

Leg. Prog.

December 6, 1996

Memorandum 96-82

1997 Legislative Program

The staff is in the process of contacting likely bill authors as we complete work on the Commission's recommendations for the 1997 legislative session. Typically when the Commission completes work on a topic the staff checks it carefully for any errors before submitting the draft to Legislative Counsel to be prepared in a form ready for introduction. We may go back and forth with Legislative Counsel if some of their "style" changes appear to affect the substance of the Commission's proposal or impact carefully worked out compromise language.

Best Evidence Rule

The Commission at the November meeting approved its recommendation to replace the Best Evidence Rule with the Secondary Evidence Rule. The staff is preparing it for submission to Legislative Counsel. Senator Kopp has indicated an interest in authoring the measure.

We have received the letter attached as Exhibit pages 1-2 from the State Bar Litigation Section "strongly opposed" to the recommendation and urging that it not be submitted to the Legislature. The points made by the Litigation Section are that (1) the best evidence rule creates no problems in practice, (2) the secondary evidence rule, instead of requiring the proponent of evidence to establish its admissibility, would improperly require the opponent of evidence to prove its inadmissibility, and (3) the best evidence rule plays an ever-more-important function in an age when documents can easily be electronically manipulated. "We request that the Commission drop this project."

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

**LITIGATION SECTION
THE STATE BAR OF CALIFORNIA**

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HON. JAMES L. WARREN, San Francisco
MICHAEL D. WHELAN, San Francisco

State Bar Litigation Section Administrator
JANET X. HAYES, San Francisco



555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8848
Fax: (415) 561-9365

Executive Committee
FRANCISCA N. ARAIZA, Pasadena
NANCI L. CLARENCE, San Francisco
MARJORIE W. DAY, Tustin
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November 15, 1996

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

re: Staff Memorandum on Best Evidence Rule
(September 4, 1996)

Ladies and Gentlemen:

The Litigation Section of the State Bar of California submits the following comments in response to the proposed legislation contained in the September 4, 1996, Staff Memorandum on the Best Evidence Rule.

We have previously commented on the proposal and will not here repeat the prior criticisms. However, we are strongly opposed to the recommendation and urge that it not be presented to the Legislature.

The fundamental concepts contained in the best evidence rule are sound. In the vast majority of cases, the best evidence rule presents no obstacle to the introduction of evidence because there is no dispute about the authenticity of a document or of a copy of a document.

However, the fundamental flaw in the proposed "secondary evidence rule" is that it improperly transfers the burden of proof. Instead of the proponent of evidence being required to lay a foundation for its admissibility, the opponent of evidence will have the burden of convincing the trial judge that the grounds for exclusion of secondary evidence exist. This is an invitation to injustice.

In this age, it is too easy for less than honest litigants or lawyers to offer altered or false documents. For example,

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signatures can be scanned from one document into a computer and printed out as if they are signatures on a different document. A document with notes on it can be photocopied so that the notes do not appear on the copy. Text can be added or suppressed. Photographs can be altered to change the appearance of an accident by moving objects, changing weather, backing up a clock, or otherwise. As shown by the recent example of Pierre Salinger's gullible acceptance of a false document connected with TWA Flight 800, even intelligent, well-intentioned people can be misled by such manipulations.

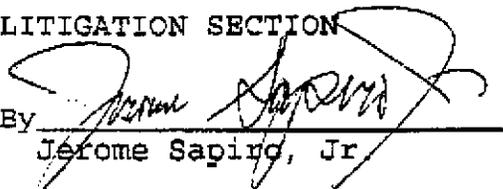
If the Law Revision Commission sponsors legislation which will institutionalize the admission of false evidence, it will be promoting injustice. Such a radical transformation of evidentiary concepts should not be rationalized by any supposed difficulty academics, law students, or inexperienced lawyers or judges may have in satisfying or ruling on the foundational requirements for evidence or understanding the best evidence rule. In addition, civil litigation should not be used as a basis for experimentation on the public. Although not all of the constitutional principles applicable to criminal litigation apply to civil litigation, civil litigation should not be used as a "proving ground" for questionable evidentiary concepts that are just as dangerous to civil litigants as they may be to criminal defendants.

We request that the Commission drop this project.

Please feel free to call the undersigned if you have any questions regarding the foregoing.

Very truly yours,

LITIGATION SECTION

By 

Jerome Sapino, Jr

cc: Teresa Tan, Esq.
Ruth Robinson, Esq.
Ms. Janet Hayes

(JS:159:jw)