1562 procedure satisfy the criteria of Evidence Code § 1271 since under any construction, Evidence Code § 1562 would make the copies admissible only "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."

However, there remains the issue of whether the presence of the custodian or other qualified witness should be required. Since section 1562 seems to contemplate admissibility of records upon a foundation provided by affidavit alone without oral testimony it would appear that this issue should be the proper focus of the commission's attention. However, in discussing this problem the commission seems to treat it as ancillary to the issue of application of section 1271 criteria, so that it arises only as to "the additional matters required under Section 1271" (see its discussion at p. 5). Furthermore, the first paragraph of proposed section 712 leaves it uncertain whether the testimony in court of the custodian or other qualified witness would nevertheless be still required for an Evidence Code § 1271(c) foundation even after "all of the following [procedural steps of notice and waiver] are established" by the proponent of the evidence (see p. 5. of recommendation).

Since (1) the testimony of the custodian or other qualified witness would relate only to preliminary (or foundational) matters and not to the merits of the litigation, (2) the effect of his testimony would raise a presumption only as to truth of the affidavit for purposes of shifting the burden of producing evidence (section 1562) and (3) such witness being such by virtue of his (institutional) position rather than any personal observation so as to make him (or a replacement) always available to defense subpoena, it may be that application of section 1962 to criminal matters would not violate the confrontation clause despite the prosecution's ability to produce the witness (see generally People v. Gambos, 5 Cal.App.3d 187, 194; California v. Green, 399 U.S. 149, 26 L.Ed.2d 489, 90 S.Ct. 1930 [1970]; Dutton v. Evans, 400 U.S. 74, 27 L.Ed.2d 213, 91 S.Ct. 210 [1970]; Read, The New Confrontation - Hearsay Dilemma, 45 S.Cal.L.Rev. 1 [1972]).

It seems dubious that the commission's proposed notice-waiver procedure would "further serve[]" what it acknowledges as "the important purpose of minimizing the demand of time and 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" (see discussion at p. 5 of recommendation). Rather, as a practical matter, this "confrontation" approach seems to invite an objection

by opposing counsel (who might wish to use it merely for harassment purposes) and to magnify preliminary matters out of all proportion to the litigation as a whole. Since any objections would be made on all possible grounds, the effect would be to eviscerate section 1562. Finally, it is unclear how this procedure would operate in an uncontested civil matter.

In sum it is felt that the proposed recommendation is unnecessary, unworkable as presently drafted, and would probably operate to the detriment of its stated purposes. Furthermore, the comments to proposed section 712 and amended section 1562 misconceive the state and effect of the present law (see pp. 7 and 9 of the recommendation).

DLH:jh

Memo 74-64 EXHIBIT IV

COUNTY OF SACRAMENTO
DISTRICT ATTORNEY
DOMESTIC RELATIONS
1901 - 19TH STREET
SACRAMENTO, CALIFORNIA 95814

JOHN M. PRICE
DISTRICT ATTORNEY

GEOFFREY BURROUGHS
CHIEF DEPUTY

MICHAEL E. BARBER
SUPERVISING DEPUTY

JON T. HEINZER
DIVISION CHIEF

September 26, 1974

California Law Revision
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

I wish to express an objection to your Section 712 Evidence Code proposal in that by incorporating Section 1271 of the Evidence Code you are going to, in effect, destroy the effectiveness of Section 1560 et seq. of the Evidence Code. If you would amend your proposal to permit affidavits to be submitted in lieu of the personal appearance required in 1271(c) of the Evidence Code then there would be no problem in adapting our proceedures to your proposed statute. Further, if the twenty (20) days notice provision in your proposed Section 712 of the Evidence Code could be waived in the event of a criminal action requiring a hearing within less than twenty (20) days or on a showing of good cause in any action, then there would be no problem with your proposal.

