

Memorandum 76-21

Subject: Study 63.60 - Evidence (Duplicates)

You will recall that one of the recommendations to the 1976 Legislature relates to the admissibility of duplicates in evidence. This recommendation is now being printed, and a copy is attached.

Assembly Bill 2580 was introduced by Assemblyman McAlister to effectuate this recommendation. A copy of the bill is attached.

The State Bar Committee on the Administration of Justice has considered this recommendation. By a 23 to 2 vote, the committee recommends that the proposal be opposed by the State Bar unless amended in accordance with a suggestion of the committee. See Exhibit I attached. The State Bar Committee suggests that Section 1581 (page 2 of the bill) be amended to read:

1581. A duplicate of a writing is admissible to the same extent as the writing itself unless (1) a genuine question is raised as to the authenticity of the writing itself or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the writing itself or (3) there has not been an opportunity to examine the original and compare it with the original .

With respect to the State Bar Committee suggestion, two points should be noted. First, an exception already is provided for the case where the original is available in court at the time when the duplicate is offered in evidence. Second, the Comment to the proposed section specifically mentions the fact that the court should consider whether the party opposing introduction has had an opportunity to obtain a copy of the original through discovery or other means:

If a party opposes introduction of the duplicate on the ground of unfairness, the court should consider the conduct of the parties in determining whether it would be unfair "in the circumstances" to admit the duplicate including, for example, whether the parties have relied on the duplicate in their dealings prior to or during the preliminary stages of litigation, or whether the party opposing introduction reasonably could have demanded production of the original (see Code Civ. Proc. § 2031) or could have used other discovery procedures to obtain the original.

Nevertheless, the staff believes that it is important that we avoid having a conflict with the State Bar on this proposal. We are reluctant to recommend any revisions in the language of Section 1581 because the

section now follows the substance of the comparable federal rule of evidence. The general concept of unfairness should be adequate to protect the party against whom the duplicate is offered. Obviously, the State Bar Committee does not agree. Accordingly, the staff recommends that the Commission consider amending Section 1581 to read:

1581. A duplicate of a writing is admissible to the same extent as the writing itself unless (1) a genuine question is raised as to the authenticity of the writing itself or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the writing itself or (3) the party opposing the introduction of the duplicate could not reasonably have anticipated that evidence of the writing would be offered at the trial or (4) the party opposing the introduction of the duplicate did not have a reasonable opportunity prior to trial to demand production of the original or to use other discovery procedures to obtain the original or a copy of the original .

Note that two new, separate, and distinct grounds for excluding the duplicate are provided. A party ordinarily could satisfy these requirements by sending the opposing party a copy of the duplicate prior to trial. These additional requirements are provided in lieu of the State Bar Committee proposal which requires that the opposing party be given an opportunity to compare the duplicate with the original. The staff is not entirely satisfied with the suggested amendment, and we are hopeful that you will give some thought to this problem prior to the meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

12. Evid. C. 1580, 1581 - Admission of Duplicates in Evidence

Source: Law Revision Commission

The Law Revision Commission in July 1975 asked the State Bar for comments concerning a tentative proposal to add a new section to the Evidence Code to adopt the substance of Rule 1003 of the Federal Rules of Evidence by providing that a "duplicate" is not made inadmissible by the best evidence rule unless a genuine question is raised as to the authenticity of the writing itself or, in the circumstances, it would be unfair to admit the duplicate in lieu of the writing itself.

While the committee is in favor of the principle of the proposal as recognizing a procedure now generally in use and to save time and expense for parties, it does not offer sufficient protection against possible abuse. The only objections that can be raised against the introduction of a duplicate are that there is either a genuine question as to the authenticity of the original or that the introduction would be unfair. Modern duplicates do not show erasures or corrections and unless the duplicate can be compared with the original there is no guarantee it is a true duplicate. As written, it is doubtful if a party could object solely on the ground he has not had an opportunity to examine the original and compare it with the duplicate.

A majority of the committee therefore recommends the proposal be opposed unless amended to add a requirement that opposing parties be given an opportunity to examine the original (13 yes, 2 no). It is suggested that a third subsection be added reading "or there has not been an opportunity to inspect the original". Two members felt that the provision restricting entry where it would be unfair would be sufficient protection.

In December 1975 the Law Revision Commission forwarded to the State Bar a revised proposal. The revision merely deletes reference to the best evidence rule and provides that a duplicate is admissible to the same extent as the writing itself unless a genuine question is raised as to the authenticity of the original or it would be unfair to admit it in lieu of the writing. The objection to the original proposal applies equally to the revised proposal.

It is recommended your Board advise the LRC the State Bar will oppose the recommendation unless it is amended along the lines suggested herein and that a copy of this report be forwarded to the Commission.