12/18/75

Memorandum 76-13

Subject: Study 63.50 - Admissibility of Business Records

Attached to this memorandum is a Revised Staff Draft of a Recommendation Relating to Admissibility of Copies of Business Records in Evidence. An earlier version of this recommendation (January 1975) was submitted to the 1975 Legislature. The legislation introduced to effectuate that recommendation (AB 974) was held in committee because of its complexity, the possibility that a genuine hearsay objection might be inadvertently waived, and problems involved in requiring a criminal defendant to make the pretrial affidavit necessary to preserve his hearsay objection.

At the October meeting, the Commission considered Memorandum 75-64 which suggested a modified approach to meet legislative objections to the earlier recommendation. This modified approach eliminated the requirement that the party opposing the introduction of business records furnished under Evidence Code Sections 1560-1566 make his hearsay objection before trial or lose the right to object on that ground. It substituted a pretrial notice by the proponent that business records were being subpoenaed under Sections 1560-1566, and eliminated the hearsay objection unless (1) a genuine question was raised as to the accuracy of the records, or (2) in the circumstances it would be unfair to admit the copy without requiring the personal attendance of the custodian or other qualified witness.

The Commission suggested some drafting changes but left the basic approach intact. In the attached recommendation, the hearsay exception and notice requirements are contained in proposed Section 1562.5 with some additional minor changes in wording.

The Commission requested that in its revised draft the staff deal with the following matters:

(1) Provide a procedure for parties to examine or obtain copies, before the trial or other hearing, of records forwarded to court as authorized by Section 1560. The Commission suggested that this might be dealt with by rules developed by the Judicial Council. The attached recommendation provides that any party is entitled to be furnished with a copy of the records by the clerk on request and payment of the fee provided by Section 26831 of the Government Code. (See proposed subdivision (e) of Section 1560.) Additional rules would not appear to be

required, although the Judicial Council has the duty to "adopt rules for court administration, practice and procedure, not inconsistent with statute . . . ." (Cal. Const. Art. 6, § 6.)

(2) Provide a procedure to allow use at trial of records produced in response to a subpoena duces tecum in connection with a deposition. The attached recommendation provides that the officer before whom a deposition of a custodian of records is taken shall, on request by any party, forward business records produced by the custodian to the court for trial, together with an additional authenticating affidavit. (See proposed Section 1561.5.)

(3) Allow the custodian's deposition, if given personally, to be used in lieu of the affidavit required by Section 1561. This is contained in proposed subdivision (b) of Section 1562.

Other provisions of this recommendation are as follows:

(4) In addition to the notice required to be given when business records are subpoenaed pursuant to Sections 1560-1566, notice is required to be given when a request is made to have the officer before whom a deposition is to be taken forward records for trial in accordance with proposed Section 1561.5.

(5) Section 1560 is amended to make clear that the custodian may mail or otherwise deliver original records if he chooses, and not merely copies. (See proposed subdivision (a)(2) of Section 1560.)

(6) A specific requirement is added that the records shall remain in custody of the court, tribunal, or officer to whom they were delivered, and that any copying shall be done by or under the immediate supervision of such court, tribunal, or officer. (See proposed subdivisions (d)(1) and (e)(2) of Section 1560.)

(7) Definitions of "evidentiary copy of the records" and "information copy of the records" are provided to avoid confusion by use of the term "copy." (See proposed subdivisions (a)(2) and (a)(3) of Section 1560.)

The interrelationship of these various procedures is illustrated in the following diagram:

SUBPOENA DUCES TECUM FOR DEPOSITION

SUBPOENA DUCES TECUM FOR TRIAL

Proponent serves subpoena duces tecum on custodian to attend deposition. See Evid. Code § 1560. Notice given to all parties. CCP § 2019(a)(1).

Proponent serves subpoena duces tecum on custodian for trial without requiring personal appearance. See Evid. Code § 1560(b). No notice required.

If custodian's personal appearance is required in subpoena, Evid. Code § 1564, or if not required but custodian elects to appear personally, custodian testifies to matters required in Evid. Code § 1561. Notary forwards transcribed deposition to clerk and furnishes copy to parties. CCP § 2019(f). Records attached to deposition. Evid. Code § 1562(b).