This Evidence Code section is particularly important to us in the Child Support area. In cases involving P.C. 270 Violations and in civil support actions it relieves us of the duty of bringing back the keeper of the records, showing the man's employment and income. This simplifies and reduces the cost of prosecution in these cases particularly where the records are held out of state. In Civil actions involving an out of state source of income or a source of income remote from the site of our proceeding or even one relatively close where the appearance would be inconvenient, Section 1560 et seq, does a great deal to expedite the proceeding. We would have no problem at all in complying with Section 1271 of the Evidence Code and welcome incorporating the requirements of that section into affidavits but to require the physical presence of the keeper of the record at the option of the opposing party, as your bill seems to do, would subject the prosecution to an unnecessary burden. (See People vs Blagg 267 CA2d 598; People vs Moore 50A3rd 486)

One other point. It appears to us in this office that Section 1560 requires a duplication of effort where there has been a preliminary hearing, Evidence Code Section 1292 not withstanding.

I hope that if in fact an amendment to Section 1560 of the Evidence Code is necessary in this regard you consider taking such a step.

Very truly yours,

JOHN M. PRICE

Michael E. Barber

By Michael E. Barber,
Supervising Deputy
District Attorney

MEB/mm

cc: Jan Stevens, Assistant Attorney General
Gloria DeHart, Deputy Attorney General
Alphonsus C. Novick, Division Chief
Milton M. Hyams, Supervising Deputy District Attorney
Maureen Lenahan, Deputy District Attorney
George Grenfell, Deputy District Attorney
Albert L. Wells, Deputy District Attorney
Richard Iglehart, Legislative Advocate
Thomas Allen, Legal Counsel-Legal Affairs

John M. Price, District Attorney
Vic Saradaryan, Deputy District Attorney
Joe Campoy Jr., Deputy District Attorney
W.E. McCamy, Deputy District Attorney
George Goff, Legal Research Assistant

September 30, 1974

Michael E. Barber, Esq.
Office of District Attorney
1901 - 19th Street
Sacramento, California 95814

Dear Mr. Barber:

Your letter concerning the Law Revision Commission's Tentative Recommendation Relating to the Admissibility of Evidence of Business Records will be brought to the attention of the Commission.

I am not sure that you have received a copy of the Commission's tentative recommendation (copy enclosed); you may have written your letter based on a published report of the recommendation. I am somewhat surprised that the courts in your area have admitted business records under Section 1960 et seq. when there has been a hearsay objection because judges in other areas of the state have advised the Commission that they exclude such records when a hearsay objection is made. The issue is the violation of the right of confrontation, and I understand that, in one criminal case, an appeal was contemplated from a trial judge decision concerning a hearsay objection to business records offered under Section 1960 et seq. I have heard nothing further on this case, so I assume that the appeal was not taken.

I am sure the Commission would be interested in knowing if the judges in your area are admitting evidence in criminal cases under Section 1960 et seq. notwithstanding a hearsay exception. Compare the last paragraph of the report of Judge Herlands set out in footnote 5 of the tentative recommendation.

I would appreciate your response to this letter so that it can be brought to the attention of the Commission at the same time your letter of September 26th is considered by the Commission.

Sincerely,

John H. DeMoully
Executive Secretary

JHD:vh
enc.

Memo 74-64

KIPPERMAN, SHAWN & KEKER
ATTORNEYS AT LAW
407 SANSOME STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

STEVEN M. KIPPERMAN
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TELEPHONE: (415) 788-2200

September 23, 1974

California Law Revision Commission
School of Law
Stanford, California 94305

RE: TENTATIVE RECOMMENDATIONS RELATING TO ADMISSIBILITY OF COPIES OF BUSINESS RECORDS IN EVIDENCE

Dear Sirs:

The Commission's latest recommendation again has that facial appealability which, I am sure, will insure its adoption probably up to and including the Legislature. I fear, however, that it is -- when examined in more depth -- another example of academia tinkering with established rules of evidence out of some heroic sense that by making it easier to get relevant evidence before the court without regard to cross-examination that somehow justice is being served. What really troubles me about the kind of recommendation now before me is that I believe it to be propelled by one or more now-fashionable assumptions which I think are simply bunk:

First, there is the everyone-is-practicing-personal-injury-law assumption. This assumption, pioneered by C.E.B. in its ludicrous programming in otherwise useful subjects such as evidence, has apparently been embraced by the Commission now as well. Just look at the "hospital records" examples in your recommendation.

