Document Summaries in Court

In modern litigation the so-called documents case has become a significant phenomenon. Though 30 years ago it might have been startling to find 17 million pages of evidence (see *Transamerica Computer Co., Inc. v. International Business Machines Corp.*, 573 F.2d 646, 648 (9th Cir. 1978)), that is not true today. Litigation involving a huge volume of material - especially with the proliferation of electronically stored information - is now the rule rather than the exception.

When a complex case goes to trial, the sheer volume of information may overwhelm and confuse the trier of fact. To minimize this risk, a litigator must radically simplify his or her trial presentation.

A written summary of voluminous documents is likely to be helpful, but there is some uncertainty over whether such a summary constitutes admissible evidence in state court.

Federal-State Dichotomy

In federal court, the rules expressly authorize the use of summaries. (Fed. R. Evid. 1006.) In California courts, however, the situation is different. For many years, state court procedure paralleled the federal rules. But in 1999 a new set of California statutes took effect, and they did not include an express provision similar to Rule 1006. (Compare former Cal. Evid. Code § 1509 with current §§1521-22.) California's appellate courts have yet to definitively resolve how these changes apply to a written summary. Even so, it appears that a comprehensive summary may still be introduced into evidence in a state court proceeding.

Federal Procedure

The Federal Rules of Evidence contain a clear statement of the traditional "Best Evidence Rule," which requires production of the original to prove the content of a writing. (Fed. R. Evid. 1002.) When a writing is voluminous, Rule 1006 provides a powerful tool for simplification. It provides that a party may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent of such a summary must make the originals or duplicates available for examination or copying - or both - by other parties at a reasonable time and place. And the court may order the proponent to produce the originals in court.

The admission of a written summary pursuant to Rule 1006 is a practical means of making a voluminous writing available to the judge and jury. As a condition precedent to admitting such a summary, however, the proponent must demonstrate the admissibility of the underlying writing (or writings) that are summarized. (See *United States v. Cecil*, 615 F.3d 678, 690 (6th Cir. 2010).)

State Procedure

As noted, until 1999 the California rules of evidence tracked their federal counterpart. Section 1500 of the California Evidence Code generally mandated production in court of original documents. California also recognized numerous exceptions to the Best Evidence Rule, including one similar to federal Rule 1006. Before it was repealed, section 1509 of the state evidence code provided that "secondary evidence" of the content of a writing, whether written or oral, may still be admissible despite the Best Evidence Rule, provided in general that the writing consists of numerous accounts or other writings and cannot be examined in court without great loss of time. The section further provided that the court may require that the underlying documents be produced for inspection by the adverse party. California courts construed former

section 1509 in the same general fashion as Rule 1006 (see *Wolfen v. Clinical Data, Inc.*, 16 Cal. App. 4th 171, 182-83 (1993)).
Everything changed when the Legislature enacted a new scheme - referred to as the Secondary Evidence Rule. (See 1998 Cal. Stats. ch. 100.) As part of this reform, section 1509 was repealed. Some, but not all, of its language was continued in new section 1523, which states that unless provided by statute, "*oral testimony* is not admissible to prove the content of a writing." (Cal. Evid. Code § 1523(a) (emphasis added).) However, the section goes on to state that "[o]ral testimony of the content of a writing is not made inadmissible ... if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole." (Cal. Evid. Code § 1523 (d).)
Section 1523 thus expressly authorizes the receipt of oral testimony summarizing voluminous records, but it does not refer to a written summary. Nevertheless, as explained below, logic suggests that the law ought to permit the use of such a summary.

Legislative Intent

California's current statutory scheme supports this common sense result. The new provisions of the Evidence Code were enacted on the recommendation of the state's Law Revision Commission, which found that the Best Evidence Rule had become unnecessary due to technological developments and the expansion of pretrial discovery. The commission also pointed out that the parties' normal motivation to present the most convincing evidence naturally discourages the use of unreliable secondary evidence. It recommended that secondary evidence of the content of a writing be generally admissible - rather than presumptively inadmissible as under the Best Evidence Rule. (See Best Evidence Rule, 26 Cal. L. Revision Comm'n Reports 369 (1996).)

