

Study K-501

September 11, 1996

First Supplement to Memorandum 96-60

Best Evidence Rule: Professor Uelmen's Input on Revised Staff Draft Recommendation

In response to the staff's latest request for input on the Commission's study of the best evidence rule, Professor Uelmen has provided both oral and written comments. A copy of his letter is attached as Exhibit page 1. In it, he cautions:

In view of the many issues still to be resolved concerning the poorly drafted Reciprocal Discovery Law, I still believe it would be wiser to limit the new Secondary Evidence Rule to civil cases for now. By the time we have accumulated some experience with its application in the civil context, the unresolved issues of reciprocal discovery may have been sorted out, and we can then address the problems of the Best Evidence Rule in criminal cases with less apprehension.

In preparing his letter, Professor Uelmen inadvertently focused on the First Supplement to Memorandum 96-27, rather than on Section 1521(b) of the revised staff draft recommendation (Mem. 96-60, at Exhibit p. 12). After studying Section 1521(b), he reported by phone that he continues to have concern about extending the Commission's proposal to criminal cases.

To explain, he posed the following hypothetical. Suppose the prosecution tapes a witness interview in which the witness makes disclosures that are embarrassing to the prosecution. The prosecution prepares a transcript and then destroys the tape. Under current law, the transcript would be inadmissible: (1) the best evidence rule (Evidence Code Section 1500) requires use of the tape, and (2) the exception for lost or destroyed writings (Evidence Code Section 1501) is inapplicable because it applies only if the writing "is lost or has been destroyed *without fraudulent intent* on the part of the proponent of the evidence." (Emphasis added.)

Professor Uelmen worries whether a court applying proposed Section 1521 would necessarily reach the same result. The special provision for criminal cases (Section 1521(b)) is not grounds for excluding the transcript, because it applies only if the original is in the proponent's possession, custody, or control. The

general rule (Section 1521(a)) is broad enough to support exclusion, but it does not compel that result as explicitly as existing Section 1501.

The Commission could address that concern by revising Section 1521 to read:

1521. (a) The content of a writing may be proved by secondary evidence of the writing that is otherwise admissible. The court shall exclude secondary evidence of the content of a writing if the court finds either any of the following:

(1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.

(2) Admission of the secondary evidence would be unfair.

(3) *With fraudulent intent on the part of the proponent of the evidence, the original was destroyed or otherwise made unavailable.*

(b) In addition to the grounds for exclusion authorized by subdivision (a), in a criminal action the court shall exclude secondary evidence of the content of a writing, other than a duplicate as defined in Section 260, if it is closely related to the controlling issues and the court finds both of the following:

(1) The original is in the proponent's possession, custody, or control.

(2) The proponent has not made the original reasonably available for inspection at or before trial.

(c) Nothing in this section excuses compliance with Section 1401 (authentication).

(e) This section shall be known as the "Secondary Evidence Rule."

The Comment and preliminary part would need corresponding changes.

Such a revision would eliminate the last of Professor Uelmen's specific concerns about the Commission's proposal. Even so, he would be reluctant to immediately apply the proposed approach to criminal cases. He would still be inclined to experiment with the Secondary Evidence Rule in civil cases before extending it to criminal cases.

CDAAs and the Los Angeles County District Attorneys Office have not yet submitted comments on proposed Section 1520(b). It would be helpful to know their views before determining how to proceed.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel



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September 6, 1996

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File: K-501

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Re: Best Evidence Rule

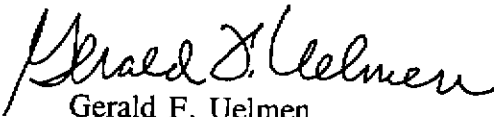
Dear Ms. Gaal:

Thank you for sending the First Supplement to Memorandum 96-27, addressing my comments on proposed revisions to the Best Evidence Rule.

I can certainly understand the lack of enthusiasm to compound the confusion engendered by separate rules of evidence for civil and criminal cases. Unfortunately, our reluctance is not shared by the legislature, which seems to add to the list of separate criminal evidentiary rules every session, including this one. In view of the many issues still to be resolved concerning the poorly drafted Reciprocal Discovery Law, I still believe it would be wiser to limit the new Secondary Evidence Rule to civil cases for now. By the time we have accumulated some experience with its application in the civil context, the unresolved issues of reciprocal discovery may have been sorted out, and we can then address the problems of the Best Evidence Rule in criminal cases with less apprehension.

Limiting the rule to civil cases would, of course, obviate the concerns that inclined me to support the longer of the two versions.

Sincerely,


Gerald F. Uelmen
Professor of Law

GFU:be