Second, there is the let-everything-in-including-the-kitchen-sink mentality. This view lets everything in if someone can dream up some theory of tangential relevance. I attended Boalt Hall and was thoroughly indoctrinated to accept this view of evidence by the erstwhile Professor Louisell. Why, we had to take off our shoes to count up the exceptions to the hearsay rule! And therefore (and this is the start of the nonsequitur) the hearsay rule "must" be ridiculous. Judges may think the same thing of the best evidence rule -- apparently the Commission thinks the same of hearsay and best evidence.

Third, there is the everything-can-be-resolved-before-trial idiocy. How symmetrical is your 20 day/10 day proposal! And how absurd. In practice, you may create more objections (and the attendant necessity of calling live witnesses to the courthouse) than would occur if you left everything alone. The assumption that everyone knows what documentary evidence is going to be used in advance of trial is ludicrous -- it is worse when speaking of defendants (though your proposal treats them equally with plaintiffs) but I cannot think of a more descriptive word.

It is really difficult to take on the Commission with a facially appealing and neatly symmetrical scheme. A sense of feel for the evidence as it is practiced in the courtroom is basic to an intelligent discussion of codifying evidence. I may not have as much of that sense or feel as one should have to differ with you about your proposals, but I fear that the Commission has as little or less than I.

It is often through probing cross-examination that weaknesses in apparently unassailable documentary evidence are uncovered. I know you will say "well, anyone who wants to take a shot at the evidence may object within 10 days". But to be safe I am almost always going to object under your system whether I know or not if I will actually ask questions about proffered copies of business records. If business records were as simple and consistent a proposition as the old "shop book" of accounts, there would be little trouble. But with the modern tendency to let in anything as a business record, with the failure of courts to distinguish between the record itself and its contents, and with the modern copying machine's versatility, cross-examination should be encouraged and not discouraged.

I guess my only substantive objection to your proposal is that it builds into the law another "waiver trap". Failure to object timely is going to result in unnecessary litigation over intentional and inadvertent waiver. It is no answer to say that judges will be able to fairly handle those problems on a case by case basis because the objection says why create more problems and traps in the first place. The burden should be put on the proponent of the evidence to get a pre-trial stipulation for admissibility without a live witness rather than reversing the burden. In that way, if both sides are willing, the same result can be achieved as through your system and without the artificial

time traps you have created.

I oppose this latest tinkering with the Evidence Code.

Very truly yours,

STEVEN M. KIPPERMAN

SMK/jm

September 24, 1974

Steven M. Kipperman, Esq.
407 Sansome St., Suite 400
San Francisco, California 94111

RE: TENTATIVE RECOMMENDATIONS RELATING TO ADMISSIBILITY OF COPIES OF BUSINESS RECORDS IN EVIDENCE

Dear Mr. Kipperman:

I appreciate your letter concerning the above referenced tentative recommendation of the Law Revision Commission.

The primary reason the Commission prepared this tentative recommendation is that we had been advised that a number of judges have considered the procedure provided by Sections 1560-1566 to constitute an exception to the hearsay rule as well as the best evidence rule. In fact, I was advised of one criminal case where the judge overruled a hearsay objection to the admissibility of business records on this basis. Does this fact have any effect on the comments you make on the tentative recommendation?

Sincerely,

John H. DeMoully
Executive Secretary

JHD:aj

KIPPERMAN, SHAWN & KEKER
ATTORNEYS AT LAW
407 SANSOME STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

STEVEN M. KIPPERMAN
JOEL A. SHAWN
JOHN W. KEKER

TELEPHONE: (415) 788-2200

September 25, 1974

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

RE: TENTATIVE RECOMMENDATIONS RELATING TO ADMISSIBILITY OF COPIES OF BUSINESS RECORDS IN EVIDENCE

Dear Mr. DeMoully:

Thank you for your letter of September 24, 1974. The answer to your question is "no". If judges are misconstruing the best evidence statutes in the Evidence Code, they should, of course, be reversed on appeal. At most, it seems to me that a clarifying statute expressly stating that the best evidence statutes are not exceptions to the hearsay rule would be in order, rather than go along with the judges who are wrong and make the best evidence provisions into an exception to the hearsay rule.

Even as to your recommendations which would create a hearsay exception to properly authenticated copies of business records, I think the statute would clearly be unconstitutional as applied in a criminal case, and to avoid that confusion in litigation at the very least the Commission should include a provision that the hearsay exception is not applicable in criminal cases.

