Study K-202 November 8, 2004

# Memorandum 2004-55

## Conforming Evidence Code To Federal Rules: Role of Judge and Jury

In September, the Commission considered part of Memorandum 2004-44 (available at www.clrc.ca.gov), which discussed the role of judge and jury in determining the admissibility of evidence. After considering two of the issues in that memorandum, the Commission approved the following proposals for inclusion in a tentative recommendation:

(1) Evidence Code Section 402 should be revised to require that a proceeding to determine the admissibility of a confession or admission in a criminal case be conducted out of the presence and hearing of the jury. We have since received a letter from the Committee on Federal Courts of the State Bar, expressing support for the proposed change to Section 402. That letter is attached at Exhibit p. 6.

(2) Evidence Code Section 405 should be revised to provide that a judge is not bound by the rules of evidence (other than rules governing privilege) when determining the existence or nonexistence of a preliminary fact.

Issues that were not considered in September are presented again in this memorandum. A letter from Professor Miguel Méndez that was attached to Memorandum 2004-44 is attached at Exhibit p. 1.

The staff draft tentative recommendation that was attached to Memorandum 2004-44 is not attached to this memorandum. The staff would like to have further Commission guidance on the issues relating to admissibility of secondary evidence (discussed below) before preparing a revised draft.

Except as otherwise indicated, all statutory references in this memorandum are to the Evidence Code and all references to "Rules" or "Federal Rules" are to the Federal Rules of Evidence.

### BACKGROUND: ROLE OF JUDGE AND JURY IN DETERMINING PRELIMINARY FACT

In many cases, the admissibility of a piece of proffered evidence will depend on the existence or nonexistence of a preliminary fact. In California, there are two

rules for determining a preliminary fact, which assign the final fact-finding role to either the judge or the jury.

Under Section 403, the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact. The question is then put to the jury. Section 403 applies if the preliminary fact question involves the relevance of proffered evidence, the authenticity of a writing, the personal knowledge of a lay witness, or whether a statement or conduct was correctly attributed to a person. The Assembly Judiciary Committee Comment to Section 403 explains the application of that section:

> The preliminary fact questions … to be determined under the Section 403 standard, are not finally decided by the judge because they have been traditionally regarded as jury questions. The questions involve the credibility of testimony or the probative value of evidence that is admitted on the ultimate issues. It is the jury's function to determine the effect and value of the evidence addressed to it. … Hence, the judge's function on questions of this sort is merely to determine whether there is evidence sufficient to permit a jury to decide the question. … If the judge finally determined the existence or nonexistence of the preliminary fact, he would deprive a party of a jury decision on a question that the party has a right to have decided by the jury.

A preliminary fact question that is not governed by Section 403 is determined by the judge alone, under Section 405. The Assembly Judiciary Committee Comment to Section 405 explains the application of that section: "Section 405 deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion." For example, a preliminary fact necessary for admission of hearsay, or of a confession in a criminal case, or to establish an evidentiary privilege, will be decided by the judge, so as to shield the jury from potentially misleading, prejudicial, or privileged evidence until it can be determined whether there is grounds for its admission.

Federal Rule 104 provides a substantively similar system for determination of preliminary facts: a preliminary fact relating to relevance is decided by the jury (after the judge determines that there is sufficient evidence of the preliminary fact). Rule 104(b). All other preliminary facts questions are decided by the judge alone. Rule 104(a).

The main issue that was not considered in September is whether the judge or the jury should determine a preliminary fact relating to authentication of a writing, when secondary evidence is being offered to prove the contents of an original.

