Advisory Committee on Evidence

Memorandum No. 3

Article X, Content of Writings

Preliminary Discussion

The misleadingly named "best evidence" rule is generally agreed today to apply only to writings. While the writers inevitably vary somewhat in their terminology, in substance they agree that the rule is as follows: to prove the terms of a writing, the original writing itself must be produced unless satisfactory explanation is given for the failure to produce it; if a satisfactory explanation of nonproduction is given, then other evidence of the terms of the writing is admissible.[1]

A good many generations of legal minds have been brought to bear upon the rule, and, as would be expected, a substantial body of law has been evolved around each element. The questions raised may be grouped as follows:

1. What is a writing?
2. When are terms involved?
3. What is the original writing?
4. What is a satisfactory accounting for failure to produce the original?
5. What secondary evidence is admissible?
6. Are there exceptional situations?

Before considering these questions, it may be well to consider briefly whether the rule is in fact justified.

The reason given for the rule by all the leading writers is posited upon the importance of accuracy in placing the terms of a writing before a court: copies and oral testimony are more prone to inaccuracy and subject to fraud.[2] A close kinship to the parol evidence rule and the Statute of Frauds is readily apparent. Wigmore adds another reason: the appearance

of the document may furnish information as to its authenticity.[3] This added reason presents an aspect of the rule which is more resistant to treatment in the light of modern techniques than is so with respect to accuracy of terms. Oddly enough, Wigmore himself seems not to have pursued this aspect of the foundation for the rule.

Conceding the desirability of accurate proof of the terms of documents, is the elaborate rule which has been evolved necessary to achieve the result? When the rule was being evolved, a corollary of the rule that a party was not compellable to testify was that he could not be compelled to produce documents or other evidence in his possession.[4] Some relief was afforded by the doctrine of profert. Also, discovery could be had by bill in equity, though only subject to the crippling limitation that the matter sought relate to the party's own case, not the case of his opponent. Hence in the absence of the best evidence rule, a litigant would have been relatively helpless to meet inaccurate or fraudulent testimony or copies when his opponent possessed the original. The implications of this explanation of the origin of the rule seem not to have been explored.

Today the situation is very different. Statutes providing for orders to produce have been on the books for many years,[5] and broad discovery is generally available. Moreover, it is unlikely that a litigant would put himself in the position of introducing false or inaccurate testimony as to the terms of a document or a false or inaccurate copy, only to be confounded by production of the original. The adversary system, as it is practiced, would seem to take care of the bulk of the situations.

A further argument against the rule may be derived from the generally recognized requirement today that errors in rulings on the admission or exclusion of evidence are not grounds for reversal unless prejudicial. In this context "prejudicial" means reasonably likely to have affected the

result. In terms of the best evidence rule, Professor McCormick viewed this approach to error as requiring a court in passing on a motion for new trial or an appeal, based on the admission of secondary evidence, to inquire whether there was an actual dispute over accuracy and in the absence of an affirmative answer to classify any error as harmless. He did not, however, seem to sense that taking this same attitute one step further back at the trial itself would pretty well undermine the rule, and that no justification appears for limiting the attitude to post-trial situations.[6]

A serious question may thus be raised as to whether the rule still possesses much vitality.

Arguments for the retention of the rule, nevertheless, are not lacking. The document which is outside the jurisdiction may not be susceptible to discovery without a substantial outlay of time and money. The unanticipated document is not discoverable at all. The criminal cases have limitations imposed by the privilege against self-incrimination and by the relatively modest proportions of criminal discovery.

In final analysis, sound policy may be to attempt to reduce waste and inconvenience to a minimum, and then to leave the burden of what is left of them on the proponent of the evidence as the best evidence rule traditionally has done.

Now to turn to the questions raised under the rule.

1. <u>What is a writing</u>? Things written or printed in some fashion on paper are pretty clearly writings; objects which bear no inscription of any kind are not. Examples would be a will, on the one hand, and a plain empty box on the other. Many chattels, however, bear inscriptions, ranging from boxcars to fired shell cases, and the area is one of controversy.