If custodian's personal appearance is not required in subpoena, custodian may mail original records or a copy with affidavit. Evid. Code §§ 1560, 1561. On request by any party, notary forwards records to clerk with another affidavit. Evid. Code § 1561.5.

Custodian may mail original records or a copy to the clerk with affidavit. Evid. Code §§ 1560, 1561.

Deposition admissible at trial to establish matters required by Evid. Code § 1561. Evid. Code § 1562(b).

Affidavit(s) admissible at trial to establish matters required by Evid. Code § 1561. Evid. Code § 1562.

If proponent has given notice that records have been subpoenaed for trial, or notice that the notary has been requested to forward records to the clerk under Evid. Code § 1561.5, then:

If proponent has given no notice that records have been subpoenaed for trial, or notice that the notary has been requested to forward records to the clerk under Evid. Code § 1561.5, then:

Records are not made inadmissible by hearsay rule unless genuine question re accuracy is raised, or it would be unfair to admit, Evid. Code § 1562.5, and:

Authenticity of records is established, and records not made inadmissible by best evidence rule. Evid. Code § 1562.5.

We plan to go through the proposed legislation section by section at the meeting. After the meeting, we will revise the statute and the preliminary portion of the recommendation and present it for review at a future meeting with a view to obtaining approval to send it out for comment.

Respectfully submitted,

Robert Murphy
Legal Counsel

Revised Staff Draft

RECOMMENDATION

relating to

ADMISSIBILITY OF COPIES OF

BUSINESS RECORDS IN EVIDENCE

Background

Before a copy of a business record may be admitted into evidence, at least three requirements must be satisfied:

First, as is true of any writing, the record must be authenticated, i.e., it must be established that "it is the writing that the proponent of the evidence claims it is . . . ."[1]

Second, the copy must be shown to fall within an exception to the best evidence rule requiring production of the original[2]--normally the business records exception which makes photographic copies made as a business record as admissible as the original.[3]

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1. Evid. Code §§ 1400, 1401. These sections provide:

> 1400. Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.
>
> 1401. (a) Authentication of a writing is required before it may be received in evidence.
>
> (b) Authentication of a writing is required before secondary evidence of its content may be received in evidence.

2. The best evidence rule is codified in 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. See Evid. Code § 1550, which provides:

> 1550. A photostatic, microfilm, microcard, miniature photographic or other photographic copy or reproduction, or an enlargement thereof, of a writing is as admissible as the writing itself if such copy or reproduction was made and preserved as a part of the records of a business (as defined by Section 1270) in the regular course of such business. The introduction of such copy, reproduction, or enlargement does not preclude admission of the original writing if it is still in existence.

Finally, if the record is offered to prove the truth of statements which it contains, the statements must be shown to fall within one of the exceptions to the hearsay rule[4]--normally the business records exception[5] (not to be confused with the business records exception to the best evidence rule).

If the custodian of records is called as a witness, the custodian can ordinarily testify to the authenticity of the records, to the making and preservation of such records "as a part of the records of a business . . . in the regular course of such business"[6] to overcome the best evidence rule, and to the four statutory elements necessary to overcome the hearsay rule.[7]

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4. The hearsay rule is set forth in Evidence Code Section 1200 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.

5. Evid. Code § 1271. This section provides:

> 1271. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
>
> (a) The writing was made in the regular course of a business;
>
> (b) The writing was made at or near the time of the act, condition, or event;
>
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
>
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

6. See Evid. Code § 1550.

7. See Evid. Code § 1271.

However, in most cases there is no genuine controversy over the accuracy of the records and the custodian's testimony is perfunctory. When the custodian is called personally to testify in such cases unnecessary time is consumed, and the cost to certain kinds of institutions--for example, hospitals and banks--which are often stakeholders of records needed in litigation to which they are not a party, may be substantial.[8]

As a result, legislation sponsored by the California Hospital Association was enacted in 1959 to allow hospital records to be admitted into evidence without the personal appearance of the custodian.[9] When the hospital was neither a party to the action nor the place where the cause of action arose, the custodian was permitted to respond to a supoena duces tecum by mailing or otherwise delivering a copy of the records together with an affidavit establishing foundational matters. The copy was made "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."[10] This legislation is now codified in Evidence Code Sections 1560-1566, and was broadened in 1969 to apply to records of every kind of a business.[11]

The effect of this legislation on the application of the authentication requirement and the best evidence rule to records mailed with an affidavit under Section 1560-1566 is clear. Under Section 1561, the affidavit must state the affiant's custodianship and authority to certify the records, that the copy "is a true copy of all the records described in the subpoena," and that the records were prepared by "per-

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8. Ludlam, Subpoenas for Hospital Records, 32 L.A. Bar Bull. 335 (1957).

