

## First Supplement to Memorandum 2007-43

**Technical and Minor Substantive Statutory Corrections: References to Recording Technology (Comments on Tentative Recommendation)**

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In April 2007, the Commission circulated a tentative recommendation on *Technical and Minor Substantive Statutory Corrections: References to Recording Technology* (April 2007). The point of the tentative recommendation is to modernize references to “tape” recording, audio “tape,” and video “tape” so that they do not imply that a recording must be stored on analog tape. Those changes would make clear that digital recording is permitted (and would not preclude the use of any recording medium that may develop in the future).

The tentative recommendation identified a number of sections that involved acute concerns about privacy and asked whether allowing digital recording in those provisions would cause problems. See, e.g., Penal Code Section 1346 (recording of testimony of child or developmentally disabled victim of sexual abuse at preliminary examination in felony case).

In response to the tentative recommendation, the Commission received a letter from the California Court Reporters Association (“CCRA”). See CLRC Memorandum 2007-43, Exhibit pp. 1-5.

CCRA expressed concern that digital recordings may be easier to tamper with than recordings on analog magnetic tape. The letter quotes an article highlighting that risk.

Based largely on the CCRA comment, the staff recommended the repeal of the Penal Code Sections that had been identified as potentially problematic. See CLRC Memorandum 2007-43, p. 2.

**Other Authenticity Problems?**

After the release of Memorandum 2007-43, it occurred to the staff that the heightened risk of undetectable tampering might be a problem in other provisions of the proposed law as well. With that in mind, the staff reviewed all

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of the provisions of the proposed law to see whether there are any other sections that raise heightened concerns about authenticity.

The staff also reviewed the Evidence Code provisions on authentication to see whether there was any special treatment of digital media in that context.

## **Discussion**

Many of the provisions of the proposed law raise little or no concern about the authenticity of a recording. See, e.g., Health & Safety Code § 1569.69 (training materials may be provided on video).

However, there are some provisions in the proposed law that involve use of a digital recording as evidence. See, e.g., Penal Code §§ 298.1 (video of forced extraction of cell sample), 599aa (photographic or video evidence in animal cruelty arrest). In those cases, authenticity is a concern. However, there is nothing in any of those provisions that raises an *unusual* concern about authenticity, as compared to the concern that always exists with respect to evidence.

As it turns out, the Evidence Code already has rules for dealing with the authentication of evidence that is digitally based. Those rules are discussed below.

First, Evidence Code Section 250 defines the term “writing” as follows:

"Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, *transmitting by electronic mail* or facsimile, and *every other means of recording* upon any tangible thing, any form of communication or representation, including letters, words, *pictures, sounds, or symbols*, or combinations thereof, and any record thereby created, *regardless of the manner in which the record has been stored.*

(Emphasis added.) That very broad definition clearly includes information stored in digital form (e.g., electronic mail). There are many provisions of the Evidence Code that use the term “writing” without any distinction drawn as to the medium in which the “writing” is recorded. See, e.g., Evid. Code § 1400 (authentication of a “writing”).

The Evidence Code also has provisions that specifically address digitally based evidence. Section 255 provides that a “printout or other output readable by sight, shown to reflect the data accurately, is an ‘original’” of data stored in a “computer or similar device.”

Evidence Code Section 1552(a) provides that a printed representation of “computer information” is presumed to be accurate. Evidence Code Section 1553 provides a similar rule for digital photos and video:

A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent.

The Evidence Code has already been adjusted to reflect the existence of computer files, digital photographs, and digitally stored video. For that reason, the staff does not see any general problem with modernizing provisions that authorize audio or video recording.

There may be specific cases where concerns about privacy or authenticity are heightened to such a degree that the use of digital recording might be worrisome. As noted above, the staff has recommended the deletion of some provisions of that sort from the proposed law.

The staff does not believe that concerns about authenticity warrant any other changes to the proposed law at this time.

Respectfully submitted,

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Executive Secretary