Ordinarily, authentication of a writing is a matter for the jury to decide. Section 403(a)(3). This is consistent with the general policy that the jury decide questions that "involve the credibility of testimony or the probative value of evidence that is admitted on the ultimate issues. It is the jury's function to determine the effect and value of the evidence addressed to it. … If the judge finally determined the existence or nonexistence of the preliminary fact, he would deprive a party of a jury decision on a question that the party has a right to have decided by the jury." Section 403 Comment. For example:

> [If] the question of A's title to land is in issue, A may seek to prove his title by a deed from former owner O. Section 1401 requires that the deed be authenticated, and the judge, under Section 403, must rule on the question of authentication. If A introduces evidence sufficient to sustain a finding of the genuineness of the deed, the judge is required to admit it. If the rule were otherwise and the judge, on the basis of the adverse party's evidence were permitted to decide that the deed was spurious and not admissible, the judge would be resolving the basic factual issue in the case and A would be deprived of a jury finding on the issue, even though he is entitled to a jury decision and even though he has introduced evidence sufficient to warrant a jury finding in his favor.

*Id*.

However, there seems to be an exception to the general rule. Former Section 1511 allowed the use of a duplicate to prove the content of an original, but specifically provided for exclusion of the duplicate if "a genuine question is raised as to the authenticity of the original." At that time, preliminary facts relating to the best evidence rule were decided by the court. See Section 405 Comment. This meant that it was the judge rather than the jury who decided whether the original was properly authenticated.

On the Commission's recommendation, the best evidence rule was eliminated in California and replaced with the "secondary evidence rule," which allows use of secondary evidence to prove the content of an original unless an exception applies. The exceptions in the secondary evidence rule (Section 1521(a)) were

modeled after former Section 1511 and implement a similar approach. Section 1521(a) requires the court to exclude secondary evidence if the judge determines that either of the following is true:

> (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.

Note that Section 1521(a)(1) does not use the term "authentication," but instead refers to a dispute "concerning material terms." It also adds a second prong to the test: justice must require exclusion of the secondary evidence. These changes from former Section 1511 introduce some uncertainty as to whether Section 1521(a)(1) applies to disputes about authentication.

**Application of Section 1521 to Authentication Disputes**

Authentication of a writing requires a showing that the writing "is the writing that the proponent of the evidence claims it to be." In other words, the proponent must show "that the writing was made or signed by its purported maker." See Section 1400 Comment.

Authenticity has been distinguished from accuracy. Concerns about accuracy generally relate to the weight of the evidence rather than its admissibility. See *People v. Garcia*, 201 Cal. App. 3d 324, 329, 247 Cal. Rptr. 94 (1988) (conflicting inference as to accuracy of secondary evidence "goes to the weight rather than the admissibility of the [secondary evidence], because conflicting inferences are for the jury to resolve."). See also Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code 72* (Jan. 1976) (on file with the Commission) ("If a writing is otherwise authenticated, an apparent alteration would seem more appropriately to go to the weight of evidence, not to admissibility.").

To what extent then would a dispute "concerning the material terms" of an original writing present a question of authentication?

A dispute that centers on the accuracy of the original or of the secondary evidence arguably does not present a question of authentication. For example, a duplicate of a tape recording can be both genuine (it is a duplicate of the tape recording) and inaccurate (technical reproduction problems materially distort the content). Once the authenticity of the recording has been established, it should be admitted to the jury who will then determine its probative value. An exception exists when the inaccuracy is so severe that it would be "unfair" to admit the

secondary evidence. However that exception seems to be a specific example of the court's general discretion to exclude evidence when the probative value of the evidence is outweighed by the risk that the evidence will be prejudicial, confusing, or misleading. See Section 352.

Nonetheless, there are instances in which a dispute over material terms will raise a question of authentication. For example:

(1) *Original Never Existed.* Authentication can be an issue under Section 1521 when an opponent to secondary evidence objects that the original never existed and that the secondary evidence is a fabrication.

(2) *Original Altered After Execution.* Section 1402 provides a special authentication rule that applies when an original "has been altered, or appears to have been altered after its execution, in a part material to the question in dispute." In such a case, the proponent must account for the alteration or the writing will not be admitted. This suggests that a dispute about alteration of material terms would be considered a question of authenticity.

(3) *Signature Disputed.* The opponent may dispute the authenticity of a signature on the original.

Given that there are situations in which Section 1521(a) can apply to a dispute concerning authentication, we need to consider whether that it is the proper result as a matter of policy. Unfortunately, the staff found no published cases interpreting Section 1521(a) to shed light on how the section is be applied in practice.

