Study K-501 November 7, 1996

Second Supplement to Memorandum 96-60

Best Evidence Rule: Further Developments

In considering the revised staff draft recommendation attached to Memorandum 96-60, the Commission should be aware of the following recent developments:

APPLYING THE PROPOSAL TO CRIMINAL CASES

The Commission has received two new letters discussing application of its proposal to criminal cases. Joseph Smith, Senior Deputy District Attorney in Orange County, wrote in response to the Commission's request for input from the California District Attorney's Association. (Exhibit p.1.) The Criminal Law Division of the California Attorney General's office also sent a letter. (Exhibit pp. 2-3.) Despite repeated requests, we have not yet gotten any input from William Hodgman or anyone else in the Los Angeles County District Attorney's Office.

The Criminal Law Division of the California Attorney General's office urges the Commission to "limit any changes it decides to make to civil cases." (Exhibit p. 2.) It maintains that the basic assumption of the Commission's proposal, that discovery eliminates the need for the best evidence rule, "is incorrect in the context of criminal cases." (*Id.*) In the experience of the Attorney General's office, "so-called reciprocal discovery in criminal cases simply does not work as was intended." (*Id.*) The office is seeking corrective legislation. (*Id.*)

The tenor of Mr. Smith's letter is quite different. Instead of commenting on whether the Commission's proposal should apply to criminal cases at all, he compares two versions of the proposed special provision for criminal cases. (Exhibit p. 1.) Those alternate versions, Section 1520(c) and Section 1520.5, appear at pages 11-14 of Memorandum 96-53. They are reproduced at Exhibit pp. 4-5. Mr. Smith states that Section 1520.5 is preferable because it "is more explicit re: admission of duplicates of public records for example, 969(b) (aka prison prior) packages." (Exhibit p. 1.)

Before considering Mr. Smith's point, the Commission needs to resolve the more fundamental issue of whether to repeal the best evidence rule in criminal cases. Professor Uelmen shares the Attorney General's reluctance to take that

step. See Second Supp. to Mem. 96-60; First Supp. to Mem. 96-27. Earlier this year he wrote:

> …. [T]he 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.
>
> [First Supp. to Mem. 96-27 at Exhibit p. 1.]

In light of the concern expressed by both Professor Uelmen and the Attorney General's office, it may be unwise to apply the Commission's proposed Secondary Evidence Rule to criminal cases, even with a special provision for such cases.

If the Commission decides not to apply its proposal to criminal cases, however, then it should revisit whether to pursue the proposal in civil cases. On the one hand, going forward would entail a complex statutory scheme, with two sets of statutes governing proof of the content of a writing. On the other hand, if the Secondary Evidence Rule was adopted in civil cases, the Commission could examine experience under the rule and then reconsider whether to extend it to criminal cases. A gradual, two-step reform process might be a good way to implement the Secondary Evidence Rule.

In deciding whether to proceed, it may be helpful to reflect on the input received thus far. The State Bar Family Law Section Executive Committee (FLEXCOM), attorneys James Birnberg and Jerome Fishkin, and Professors Mendez and Fisher of Stanford University wrote in support of the tentative recommendation. (Mem. 96-27 at Exhibit pp. 1-4, 14-15.) In addition, Professor Uelmen "concur[s] fully in the recommendation with respect to civil cases …." (First Supp. to Mem. 96-27 at Exhibit p. 1.) Practitioners in the civil division of the

Attorney General's office opposed the tentative recommendation, as did three State Bar groups: the Committee on Administration of Justice (CAJ), the Committee on Rules and Procedures of Court, and the Litigation Section. (Mem. 96-27 at Exhibit pp. 5-13, 16-19.) The Commission revised its proposal to address the concerns raised, but we have not heard whether those opposing the tentative recommendation would support the proposal as revised. If the Commission has mixed thoughts about proceeding, it might be instructive to seek further input from those sources.

EVIDENCE CODE SECTION 1500.6

The revised staff draft recommendation states in part: "Advances in technology, such as fax machines, electronic mail systems, and computer networks, pose new possibilities for confusion and inconsistencies in application of the best evidence rule." (Mem. 96-60 at Exhibit p. 9.) Consistent with that observation, the Legislature just enacted a new exception to the best evidence rule, pertaining to images stored on video or digital media. Evid. Code § 1500.6 (1996 Cal. Stat. ch. 345), reproduced at Exhibit p. 6. If the Commission goes forward with its proposal, the next draft should incorporate this new statute. To some extent, its existence suggests that the best evidence rule is ripe for reform.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

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October 10, 1996

Barbara Gaal
California Law Revision Commission
Hyatt Regency
Long Beach, California

Re: Best Evidence Rule

Dear Ms. Gaal:

Our preference is for the language of 1520.5 rather than 1520(c).