In a famous English prosecution for unlawful assembly, evidence that the participants carried banners inscribed with dangerous sentiments such as "Unite and be free" was ruled admissible without producing or accounting for the originals.[7] The ruling was probably wrong. A recent federal case, on the other hand, allowed a witness to testify that whiskey was in containers bearing no stamps, despite their destruction,[8] since the rule did not apply. The decision seems sound, since most of us can tell a stamp without examining in detail what is written upon it. Had a case of forged stamps been presented, the answer might have been different. In a Kansas decision of 1920, the court managed to escape deciding whether the rule applied to altered numbers on an automobile engine, since in any event the Kansas mud satisfactorily accounted for failure to produce the vehicle.[9]

A painting has been held not to be within the rule, in an action for infringing copyright by selling photos of it, despite the obvious enlightenment which would have accrued to the trier from a comparison.[10] Sound recordings, on the other hand, have been held to fall within the rule.[11]

Wigmore believed that all these questions should be left much to the discretion of the judge.[12] Uniform Rule 1(13), however, defined writing so broadly as to include them all. The main architect of the Model Code, from which the definition was taken, has said that the inclusion of pictures and recorded sounds may be debatable.[13]

2. <u>When are terms involved?</u> The answer is best found by examining a series of situations in which terms are not involved.

(a) A happening or transaction may itself assume the form of a writing, as with a deed or written contract, in which case proof of the happening or transaction necessarily involves the contents of the writing and calls for application of the best evidence rule. If, however the event or happening does not take the form of a writing, it may be proved by nondocumentary evidence, even though a written record or memorandum was made. The best evidence rule would apply only when the happening or transaction was sought to be proved by the writing. Examples are proving the payment of money without producing or accounting for a written receipt, or proving earnings without producing or accounting for books of account.[14]

Extending this approach to proof of former testimony leads to allowing any person present to testify to what the witness said,[14a] even though the testimony was taken down by an official stenographer[15] or recorded electronically.[16] In the leading case, a prosecution for perjury in which the "substance" of testimony which had taken two days and occupied 315 pages was given in half a page, a vigorous dissent suggests that the result was "to apply a meaningless formula and ignore crystal-clear actualities."[17] It may be that the rule needs some stretching in this instance.

(b) The rule does not apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.[18]

(c) As Wigmore says, the rule does not apply to facts about a document other than its terms, but he also points out the difficulty of drawing a line between terms and other facts.[19] Evidence as to the existence, execution, or delivery of a document does not involve its terms, says McCormick,[20] but Wigmore is not so sure and suggests that the answer depends on emphasis.[21] The Fourth Circuit recently had before it the question whether the rule applied to a social security check which was allegedly stolen

from an authorized mail depository.[22] The court held that terms were involved, since the existence and identity of the check could scarcely be established without reference to its terms. Would the result have been the same if Federal Reserve notes or a government bond had been stolen?

(d) The rule does not apply to "collateral" documents. The term is admittedly vague and represents an attempt to define situations in which no good purpose would be served by production. McCormick would include only cases in which substantial dispute over terms seems probable,[23] while Wigmore would not go that far and would include cases in which the opponent "may not be prepared to dispute its terms and yet he may fairly desire the opportunity to see the document and not be obliged to accept the proponent's testimony to its contents."[24] Illustrations of collateral documents are the newspaper in an action for the price of publishing defendant's advertisement[25] and the streetcar transfer of a plaintiff claiming status as a passenger thereby.[26]

The dividing line, between "collateral" documents and the situations involving facts about rather than terms of documents, discussed in (c) above, is far from clear and at least some of the cases disposed of under that theory might better be treated here.

3. What is the original writing? In this connection the meaning of "copy" becomes elusive and the word virtually unusable. It is by no means necessarily the converse of "original," and we find it being used in common parlance to describe a good many different situations. "Counterpart" may be a more acceptable term, simply because it does not have the connotations which "copy" has acquired.

When a contract is prepared in the usual manner by making a ribbon and a carbon counterpart on the typewriter, and the parties execute both, each retaining one, no one would contend that each party did not have an original. The same result is indicated when carbon paper is used also in the act of signing. In these cases it may be said that each counterpart was intended to be a legally effective act, hence of equal standing and an original. Any question of preferring one over the other in evidence is thus foreclosed.