**Should a Judge Exclude Secondary Evidence on the Basis of an Authentication Dispute?**

Judicial determination of authenticity can undermine the traditional role of the jury in deciding the weight and credibility of evidence offered to prove an ultimate issue in the case. Suppose a duplicate is offered to prove the existence of a deed that has been innocently lost. If the judge excludes the only evidence of the existence of the deed, the proponent's case may fail without the jury ever having had an opportunity to determine the credibility and weight of the evidence. That is why authentication is generally a matter for the jury. See Section 403 Comment.

However, Section 1521 may represent a special case that warrants an exception to the general rule. Why? Because the liberal admissibility provided by the secondary evidence rule may increase the risk of fraud, which was previously deterred by the best evidence rule. Section 1521(a) allows the court to reject

suspect secondary evidence and instead require that the original be produced. Professor Méndez suggests that this may have been the rationale for judicial determination of authenticity under the best evidence rule and California's secondary evidence rule:

> As a matter of policy, the Best Evidence Rule expresses a preference for the use of originals to prove the contents of a writing, unless an exception applies. The Rules' duplicate original doctrine and the California Secondary Evidence Rule turn that policy on its head by allowing the use of duplicates in federal courts and of secondary evidence (including duplicates) in California courts to prove the contents of a writing without accounting for the original. But the generous treatment accorded duplicates in federal courts and secondary evidence in California courts comes with a special price: if the opponent raises serious questions about the authenticity of either the original or the secondary evidence, the judge may exclude the secondary evidence and require the use of the original.

Exhibit at 4.

When the Commission was developing its recommendation to replace the best evidence rule with the secondary evidence rule, practitioners raised concerns about the increased risk of fraud. In response, the Commission made the grounds for exclusion under Section 1521(a) mandatory and deleted Comment language suggesting that the court's authority to exclude secondary evidence should be used sparingly. See Memorandum 96-27 at 7-8. What's more, the Commission's Comment to former Section 1511 expressed an intent that the court's power to exclude duplicates be exercised liberally:

> The courts should be liberal in finding that a "genuine question is raised as to the authenticity of the writing itself." … For example, if a party opposing admission of a duplicate makes a good faith claim that the writing from which the duplicate has been made is not authentic and it would be impractical or more difficult to determine the authenticity of the writing itself from the duplicate, the court should require that the writing itself be produced for examination … before permitting the duplicate to be introduced in evidence.

See *Admissibility of Duplicates in Evidence*, 13 Cal. L. Revision Comm'n Reports 2115, 2125 (1975).

As noted earlier, the problem is that judicial determination of authenticity can prevent the jury from exercising its traditional role in determining the probative value of evidence offered on ultimate issues in the case. The Federal Rules

recognize this problem and expressly provide that it is the jury and not the judge who determines whether a disputed original ever existed or whether the secondary evidence correctly reflects the content of the original. Rule 1008. The Advisory Committee Note to Rule 1008 explains:

> [Questions] may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue. … [Rule 1008] is designed to insure treatment of these situations as raising jury questions. The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations. See Rule 104(b), supra.

Thus, we are faced with two competing policies. On the one hand, it makes sense to allow the court to exclude secondary evidence where there is a genuine dispute as to the authenticity of the original. This helps to prevent fraud under the more relaxed admissibility regime provided by the secondary evidence rule. On the other hand, judicial determination of the preliminary facts can supersede the jury's traditional role in deciding matters of authentication.

The tension between these two choices is relieved somewhat by the fact that Section 1521(a)(1) only requires the court to exclude secondary evidence on the basis of a genuine dispute as to material facts *if justice requires the exclusion*. Consideration of justice would allow the court to look at all of the circumstances and balance the equities before deciding whether to exclude secondary evidence. For example, if the original can be produced with little difficulty or was destroyed in bad faith by the proponent of the secondary evidence, the court may conclude that it is fair to exclude the secondary evidence after a fairly modest showing of potential fraud. If, however, the original was destroyed innocently, a court might require a more significant objection before determining that justice requires exclusion of the secondary evidence.

