

## First Supplement to Memorandum 96-27

### Best Evidence Rule: Professor Uelmen's Comments

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Professor Uelmen's comments on the tentative recommendation are attached as Exhibit page 1. He draws a distinction between civil and criminal cases. With respect to civil cases, he "concur[s] fully in the recommendation" and "agree[s] that the availability of modern discovery in civil litigation has largely eliminated the need for the rule."

With respect to criminal cases, he cautions that discovery is more narrow:

California's reciprocal discovery law is carefully limited to preserve the right of the defense to withhold evidence that will only be offered as rebuttal evidence. Many of the most difficult ambiguities of the poorly drafted initiative containing the reciprocal discovery law are yet to be resolved, as witnessed by the recent controversy over the notes of a psychiatrist called as an expert witness in the *Menendez* trial. In the case of *People v. O.J. Simpson* there were numerous very contentious issues raised with respect to reciprocal discovery obligations.

[Exhibit p. 1.]

Accordingly, he believes that the best evidence rule "continues to play an important role in criminal trials, frequently in the context of easily altered evidence such as tape recordings." *Id.* He maintains that there "should be no difficulty limiting the repeal to civil cases, since the Evidence Code frequently distinguishes between civil and criminal cases." *Id.*

The staff is less enthusiastic about complicating the Evidence Code with differing civil and criminal rules for proof of the content of a writing. Although some evidentiary rules distinguish between civil and criminal cases (*see, e.g.,* Evid. Code §§ 1102, 1103, 1106-1108, 1292, 1300, 1350), the vast majority of provisions apply in both types of cases. That simplicity facilitates use of the Code.

On the other hand, legal distinctions between civil and criminal cases are so common that courts and litigants are on the lookout for them. Here, differences in availability of discovery may warrant adopting the secondary evidence rule

for civil but not criminal cases. Even if such differences are less pronounced than Professor Uelmen says, it may be valuable to experiment with (and perhaps refine) the secondary evidence rule in the civil context before making any change in the criminal arena.

Finally, the tentative recommendation includes alternative versions of Section 1521, which governs oral testimony of the content of a writing. Professor Uelmen “strongly prefer[s]” the longer of the two versions. [Exhibit p. 1.] That version would more strictly preserve existing law. Professor Uelmen favors it because it “contains important safeguards of particular importance in criminal cases, where original documents are frequently in the custody of police agencies, who should be required to account for their loss or destruction.” *Id.* If the secondary evidence rule is limited to civil cases, that might help alleviate his concern. In the interests of clarity and simplicity, the staff continues to prefer the short version of Section 1521.

Respectfully submitted,

Barbara S. Gaal  
Staff Counsel



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May 7, 1996

Law Revision Commission  
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File: \_\_\_\_\_

Barbara S. Gaal  
Staff Counsel  
California Law Revision Commission  
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Room D-1  
Palo Alto, CA 94303-4739

Re: Best Evidence Rule

Dear Ms. Gaal:

Thank you for the opportunity to comment on the tentative recommendation of the Law Revision Commission to repeal the Best Evidence Rule in the California Evidence Code.

I concur fully in the recommendation with respect to civil cases, and agree that the availability of modern discovery in civil litigation has largely eliminated the need for the rule. With respect to criminal cases, however, the Commission should not proceed on the assumption that "the law now permits liberal reciprocal discovery in criminal cases." California's reciprocal discovery law is carefully limited to preserve the right of the defense to withhold evidence that will not be proffered at trial, and the right of both sides to withhold evidence that will only be offered as rebuttal evidence. Many of the most difficult ambiguities of the poorly drafted initiative containing the reciprocal discovery law are yet to be resolved, as witnessed by the recent controversy over the notes of a psychiatrist called as an expert witness in the Menendez trial. In the case of People v. O.J. Simpson, there were numerous very contentious issues raised with respect to reciprocal discovery obligations. The Best Evidence Rule continues to play an important role in criminal trials, frequently in the context of easily altered evidence such as tape recordings. Thus, I believe it is premature to repeal the Best Evidence Rule in criminal cases. There should be no difficulty limiting the repeal to civil cases, since the Evidence Code frequently distinguishes between civil and criminal cases.

With respect to the short and long alternatives of Rule 1521, I would strongly prefer the longer version. It contains important safeguards of particular importance in criminal cases, where original documents are frequently in the custody of police agencies, who should be required to account for their loss or destruction.

Sincerely,

  
Gerald F. Uelmen,  
Professor of Law