There are numerous other instances in which controversy over terms seems to be foreclosed, not because the parties elected to regard counterparts as originals but because the method of presentation is calculated to insure complete accuracy. This requires consideration of (a) simultaneous production, as in the case of carbon copies, (b) counterparts from the same matrix, as in the case of printing or an equivalent process, and (c) subsequently produced counterparts, made by manual copying, by some form of photography, or other methods of reproduction. The courts have disagreed as to whether carbons generally are originals, with perhaps a trend so to treat them.[27] Counterparts from the same matrix seem to have presented little difficulty: all are originals.[28] Photographic reproductions, on the contrary, have generally been rejected as originals, although their accuracy seems unimpeachable. An explanation may perhaps be found in the fact that the earliest method of copying, i.e. a subsequent copying by hand, possesses inherently an element of inaccuracy, and copies so produced have generally failed to achieve status as originals. The same thinking, with the emphasis shifted to the time aspect of the reproduction, was applied to letter-press copies, with much less validity,[29]

and in turn to photographic copies, where it has no validity at all.[29a]

If, however, attention is turned from the question whether terms are accurately given to the question whether the document is authentic and perhaps to problems of completeness,[30] a different aspect is presented. Many of the clues to the authenticity of a document are lacking in a carbon or a photostat. As to completeness, in the Toho Bussan case,[31] rejecting photostatic copies of plaintiff's books made for trial, it may be suspected that the court was actually influenced more by the fact that the books were in Japan, and hence not conveniently available for examination in toto, than by the possibility that the photostats were faked.

Evolving a rule which would avoid needless expenditure of time and trouble in proving uncontroverted terms, but which would also satisfy a reasonable desire to inspect the original, may be beyond the grasp of the Committee. The choice may lie between a large measure of discretion in the judge or a fairly elaborate and technical scheme. The Uniform Photographic Copies of Business and Public Records as Evidence Act (1949), touches only a relatively small segment of the problem in view of its limitation to photographic copies made in the regular course of business.

4. What is a satisfactory accounting for failure to produce the original? No doubt this aspect of the rule is the most involved. It may be considered under three headings:

(a) A species of unavailability, which may involve variously a document now or once in the possession of the proponent, in the possession of the opponent, or in the possession of a third person. Satisfactory accounting for the original may require a search, a notice to produce, or a subpoena duces tecum. The various aspects have evolved too elaborately to be treated here.[32]

In passing, another instance where the lawyers act more sensibly about their own business than about other people's may be noted: notice to produce a notice which has been served on the opponent ordinarily is not required.[33] While in logic this exception need not extend beyond a notice to produce a notice to produce (where otherwise a picture within a picture within a picture results), the convenience and good sense of the exception are apparent.

(b) The removal of public records from their usual place would be attended by serious inconvenience to the public and to the custodian himself, as well as the possibility of loss or damage. As a consequence, it is widely held by case and statute that no accounting need be made for failure to produce a public record.[34]

(c) Summaries of voluminous masses of books, records, or documents are generally admitted without producing the original, as offering the only practicable means of making the data available to the trier. A usual safeguard, to protect against abuse and to insure equality between the parties, is to require that the material be made available reasonably to the opposite party in advance of trial, although an occasional case has required that the material be in court.[35]

5. What secondary evidence is admissible? Assuming a satisfactory accounting for failure to produce the original, the question then arises whether the principle of preference should continue to be followed, or, in other words, whether degrees of secondary evidence should be recognized. Logic probably favors recognizing degrees of secondary evidence. After all, a copy subsequently made by hand is intrinsically more accurate than the testimony of a witness who once read the document. The difficulty lies in formulating too elaborate a hierarchy of preferences and in making the procedure too complex. Lumping all copies, regardless

of how produced, in one category and preferring it to testimonial proof would perhaps be a simple solution of one aspect, and placing on the party objecting to oral testimony the burden of producing a copy might take care of the procedure.[36]

Simpler yet is the abandonment of degrees of secondary evidence, leaving to the dissatisfied party the possibility of ferreting out and presenting more convincing evidence.