If Section 1521 is intended to apply to a dispute concerning authentication, it should probably be revised to make that intention clearer. Professor Méndez suggests the following revision of the introduction to Section 1521(a):

> 1521. (a) The content of a writing may be proved by otherwise admissible secondary evidence. <u>Although the authenticity of a</u>

writing or of secondary evidence of a writing is ordinarily a question to be determined by the jurors, the ~~The~~ court shall exclude secondary evidence of the content of a writing if the court determines either of the following:

See Exhibit p. 5. If we take this approach, it might be helpful to provide additional guidance in the Comment. For example:

> **Comment**. Section 1521 is amended to make clear that, in some cases, subdivision (a)(1) may require the court to exclude secondary evidence if there is a genuine dispute as to the authenticity of an original, despite the fact that authentication of a writing is ordinarily a matter for jury determination. See Section 403(a)(3). For example, a dispute concerning material terms might involve a claim that an original never existed, that a signature on an original is not genuine, or that an original was materially altered after execution. However, the court may only exclude evidence under subdivision (a)(1) to the extent that justice so requires. Factors a court might consider in determining whether justice requires exclusion of secondary evidence include: (1) whether the original is available, (2) whether either party engaged in sharp practices in connection with the loss, destruction, or discovery of the original, (3) whether the probative value of the secondary evidence is outweighed by the risk of confusing the issues or misleading the jury, and (4) whether exclusion would prevent the jury from deciding an ultimate issue in the case.

Alternatively, if the Commission decides that matters of authentication should be left entirely to the jury, Section 1521 could be amended along the following lines:

> 1521. (a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines 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.
>
> (b) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing).
>
> (c) Nothing in this section excuses compliance with Section 1401 (authentication). A dispute concerning the authenticity of a writing is not governed by paragraph (1) of subdivision (a).
>
> (d) This section shall be known as the "Secondary Evidence Rule."

Under this approach, the court would still have authority to exclude secondary evidence where concerns about material accuracy, rather than genuineness, are raised (e.g., a distorted tape recording that is more misleading than illuminating).

The staff recommends that the revision proposed by Professor Méndez be included in the tentative recommendation, along with the proposed Comment language. We need to gather input from practitioners on this issue, to understand how the provision is being applied in practice and what the practical effect of any change would be. The recommended language seems most likely to provoke useful comments.

## VICTIMS' BILL OF RIGHTS

The Victims' Bill of Rights, a ballot measure approved by the voters in 1982, includes a Truth-in-Evidence provision, which provides:

> Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, *relevant evidence shall not be excluded in any criminal proceeding,* including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

Cal. Const. art. I, § 28(d) (emphasis added). This acts as a potential constraint on any reform that would increase the scope of exclusion of evidence in a criminal case. It is not of concern to the matters discussed in this memorandum because the proposed law would not increase the scope of the exclusion of relevant evidence:

- A rule exempting judicial determination of a preliminary fact from the exclusionary rules of evidence would, on its face, be consistent with the general policy of limiting the exclusion of relevant evidence. Furthermore, the practical effect of the change would be to make it easier to establish preliminary facts necessary for the admission of proffered evidence.
- Requiring that the admissibility of an admission or confession in a criminal case be decided out of the presence and hearing of the jury is a matter of procedure that would have no substantive effect on the extent to which evidence is excluded.

- The recommended changes to Section 1521 and its Comment are intended as clarifications of existing law and should have no substantive effect on the extent to which evidence is excluded.

The Victim's Bill of Rights should not have any effect on the proposed law.

## AUTHORIZED ADMISSIONS

California law differs from the Federal Rules with respect to who determines the admissibility of an authorized admission by an out of court declarant (including a co-conspirator admission):

- Under Federal Rule 104, the admissibility of an authorized admission is determined by the *court*. The exclusionary rules of evidence do not apply, except for the rules regarding privileges. However, Rule 801(d)(2)(E) provides that the hearsay statement itself is not sufficient to prove the preliminary facts for admissibility. There must also be some independent corroborative evidence.
- Under Sections 1222(b) and 1223(c), an authorized admission will be admitted after admission of "evidence sufficient to sustain a finding" of the necessary preliminary facts. This is the standard governing *jury* determination of a preliminary fact under Section 403. The exclusionary rules of evidence apply.