1520.5 is more explicit re: admission of duplicates of public records for example, 969(b) (aka prison prior) packages.

Under 1520(c), a defense attorney might argue that the prosecution had not made the prison records "reasonably available", whereas 1520.5 would exempt duplicates of public records from this admissability threshold showing.

This additional language is preferable to the potential ambiguity and possibility of misapplication by magistrates entertaining motions to exclude People's evidence.

Yours truly,

Joseph Smith
Senior Deputy District Attorney

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October 18, 1996

Nathaniel Sterling, Esquire
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Rm. D-1
Palo Alto, California 94303-4739

RE: Best Evidence Rule - Proposed Change

Dear Mr. Sterling:

On behalf of the Criminal Law Division of the California Attorney General's Office, I urge that the Law Revision Commission limit any changes it decides to make to civil cases.

After review of the materials Barbara Gael provided to Mr. Robert Mukai as part of her September 23, 1996, correspondence, we believe that your basic assumption, that discovery eliminates the need for the rule, is incorrect in the context of criminal cases. This basic assumption, which runs throughout your proposal, is stated most clearly on page six of the August revised staff recommendation:

> "When litigants are able to examine original documents in discovery, they can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the best evidence rule in the midst of trial."

The experience of this office is that so-called reciprocal discovery in criminal cases simply does not work as was intended. Our office became so concerned about the failure of this system that we sponsored legislation to correct the problem [see AB 2057 (Murray)]. Although we were unable to secure approval of this legislation in the Senate Criminal Procedure Committee last year, we expect to pursue this necessary reform in the upcoming session.

One blatant example of the depth of the problem that exists in the criminal law arena is the psychiatric report dispute that arose in the midst of the *People* v. *Menendez* retrial. The public reports of this incident strongly suggest that a fraudulent report was prepared after defense counsel became concerned that

the original report was detrimental to her client. An alert prosecutor compared what he was given in discovery with a true original and was able to call the court's attention to the fraud. The true original was *inadvertently* made available to him; in other words the discovery process was being used to mislead not to fairly disclose. The truth seeking process in criminal cases would be ill served by the application of any of the proposed changes in the best evidence rule.

Sincerely,

DANIEL E. LUNGREN
Attorney General

George Williamson

GEORGE WILLIAMSON
Chief Assistant Attorney General

GW:JAG:KC

§ 1520. Proof of the content of a writing

1520. (a) The content of a writing may be proved by an original of the writing that is otherwise admissible or by secondary evidence of the writing that is otherwise admissible.

(b) Notwithstanding subdivision (a), the court shall exclude secondary evidence of the content of a writing if the court finds either 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.

(c) [Notwithstanding subdivision (a), in a criminal action or proceeding the court shall exclude secondary evidence of the content of a writing, other than a duplicate, 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.]

(d) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1521.

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

(f) This section shall be known as the secondary evidence rule.

Comment. Section 1520 (secondary evidence rule) and Section 1521 (oral testimony about content of writing) replace the best evidence rule and its exceptions. Because of the breadth of the exceptions to the best evidence rule, this reform is not a major departure from former law but primarily a matter of clarification and simplification. Discovery principles remain unchanged.

Subdivision (a) makes secondary evidence generally admissible to prove the content of a writing. The nature of the evidence offered affects its weight, not its admissibility. The normal motivation of parties to support their cases with convincing evidence is a deterrent to introduction of unreliable secondary evidence. See also Section 412 (if a party offers weaker and less satisfactory evidence despite ability to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust).

Subdivision (b) provides further protection against unreliable secondary evidence. *See* Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, 9 U.C. Davis L. Rev. 257, 282-83 (1976). The mandatory exceptions set forth in subdivision (b) are modeled on the exceptions to former Section 1511 and to Rule 1003 of the Federal Rules of Evidence. Cases interpreting those statutes provide guidance in applying subdivision (b). *See, e.g.*, People v. Atkins, 210 Cal. App. 3d 47, 258 Cal. Rptr. 113 (1989); People v. Garcia, 201 Cal. App. 3d 324, 247 Cal. Rptr. 94 (1988). Courts may consider a broad range of factors, for example: (1) whether the proponent attempts to use the writing in a manner that could not reasonably have been anticipated, (2) whether the original was suppressed in discovery, (3) whether discovery was reasonably diligent (as opposed to exhaustive) yet failed to result in production of the original, (4) whether there are dramatic differences between the original and the secondary evidence (e.g., the original but not the secondary evidence is in color and the colors provide significant clues to

interpretation), (5) whether the original is unavailable and, if so, why, and (6) whether the writing is central to the case or collateral.

