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The Best Evidence Rule is Dead . . . Except in the Mind of the Law!



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Traditions are hard to change, especially in the legal profession. The reliance of the legal community on precedent highlights the problem. Legal precedent means "looking at yesterday's solutions to today's problems."

The law changes slowly to protect society. All of us want to be treated fairly. When the "rules of the game" remain constant, we can modify our behavior to conform with what the law expects. If the rules constantly change, we may not know what is expected or what we can or cannot legally do. If the law changes too fast, we end up punishing people for actions they could not reasonably anticipate. While "ignorance of the law is no excuse", ignorance of changes in the law is also no excuse.

Courts will generally utilize precedent — previously established legal principles — when determining the outcome of current cases. The public should already be familiar with yesterday's solutions or legal principles. In most cases, we expect these established principles to merely be applied to new fact situations.

State and federal legislative bodies also change the law at a slow pace. Each change in a statute requires slow and careful deliberation. United States federal regulations, for example, cannot be changed until the public has been provided adequate time to comment and the Office of Management and Budget has reviewed recordkeeping provisions falling under the Paperwork Reduction Act.

In some cases, however, the established legal principle has outgrown its usefulness. Change is needed at a much faster pace than provided for by the normal pace of change.

The evolving technologies affecting records represent an obvious area where change in the law is needed at a much faster pace than is currently being addressed by courts and legislative bodies. The change that is needed is not related to a particular technology or approach — contrary to the view of advocates trying to change current laws to recognize optical disk technology. The change that is needed relates to the underlying legal principle governing the legal acceptance of records — the Best Evidence Rule.

The Best Evidence Rule

The Best Evidence Rule has evolved from court decisions starting in the Middle Ages and laws enacted primarily in the last one hundred years. In its most basic form, the Best Evidence Rule states that the best or highest form of evidence available to a party must be presented in evidence. For example, a party cannot rely solely on the testimony of an individual who knows something about a subject when another individual is available who is thoroughly familiar with the facts in the matter.

The Best Evidence Rule originally was developed to ensure that the courts considered the best evidence related to a particular matter. In the Middle Ages, live testimony was the primary form of evidence accepted by courts. At that time, courts did not allow records in any form to be admitted in evidence because they were hearsay — records created outside of the court that a party wanted to introduce into evidence to prove the truth of the matter asserted in the records. Between live testimony and records, live testimony was not just the best evidence, it was the only evidence.

As British society progressed through the Middle Ages, more and more organizations maintained records that accurately documented transactions. When employees familiar with certain events became unavailable to testify at trial, these organizations requested the courts to accept records in place of the live testimony. The pressure on the courts to change the Best Evidence Rule grew as the volume and reliance on records grew.

Finally, succumbing to substantial societal pressure, courts modified prevailing rules of evidence to recognize the "Business Records Exception to the Hearsay Rule". This exception permitted records to be admitted in evidence (even if the author of the record was unavailable), provided certain conditions were met related to the creation and maintenance of the records. Courts recognized that records could not be subject to cross-examination and other safeguards leading to truthfulness such as the swearing in process for witnesses. Courts viewed the method or circumstances for preparing the records as the primary safeguard to ensure the accuracy of the records introduced into evidence.

In modern times, the Business Records Exception to the Hearsay Rule has been embodied in provisions in the Uniform Business Records Act and the Uniform Rules of Evidence. Both uniform laws establish the criteria for producing records that can be admitted into evidence. Some of the major provisions found in these laws include making the record at or near the time of the event, obtaining information for the record by or from somebody with knowledge, producing the record in the regular course of business and providing a custodian or other qualified person as a witness to testify regarding the methods used to create the records.

With these exceptions to the hearsay rule, the Best Evidence Rule also evolved to recognize records as a primary form of evidence. Where once live testimony was the only form of evidence, now live testimony and records served as primary forms of evidence. In fact, some judges believe that records might even be a better form of evidence than live testimony since peoples' memory changes and weakens over time while records preserve the information in the same form in which it was originally recorded.

The Best Form of Records

The Best Evidence Rule not only permitted records to be introduced as a primary form of evidence, but also specified that the original records would be preferred. In the spirit of the rule, when given a choice between two forms of the same records such as the originals versus duplicates, the court will normally require the original, paper records to be produced.

This position evolved initially because the original record was not just the preferred form of the record, but probably the only reliable form. Clearly, reproduction technologies as we know them today were not available in the Middle Ages. Duplicates were made at that time only through the transcription process — the copying of records by hand involving human intervention. Because of the high likelihood of error, transcription could not produce trustworthy results.