In the background study, Professor Méndez discusses these differences, but makes no recommendation as to whether California should conform to the federal approach. See Méndez, *Comparison of Evidence Code with Federal Rules: Part I. Hearsay and Its Exceptions* 11-12 (May 2002) (attached to Staff Memorandum 2002-41). "Reasonable people might differ on whether the foundational facts for this hearsay exception should be proved by a sufficiency or higher standard." Méndez, *California Evidence Code — III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 1003, 1019 (2003).

In a study prepared for the Commission in 1976, Professor Jack Friedenthal discusses differences in the treatment of authorized admissions under the California Evidence Code and the Federal Rules. He describes the admissibility of an authorized admission as turning on a question of conditional relevance, i.e., if a statement is not authorized by a party or is not made in furtherance of a conspiracy of which the defendant is part, then it is inadmissible *because irrelevant*. Questions of conditional relevance are for the jury to determine under Section 403. Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code* (Jan. 1976), at 46-47, 50 (on file with the

Commission). Professor Friedenthal does not recommend any substantive change in existing law on this issue.

The principal argument against the California approach is that jurors will not properly condition their consideration of an authorized admission on whether or not the admission was in fact authorized. See J. Kaplan, *Of Mabrus and Zorgs — An Essay in Honor of David Louisell*, 66 Cal. L. Rev. 987, 997-99 (1978) (a "mabru" is a preliminary fact that should be decided by the judge; a "zorg" is a preliminary fact that should be decided by the jury):

> The jury will likely give short shrift to questions such as whether the declarant … was himself a member of the conspiracy or whether the statement was made in furtherance of the conspiracy. Rather, … the jurors probably will ignore our hearsay rule and decide whether to give the statement weight depending on whether they think [the declarant] was knowledgeable and truthful, regardless of whether he was a coconspirator.

Professor Kaplan makes a good point. However, Section 1223 does include some safeguards that help to ameliorate the problem described:

(1) Before the preliminary fact question is submitted to the jury, the court would screen the evidence to determine whether there is sufficient independent evidence to support a finding of the preliminary fact. In the absence of sufficient independent evidence, the proffered evidence would be excluded by the court.

(2) If the evidence is admitted, the court may instruct the jury that it should disregard the proffered evidence unless it finds the necessary preliminary fact to be true. See Section 403(c)(1). Jurors might find it hard to compartmentalize their thinking in that way, but at least they would be aware of the need to try.

Jury determination of a preliminary fact necessary for introduction of an authorized admission into evidence has been the law in California for over 37 years. Neither Professor Méndez nor Professor Friedenthal are recommending a substantive change to that approach. While the staff sees merit in the criticism offered by Professor Kaplan, it isn't clear that the problem he describes is actually creating practical difficulties significant enough to warrant reversal of long-standing law.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

## EMAIL SUBMISSION FROM PROFESSOR MIGUEL MENDEZ (8/20/04)

### Functions of Judge and Jury and the Secondary Evidence Rule

*Federal Rules.* Under the Federal Rules, judges are required to exclude copies of writings unless the proponent persuades the judge by a preponderance of the evidence that non-production of the original writing is excused.[1] Accordingly, if the opponent objects to the introduction of a copy, the proponent must convince the judge by a preponderance of the evidence that the original has been lost or destroyed.[2] The persuasion burden is placed on the proponent because the Best Evidence Rule embodies a public policy favoring the use of original writings to prove the contents of writings.