Secondary Evidence Rule

The Legislature adopted that recommended approach. Section 1521, which contains the Secondary Evidence Rule, states that "[t]he content of a writing may be proved by otherwise admissible secondary evidence." The section further requires the court to exclude secondary evidence of the content of a writing if it determines either that a "genuine dispute exists concerning material terms of the writing and justice requires the exclusion" or that admission of the secondary evidence would be "unfair." (Cal. Evid. Code § 1521(a)(1) and (a)(2).) Before secondary evidence can be admissible, it must be authenticated pursuant to other portions of the code. (§1523(c); see §§ 1401-54.)

Written Summaries

A key question is whether a written summary of a voluminous writing can constitute secondary evidence and be used at trial.
Although the expression *secondary evidence* has appeared in the California Evidence Code ever since its enactment in 1965, the code has never defined the term. Similarly, courts applying the Best Evidence Rule appear to have understood the expression so well that they typically did not consider it necessary to discuss its meaning. (See *People v. Wright*, 52 Cal. 3d 367, 391-93 (1990), and *Osswald v. Anderson*, 49 Cal. App. 4th 812, 818-20 (1996).)
The expression *secondary evidence* seems widely accepted to have encompassed any evidence of the content of the writing, other than the original document itself. As Justice Stanley Mosk put it in a case decided before the Legislature changed the rules, "the best evidence rule ... declares that evidence other than the original of a writing, i.e., secondary evidence, is generally inadmissible

to prove the writing's content." (*People v. Woodell*, 17 Cal. 4th 448, 464-65 (1998) (Mosk, J., concurring in part & dissenting in part).)

While the Best Evidence Rule was in force in California, secondary evidence was understood to include a written summary of a voluminous writing. In fact, the provision relating to voluminous writings (former section 1509) expressly referred to "secondary evidence" of the content of a voluminous writing, not to a written or oral summary of the content of such a writing. By applying this provision to a written summary of a voluminous writing, as in *Wolfen* and cases cited therein, courts necessarily characterized the written summary as secondary evidence of the content of the writing. (By parity of reasoning, an oral summary would then also be secondary evidence.)

The replacement of the Best Evidence Rule with the Secondary Evidence Rule in 1999 did not change the status of a written summary of voluminous material, which remains a type of secondary evidence. Indeed, while the legislation in question was pending, several parties raised the possibility of including a statutory definition of secondary evidence. However, the Legislature adopted the Secondary Evidence Rule without a definition - and without manifesting any intent to change the long-standing usage of the expression. (See Assembly Committee on Judiciary Analysis of SB 177 (June 9, 1998); and Senate Committee on Criminal Procedure Analysis of SB 177 (March 18, 1997).)

Because California's section 1521 makes secondary evidence generally admissible and because a written summary is secondary evidence, such a summary may still be admissible in state court. Several unpublished appellate opinions hold as much. (See *Brown Field Aviation Park, LLC v. PB Aviation, Inc.*, 2005 WL 1684689 (Cal. Ct. App.), and *People v. Grant*, 2002 WL 343165 (Cal. Ct. App.).) A published case also reaches that result, albeit without much analysis and with a citation to section 1523 instead of section 1521 (*Heaps v. Heaps*, 124 Cal. App. 4th 286, 293-94 (2004)).

Written and Oral Summaries

Further, the adoption of the Secondary Evidence Rule explains why the code no longer contains a statutory exception specifically authorizing admission of a written summary of a voluminous writing. Section 1509 was repealed because there is no longer a general bar to the admissibility of secondary evidence; there is no need for an exception to a nonexistent general rule. As the court of appeal explained in another unpublished decision, "[o]nce secondary documentary evidence became generally admissible, there was no longer a need for a specific provision governing documents summarizing voluminous writings." (*Schmidt v. Rubber Tech. Int'l, Inc.*, 2006 WL 3290969 (Cal. Ct. App.).)