I adhere, however, to my view that the proposal of the Commission is unwise and that no additional hearsay exceptions should be created for copies of business records whether in a civil or in a criminal case.

Very truly yours,

STEVEN M. KIPPERMAN

SMK/jm

Memo 74-64 EXHIBIT VI

DION G. DYER
ATTORNEY AT LAW
[redacted]
[redacted] CALIFORNIA [redacted]
[redacted]

Please reply to:

208 Mark Twain Avenue
San Rafael, Ca. 94903

(415) 479-1641

State of California
California Law Revision Commission
School of Law
Stanford, California 94305

Gentlemen:

I wish to voice my objection to your proposal concerning the "Admissibility of Copies of Business Records in Evidence."

Recently, I have encountered several instances in which it was not possible to have such records admitted as evidence due to the short time that was available to obtain the necessary declarations. In such circumstances, and considering the fact that the custodian of such records will not always be a third party to the proceedings, the enactment of a new Evidence Code Section 712 will make the procedures even more cumbersome and will consequently result in the exclusion of material evidence for mere procedural reasons.

As an alternative, I would suggest that an additional clause be added to Section 1562 to the effect that the presumption established by that section shall be effective only if the proponent of the evidence has furnished the other parties to the proceeding with a notice that such records and the custodian's declaration will be produced at the hearing. The notice should be given at a time adequate to allow any objecting party to either require the appearance of the declarant for the purpose of cross-examination or the compliance with the requirements of Section 1271.

Thank you for this opportunity to respond to your recommendation and for your consideration.

Sincerely,

Dion G. Dyer
Attorney

DGD:em

Memo 74-264 EXHIBIT VII

LATHAM & WATKINS
ATTORNEYS AT LAW
555 SOUTH FLOWER STREET
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PAUL R. WATKINS (1899-1973)
DANA LATHAM (1898-1974)

CABLE ADDRESS LATHWAT
TWX 910 321-3733

September 30, 1974

California Law Revision Commission
School of Law
Stanford, California 93405

Re: Tentative Recommendations Relating to Admissibility of Copies of Business Records in Evidence (September 1974)

Gentlemen:

This is in response to your request for comments regarding your Tentative Recommendations Relating to Admissibility of Copies of Business Records in Evidence and suggested revisions to Evidence Code § 1560 et seq.

I agree with your analysis that the affidavit presently required by E. C. § 1561, while sufficient to establish a best evidence exception is insufficient to establish the business records hearsay exception. I also agree that some simplified procedure should be devised to provide for a business records exception where the foundational matters will be uncontested.

Your proposed revision, however, contains some features which seem undesirable (and possibly unintended).

First, the proposed revision would delete virtually all of the operative language of E. C. § 1562, including that portion which presently states "the affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the matters so stated are presumed true." No similar provision appears in the proposed replacement, § 712. As a result the affidavit would no longer itself be exempt from the hearsay rule and would consequently be inadmissible. If the affidavit

is inadmissible, the copies of business records intended to be qualified by it would be inadmissible unless a qualifying witness were present to testify to the facts establishing a best evidence exemption.

Second, your revision continues the provisions of E. C. § 1560 concerning the manner of production. Production to the court is required where the documents are subpoenaed for trial. Yet the copies produced will be exempted from the best evidence rule pursuant to proposed § 712 only if the party proposing to offer the copies serves copies thereof on his adversary 20 or more days prior to trial. Unless the proponent has subpoenaed the documents by subpoena duces tecum re deposition, he is unlikely to have the documents 20 days prior to trial.

Third, the procedure contemplated by proposed § 712, that the documents will be treated as exempt from the best evidence and hearsay rule if previously served on the opponent and no demand for testimony is received, requires only that the copies of the business records be served on the adversary. There is no requirement that a copy of the affidavit received be served. The adversary would therefore have to decide whether to require qualifying testimony without knowing what the affidavit has stated.

Fourth, and related to the third point above, it appears that the proposed revision requires service on the adverse party only of such of the documents produced which the proponent intends to offer into evidence. Often an affidavit in the language of E. C. § 1561 will be returned with documents which were not in fact prepared in the regular course of business. If the adversary sees only the documents which the proponent selects to offer into evidence, an opportunity to test the credibility of the affiant, and perhaps to demonstrate that only a haphazard attempt to comply with the subpoena was made, is lost. Further, since only favorable documents are likely to be offered by the proponent, the adversary would be required to serve his own E. C. § 1560 subpoena to obtain and review all documents originally produced to the proponent.