In one instance, that of public records, a preference for certified, sworn, or examined copies is the established practice.[37]

6. Are there exceptional situations? Perhaps two should be noted.

(a) Proof of contents of a writing by testimony of an oral admission of the party-opponent, while approved by the parent case in England,[38] may be open to question in view of the ease of fabricating evidence of this kind.[39] At least two solutions have been suggested: if there is a bona fide dispute, manifested by the presentation of contrary testimony, the document should be produced or failure to produce explained;[40] or limit proof by admission to those in writing or made on the witness stand.[41]

(b) Wigmore attacks with great vigor the rule in The Queen's Case, that a document emanating from a witness must be shown or read to him before he may be cross-examined as to its contents. It does not, he says, call for application of the best evidence rule, since no attempt is then being made to prove the terms of the writing. In any event, he argues, an exception should be made, in order to preserve the utility of this effective cross-examination technique.[42]

Footnotes

1. McCormick, EVIDENCE § 196 (1954); Morgan, BASIC PROBLEMS OF EVIDENCE 332 (1954); 4 Wigmore, EVIDENCE § 1178 (3rd ed. 1940), respectively cited hereinafter by author only.

2. McCormick § 197; Morgan 332; 4 Wigmore § 1179.

3. 4 Wigmore § 1179.

4. 8 Wigmore § 2219 (McNaughton rev. 1961).

5. Ibid.

6. McCormick § 209. Several recent cases illustrate the point. Myrick v. United States, 332 F.2d 279 (5th Cir. 1964), no error in admitting photostatic copies of checks instead of original microfilm in absence of suggestion to trial court that photostats were incorrect; Johns v. United States, 323 F.2d 421 (5th Cir. 1963), not error to admit concededly accurate tape recording made from original wire recording; Sauget v. Johnson, 315 F.2d 816 (9th Cir. 1963), not error to admit copy of agreement when opponent had original and did not on appeal claim there was any discrepancy.

7. Rex v. Hunt, 3 B. & Ald. 566, 106 Eng. Rep. 768 (K.B. 1820). Wigmore, § 1182, is critical of the ruling.

8. Chandler v. United States, 318 F.2d 356 (10th Cir. 1963).

9. State v. Lewark, 106 Kan. 184, 186 P. 1002 (1920).

10. Lucas v. Williams, [1892] 2 Q. B. 113 (C.A.).

11. Conrad, Magnetic Recordings in the Courts, 40 Va. L. Rev. 23 (1954), in SELECTED WRITINGS ON EVIDENCE AND TRIAL 63, 66 (1957).

12. 4 Wigmore § 1182.

13. Morgan 333.

14. McCormick § 198; 4 Wigmore § 1245.

14a. Tracy, The Introduction of Documentary Evidence, 24 Iowa L. Rev. 436, 459 (1939).

15. Meyers v. United States, 171 F.2d 800, 11 A.L.R. 2d 1 (1948), cert. denied 336 U.S. 912.

16. People v. Sica, 112 Cal. App. 2d 574, 247 P.2d 72 (1952), recording of telephone conversation.

17. Prettyman, Circuit Judge, in Meyers v. United States, supra n. 15.

18. McCormick § 198; Wigmore § 1244.

19. 4 Wigmore § 1242.

20. McCormick § 198.

21. 4 Wigmore § 1247.

22. United States v. Alexander, 326 F.2d 736 (4th Cir. 1964).

23. McCormick § 200.

24. Wigmore § 1253.

25. Foster-Holcomb Investment Co. v. Little Rock Publishing Co., 151 Ark. 449, 236 S.W. 597 (1922).

26. Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 68 N.E. 1087 (1903).

27. Annot. 65 A.L.R. 2d 342, 355.

28. 4 Wigmore § 1234.

29. McCormick § 206.

29a. Annot. 76 A.L.R. 2d 1356.

30. Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd., 265 F.2d 418, 76 A.L.R. 2d 1344 (2d Cir. 1959). The situation is complicated by the possibility that a retained copy, no matter how produced,

may qualify as a business record, being an original for that purpose. United States v. Manton, 107 F.2d 834 (2d Cir. 1938), recordak of checks clearing through bank; Chicago & E. I. R. R. Co. v. Zapp, 209 Ill. 339, 117 N. E. 286 (1917), letter-press copies of weather reports retained by local bureau, originals being sent to Washington; Hall v. Pierce, 210 Ore. 98, 307 P.2d 292, 65 A. L. R. 2d 316 (1957), retained carbons of letters.

31. Supra, n. 30.

32. See McCormick §§ 201-203.

33. Wigmore § 1206.

34. McCormick § 204; 4 Wigmore §§ 1215-1228.

35. Wigmore § 1230.

36. See Wilson v. South Park Commissioners, 70 Ill. 46 (1873); cf. McCormick § 207, discussing a proposal that the proponent, before using recollection testimony, be required to show that he does not have a copy available, and that, before using a remote copy, he be required to show that he has available no first-hand copy.

37. 4 Wigmore §§ 1269, 1273.

38. Slatterie v. Pooley, 6 M. & W. 664, 151 Eng. Rep. 579 (Exch. 1840).

39. See 4 Wigmore § 1255 for this criticism.

40. Ibid.

41. McCormick § 208.

42. 4 Wigmore § 1259.

Advisory Committee on Evidence

Memorandum No. 3

First Draft

Article X. Contents of Writings and Recordings

Rule 10-01. Definitions. For purposes of this article the following definitions are applicable:

(a) "Writings and recordings" consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse mechanical or electronic sound recording, or other means, ~~in reasonably permanent form.~~

(b) The "original" is the writing or recording itself or any counterpart intended to be legally operative.

(c) A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, or by mechanical or electronic re-recording, or by other equivalent technique designed to insure a precise reproduction of the original.

Comment

Subsection (a). The caption of Article IX of the Uniform Rules indicates that the article deals with "writings". Probably most people, including

lawyers, think of a writing essentially as words written on a piece of paper. Only when one turns to the definition in Uniform Rule 1 (13) does he find that the article deals with sound recordings, pictures, and inscribed chattels of all kinds. The use of the term "documentary originals" in the caption of Uniform Rule 70 compounds the likelihood of confusion. Wholly aside from any questions of the wisdom of stating the best evidence rule so as to include such items, it is suggested that it not be done by evolving a definition which attaches an artificial meaning to a common term. Whatever is done ought to be in a form which is readily perceived and understood.

The proposed definition is more restrictive than that of Uniform Rule 1 (13). It is drafted on the theory that the best evidence rule over the years has solidified into a rule concerned only with words or their equivalent and ought not to be expanded into other areas. Recording words electronically on tape or otherwise "storing" them is certainly the equivalent of writing them on paper. The emphasis is on the words, rather than on the means of recording them. If the rule requiring production of the "best evidence" is extended beyond words, then there is no apparent logical stopping place.

The best evidence rule is a highly technical rule. It is inevitably raises uncertainties as to when "secondary" evidence is admissible. The expansion of discovery has lessened the need for and reduced the utility of the rule. It is submitted that to extend the applications of the best evidence rule is not progress and that progress more likely lies in effecting some restriction of the rule. McCormick indicates that extending the rule beyond writings would be "a sore incumbrance upon the parties" (p. 411) and that the Uniform Rules definition is calculated to encourage inflexibility in dealing with new forms of "writings". (p. 412, n. 5) Morgan suggests that the inclusion

of "pictures and recorded sounds may be debatable." (p. 333)

Subsection (b) is designed to insure that "copies" are treated as originals when the parties so regard them or give them currency as such. Examples are: a signed carbon copy of a contract executed in duplicate, and a carbon copy of a sales ticket given the customer.

Subsection (c). The definition of "duplicate" is included as a means of describing a "copy" produced by a method calculated to reproduce the same words with precision. In a subsequent rule, a duplicate will be accorded essentially the same standing as an original, except when a substantial question is raised as to authenticity or completeness. In this way it is believed that all accurate copies can be used, subject to reasonable safeguards. Is the definition broad enough to include subsequently made manual copies? Should it be, especially with respect to compared copies? Compare Rule 10-08, infra.