Why, then, does the Evidence Code continue to include a provision (section 1523(d)) specifically authorizing the use of an *oral* summary of a voluminous writing? The answer is that in proposing the Secondary Evidence Rule, the Law Review Commission distinguished between oral testimony and written evidence of a document's contents. It explained that "people usually cannot accurately recall the words of a writing," and oral testimony is "more difficult to control than documentary evidence." Consequently, the commission endorsed a general principle "preserv[ing] existing law making oral testimony inadmissible to prove the content of a writing, except in limited circumstances." (Best Evidence Rule, 26 Cal. Law Revision Comm'n Reports at 377 & n.21, 389-90 & n.54.) Section 1523 implements that principle, and Section 1523(d) simply clarifies that section 1523(a)'s general ban on the use of oral testimony does not apply to oral summaries.

For these reasons, both a written summary and oral testimony of the content of a voluminous writing may be admitted into evidence. Both qualify as secondary evidence under section 1521. But an oral summary must also satisfy Section 1523(d). (See § 1521(b); *Brown Field Aviation Park*, 2005 WL 1684689 at *11, and *Schmidt*, 2006 WL 3290969 at *9-10).

Admissibility Requirements

Although the Secondary Evidence Rule authorizes the use of summaries to prove the content of a voluminous writing, summaries are not automatically admissible. Among other restrictions, the court must exclude secondary evidence if the judge determines that a genuine dispute exists concerning material terms of the underlying writing and that justice requires exclusion of the proffered evidence. (See § 1521(a)(1).)

The rules also require a judge to exclude secondary evidence when admission of that evidence would be unfair. (See § 1521(a)(2).) In making this determination, the court may consider a broad range of factors, including whether:

- the proponent attempts to use the writing in a manner that could not reasonably have been anticipated;
- the original was suppressed in discovery;
- discovery conducted in a reasonably diligent (as opposed to exhaustive) manner failed to result in production of the original;
- there are dramatic differences between the original and the secondary evidence (for example, the original but not the secondary evidence is in color and the colors provide significant clues to interpretation);
- the original is unavailable and, if so, why; and
- the writing is central to the case or collateral.

The Secondary Evidence Rule further states that the content of a writing must "be proved by otherwise admissible secondary evidence." (§ 1521(a).) The phrase "otherwise admissible" indicates that a writing "that passes muster under the secondary evidence rule is not necessarily admissible." (*Molenda v. Dep't of Motor Vehicles*, 172 Cal. App. 4th 974, 994 (2009).) The written summary may still be inadmissible because of another evidentiary rule, such as hearsay, relevance, or authentication.

Of particular note, a special restriction in section 1522 applies to secondary evidence in a criminal case: If the proponent has the original, the proponent generally may introduce secondary evidence only if the proponent made the original reasonably available for inspection at or before trial.

Any litigator who has tried a documents case will attest that the type of written summary authorized by Federal Rule of Evidence 1006 can be very helpful for reducing the trial presentation to digestible proportions for the jury. At one time, the California Evidence Code contained a similar provision, permitting the use of both written and oral secondary evidence of a writing that cannot be examined in court without consuming undue time. In 1998 the Legislature enacted the Secondary Evidence Rule to liberalize the admissibility of secondary evidence. It would be anomalous if an unintended consequence of that reform was to bar the use of helpful written summaries in California trials awash in a sea of paper evidence. Fortunately, as shown above, the very first sentence of Evidence Code Section 1521 prevents that misstep.

Edward J. Imwinkelried and Miguel A. Méndez are law professors at UC Davis. Barbara S. Gaal is chief deputy counsel to the California Law Revision Commission; however, views expressed herein are the authors' and not necessarily endorsed by the commission. Attorneys Michael D. Schwartz and Walter R. Zagzebski helped with research.