The Rules, however, recognize that in some instances the power given to judges to exclude secondary evidence can impinge on the role traditionally assigned to jurors in American trials. If in a contract dispute, for example, the opponent disputes the proponent's claim that the original has been lost and objects to the introduction of a copy on the ground that no original contract ever existed, a ruling in favor of the opponent would result in a directed verdict for the opponent. To ensure that the jurors determine whether the original contract existed, the Rules reserve this question for the jurors.[3] Similarly, the Rules reserve for the jurors two additional questions—whether the exhibit offered by the proponent is the original of the writing and whether the exhibit correctly reflects the contents of the writing.[4]

Judges, however, are given greater power to withhold duplicates from the jurors. Federal Rule of Evidence 1003 generally allows a party to offer a duplicate in lieu of the original writing.[5] Since a duplicate is a counterpart produced by the same impression as the original,[6] a counterpart should serve as well as the original in getting the words or other contents before the fact finder with accuracy and precision.[7] But a federal judge may exclude a duplicate where "(1) a genuine

---

1. Federal Rule of Evidence 1001.

2. Federal Rule of Evidence 1008.

3. Id.

4. *Id.*

5. See Méndez, Evidence: The California Code and the Federal Rules–A Problem Approach § 13.06 (West Group 3d ed. 2004).

6. Federal Rule of Evidence 1001(4).

7. *Id.* (Advisory Committee Note).

question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."[8]

Since jurors are generally charged with resolving questions of authenticity, the two exceptions to the use of duplicates warrant discussion. With regard to the first exception, it should be noted that the objection is not that the duplicate is an unfaithful reproduction. Rather, the objection is that the duplicate cannot be a reproduction of the writing the proponent seeks to prove because no such writing, for example, ever existed. Since production of the original, if there was one, would facilitate the resolution of this issue, the judge, by excluding the copy, can force the proponent to offer the original.[9] More than a bare objection is required, however. The opponent must provide the judge with reasons why production of the original is justified. United States v. Haddock[10] is illustrative. The reviewing court upheld the trial judge's discretion excluding duplicates of bank records offered by the defendant in a bank fraud prosecution where in objecting to the introduction of the duplicates the government offered the following evidence:

> With regard to each of these photocopies, evidence presented at trial indicates that only Haddock could recall ever seeing either the original or a copy of these documents. Except for Haddock, no one—including in some cases persons who allegedly typed the document and persons to whom the original allegedly was sent—was familiar with the contents of the photocopies. In addition, witnesses testified that several of the documents bore markings and included statements that did not comport with similar documents prepared in the ordinary course of business at the Bank of White City and at the Bank of Herington.[11]

Federal Rule of Evidence 1003(2) also empowers judges to exclude duplicates if "in the circumstances it would be unfair to admit the duplicate in lieu of the original."[12] The Advisory Committee describes one set of circumstances when it would be unfair to admit a duplicate: "Other reasons for requiring the original may be present when [the duplicate reproduces only a part of the original] and the remainder [of the original] is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party."[13] Professors Muller and Kirkpatrick provide other examples of circumstances requiring the exclusion of duplicates. Duplicates may be excluded because of their poor quality, because of questions about the accuracy of the process used to reproduce them, or because the proponent has destroyed the originals in bad faith.[14] Their concern, it should be noted, is both with the authenticity of the

---

8. Federal Rule of Evidence 1003.

9. Michael H. Graham, Handbook of Federal Evidence § 1003.1 (West Group 5th ed. 2001).

10. 956 F.2d 1534 (10th Cir. 1992).

11. *Id.* at 1545-1546.

12. Federal Rule of Evidence 1003(2).

13. *Id.*

14. Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 10.8 (Aspen 2d ed. 1999).

duplicates (whether they are faithful reproductions of the original writings) and with the authenticity of the original writings (whether the proponent destroyed the originals in bad faith to prevent their use in proving their contents). Although whether a copy is a faithful reproduction of the original is generally deemed to be a jury question, the Federal Rules empower the judge to keep a duplicate from the jurors whenever in the judge's estimation it would be "unfair" to the opponent to receive the duplicate. In this instance, however, sharp practices may not be the only reason for giving the judge the power to exclude duplicates. Their poor quality, as Professors Muller and Kirkpatrick point out, might suffice.

