#63.60 3/2/76

Memorandum 76-29

Subject: Study 63.60 - Evidence (Duplicates)

The Board of Governors of the State Bar has considered the report of the State Bar Committee on the Administration of Justice concerning the Commission's recommendation relating to duplicates and has taken a different view of this recommendation than the Committee on the Administration of Justice.

The Board of Governor's action was: "Disapproves said proposal unless the same is amended to require notice of intention to introduce the duplicate." The notice was considered necessary to permit a reasonable opportunity to the opposing party to inspect the original.

At the February meeting, the Commission considered the report of the State Bar Committee on the Administration of Justice and determined that a duplicate would be admissible "unless . . . (3) there has not been an opportunity to examine the writing itself and to compare the duplicate with the writing itself." The staff is concerned that the enactment of the recommended legislation with this addition will, as a practical matter, make it more likely that objections will be made when a duplicate is offered than is the case under existing law. You will recall that we were advised that duplicates are often received in evidence now without objection. The addition approved by the Commission at the February meeting duplicates an existing exception to the best evidence rule (Evid. Code § 1510) except insofar as the provision might include a pretrial "opportunity" to make the comparison. Such a comparison could be made prior to trial, however, only if the opposing party had a copy of the duplicate prior to trial so he could make the comparison with the writing itself. The enactment of the section might be an invitation to object to duplicates that did not qualify for admission under the section.

The proposal of the Board of Governors, on the other hand, would permit admission of duplicates if the opposing party has been given reasonable pre-trial notice of the intention to offer the duplicate. In many cases, the opposing party will already have a copy of the writing itself obtained through discovery and will have no objections to the admission of the duplicate. If he does not already have a copy of the writing, the opposing party may want to inspect the writing itself prior to trial if he has any concern about the matter and perhaps make a copy of the writing itself. If he desires, he can then compare his copy with the duplicate offered at the trial (just as under the existing exception to the best evidence rule, he is given the right to compare the copy to be received in evidence with the original produced at the trial before the copy is received in evidence). What would constitute reasonable notice would depend on the circumstances. Where the opposing party already has a copy of the original writing obtained through discovery proceedings or has otherwise obtained a copy of the writing itself, a phone call from the lawyer who plans to offer the duplicate the day before trial should be sufficient. On the other hand, if the opposing party had no reason to anticipate that evidence of the writing would be offered and hence would not have obtained a copy of the writing itself, sufficient notice would have to be given to allow him time to inspect the writing itself.

The staff recommends that Section 1581 as proposed by the Commission be amended to incorporate the revision proposed by the Board of Governors. The amended section would read:

> 1581. If the party offering the duplicate has given the other party reasonable notice of the intention to offer the duplicate in evidence at the hearing, A 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.

Respectfully submitted,

John H. DeMoully
Executive Secretary

ASSEMBLY BILL No. 2580

Introduced by Assemblyman McAlister

January 5, 1976

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Article 5 (commencing with Section 1580) to Chapter 2 of Division 11 of the Evidence Code, relating to evidence.

LEGISLATIVE COUNSEL'S DIGEST

AB 2580, as introduced, McAlister (Jud.). Writings: best evidence rule.

Under existing law, generally speaking, copies of writings are inadmissible as evidence except in specified factual situations.

This bill would permit generally the use of "duplicates" of writings, as defined, as evidence unless a genuine question is raised as to the authenticity of the writing itself, or unless in the circumstances it would be unfair to admit the duplicate in lieu of the writing itself.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

SECTION 1. Article 5 (commencing with Section 1580) is added to Chapter 2 of Division 11 of the Evidence Code, to read:

Article 5. Duplicates

1580. For the purposes of this article, a "duplicate" is a counterpart produced by the same impression as the writing itself, or from the same matrix, or by means of photography, including enlargements or miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the writing itself.

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.

O