9. See Cal. Stats. 1959, Ch. 1059; 34 Cal. S.B.J. 667, 668 (1959). This legislation was codified in former Sections 1998-1998.5 of the Code of Civil Procedure. These sections were repealed in 1965 and reenacted in substantially the same form in Evidence Code Sections 1560-1566. See Cal. Stats. 1965, Ch. 299, §§ 2, 118-123.

10. Cal. Stats. 1959, Ch. 1059, § 3. This was codified in former Section 1998.2 of the Code of Civil Procedure, now in Section 1562 of the Evidence Code.

11. See Cal. Stats. 1969, Ch. 199.

sonnel of the business in the ordinary course of business at or near the time of the act, condition, or event."[12] This proof should suffice to establish the authenticity of the records. Moreover, since the copy of the records is made admissible "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,"[13] the best evidence rule does not require its exclusion.

The effect of this legislation on the hearsay rule, however, is less clear. The matters required in the custodian's affidavit under Section 1561 fall short of the foundational matters required to invoke the business records exception to the hearsay rule under Section 1271. These two sections may be compared as follows:

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12. Section 1561 of the Evidence Code provides in full:

> 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.

Under Section 1562, "[t]he affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the matters so stated are presumed true."

13. Evid. Code § 1562. This section provides in full:

> 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.

Business records exception to hearsay rule (§ 1271) requires that:	Custodian's affidavit (§ 1561) must state that:
(a) The writing was made in the regular course of a business;	(3) The records were prepared . . . in the ordinary course of a business . . . .
(b) The writing was made at or near the time of the act, condition, or event;	(3) The records were prepared . . . at or near the time of the act, condition, or event.
(c) The custodian or other qualified witness testifies to its identity	(2) The copy is a true copy of all the records described in the subpoena.
and the mode of its preparation; and	(No comparable provision)
(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.	(No comparable provision)

Hence, the matters required in the custodian's affidavit under Section 1561 do not include statements concerning the sources of the information in the records and the time and method or mode of preparation of the records so that their trustworthiness may be evaluated.[14] Such state-

14. Subdivision (c) of Section 1271 of the Evidence Code (business records exception to hearsay rule) purports to require that the identity and mode of preparation of the records be established by the testimony of the custodian or other qualified witness. See Note 5 supra; Comment to Evid. Code § 1280 ("Section 1271 requires a witness to testify as to the identity of the records and its mode of preparation in every instance"). However, this seemingly inflexible requirement has been relaxed by judicial decisions. See, e.g., People v. Dorsey, 43 Cal. App.3d 953, 960-961, 118 Cal. Rptr. 362, ___-___ (1974). In Dorsey, the defendant's conviction of knowingly writing checks with insufficient funds was affirmed. Bank records of the defendant's checking account were admitted in evidence over his objection after the bank's operations officer had testified that he was the custodian and that the records were kept by the bank in the regular course of its business. No testimony was given, however, concerning the mode and time of preparation of the records. On appeal, the court held that the defendant's hearsay objection had been insufficiently specific but, in dictum, went on to say that the foundation requirements of Section 1271 "may be inferred from the circumstances." The court noted that bank records were in a "different category" than ordinary business records and that the mode and time of preparation of checking

ments, if included in the affidavit, would not be admissible under Section 1562, since that section makes the affidavit "admissible as evidence of the matters stated therein pursuant to Section 1561 . . . ."

Despite the fact that an affidavit under Section 1561 would not contain statements concerning the "sources of information and method and time of preparation" required by Section 1271, it was assumed by many attorneys prior to the 1969 amendments[15] that Sections 1560-1562 constituted an exception to Section 1271 for hospital records, allowing such records to be received in evidence with less of a foundation than that required for the records of other businesses.[16] This view found support in a 1968 appellate decision.[17]

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account statements is "common knowledge." The omitted testimony would not, therefore, have had "a bearing on the basic trustworthiness of the records" and the error, if any, was "not prejudicial." Id.