[Subdivision (c) is a special rule for criminal cases, which are governed by narrower discovery rules than civil cases. See Penal Code §§ 1054-1054.7. Subdivision (c) does not expand discovery obligations, it simply conditions use of noncollateral secondary evidence, aside from duplicates (see Section 260), on making the original reasonably available for inspection if the proponent has it.

In determining whether the proponent of secondary evidence made the original "reasonably available," the court should examine specific circumstances, such as the time, place, and manner of allowing inspection. The concept is fluid, not rigid. For example, making the original available moments before using secondary evidence may suffice if a defendant is rebutting a surprise contention, but not if the prosecution is presenting its case in chief. Similarly, what constitutes reasonable access to computer evidence may vary from system to system.]

Subdivision (e) makes clear that like other evidence, secondary evidence is admissible only if it is properly authenticated. Under Section 1401, the proponent must not only authenticate the original writing, but must also establish that the proffered evidence is secondary evidence of the original. *See* B. Jefferson, Jefferson's Synopsis of California Evidence Law, § 30.1, at 470-71 (1985).

§ 1520.5. Exclusion of secondary evidence in criminal cases

1520.5. (a) Notwithstanding Section 1520, in a criminal action or proceeding the court shall exclude secondary evidence of the content of a writing if 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.

(b) Subdivision (a) does not apply to any of the following:

(1) A duplicate as defined in Section 260.

(2) A writing that is not closely related to the controlling issues in the action or proceeding.

(3) A copy of a writing in the custody of a public entity.

(4) A copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

Comment. Section 1520.5 is a special rule for criminal cases, which are governed by narrower discovery rules than civil cases. See Penal Code §§ 1054-1054.7.

Subdivision (a) does not expand discovery obligations, it simply conditions use of secondary evidence on making the original reasonably available for inspection if the proponent has it. In determining whether the proponent of secondary evidence made the original "reasonably available," the court should examine specific circumstances, such as the time, place, and manner of allowing inspection. The concept is fluid, not rigid. For example, making the original available moments before using secondary evidence may suffice if a defendant is rebutting a surprise contention, but not if the prosecution is presenting its case in chief. Similarly, what constitutes reasonable access to computer evidence may vary from system to system.

The exceptions in subdivision (b) are drawn from exceptions to the former best evidence rule (former Evidence Code Section 1500). Subdivision (b)(1) is drawn from former Section 1511. Subdivision (b)(2) is drawn from former Section 1504. Subdivision (b)(3) is drawn from former Section 1506. Subdivision (b)(4) is drawn from former Section 1507.

See Section 1520 (proof of the content of a writing), Section 1521 (oral testimony about content of writing).

CHAPTER 345

(Assembly Bill No. 2897)

An act to add Section 1500.6 to the Evidence Code, relating to evidence.

[Approved by Governor August 19, 1996.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2897, Bowler. Evidence: video or digital images.

Existing law, the best evidence rule, generally prohibits the admission of evidence other than the original of a writing to prove the content of a writing. Existing law exempts from this rule a printed representation of computer information or a computer program which is being used by or stored on a computer or computer readable storage media to prove the existence and content of the computer information or computer program.

This bill would provide an additional exemption for a printed representation of an image stored on video or digital media to prove the existence and content of the image stored on the video or digital media, as specified.

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

SECTION 1. Section 1500.6 is added to the Evidence Code, to read:

§ 1500.6. (a) Notwithstanding Section 1500, a printed representation of an image stored on video or digital media shall be admissible to prove the existence and content of the image stored on the video or digital media.

Images stored on video or digital media, or copies of images stored on video or digital media, shall not be rendered inadmissible by the best evidence rule. Printed representations of images stored on video or digital media shall be presumed to be accurate representations of the images that they purport to represent. This presumption, however, is a presumption affecting the burden of producing evidence only. If any party to a judicial proceeding introduces evidence that such a printed representation is inaccurate or unreliable, the party introducing it into evidence shall have the burden of proving, by a preponderance of evidence, that the printed representation is the best available evidence of the existence and content of the images that it purports to represent.

(b) This section shall not be construed to abrogate the holding of People v. Enskat, (1971) 20 Cal. App. 3d Supp. 1.