#63.50 1/7/75

Memorandum 75-2

Subject: Study 63.50 - Admissibility of Business Records

Attached to this memorandum is a revised staff draft of the Recommendation relating to Admissibility of Copies of Business Records in Evidence incprporating the decisions made at the November meeting.

The proposed legislation has been renumbered as Sections 1562.5, 1562.6, and 1562.7. Section 1562.5 basically incorporates the section as previously proposed. This includes Section 1562.5(d) which requires the adverse party to serve on the party seeking to introduce the business records, a written demand that the requirements of Section 1271 be satisfied, together with an affidavit stating that he has good reason to believe that the business records served on him do not satisfy the requirements for admissibility of Section 1271 and setting forth the precise facts on which this belief is based. The intent of this provision is to place the burden on the adverse party to state specific facts upon which he bases his belief that the records do not satisfy the requirements for admissibility of Section 1271. This will tend to ensure that the adverse party will not make such a demand automatically and without just cause, thus extinguishing the efficacy of subdivision (c). As indicated in previous Commission discussion, this may require that the adverse party investigate a situation in which he lacks knowledge of the facts sought to be proved.

Section 1562.6 is added to provide a means by which the court can protect against unjustified demands under Section 1562.5(d). It is patterned on the

sanction in Code of Civil Procedure Section 2034(c) which provides that where a party has made a request for admission of the genuineness of any document or the truth of any matters of fact pursuant to Code of Civil Procedure Section 2033, and the party served with the request serves a sworn denial thereof, the party who has served the request may, after proving the genuineness of such documents or the truth of such matters of fact, apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making his proof, including reasonable attorney's fees. Section 2034(c) provides that, if the court finds that there were no good reasons for the denial, and that the admissions sought were of substantial importance, the court shall order the expenses paid. Proposed Evidence Code Section 1562.6 gives the court discretion to order payment of the expenses of obtaining the testimony of the custodian or other qualified witness, including reasonable attorney's fees, upon a finding that the party serving the affidavit did not have substantial justification for believing that the business records sought to be admitted did not satisfy the requirements for admissibility of Section 1271.

Section 1562.7 is added to make clear that copies of business records admitted into evidence under the procedure specified in Section 1562.5 do not constitute conclusive evidence of the facts sought to be proved. The opposing party maintains the right to offer evidence to disprove any act, condition, or event recorded.

Also attached hereto are copies of the statutes of two states which have dealt with the problems presented herein in somewhat different manners. The New York statute, New York Civil Practice Law and Rules Section 4518(c) (1963), adopted in 1970, (Exhibit I), makes records prima facie evidence of the facts contained therein when accompanied by a certification or authentication by the head of the hospital, library, department or bureau of a

municipal corporation or of the state or by an employee delegated for that purpose. The statute is limited, however, to hospital records, books, papers and other things of a library, department or bureau of a municipal corporation or of the state, by an employee delegated for that purpose. It should be noted that, under Evidence Code Section 1280, California has already eliminated the requirement of testimony by a public employee as to official records and reports. The Comment, upon adoption of Section 1280, states as follows:

> 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.

As previously noted, and as pointed out in the recommendation appended hereto, some attorneys interpreted Sections 1560-1566, when they applied only to hospitals, as providing an exception to Section 1271. It is the conclusion of the staff that these sections were not so intended and do not create such an exception.

The Texas statute as amended in 1969, Texas Civil Statutes, Article 3737e (1926)(Exhibit II), provides for admission into evidence of business records upon the affidavit of the entrant, custodian, or other qualified witness as to the matters required to be shown by that state's business records exception to the hearsay rule. The staff has concluded that adopting the Texas solution is undesirable since it places the burden upon the adverse party to subpoena the custodian-affiant in order to exercise his right of cross-examination. Texas does, in Article 3737e, Section 5, provide for the filing of the records along with the affidavit with the clerk of the court

for inclusion with the papers in the cause, and for notification of the opposing party of such filing. The adverse party then has an opportunity to inspect or copy the records if desired. It is submitted that this places an additional burden and expense on the adverse party and that the party seeking to have the records admitted into evidence should have the duty of providing copies of the records as provided in the proposed statute. It might be helpful, however, to require the affidavit of the custodian or other qualified witness to be filed with the other court papers. This question remains for Commission consideration.