Fifth, if it is intended that the affidavit received in response to an E. C. § 1560 subpoena be admissible at the time of trial (unless objection is made in advance of trial) I see no reason why the presumption that the matters stated in the affidavit are true should be deleted. The presumption has, however, been deleted in the tentative recommendation.

Since all references to the admissibility of the E. C. § 1561 affidavit have been deleted in the tentative recommendation and its service on the opposing party is not required, it seems possible that it is your intention to convert E. C. § 1560 et seq. from an evidentiary exemption to a discovery device only. If so, the foregoing comments are inapplicable. If that is your intention, however, I would recommend that E. C. § 1560 et seq. be expanded to include production of copies of documents regularly maintained by the business. It is often desirable to obtain records which are maintained, but not prepared, by a business. For example, one may wish to obtain from a bank copies of loan applications submitted to it by a party and regularly maintained by the bank in the ordinary course of its business. Under present procedure, it would be necessary to serve an ordinary subpoena duces tecum on the custodian of such records and to require his attendance at a deposition, the only purpose of which is to obtain copies of the documents and the custodian's statement that he is the custodian, the copies are true copies of all such records, and the records are maintained by the business in the ordinary course of its business. The expedited procedure presently provided by E. C. § 1560 could accomplish this purpose with minimum burden on the producing entity. No evidentiary exemption need be provided for the documents. Having obtained the document, it would then of course be up to counsel to determine whether they wished to utilize them at the time of trial and, if so, to obtain the originals and establish their admissibility in the ordinary manner.

Admittedly, this latter point is more in the nature of a revision to the present discovery procedures than to the rules of evidence, but it would seem it might appropriately be considered during your consideration of

proposed changes to E. C. § 1560 et seq.; particularly if it is your intention to remove the automatic evidentiary exemptions, as noted above, from the present provisions.

I trust these comments will be of some value to you and would be happy to develop them further should you so desire.

Sincerely,

Fredric J. Zepp
of LATHAM & WATKINS

Memo 74-64 EXHIBIT VIII

STATE OF CALIFORNIA—BUSINESS AND TRANSPORTATION AGENCY RONALD REAGAN, Governor

DEPARTMENT OF TRANSPORTATION
LEGAL DIVISION
1120 N STREET, SACRAMENTO 95814
P.O. BOX 1438, SACRAMENTO 95807

October 22, 1974

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

Dear John:

In re: Act to amend Sections 1561 and 1562 of and add Section 712 to the Evidence Code

I have before me your tentative recommendation relating to the admissibility of copies of business records in evidence. I concur with your staff's recommendation and comments concerning the amendments to Sections 1561 and 1562 of the Evidence Code and also the addition of Section 712.

The Department of Transportation, in the normal course of its operations, accumulates many kinds of business records which are often needed by private litigants. A very common example is an action arising out of a Department construction contract wherein a subcontractor seeks to enforce a stop notice right. Often one of the parties to the action needing Departmental fiscal or construction records for the trial will serve a Subpena Duces Tecum on a Department employee. In such a case, usually certified copies of the records will satisfy the party seeking them. However, on a number of occasions attorneys anticipating objections from opposing counsel have required the personal attendance of the employee. The net effect is a loss of time and expense which would in most cases be saved by your proposed legislation.

I wish to thank you for giving me the opportunity for commenting on your tentative recommendation.

Best personal regards,

Bob

ROBERT F. CARLSON
Assistant Chief Counsel

STATE OF CALIFORNIA
RONALD REAGAN, Governor

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

LETTER OF TRANSMITTAL

The California Law Revision Commission has prepared the attached Tentative Recommendation Relating to Admissibility of Copies of Business Records in Evidence. The tentative recommendation deals with a problem brought to the Commission's attention by a number of judges and practicing lawyers.

The Commission is distributing this tentative recommendation to interested persons and organizations for comment. Comments should be sent to the Commission not later than October 15, 1974. All comments will be considered when the Commission determines what recommendation, if any, it will make to the 1975 session of the Legislature.