In any case where the foundation requirements of subdivisions (c) and (d) of Section 1271 may be inferred from the circumstances or established by judicial notice, of course, the inability of the proponent of the records to establish such matters by affidavit will be of no consequence.

15. Cal. Stats. 1969, Ch. 199.

16. See Note 21 infra.

17. See People v. Blagg, 267 Cal. App.2d 598, 609-610, 73 Cal. Rptr. 93, ___-___ (1968). In Blagg, a criminal case arising out of a sexual assault, the trial court had excluded hospital records offered by the defense to show the victim's condition when examined at the hospital following the attack on him. The appellate court reversed on an unrelated ground but said in dictum concerning the exclusion of the hospital records:

> The fact that the records are hearsay and that the particular nurse, doctor or other person making the record has not been called does not preclude their admission. . . . Under sections 1560 et seq. of the Evidence Code . . . the requirements as to foundation had been relaxed so that an affidavit could be used in place of the oral testimony of an authenticating witness.

In 1969, however, the provisions of Evidence Code Sections 1560-1566 were made applicable to records of every kind of a business.[18] Under the view that these sections create an exception to Section 1271, the foundation required since 1969 to invoke the business records exception to the hearsay rule would be less when established by the custodian's affidavit under Section 1561 than when established by oral testimony under Section 1271.[19] Such an anomalous result seems unreasonable and therefore contrary to legislative intent.[20]

The Commission is informed that some trial courts are applying the more reasonable interpretation of Sections 1560-1562 and are requiring the custodian to appear and testify to the additional matters required by Section 1271 when a hearsay ofjection is made.[21] The Commission has

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18. See Cal. Stats. 1969, Ch. 199.

19. See Note 21 infra.

20. When a statute is subject to two possible constructions, the more reasonable construction is preferred. 45 Cal. Jur.2d, Statutes § 116 (1958). And statutes on the same subject should be construed so as to harmonize them, and seeming inconsistencies should be reconciled if possible. Id. § 121.

21. Judge Herbert S. Herlands of the Orange County Superior Court reports the situation in his 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.
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> 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

concluded that the uncertainty of present law and the desirability of excusing the custodian from appearing personally to meet a hearsay objection when there is no genuine dispute as to the accuracy of the records warrant legislative action.

Recommendations

Where there is a genuine question as to the accuracy of the records, the provisions of Section 1271--requiring foundation testimony to establish that the "sources of information and method and time of preparation" of the records are such as to indicate their trustworthiness--are sound and should not be abrogated. Moreover, such a foundation cannot easily be furnished by affidavit, since the information required varies with each case and neither the custodian nor the proponent of the evidence could be certain what information would be satisfactory to the court. And to allow such matters to be established by affidavit would unfairly place the burden on the opposing party to subpoena the custodian-affiant to probe on the question of trustworthiness through cross-examination.

However, the salutary purposes of Sections 1560-1566 would be served by providing that when business records are submitted with an

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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.

affidavit which complies with Section 1561, the custodian need not appear and testify concerning the "sources of information and method and time of preparation" of the records unless there is a genuine question concerning the accuracy of the records, or it would be otherwise unfair to admit the records without requiring such testimony.

The proponent of the evidence who intends to use the procedure authorized by Sections 1560-1566 should be required to give notice to all parties sufficiently prior to the trial or hearing to allow any party to determine whether there may be a genuine question concerning the accuracy of the records. Any party should be entitled to obtain a copy of the records and accompanying affidavit from the court or tribunal where the records are lodged[22] upon payment of the statutory fee.[23]

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22. See Evid. Code § 1560.

23. See Govt. Code § 26831 (photocopy of 8-1/2 by 13-inch page is $0.50 for first copy and $0.30 for each additional copy).

    Prior to the enactment in 1968 of the California Public Records Act, Section 39 of Chapter 1473 of the Statutes of 1968, the availability of judicial records for inspection and copying was governed by former Sections 1892 ("[e]very citizen has a right to inspect and take a copy of any public writing of this State, except as otherwise expressly provided by statute"), 1893 (citizen entitled to certified copy of public writing on demand and payment of fee), and 1894 (public writing includes judicial records) of the Code of Civil Procedure. Under these sections, only judicial records that were expressly made confidential were not available for inspection by the general public. 24 Op. Atty. Gen. 69, 72 (1954). These sections were repealed in 1968. See Cal. Stats. 1968, Ch. 1473, §§ 25-27.