Respectfully submitted,

Jo Anne Friedenthal
Legal Counsel

EXHIBIT I

Rule 4518. Business records

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

(b) Hospital bills. A hospital bill is admissible in evidence under this rule and is prima facie evidence of the facts contained, provided it bears a certification by the head of the hospital or by a responsible employee in the controller's or accounting office that the bill is correct, that each of the items was necessarily supplied and that the amount charged is reasonable. This subdivision shall not apply to any proceeding in a surrogate's court nor in any action instituted by or on behalf of a hospital to recover payment for accommodations or supplies furnished or for services rendered by or in such hospital, except that in a proceeding pursuant to section one hundred eighty-nine of the lien law to determine the validity and extent of the lien of a hospital, such certified hospital bills are prima facie evidence of the fact of services and of the reasonableness of any charges which do not exceed the comparable charges made by the hospital in the care of workmen's compensation patients.

Rule 4518. Business records

[See main volume for text of (a) and (b)]

(c) Other records. All records, writings and other things referred to in sections 2306 and 2307 are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital, library, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose.

As amended Jud.Conf.1970 Proposal No. 2, eff. Sept. 1, 1970.

Subd. (c) added Jud.Conf.1970 Proposal No. 2, eff. Sept. 1, 1970.

Supplementary Practice Commentary

By Joseph M. McLaughlin

1970

This section, the business records statute, creates an exception to the hearsay rule for records which are kept in the regular course of business. While the hearsay objection is thus hurdled, there remains a problem of authentication, a problem recognized by the provision in subdivision (a) that the judge must find, as a preliminary question of fact, that the record "was made in the regular course of any business and that it was the regular course of such business to make it . . ."

Where hospital records are involved (and many other records maintained by governmental bodies—cf. CPLR 2306, 2307), the practice has been to subpoena these records; and copies thereof are then presented at trial—in a sealed envelope. Where is the authenticating testimony? Where is the proof that these records are legitimate business records?

Following the blueprint of subdivision (b), the Judicial Conference, in 1970, amended CPLR 4518 to insert a new subdivision (c) which provides that all records referred to in CPLR 2306 and 2307 are "prima facie evidence of the facts contained" therein, provided they bear the appropriate certification or authentication. This dispenses the plaintiff from the requirement of producing an authenticating witness, and casts upon the party who attacks the records the burden of rebutting the presumption that the facts are as contained in the record.

It should be recognized that the new subdivision makes these records admissible even when they have not been subpoenaed under CPLR 2306 and 2307, but have been voluntarily produced. And although the statute is not entirely clear, no reason is apparent why the new subdivision should not extend to similar records obtained from a sister state.

EXHIBIT II

Art. 3737e. Memorandum or record of act, event or condition; absence of memorandum or record as evidence

Competence of record as evidence

Section 1. A memorandum or record of an act, event or condition shall, insofar as relevant, be competent evidence of the occurrence of the act or event or the existence of the condition if the judge finds that:

(a) It was made in the regular course of business;

(b) It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum or record;

(c) It was made at or near the time of the act, event or condition or reasonably soon thereafter.

Proof of identity and mode of preparation; lack of personal knowledge

Sec. 2. The identity and mode of preparation of the memorandum or record in accordance with the provisions of paragraph one (1) may be proved by the testimony of the entrant, custodian or other qualified witness even though he may not have personal knowledge as to the various items or contents of such memorandum or record. Such lack of personal knowledge may be shown to affect the weight and credibility of the memorandum or record but shall not affect its admissibility.

Absence of record

Sec. 3. Evidence to the effect that the records of a business do not contain any memorandum or record of an alleged act, event or condition shall be competent to prove the non-occurrence of the act or event or the non-existence of the condition in that business if the judge finds that it was the regular course of that business to make such memoranda or records of all such acts, events or conditions at the time or within reasonable time thereafter and to preserve them.

Business defined

Sec. 4. "Business" as used in this Act includes any and every kind of regular organized activity whether conducted for profit or not. Acts 1951, 52nd Leg., p. 345, ch. 321.