*California Evidence Code.* Prior to its replacement by the Secondary Evidence Rule, California's Best Evidence Rule was in most ways identical with its federal counterpart. Like the Federal Rules, California's preference for an original to prove the contents of a writing was relaxed when the proponent offered a duplicate. California used the federal definition of a duplicate[15] and allowed the use of duplicates to the same extent as the Federal Rules.[16] Former § 1511 provided that a duplicate was "admissible to the same extent as an original unless (a) a genuine question [was] raised as to the authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original."[17]

Former § 1511 was repealed by the enactment of the Secondary Evidence Rule, which allows proof of the contents of a writing by an otherwise admissible original or secondary evidence.[18] The judge, however, is empowered to exclude secondary evidence when (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion or (2) admission of the secondary evidence would be unfair.[19] As the Commission acknowledged in its Comment, the exceptions are modeled on the exceptions to former § 1511 and Federal Rule 1003.[20]

As in the case of Rule 1003(2), the second exception empowers the judge to withhold secondary evidence from the jurors whenever the judge is convinced that the proponent has engaged in sharp practices. As the Commission notes, "A classic circumstance for exclusion pursuant to subdivision (a)(2) is [where] the proponent destroyed the original with fraudulent intent * * *."[21] Also like Rule 1003(2), the second exception is concerned with the authenticity of the secondary

---

15. West's Ann. California Evidence Code § 260.

16. West's Ann. California Evidence Code § 1511, repealed by the enactment of the Secondary Evidence Rule. See West's Ann. California Evidence Code §§ 1500 to 1511.

17. West's Ann. California Evidence Code § 1511.

18. West's Ann. California Evidence Code §§ 1520-1521.

19. West's Ann. California Evidence Code § 1521.

20. *Id.* (Comment).

21. *Id.*

evidence. As an example of this exception, the Commission cites Amoco Production Co. v. United States[22] for the proposition that it would be unfair to admit a copy that lacked a critical part included in the original.[23]

A federal judge, as discussed, may also exclude a duplicate when the judge finds that the opponent has raised a genuine question as to the authenticity of the original.[24] But, as noted, more than a bare objection is required for exclusion. The opponent must provide the judge with reasons why production of the original is justified. Similarly, the language of the first exception to the Secondary Evidence Rule appears to embrace serious questions about the authenticity of the original. It empowers the judge to exclude secondary evidence whenever the opponent convinces the judge that a genuine dispute exists concerning material terms of the writing and justice requires its exclusion. Why the Commission chose this language instead of the language of former § 1511 is unclear from the Comment. It may be that the Commission wanted to make sure that California judges had the power to exclude secondary evidence when the parties disagreed about material terms of the original, not just about the existence of the original, and production of the original was necessary to resolve the dispute.

The Law Revision Commission's Comment is not particularly helpful in this regard. The three federal cases and one California case cited by the Commission involve the authenticity of the secondary evidence, not of the original.[25] That may be unimportant, however, since what matters is that the Commission appears to have intended to follow the lead set by Federal Rule of Evidence 1003 and former § 1511: although authenticity is normally a matter for jury resolution, in some instances California judges should be empowered to exclude secondary evidence when serious questions about the authenticity of either the secondary evidence or the original are raised by the opponent.

As a matter of policy, the Best Evidence Rule expresses a preference for the use of originals to prove the contents of a writing, unless an exception applies. The Rules' duplicate original doctrine and the California Secondary Evidence Rule turn that policy on its head by allowing the use of duplicates in federal courts and of secondary evidence (including duplicates) in California courts to prove the contents of a writing without accounting for the original. But the generous treatment accorded duplicates in federal courts and secondary evidence in California courts comes with a special price: if the opponent raises serious questions about the authenticity of either the original or the secondary evidence, the judge may exclude the secondary evidence and require the use of the original. The Commission's Comment includes a useful non-exclusive list of factors judges should consider in determining whether to exclude the secondary evidence offered.

---

22 . 619 F.2d 1383 (10th Cir. 1980).

23 . West's Ann. California Evidence Code § 1521 (Comment).

24 . Federal Rule of Evidence 1003(1).

25 . West's Ann. California Evidence Code § 1521 (Comment).

It would be helpful, however, if § 1521 or its Comment made clear that judges should normally allow the jurors to determine disputes concerning the authenticity of the secondary evidence or of the original unless the evidence offered by the opponent raises the dispute to the level contemplated by § 1521.