    Section 6260 of the Government Code, enacted in 1968 as part of the California Public Records Act, supra, provides that the Act does not "affect the status of judicial records as it existed immediately prior to the effective date" of the Act. Hence, present law appears to be the same as pre-1968 law, viz., that judicial records are available for public inspection and copying except records that are expressly made confidential. See 53 Op. Atty. Gen. 25 (1970). See also Cal. Rules of Court, Rule 243 ("clerk shall not deliver any papers filed, except for purposes of inspection in the office of the clerk, to the possession of any person other than an attache of the court unless so ordered by the court").

The Commission also recommends the adoption of procedures to allow the use at trial of records produced in response to a subpoena for a deposition, so that the custodian need not be served with a separate subpoena for trial. This may be accomplished by allowing the custodian's deposition, when he appears personally and is deposed, to be used in lieu of the affidavit required by Section 1561. If the custodian does not appear for the deposition but mails or otherwise delivers the records,[24] the officer before whom the deposition is to be taken may be required to forward such records, together with an additional affidavit, to the court for use at trial when requested to do so by any party.

The Commission recommends that legislation be enacted to accomplish the foregoing purposes and containing the following provisions:

(1) When a custodian of business records or other qualified witness responds to a subpoena duces tecum by mailing or otherwise delivering such records as authorized by Section 1560, notice of such subpoena has been given to each party, and the foundation matters required by Section 1561 are established by affidavit or deposition, the records are not made inadmissible by the hearsay rule unless a genuine question is raised as to the accuracy of the records or in the circumstances it would be unfair to admit the records without requiring the personal attendance of the custodian or other qualified witness.

(2) When business records or copies thereof are delivered to the court or other tribunal, or to an office before whom a deposition is to be taken, as authorized by Section 1560, require such court, tribunal, or officer to furnish a copy of the records and accompanying affidavit to any party on request and payment of the statutory fee.

(3) If the custodian of records or other qualified witness appears personally for a deposition and testifies to the matters required in the affidavit accompanying the records, allow the deposition (with records attached) to be used at trial in lieu of the affidavit.

(4) If the custodian or other qualified witness is subpoenaed for a deposition and mails or otherwise delivers the records instead of appearing personally, require the officer before whom the deposition is taken to forward the records to the court or other tribunal where the

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24. See Evid. Code § 1560.

matter is pending, together with an additional affidavit, if any party so requests at or before the time for the deposition.

(5) Give the custodian the alternative of delivering the originals of subpoenaed business records if he chooses, rather than having to deliver a copy as now required.[25]

(6) Provide a specific directive that the records or copy thereof to be used in evidence shall remain in custody of the court, tribunal, or officer to whom they were delivered until the time of trial, deposition, or other hearing, and provide that any copying shall be done by or under the immediate supervision of such court, tribunal or officer.

Proposed Legislation

An act to amend Sections 1560, 1561, and 1562 of, and to add Sections 1561.5 and 1562.5 to, the Evidence Code, relating to the admissibility of business records in evidence.

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

Evidence Code § 1560 (amended)

SECTION 1. Section 1560 of the Evidence Code is amended to read:

1560. (a) As used in this article:

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

(2) "Evidentiary copy of the records" means the records delivered pursuant to this article for ultimate use in evidence, whether such records are originals or a copy thereof.

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25. The Commission is informed that, under current practice, some attorneys and institutional notaries require the custodian to produce the original records at a deposition since they make better photocopies. This is done by including the language of Evidence Code Section 1564 in the subpoena, requiring the personal attendance of the custodian, and accompanying the subpoena with a notice that personal attendance will be excused notwithstanding the language of the subpoena only if the original records are mailed. The Commission recommends that any doubt concerning the admissibility of such originals at trial under Section 1562 be eliminated by express statutory authorization for their admission.

(3) "Information copy of the records" means a true, legible, and durable copy of the evidentiary copy of the records, or of such part thereof as may be specified in the request referred to in subdivision (e).

(4) ~~"Record"~~ "Records" includes every kind of record maintained by such a business.