Records or photo copies; admissibility; affidavit; filing

Sec. 5. Any record or set of records or photographically reproduced copies of such records, which would be admissible pursuant to the provisions of Sections 1 through 4 shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Sections 1 through 4 above, that such records attached to such affidavit were in fact so kept as required by Sections 1 through 4 above, provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen (14) days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party

or parties who files the records and serves notice of said filing, in compliance with this Act. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule 21a, Texas Rules of Civil Procedure, fourteen (14) days prior to commencement of trial in said cause.

Sec. 5 added by Acts 1969, 61st Leg., p. 1076, ch. 353, § 1, emerg. eff. May 27, 1969. Amended by Acts 1973, 63rd Leg., p. 276, ch. 128, § 1, eff. Aug. 27, 1973.

Hospital X-Ray pictures; admissibility; affidavit; filing

Sec. 6. X-rays which are made in any hospital in the United States of America, which are made as a regular part of the business of that hospital, which are made in accordance with good radiology techniques, by a person competent to make X-rays, which are made under the supervision of the Department of Radiology of such hospital, which have photographed thereon the name and, if applicable, the hospital number assigned the person X-rayed, along with the date of such X-ray and, if the person's name is not known, then the words "Name Unknown" and the number assigned said person, shall be admitted into evidence in the trial of any cause in this state if they are accompanied by the affidavit of the head of the Radiology Department of said hospital or one of his partners, which affidavit shall affirmatively state that the conditions of this section have been met, and if the Radiology Department has been changed, then such affidavit may be made by the person who was the head of the Radiology Department of said hospital or one of his partners at the time said X-rays were made, provided such X-rays are accompanied by such affidavit and shall be filed with the clerk of the court for inclusion with the papers in the cause in which the X-rays are sought to be used as evidence at least fourteen (14) days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such X-rays and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and which notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule 21a, Texas Rules of Civil Procedure, fourteen (14) days prior to commencement of trial in said cause; the clerk of the court shall permit any party to said cause to remove the X-rays from his possession for the purposes of examination, provided a receipt is presented therefor and said X-rays shall be returned to the clerk of said court at least seven (7) days prior to the day upon which trial of said cause commences.

Sec. 6 added by Acts 1969, 61st Leg., p. 1076, ch. 353, § 1, emerg. eff. May 27, 1969. Amended by Acts 1973, 63rd Leg., p. 277, ch. 128, § 2, eff. Aug. 27, 1973.

Medical records; form of affidavit

Sec. 7. A form for the affidavit of such person as shall make such affidavit as is permitted in Section 5 above shall be sufficient if it follows this form, though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this Act shall suffice, to-wit:

No._____

John Doe (Name of Plaintiff)	IN THE _____
v.	COURT IN AND FOR
John Roe (Name of Defendant)	_____ COUNTY, TEXAS

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

My name is _____, I am over 21 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the medical records librarian of _____ Hospital and as such I am the custodian of the records of the said _____ Hospital. Attached hereto are ____ pages of records from the _____ Hospital. These said ____ pages of records are kept by the _____ Hospital in the regular course of business, and it was the regular course of business in the _____ Hospital for an employee or representative, or a doctor permitted to practice in the _____ department or division, of the _____ Hospital, with personal knowledge of the act, event or condition recorded to make the memorandum or record or to transmit information thereof to be included in such memorandum or record; and the memorandum or record was made at or near the time of the act, event or condition recorded or reasonably soon thereafter. The records attached hereto are exact duplicates of the original, and it is a rule of the _____ Hospital to not permit the originals to leave the hospital.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the ____ day of _____, 19____.

_____
Notary Public in and for _____ County, Texas

Sec. 7 added by Acts 1969, 61st Leg., p. 1076, ch. 353, § 1, emerg. eff. May 27, 1969.

#63.50 1/3/75

RECOMMENDATION

relating to

ADMISSIBILITY OF COPIES
OF BUSINESS RECORDS IN EVIDENCE

Background

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

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1. Evidence Code Section 1400 provides:

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

Evidence Code Section 1401 provides:

> 1401. (a) Authentication of a writing is required before it may be received in evidence.
>
> (b) Authentication of a writing is required before secondary evidence of its content may be received in evidence.