Rule 10-02. Best evidence rule. To prove the content of a writing or recording the original writing or recording is required, except as otherwise provided in these rules.

Comment

This is the conventional best evidence rule, expanded to include sound recordings, but excluding pictures and objects not bearing words, by virtue of the definition in proposed Rule 10-01 (a) above. The language is that of the opening portion of Uniform Rule 70, except that the words "as tending" have been omitted as needless and perhaps somewhat confusing.

Each of the various exceptions is incorporated in a separate rule, and these rules immediately follow. In this respect the California approach has been adopted. Although more space is needed, the technique seems to make the contents more readily accessible and understandable than the highly condensed and complex structure of Uniform Rule 70.

A further departure from the Uniform Rules is found in phrasing the exceptions in terms of absolutes rather than in terms of "findings" by the judge. This change is designed to allay fears as to excessive grants of discretion to the trial judge. The role of the judge will be spelled out in a rule corresponding to Uniform Rule 70 (2), which deals specifically with best evidence situations, and in a general rule on the function of the judge along the lines of Uniform Rule 8.

Rule 10-03. Exception: Duplicates. A duplicate is admissible to the same extent as an original unless a substantial question is raised as to the authenticity of the original or fairness requires ~~access to~~ parts of the original not included in the duplicate. ~~In either of these events, the duplicate constitutes secondary evidence.~~

Weinstein suggests a requirement of notice of intention to use duplicate and furnishing a copy.

receipt of the duplicate without accounting for the original is unfair because are

Comment

The proposed rule represents an effort to deal with the situations in which the only consideration is to get the words before the court with precision. This need can be satisfied as readily by use of an exact copy as by the original. If, however, there is a substantial question as to the authenticity of the original, a copy is not as satisfactory as the original, and the rule is drafted accordingly. Similar considerations prevail as to situations in which only a part of the original is reproduced, and the remainder is needed for cross-examination or may disclose aspects useful to the opponent. It should be pointed out that the best evidence rule as conventionally administered affords no assurance that all of a set of books or of a series of documents will be produced.

Rule 10-04. Exception: loss or destruction. ~~Secondary~~ Other evidence of contents is admissible if ~~the~~ all originals ~~are~~ lost or ~~has~~ have been destroyed without fraudulent intent on the part of the proponent. ~~of the evidence.~~

Comment

The language is that of clause (a) of Uniform Rule 70. It differs from California Evidence Code § 1501 in containing no reference to a copy. The difference is due to the non-recognition of degrees of secondary evidence in the Uniform Rules. If the Committee should determine that degrees of secondary evidence should be recognized, the matter can be covered in a rule to that effect. The California approach is believed to be needlessly complicated.

The rule stated is the common law. McCormick § 201. It scarcely seems feasible to spell out in detail the kind of search which must be conducted before a document can be regarded as lost.

Rule 10-05. Exception: Originals unavailable by process or other means. ~~Secondary~~ Other evidence of contents is admissible if ~~the~~ no original cannot be obtained by court process or by deposition and the proponent has been unable to obtain it by other reasonable means.

Comment

If a document which has been neither lost nor destroyed might be obtained through judicial machinery, the policy of the best evidence rule would seem to require a showing that resort to legal process is ineffective. The available mechanisms are subpoena and deposition. The proposed rule requires that the possibilities of both be exhausted. Subpoenas of federal courts have a limited reach. Under Federal Rule of Civil Procedure 45 (e), a subpoena may be served anywhere in the district or outside the district within 100 miles of the place of trial, although in anti-trust cases the court may order that subpoenas issue for witnesses at greater distances. 15 U.S.C. § 23. A court of the United States may issue a subpoena for a national or resident of the United States who is in a foreign country upon a finding that his testimony or the production of a document or thing by him is necessary in the interest of justice, and, except in criminal cases, if his testimony cannot be obtained in admissible form without his personal appearance or the document or thing cannot be obtained in any other manner. 28 U.S.C. § 1783, as amended Oct. 3, 1964. In civil cases, the areas beyond the reach of subpoenas are pretty well within the reach of depositions: a deposition may be taken anywhere in the United States under Federal Rules of

Civil Procedure 26 and 28, and it may be assumed that any civilized foreign nation has provisions for lending its judicial machinery to the taking of depositions for use in the United States. While 18 U.S.C. §§ 3491-3496 sets up a procedure for authenticating documents for use in a criminal prosecution in the United States, it does not provide means to compel production except insofar as the foreign judicial machinery may be invoked in the taking of depositions. If these possibilities are to be exhausted before secondary evidence is used, there should be included in the rule a more definite statement than the ambiguous "outside the reach of the court's process" of Uniform Rule 70 (1) (b). Hence the proposal contains specific mention of depositions.