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

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

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

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

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

(d) Unless the parties to the proceeding otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the evidentiary copy of the records shall :

(1) Remain in the custody of the clerk, judge, officer, body, or tribunal to whom it was delivered until the time of trial, deposition, or other hearing.

(2) Except as provided in subdivision (e), remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at such trial, deposition, or hearing.

(e) If a party to the proceeding so requests and pays the fee required by Section 26831 of the Government Code, the clerk, judge, officer, body, or tribunal to whom the evidentiary copy of the records was delivered shall do all of the following:

(1) Open the sealed envelope or wrapper.

(2) Make, or cause to be made under its immediate supervision, an information copy of the records, together with a copy of the accompanying affidavit or affidavits, and furnish them to the requesting party.

(3) Immediately reseal the evidentiary copy of the records.

(f) Records which are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received.

Comment. Subdivision (a) of Section 1560 is amended to add definitions of "evidentiary copy of the records" and "information copy of the records." This will allow the use of their terms elsewhere in this article to distinguish clearly between business records or a copy thereof which are intended ultimately to be offered in evidence, and copies which are furnished to parties for purposes of information and trial preparation.

Subdivision (b) is amended to allow the custodian of records or other qualified witness of a business to comply with a subpoena duces tecum (subject to Section 1564) by sending either the original records or a copy thereof. The amendment to subdivision (c) is technical.

Subdivision (d) is amended to make clear that the evidentiary copy of the records shall remain in official custody from the time of its receipt until the time of trial, deposition, or other hearing, and to provide an exception to the requirement that the records remain sealed when a party requests an information copy.

Subdivision (e) is added to allow a party to obtain an information copy of the records on request and payment of the statutory fee. The last sentence of old subdivision (d) is designated as new subdivision (f).

Evidence Code § 1561 (technical amendment)

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

1561. (a) The evidentiary copy of 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.

Comment. Section 1561 is amended to make clear that the copy of the records which shall be accompanied by the custodian's affidavit is the "evidentiary copy of the records." See Evid. Code § 1560(a)(2).

Under contemporaneous amendments to Section 1562, a deposition of the custodian may, if the business records are attached as an exhibit to the deposition, be used in lieu of the affidavit required by this section.

Evidence Code § 1561.5. Forwarding for trial records subpoenaed for deposition (added)

SEC. 3. Section 1561.5 is added to the Evidence Code, to read:

1561.5. (a) If, in response to a subpoena duces tecum in connection with a deposition, the custodian of the records or other qualified witness delivers the records pursuant to Sections 1560 and 1561 to a person described in subdivision (a) of Section 2018 of the Code of Civil Procedure, such person shall, upon request by any party made at or before the time of the deposition, do all of the following:

(1) After the sealed envelope or wrapper containing the evidentiary copy of the records has been opened and any information copies have been

made, reseal the evidentiary copy of the records in the same manner as provided in subdivision (c) of Section 1560.

(2) Prepare an affidavit stating the date the evidentiary copy of the records was received, the name of the person having custody of such copy from the date of receipt until the date of forwarding, the date and time such copy was opened and resealed, and what alterations or omissions, if any, have occurred to such copy from the time of its receipt.

(3) Deliver by mail or otherwise the resealed evidentiary copy of the records, the affidavit of the custodian or other qualified witness required by Section 1561, and the affidavit required by subdivision (a)(2), to the clerk of the court in which the action is pending or to the judge thereof if there be no clerk, or to the officer, body, or tribunal before whom the matter is pending.

(b) When received by the clerk, judge, officer, body, or tribunal, the evidentiary copy of the records shall be kept as provided in subdivisions (d), (e), and (f) of Section 1560.

Comment. When a custodian of business records responds to a subpoena duces tecum in connection with a deposition by mailing such records or authorized by subdivision (b) of Section 1560, any party may, under Section 1561.5, require the officer before whom the deposition is to be taken to forward the evidentiary copy of the records to the court or other tribunal where the matter is pending. Section 1561.5 further provides for an affidavit to be made and forwarded with the records by such officer to establish the chain of custody for authentication purposes and to indicate whether any alterations or omissions have occurred to the records.

Evidence Code § 1562 (amended)

SEC. 4. Section 1562 of the Evidence Code is amended to read:

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.~~

(a) ~~The~~ An affidavit submitted pursuant to Section 1561 or 1561.5 is admissible as evidence of the matters stated therein ~~pursuant to Section 1561~~ as required by such sections 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.