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

> 1500. Except as otherwise provided by statute, no evidence other than the writing itself is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.

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

> 1200. (a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.
>
> (b) Except as provided by law, hearsay evidence is inadmissible.
>
> (c) This section shall be known and may be cited as the hearsay rule.

the business records exception.[4]

The requirement of authentication can be met by calling the custodian of the record as a witness. However, in the vast majority of situations the cost of calling such a witness to trial, or of taking his deposition[5] is wasteful and burdensome on persons whose normal duties are to care for such records such as custodians of hospital records, in light of the perfunctory nature of the testimony to be elicited. Similarly, strict adherence to the requirements of the best evidence rule with respect to business records normally serves little useful purpose. There seems little reason to demand production of an original record if a copy is certified by the custodian to be identical to the original.

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4. Evidence Code Section 1271 provides:

> 1271. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
>
> (a) The writing was made in the regular course of 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 source of information and method and time of preparation were such as to indicate its trustworthiness.

5. In civil matters in which the custodian's residence is beyond the scope of a subpoena, his deposition may be taken and introduced in lieu of his testimony. Code Civ. Proc. §§ 2019(b), 2020, and 2016(d)(3). In criminal matters, Penal Code Section 1330 provides a procedure by which a witness, who resides within the state but beyond the normal distance for a subpoena, may nevertheless be subpoenaed if a judge finds his attendance at the examination, trial, or hearing is material and necessary. Penal Code Section 1334 provides a procedure whereby a witness may be brought from outside the state if the court finds that he is material and necessary. In addition, Penal Code Sections 1335-1345 provide a means of taking pretrial testimony of a material witness who is about to leave the state or who is too sick or infirm to attend the trial. Penal Code Sections 1349-1362 provide the defendant but not the prosecution with a method of taking a deposition of a material witness and having it read in evidence upon a court finding that the witness is unavailable within the meaning of Evidence Code Section 240.

Evidence Code Sections 1560-1566 specifically deal with copies of business records[6] and provide clear exceptions to the normal requirements of both the rules of authentication and best evidence. These provisions provide a procedure for compliance with a subpoena duces tecum for business records in an action in which the business is neither a party nor the place where any cause of action is alleged to have arisen. The sections permit introduction into evidence of a copy of a subpoenaed business record when it has been sent to the court in a sealed envelope accompanied by the affidavit of the custodian or other qualified witness, pursuant to Section 1561, certifying in substance each of the following:

> (1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records.
>
> (2) The copy is a true copy of all the records described in the subpoena.
>
> (3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.

Evidence Code Section 1562 provides in part as follows:

> The copy of the records is admissible in evidence to the same extent as though the original thereof were offered and the custodian had been present and testified to the matters stated in the affidavit. The affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the matters so stated are presumed true. . . .

Thus, under this procedure, a copy of a business record is admissible without the necessity of satisfying the requirements of the best evidence rule or the rules of authentication; the fact that the document offered is a copy rather than the original may be disregarded, and the matters stated in the affidavit are given the same force as if the

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

custodian had appeared and testified. The sections clearly serve a most useful purpose in a number of cases in which the content of the business record will not be challenged for the truth of statements therein.

It has been brought to the attention of the Commission, however, that some attorneys and judges take the view that an affidavit complying with Section 1561 is sufficient to assure the admission in evidence of a copy of a business record notwithstanding a hearsay objection, possibly on the theory that Sections 1561 and 1562, in effect, provide an exception to the requirements of Section 1271.[7]

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7. Judge Herbert S. Herlands, Judge of Superior Court, Orange County, reports the situation in a letter to the Law Revision Commission, dated July 8, 1974, as follows:

> I have been discussing, with some of my colleagues, the problem about which I wrote to you some time ago involving Sections 1271 and 1561 of the Evidence Code.
>
> Judge Robert A. Banyard of the Orange County Superior Court has made the point that, prior to the 1969 amendments to the Evidence Code, attorneys specializing in personal injury defense work believed that Sections 1560, 1561, and 1562 constituted an exception to the requirements of Section 1271, in that they allowed hospital records to go in with less of a foundation than that required for the records of other businesses. Apparently, it was believed, before 1969, that the attorneys for plaintiffs and defendants in personal injury cases both wanted hospital records to be admitted on the basis of the affidavit described in Section 1561, in the belief that the very nature of hospital work and hospital record-keeping established sufficient authenticity to warrant admission of the records into evidence. Judge Banyard has further suggested that, while there may have been a good factual reason for differentiating between hospital records and the records of all other businesses, the amendments in 1969 eliminated whatever exception existed for hospital records and created an apparent inconsistency between Sections 1560, 1561, and 1562, on the one hand, and Section 1271, on the other.
>
> 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