The early courts and later laws required the original records to be produced in evidence except under a few limited circumstances when the originals were not available. Circumstances recognized include situations where the originals were

public records, the originals had been destroyed, the originals were in the possession of an adverse party who refused to cooperate, or the originals simply could not be found with reasonable effort. Once these situations were adequately proven to the court, reproductions could then be admitted.

In the Uniform Rules of Evidence, the preference for original records has been perpetuated. Rule 1002 specifies the requirement for original records as follows:

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required except as otherwise provided in these rules or by statute.

Although Rule 1003 permits the introduction of duplicate records, the requirement of Rule 1002 clearly establishes a preference for the original unless other conditions in the rule have been satisfied.

The Uniform Photographic Copies of Business and Public Records As Evidence Act was developed in the late 1940's to counteract the effect on duplication of the traditional Best Evidence Rule. The UPA itself therefore only addresses the legal status of duplicates. Most jurisdictions will still have a restatement of the Best Evidence Rule related to originals in either the Uniform Rules of Evidence or other equivalent statutes or rules of evidence.

Besides the historical basis for the Best Evidence Rule, some commentators believe that the preference for original records serves to reduce forgeries or other fraud in duplicates. They argue that alterations can readily be detected in original documents while similar detection is difficult if not impossible in duplicates. They also argue that handwriting analysts can more accurately analyze signatures from original records than from duplicates.

Best Evidence Rule in Regulations

While state and federal regulations do not explicitly state a position similar to the Best Evidence Rule, they normally show a preference for originals over duplicates. For example, the Securities and Exchange Commission requires broker-dealers to maintain a variety of different records [17 CFR 240.17a-3 and 17a-4]. Many assume that the law requires the maintenance of original, paper records. In reality, the law does not state any particular form of records. The law merely states that microfilm may also be used.

Similarly, in tax law, the Internal Revenue Service specifies that certain records must be maintained to support the tax return. The law does not require original, paper records. The law specifically permits microfilm [Rev. Proc. 81-46] and computer records [Rev. Proc. 91-59] to also qualify under the definition of records. However, the Internal Revenue Service never specifies that original, paper records are required in the first instance.

Regulatory agencies rarely specify that original records are required. In only a few instances in the United States federal law — such as the retention of promissory notes for student loans — do we see requirements for original records.

Probably as a result of the judicial position related to the Best Evidence Rule, regulatory

agencies have also assumed a similar position. These agencies and many organizations regulated by them believe that when the law states that records must be maintained, the law means the original, paper records. If the agencies request records, they want paper records. If you want to use another technology, someone in your organization may question whether the agencies will approve.

Newer Technologies Are Sometimes Better

Based upon the traditional position of courts and regulatory agencies, original, paper records are best and all other records are inferior. This position, however, cannot stand up to scrutiny in the real world of records technology.

Actually, paper records systems sometimes produce inferior quality records for the following reasons:

- Paper records systems generally result in the preparation of one copy of the record. In case of fire, flood or other natural disasters, the single version of the record will be destroyed and no longer available for any evidence, regulatory or other purpose.
- Paper records can be altered without detection. While erasures can be detected on originals most other forms of fraud cannot. For example, when records are subpoenaed by the court or requested by government agencies, certain documents can be provided while others destroyed or hidden. The fraud resulting from the selected records can rarely be detected.
- Alternatively, original paper records can inappropriately be destroyed. These records may then be unavailable for any purpose including evidence and regulation. Unless the fraud related to the destruction is detected, the content of the records will effectively be excluded from consideration.
- Original paper records may not have a very long expectancy. Today, original paper records are produced using poor quality paper, poor quality ink, lift-off typewriter ribbons, or other inexpensive, short-term methods. Even records properly organized and stored, may not be usable in a few decades.
- Paper records are rarely created as part of a rigorous process or system. Most organizations do not even have a records management program. Even those that do, rarely establish rigorous procedures related to records creation, maintenance and disposition. Many records created in each organization reflect individual whims rather than systematic policy. The accuracy of records will therefore vary based upon the integrity, accuracy and capabilities of the individuals involved.
- Paper records systems are rarely audited for accuracy. Few organizations audit paper records systems to determine the accuracy of the information recorded.
- Paper records systems are rarely subject to adequate security. Any individual including the janitor may get access to paper records. The types of fraud discussed above can be accomplished without detection.