Since subpoenas and depositions taken together leave some areas not covered, it seems proper to adopt the view of the common law requiring the proponent of secondary evidence to use other reasonable means to secure an original which is beyond the reach of process. McCormick § 202. A provision to that effect accordingly has been included. Admittedly any requirement of using "reasonable means" will raise questions of what constitutes compliance, but the inclusion of further detail can scarcely be justified.

Rule 10-06. Exception: In control of opponent. ~~Secondary~~ Other evidence of contents is admissible if, at a time when ~~the~~ an original was under ~~the~~ his control ~~of the opponent,~~ he was ~~expressly or impliedly notified,~~ put on notice by the pleadings or otherwise, that the contents of the writing or recording would be a subject of proof at the hearing, and he fails to produce the original at the hearing.

Comment

The language is from Uniform Rule 70 (1) (c), with some modifications, and expresses the common law. McCormick § 203. The Uniform Rule provision regarding notice is worded unfortunately and is susceptible of being read as limited to express or implied notice in the pleadings or, with respect to implied notice, as limited to that in the pleadings. It seems unwise to risk any such limited meaning, since notice is notice, however obtained. Accordingly the broader language of California Evidence Code § 1503 (a) has been used to describe notice.

The Uniform Rule requires the notice to be that the writing will be "needed" at the hearing and further requires that a request to produce the original be made at the hearing. These are believed to be unnecessary and have been omitted. If the proponent wishes the original, he can obtain it by subpoena duces tecum or by court order. The only apparent purpose of the notice is to afford the opponent an opportunity to head off secondary evidence by producing the original. Cf. 4 Wigmore § 1202,

to the effect that the reason for requiring the request (notice) is to show that the party has taken all reasonable means to procure the original, a view which seems to date back for support to the time when law courts would not require a party to produce documents. The elimination of any provision for requesting the production of the original also eliminates any need for a provision that the request not be made in the presence of the jury in a criminal case. It also eliminates any contention that the prosecution need not give notice to the accused in a criminal case because to require production would violate his privilege against self-incrimination. The same approach is found in Rule 70 (1) (c) of the Report of the New Jersey Supreme Court Committee on Evidence.

Rule 10-07. Exception: Collateral writings and recordings. Other Secondary evidence of contents is admissible when the writing or recording is not closely related to a controlling issue.

Comment

Uniform Rule 70 (1) (d) contains the added requirement that "it would be inexpedient to require its production." This seems to go beyond the common law. See the cases in McCormick 412, n. 1. As the California Law Revision Commission Study of Article IX of the Uniform Rules points out (p. 154) the term "collateral" was sufficiently vague to allow considerable discretion in the judge. To add an inquiry into "expediency" seems only to confuse.

Rule 10-08. Exception: Official records. The contents of an official ~~regularly kept in a public office and available~~ a record, or of a writing affecting property authorized to be recorded ~~to public inspection~~ if otherwise admissible, and actually recorded in the public records, may be proved by copy, certified as correct by the custodian thereof or testified to be correct by a witness who has compared it with the original. If a ~~admissible~~ copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Comment

The first sentence is substantially Uniform Rule 70 (1)(e), with the addition of a provision permitting proof by copy certified or testified to be correct. Other secondary evidence is admissible only if the copy cannot be obtained by exercising reasonable diligence. This seems to be a situation in which the idea of degrees of secondary evidence requires recognition, even though it is not otherwise adopted. If degrees of secondary evidence are recognized generally, the redrafting of this rule should be considered.

The authentication aspect is treated under proposed Article IX.