(b) If the custodian of the records or other qualified witness of a business appears personally at a deposition, testifies to the matters required in Section 1561, and the records are attached as an exhibit to the deposition, such deposition may, notwithstanding subdivision (d) of Section 2016 of the Code of Civil Procedure, be used against any party as evidence of such matters, and the matters so stated are presumed true.

(c) Original records furnished pursuant to this article are admissible in evidence to the same extent as though the affiant or deponent had been present and testified to the matters stated in the affidavit or deposition accompanying such records.

(d) A copy of the records furnished pursuant to this article is admissible in evidence to the same extent as though the original thereof were offered and the affiant or deponent had been present and testified to the matters stated in the affidavit or deposition accompanying such records.

(e) The ~~presumption~~ presumptions established by ~~this section is a~~ subdivisions (a) and (b) are ~~presumption~~ presumptions affecting the burden of producing evidence.

Comment. Section 1562 is amended to accomplish three purposes. First, under subdivision (a), an affidavit submitted pursuant to subdivision (a)(2) of Section 1561.5 is admissible and presumptively true in the same manner as the custodian's affidavit submitted pursuant to Section 1561. Second, under subdivision (b), a deposition of a custodian of records may be used in lieu of the affidavit required by Section 1561 if the custodian testifies to the matters required by that section and if the records are attached as an exhibit to the deposition. Third, under subdivision (c), original records are made admissible to the same extent as though the contents of the accompanying affidavit or deposition had been given by oral testimony at the hearing. This eliminates an anomaly in prior law which made copies of the records more easily admissible than the original records.

Subdivision (d) is a restatement of the substance of the former first sentence of Section 1562 and allows a deposition as well as an affidavit to establish the foundation required for admission of the records. Cf. Evid. Code § 1562.5 (additional requirements for admissibility over technical hearsay objection).

Subdivision (e) restates the substance of the former last sentence of Section 1562 and applies to a deposition used under subdivision (b) as well as to an affidavit used under subdivision (a).

Evidence Code § 1562.5. Admissibility of records over technical hearsay objection; required notice (added)

1562.5. (a) When the requirements of subdivision (b) and, if applicable, subdivision (c), are satisfied, records furnished in compliance with this article, or a copy thereof, are not made inadmissible by the hearsay rule when offered to prove an act, condition, or event

recorded unless (1) a genuine question is raised as to whether the record accurately records the act, condition, or event or (2) in the circumstances, it would be unfair to admit the records or a copy thereof without requiring the personal attendance of the custodian or other qualified witness. Noncompliance with subdivision (b) or (c) shall have no effect other than to make this subdivision inapplicable.

(b) When a subpoena duces tecum is served on the custodian of records or other qualified witness of a business requiring the production of all or part of the records of a business at trial or at a hearing other than a deposition, the party serving such subpoena or causing it to be served shall, not less than 30 days prior to such trial or hearing in a civil action or proceeding and not less than 10 days prior to such trial or hearing in a criminal action, or such shorter time as the court may allow, (1) file and serve on each party written notice that such records have been subpoenaed for such trial or hearing pursuant to Article 4 (commencing with Section 1560) of Chapter 2 of Division 11 and (2) serve on each party a copy of such subpoena.

(c) When request is made to have records forwarded pursuant to Section 1561.5, written notice of such request shall be filed and served on each party not later than 10 days after such request is made.

Comment. Section 1562.5 allows business records furnished in compliance with this article, or a copy thereof, to be admitted in evidence over a technical hearsay objection if the notice requirements of this section are met. Under prior law, the requirements of Section 1561, prescribing the contents of the custodian's affidavit accompanying business records, fell short of the requirements of Section 1271 neces-

sary to invoke the business records exception to the hearsay rule. See Evid. Code § 1271(d)(must be shown that "[t]he sources of information and method and time of preparation were such as to indicate its trustworthiness").

The notice required by Section 1562.5 will permit any party to request an information copy of the records as prescribed by subdivision (e) of Section 1560. The requesting party may thus determine before trial whether there is a genuine question as to the accuracy of the records, whether there is a basis for raising unfairness as an objection, or whether to require by separate subpoena the custodian's personal attendance.