Modern record technology systems often differ in establishing processes or systems that produce accurate results. In modern reproduction systems such as microfilm or optical disk or even a data processing systems, we can expect the following characteristics that may result in more accurate and trustworthy records than with paper records systems:

- Modern records technology systems produce records as part of a process or system that includes standard procedures, written documentation, adequate training, etc.
- Modern records technology systems provide an audit trail to identify not only what actions were taken related to records but also identifying the individuals involved.
- Modern records technology systems often prohibit alterations to records or clearly identify when alterations have taken place. Most optical disk systems, for example, do not permit the alteration of images. If the system safeguards are bypassed, the audit trail will more than likely detect who altered the record. Regardless, the

alteration may only be performed by the most sophisticated, hardly-trained technicians perhaps only found among the technical staff of the product manufacturer.

- Modern records technology systems generally provide security backup for records produced. Typically, microfilm, computer, and optical disk systems will produce immediate backup records. These records are generally maintained in remote locations and can be retrieved if the original information is damaged or destroyed. Regulatory agencies, in particular, should encourage organizations to use technologies that result in vital records backup protection. Then, even in case of fire or disaster, the agency can continue to fulfill its regulatory duties.
- Modern records technology systems can produce more trustworthy records than paper-based systems. Since modern record technology systems are the product of sophisticated technology, highly developed procedures, systematic controls, and safeguards, the records produced may be more trustworthy and accurate than those from paper-based systems.

The quality of records produced by records technology systems may surprise most legal purists. They have continually argued that since information can be manipulated during reproduction or within a computer system, the records are inherently less reliable. This view, however, is not always correct.

Modern record technology systems can produce records that are more accurate than paper-based systems. Most systems prohibit fraud and detect unauthorized attempts at information manipulation. Most systems will also include audit trails and audits of data accuracy to ensure the overall integrity of the system.

Paper records systems can be manipulated by even the most unsophisticated person in the organization. Even janitors can selectively steal or destroy paper-based information without a trace. When disaster occurs, paper records may be lost forever.

Granted, fraud is theoretically possible in some modern technology systems. Compare this with the reality that fraud is far easier to accomplish in paper-based systems. The Best Evidence Rule clearly favors the wrong approach.

The New Best Evidence Rule

The Best Evidence Rule needs immediate, radical changes. Any reference to the original records or paper records as the best evidence should be excluded from both legal philosophy and law. The Best Evidence Rule should be changed to indicate that accurate records, regardless of form, can be introduced in evidence or used for regulatory purposes.

With the safeguards that can be built into today's modern records technology systems, the best evidence will not be the product of a particular technology but result of a trustworthy process or system used to produce the records. Rule 901(b)(9) of the Uniform Rules of Evidence reflects what should be the criteria for introducing records into evidence. Under the title of "Identification and Authentication", the rule establishes that records (or other evidence) can be admitted in evidence if the proponent provides "evidence describing a process or system used to produce a result and showing that the process or systems produces an accurate result." This definition remains independent of a bias towards originals, duplicates, or any particular technology. The accuracy of the process or system used to produce the result will determine the legal acceptance of the records.

The Association for Information and Image Management has established a task force to prepare guidelines for the legal acceptance of records technologies based upon the accuracy of the process or system used to produce the results rather than the specific technology used. While the ultimate goal of this task force is to establish the guidelines for systems, the task force also seeks to eliminate laws that specify a preference for one technology or another. The findings of the task force clearly goes contrary to the Best Evidence Rule.

Summary

The Best Evidence Rule is dead and has been dead for a long period of time. The preference for original records makes no sense at this time in our history. Paper records are not inherently more reliable than other forms of records.

Paper records often result in the poorest, least accurate, and most unreliable form of records. Fraud can readily be perpetuated in paper records systems without a trace. Little or no sophistication is required to commit fraud since security for records is rarely provided.

Modern records technology systems, on the other hand, may utilize sophisticated equipment, establish procedures, audits, and other system components to ensure the integrity and accuracy of the system. While fraud is still possible, systems safeguards make it improbable while audit trails track the source of the problem.

Paper records are not best, but neither are records produced from modern records technology systems. Each form of record must be viewed based upon the accuracy of process or system used to produce the record.

The time has come for the legal community to recognize that the Best Evidence Rule is irrelevant when it shows a preference for original paper records. The Best Evidence Rule is dead and has been dead for a long period of time. It is now time for the legal community to awaken to this reality.