At the Commission's June 2004 meeting, the Commission staff suggested amending § 1521 to provide that the "question of whether the original writing ever existed shall be determined under subdivision (b) of Section 1401 [relating to authentication] and not under this section."[26] Unlike the federal Best Evidence Rule, California's old Best Evidence Rule did not reserve for the jurors the question whether the original writing ever existed. Neither does the Secondary Evidence Rule, and the language is designed to remedy this omission. In retrospect, however, it seems unwise to recommend the proposed amendment. Objections to the use of secondary evidence on the ground (1) that it does not conform to the original (that the original, for example, contains material terms different from those claimed by the proponent) or (2) that no original ever existed, raise questions of authenticity that would normally be reserved for resolution by the jurors. Section 1521, however, creates two exceptions to this rule. It empowers the judge to withhold the secondary evidence from the jurors whenever the opponent raises serious questions about the authenticity of either the secondary evidence or of the original, including the question whether the claimed original ever existed. The point can be made explicit in one of two ways. First, § 1521 could be amended to read as follows:

**§ 1521. Secondary evidence rule**

(a) The content of a writing may be proved by otherwise admissible secondary evidence. Although the authenticity of a writing or of secondary evidence of a writing is ordinarily a question to be determined by the jurors, the ~~The~~ court shall exclude secondary evidence of the content of a writing if the court determines either of the following:

Second, the Comment to § 1521 could be amended to make clear that in the exceptional circumstances described in the section, the judge has the power to withhold the secondary evidence from the jurors.

---

26. Staff Memorandum 2004-19, California Law Revision Commission, Study K-202, May 27, 2004.

# THE STATE BAR OF CALIFORNIA

**— COMMITTEE ON FEDERAL COURTS**

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
Fax: (415) 538-2305


TO: The California Law Revision Commission

FROM: The State Bar of California's Committee on Federal Courts

DATE: October 25, 2004

SUBJECT: Conforming Evidence Code to Federal Rules: Role of Judge and Jury – Memorandum 2004-44

The State Bar of California's Committee on Federal Courts (the "Committee") has reviewed and analyzed California Law Revision Commission ("CLRC") Memorandum 2004-44, *Conforming Evidence Code to Federal Rules of Evidence: Role of Judge and Jury*, and appreciates the opportunity to submit these comments on the proposed amendment to Evidence Code Section 402.[*]

As Memorandum 2004-44 notes, Rule 104(c) of the Federal Rules of Evidence requires that a hearing on a preliminary fact be conducted outside the presence of the jury if: (1) the admissibility of a confession is at issue; (2) the accused is a witness and requests that the hearing be conducted without the jury; or (3) the interests of justice so require. In contrast, under California Evidence Code Section 402(b), a court in a criminal action must hear and determine the question of the admissibility of a confession or admission of the defendant outside the presence of the jury "if any party so requests."

The Committee favors Rule 104(c) of the Federal Rule of Evidence over California Evidence Code Section 402(b) because it is highly prejudicial to a defendant to hold such hearings before a jury. If a confession is found to be involuntary or otherwise inadmissible, the jury is likely to be influenced by the hearing, leading to a potential mistrial or a claim of error on appeal. In the Committee's experience, state courts in California do not, as a matter of practice, hold such hearings before juries. The Committee believes that the better rule is the Federal Rule of Evidence, which *requires* such hearings to be held outside of the presence of the jury, *irrespective* of whether a party so requests. The Committee therefore supports the proposed amendment to Evidence Code Section 402(b).

[*] By way of background, the Committee generally comments on matters that have an impact on federal court practice in California. The Committee consists of a broad range of federal practitioners, including members with civil, criminal, bankruptcy, immigration and appellate experience. Although the CLRC's proposal relates to a change in *state* court practice, the proposal is based upon a comparison with the federal rule. The Committee is therefore providing its perspective as a group of federal practitioners who have experience with the federal rule as well as current California state court practice.

**Disclaimer**

**This position is only that of the State Bar of California's Committee on Federal Courts. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.**