The argument that the requirements of the hearsay exception are satisfied by following the procedure under Sections 1560-1566 is based upon two considerations. First, Section 1562 provides that the statements in the affidavit accompanying the record are presumed true, without denoting any specific evidentiary purpose. Second, the required statements in the affidavit under Section 1561 in some respects parallel the required showing needed for the application of the business records exception to the hearsay rule under Section 1271. However, Section 1271 includes requirements not satisfied by an affidavit submitted pursuant to Section 1561.[8] The business records exception to the hearsay rule provided for in Section 1271 applies only if:

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

Moreover, there is an important difference between a rule involving a

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> is present in court for oral examination under Section 1271. . . .
>
> Of course, in most cases, both sides want the records in evidence and, therefore, do not object, or counsel on both sides assume that the affidavit under Section 1561 constitutes an adequate foundation. Yet, only last week in my own court, an objection was voiced, and the proponent had to bring in the authenticating witness to lay the necessary foundation under Section 1271. The problem, therefore, is still with us in a sporadic sort of way.

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

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

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

The uncertainty regarding the relationship between Sections 1560-1566, on the one hand, and Sections 1270-1271, on the other, could be clarified in several different ways. Section 1562 could be amended simply to provide that the affidavit submitted under Section 1561 also satisfies the requirements of Section 1271. This alternative would, as a practical matter, make business records admissible without any showing of their trustworthiness. Alternatively, the requirements specified in Section 1561 for the affidavit accompanying a copy of subpoenaed business records could be expanded to include the additional matters which must be shown under Section 1271 to satisfy the business records exception to the hearsay rule--i.e., the statute could provide that, if the affidavit shows that the mode of preparation of the records and the sources of information and method and time of preparation were such as to indicate its trustworthiness, the record be admitted without further requirements. The Commission believes that this solution would be undesirable, however, since it would place the burden upon the adverse party to subpoena the custodian-affiant in order to exercise his right of cross-examination. Additionally, the drafting of such an affidavit

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

often would be extremely difficult since the amount of information required varies with each case, and neither the custodian nor the proponent of the evidence could be certain of what information would be satisfactory to the court. A third solution could be clearly to provide that Sections 1560-1566 do not satisfy the business records exception to the hearsay rule. However, the Commission believes that this solution is too drastic.

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

In order that the adverse party have a realistic opportunity to determine whether or not to demand the presence of the custodian, he must be supplied with a copy of the records to be introduced into evidence. In the ordinary case this would not prove to be a substantial burden on the party who seeks to introduce the records since he will normally have obtained the records through usual investigation. Custodians will have a strong incentive to cooperate in providing copies of records in order to avoid the inconvenience of being required to attend trial in actions in which they are not parties and have no interest. In the event that the custodian resist voluntary disclosure in civil cases copies of such records could be obtained through the process of pretrial discovery.[10]

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10. E.g., Code Civ. Proc. § 1985.

Recommendations

The Commission recommends that Sections 1562.5, 1562.6, and 1562.7 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 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 trial.

(2) If the adverse party does not object within 10 days after receiving notice, the copy of business records is admissible, notwithstanding the requirements of the hearsay rule.

(3) If the adverse party, within 10 days after receiving notice, serves on the party seeking to introduce the records into evidence a written demand that the requirements of subdivisions (c) and (d) of Section 1271 be satisfied, together with a supporting affidavit, then the party who offers the copy of the business records as evidence must produce the custodian or other qualified witness in order to satisfy the requirements of Section 1271(d). In his supporting affidavit, the adverse party must state that he has good reason to believe that the requirements of Section 1271 cannot be satisfied and must set forth the precise facts on which this belief is based.