Sincerely,

John H. DeMoully
Executive Secretary

9/13/74

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE

RECOMMENDATION

relating to

Admissibility of Copies of Business Records in Evidence

September 1974

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

Important Note: This tentative recommendation is being distributed to that interested persons 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 15, 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 were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

404-341

TENTATIVE RECOMMENDATION

relating to

Admissibility of Copies of Business Records in Evidence

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[3] prescribes

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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 1561 provides:

> (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.

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.[4] 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 ordinary course of business at or near the time of the act, condition or event. Section 1562 provides:

> 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. 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.

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.

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4. 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.

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.[5]

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

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5. 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.
>
> 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.

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, would make a copy of a business record more easily admissible than the original record itself, and often would require a detailed statement of the mode of preparation of the records in the affidavit of the custodian.

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 a new section--Section 712--be added to the Evidence Code 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 copy of the records as evidence must give notice to the adverse party of that intention, together with a copy of the records, 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.

(3) If the adverse party does not object within 10 days after receiving notice, the copy of business records is admissible without producing the custodian or other qualified witness, notwithstanding the requirements of the hearsay rule and the best evidence rule.[6]

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6. The proposed procedure is designed to satisfy only the requirements of the hearsay rule (Section 1200) and the best evidence rule (Section 1500); the requirements of Sections 1561 and 1562 and any other requirements of or objections to admissibility must be satisfied.

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

An act to amend Sections 1561 and 1562 of, and to add Section 712 to, the Evidence Code, relating to admissibility of evidence of business records.

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

Evidence Code § 712 (new)

Section 1. Section 712 is added to the Evidence Code, to read:

712. A copy of the business records subpoenaed pursuant to subdivision (b) of Section 1560 and Sections 1561 and 1562 is admissible in evidence to the same extent as though the original thereof were offered, and is not made inadmissible by the hearsay rule when offered to prove an act, condition, or event recorded, if all of the following are established by the party offering the copy of the business records as evidence:

(a) The affidavit accompanying the copy of the records 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 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.

(c) The party offering the copy of the records as evidence has served on each adverse party, not less than 20 days prior to the date of the trial, a copy of the business records to be offered in evidence and

a notice that such copy is a copy of business records that have been 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 will be introduced in evidence pursuant to Section 712 of the Evidence Code.

(d) The adverse party has not, within 10 days after being served with the notice referred to in subdivision (c), served on the party who served the notice a written demand for compliance with the requirements of Section 1271.

Comment. Section 712 creates an exemption to the hearsay rule (Section 1200) and an exception to the best evidence rule (Section 1500) for a copy of business records subpoenaed under Sections 1560-1566 if the requirements of Section 712 are satisfied. Section 712 supersedes the portion of Section 1562 that formerly created an exception to the best evidence rule. Under prior law, the affidavit of the custodian of records or other qualified witness under Section 1561 apparently did not satisfy the requirements of admissibility stated in Section 1271--the business records exception to the hearsay rule--because the affidavit did not contain the declarations required by Section 1271 concerning the mode of preparation of the records and their trustworthiness. See Recommendation Relating to Admissibility of Copies of Business Records in Evidence, 12 Cal. L. Revision Comm'n Reports (1974).

Evidence Code § 1561 (amended)

Sec. 2. Section 1561 of the Evidence Code is amended to read:

1561. (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.

(c) When more than one person has knowledge of the facts, more than one affidavit may be made.

Comment. Subdivision (c) of Section 1561 continues without change a sentence that formerly was found in Section 1562.

Evidence Code § 1562 (amended)

Sec. 3. Section 1562 of the Evidence Code is amended to read:

1562. The copy of the records is admissible in evidence to the same extent provided in Section 712. ~~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.~~

Comment. The deleted portion of Section 1562 is superseded by Section 712 which states the extent to which a copy of the business records subpoenaed under this article is admissible in evidence notwithstanding the hearsay rule (Section 1200) and the best evidence rule (Section 1500). Section 1562 formerly provided an exception to the best evidence rule, but the affidavit provided by Section 1561 apparently did 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 in Evidence, 12 Cal. L. Revision Comm'n Reports (1974). See also Comment to Section 712.