In the Report of the New Jersey Supreme Court Committee on Evidence (p. 227) and in California Evidence Code § 1506, reference is made to other documents (writings) in the custody of a public officer (public entity). This extension has been rejected in the proposal as extending the exception unjustifiably to include such things as confessions and correspondence in the possession of public officers,

which seem to lack the assurances felt to be present with the more conventional varieties of public records. In People v. Dolgin, 415 Ill. 434, 114 N.E. 2d 389 (1953), a prosecution for counterfeiting cigarette tax stamps, the court upheld the admission of a certified copy of a letter from the meter manufacturer, setting forth the counterfeit-detection code, contained in the files of the state Department of Revenue. While the result in the particular case is quite acceptable, it may be about as far as the Committee is prepared to go. "Writings in the custody of a public officer" goes considerably farther.

Rule 10-09. Exception: Summaries. The contents of voluminous writings or recordings which cannot conveniently be examined in court may be presented in the form of a summary or calculation. The originals shall be made available for examination or copying, or both, by ~~the opponent~~ the parties at a reasonable time and place, and the judge may order that they be produced in court.

Comment

This is the familiar exception which permits the use of summaries. As a protection to the opponent, he is assured the opportunity to examine the material to prepare for cross-examination or to work up his own summary. 4 Wigmore § 1230. The situation is not covered by the Uniform Rules but is treated in Rule 70 (1)(g) of the Report of the New Jersey Supreme Court Committee on Evidence and in California Evidence Code § 1509. The California Code does not provide for requiring production in court, while the New Jersey proposal contains no provision for examination in advance of trial.

Rule 10-10. Exception: Testimony or written admission. Contents may be proved by the testimony or deposition of the party against whom offered or by his written admission.

Comment

Except insofar as it excludes oral admissions, the proposal represents the English rule, and is in accord with the views expressed in McCormick §208. A parallel provision is found in Rule 70(1)(h) of the New Jersey Supreme Court Committee on Evidence. The Uniform Rules do not cover the subject.

Note on Degrees of Secondary Evidence

If the Committee desires to incorporate a rule recognizing degrees of secondary evidence, the following draft is submitted as a basis for discussion. Proposed New Jersey Rule 70(2) requires the best written secondary evidence which is conveniently available and admits oral testimony only on a showing that no written secondary evidence is conveniently available. The California Evidence Code, as a part of its approach to best evidence by a series of negatives, provides in §§1505 and 1508 that the best evidence rule does not render other evidence of contents inadmissible if the proponent is not in possession of a copy of specified documents. Perhaps the question can be approached more directly.

If the following or an equivalent provision is approved, some re-examination will be required of the rules dealing with the various exceptions. The phrase "secondary evidence" appears only in proposed Rules 10-04 to 10-07, inclusive, and a preference for an exact copy scarcely complies with the relative informality contemplated by Rule 10-07 (collateral documents).

Unanimously rejected

Rule 10- . Degrees of secondary evidence. When proof of contents by secondary evidence is allowed by these rules, preference is given to an exact copy. Only upon a showing that an exact copy is not conveniently available may other evidence of contents be given.

Rule 10-11. Functions of judge and jury. Evidence in support of a contention by the opponent (a) that the asserted original never existed, or (b) that another writing, photograph, or recording produced at the trial is the original, or (c) that the other secondary evidence does not correctly reflect the contents of the asserted writing, is irrelevant to questions of admissibility but raises an issue to be determined by the trier of fact. A ruling by the judge on the admissibility of evidence of contents other than the original is not a finding upon any of these issues of fact.

Comment

Most preliminary questions of fact in connection with the application of the best evidence rule are for the judge, as is true of most preliminary questions. Professor Levin's helpful discussion (Authentication and Content of Writings, 10 Rutgers L. Rev. 632, 644, 1956) points out that certain preliminary best evidence questions must, however, be left to the jury. He suggests an offer of a carbon copy of a contract by a plaintiff prepared to show the original was lost without his fault, countered by evidence that no such contract was ever executed. If the judge passes on the issue and decides against plaintiff, the case is at an end without ever going to the jury on a central issue.