(4) If the adverse party demands that the requirements of Section 1271 be satisfied, and serves the required affidavit, and thereafter the evidence is admitted on the testimony of the custodian or other qualified witness, then, if the court finds that the adverse party did not have substantial justification for believing that the business records did not satisfy the requirement for admissibility of Section 1271, the court, in its discretion, may require the adverse party to pay the party offering the business records as evidence his expenses of obtaining the testimony of the custodian or other qualified witness, including reasonable attorney's fees.

(5) These new provisions would not affect the right of a party to offer evidence to disprove an act, condition or event recorded in a copy of a business record admitted into evidence.

PROPOSED LEGISLATION

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

An act to add Sections 1562.5, 1562.6, and 1562.7 to the Evidence Code, relating to admissibility 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 indamissible 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 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 seeking to introduce the record both of the following:

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

(2) An affidavit of such adverse party stating that he has good reason to believe that the business record served on him does not satisfy the requirement of subdivision (d) of Section 1271 and setting forth the precise facts upon which this belief is based.

Comment. Section 1562.5 creates an exception to the hearsay rule (Section 1200) for a copy of business records subpoenaed pursuant to Sections 1560-1566 if the requirements of Section 1562.5 are satisfied. Section 1562 creates an exception to the best evidence rule (Section 1500) and provides the necessary preliminary showing of authenticity of both the copy and the original record (Section 1401). However, the affidavit of the custodian of records or other qualified witness under Section 1561 does not satisfy the requirements of the hearsay exception provided by Section 1271--the business records exception to the hearsay rule--because the affidavit does not contain statements sufficient to satisfy the requirements of subdivision (d) of Section 1271 ("The sources of information and method and time of preparation were such as to indicate its trustworthiness."). See Recommendation Relating to Admissibility of Copies of Business Records in Evidence, 12 Cal. L. Revision Comm'n Reports ____ (1974).

Subdivision (d) provides the method by which the adverse party may demand testimony by the custodian of the records or other qualified witness before the records can be admitted into evidence. Subdivision (d) (2) ensures that the adverse party will not make such a demand automatically and without substantial justification. Under subdivision (d), the adverse party must not only state under oath that he has good reason to believe that the record is inadmissible because the requirements of

subdivision (d) of Section 1271 cannot be satisfied, but he must also state specific facts upon which the belief is based. This places a burden on the adverse party to investigate a situation in which he lacks knowledge of the facts sought to be proved. In such a case, the adverse party may support his statement of belief with facts showing that the record was in fact inaccurate or that the sources of information or method of preparation of the records was such as to render them untrustworthy. Failure to object does not preclude the adverse party from offering evidence at trial to show that the records are in fact incorrect. See Section 1562.7.

Sec. 2. Section 1562.6 is added to the Evidence Code, to read:

1562.6. If the adverse party serves an affidavit as provided in paragraph (2) of subdivision (d) of Section 1562.5 and, if the party offering the business records as evidence satisfies the requirements of Section 1271 and the records are admitted into evidence, the latter party may apply to the court in the same action for an order requiring the adverse party to pay him the expenses of satisfying the requirements of Section 1271, including the cost of obtaining the testimony of the custodian or other qualified witness and reasonable attorney's fees. The court in its discretion may enter such order upon a finding that the party serving the affidavit had no substantial justification for believing that the business record was not admissible under Section 1271.

Comment. Section 1562.6 provides a means by which the court can protect against unjustified demands under Section 1562.5 (d) for compliance with the requirements of Section 1271. The section gives the court discretion to order the party who requires the testimony of the custodian or other qualified witness under the procedure set out in Section 1562.5 to pay the expenses of obtaining such testimony including reasonable attorney's fees, if the court finds that the demand was made without substantial justification.

Sec. 3. Section 1562.7 is added to the Evidence Code, to read:

1562.7. Nothing in Section 1562.5 affects the right of a party to offer evidence to disprove an act, condition, or event recorded in a record admitted into evidence under Section 1562.5.

Comment. Section 1562.7 makes clear that copies of business records admitted into evidence under the procedure specified in Section 1562.5 are not conclusive evidence of the facts sought to be proved. The adverse party has the right to offer evidence to disprove any act, condition, or event recorded.