Evidence Column

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EVIDENCE COLUMN

By Professor Paul R. Troeh, Jr.

MICROFILM COPIES

Rare is the ALJ, Examiner, Referee or Hearing Officer that has not gazed with a pained wince upon a dreary-gray item that is "clearly" a most unclear "microfilm copy." As counsel burrow into their files for a "better copy", agency staff woefully relate, "it's the best we can get, the clerk who microfilmed it ten years ago didn't do it right, etc., etc." The proceeding then grinds to a halt as five to ten pair of eyes peer at the "copy" and five to ten voices speculate as to what the eyes see: Is it a "6" or an "8"?: Is that a check mark in a box or merely a smudge or a crease?

While most administrative proceeding rules of evidence hurdle the "hearsay" problem, it is hard to apply a maxim such as, "... the report speaks for itself..." if the retort is, "... but what does it say?"

Microfilming of records has become ubiquitous. After such processing, the "original writings" are often (but not always) destroyed. May I tender a practical suggestion to those confronted with an unreadable microfilm "copy" of a truly relevant document? Press the custodian to determine if the original has really been destroyed. Often, the destruction of these documents is delayed, sometimes for years, and the original can be located. If not, the "reader", an appliance that looks like a cross between a T.V. set and a projector, can be brought in to directly view the film. The quality of the screened picture of the document is often far better than any "hard copy" that can be produced.

If the questions raised as to what the document "says" are resolved by either of the above techniques, do a potential reviewing court a favor and take either the original or the film into the record. This will likely distress the custodian of the subject document, possibly enough to produce from the film a better "copy". At the least, such a controversy may highlight the problem for all concerned, and produce solutions to an ongoing deficiency.

Since most administrative procedures do not hold the tribunal to the "rules of evidence" (other than relevance) the technical rules of admissibility vis a vis microfilm are typically of concern where a question of "authenticity" of the document is raised. Upon receipt of a general objection to any document, the ALJ might well ask the objecting party, "does your objection go to the authenticity of this document?" If there is no objection as to the authenticity of the document, nearly all the technical rules by which a document may be excluded from the record become rather transparent and an exercise in "form over substance." Circumstantial "guarantees" of trustworthiness of the typical document are usually expressed within its corners, e.g., the date.*

* In this regard, note the Ancient Document exception to the hearsay rule. Ed.
The inference that it was created, filmed and stored in the course of regularly conducted business activity is often self-evident. In applying the "business record exception", government has been recognized as the country's biggest business activity! See, e.g., U.S. v. Karnap, 477 F.2d 390 (4th Cir. 1973) cert. den. 414 U.S. 867, 94 S. Ct. 66, 38 L.Ed.2d 87.

If the business record contains a "copy" of a document, the copy is admissible without explaining the absence of the original. The original writing rule (best evidence rule) cannot be used to exclude the copy. U.S. v. Kimmel, 274 F.2d 54, 57 (2nd Cir. 1960).

The words "copy", "duplicate", "duplicate original" and the like have an interesting background when used in regard to rules of evidence. "Copy" referred to a hand-written or typed document "copied" from an original. This laborious method was about the only way to get a copy B.C. (Before carbon-paper.) Carbon copies, being impressed at the time an original was made were and are dubbed "duplicate originals." Reproductions made on dry copiers are perhaps best designated "duplicates." The real need for "copies" that have been "conformed" or "certified true" has lost practical necessity with the advent of photography in its various forms and the passing of those patient souls who hand copied documents. The latter method of reproduction made some attestation that the repro was accurate a necessity. How many times have you mis-transcribed something you copied by hand?

Enough of the frills; down to the true grit. Microfilm records (shouldn't it be "microfilmed records"?) are admissible in evidence in virtually every jurisdiction. In a nutshell, they come in under business record exceptions to the hearsay rule, under a variety of statutes and regulations, and under the Uniform Photographic Copies of Business and Public Records as Evidence Act (mercifully known as the UPA). See 9A Uniform Laws Anno. 580.

Everything you ever wanted to know about the status of microfilm in your jurisdiction is almost certainly covered by the 'bible' in this subject:


This top-notch reference work is easy to read, updatable, and covers federal and state statutes, regulations, policies and rules. The book can be obtained from:

Cohasset Associates, Inc.
3806 Lake Point Tower
505 N. Lakeshore Dr.
Chicago, Illinois 60611

At about $100 each, the volume is probably best bought by a group of offices such as the court, law library and archives directors, unless your government is flush. The book was reviewed in the October 1980 issue of Records Management Quarterly if your friendly librarian is skeptical of its worth and needs a sales job. The review will do it.

Eastman Kodak Company deserves praise for their 1971 volume, Admissibility in Evidence of Microfilm Records. It is considered a classic and somewhat of
a collector's item. At one time it could be bought through the National Microfilm Association, Suite 1101, 8728 Colesville Road, Silver Spring, Maryland 20919, but may be out of print.

The Williams book has one exceptionally fine section on procedures which enable an organization to implement a "legally acceptable" microfilm system. Since admissibility may hinge upon a showing that operators followed ANSI or other standards that insure a high degree of accuracy in the process, this feature of the book has the potential to see "justice" better served by aiding record custodians in assuring important records are in fact admissible in evidence.

And if you ever figure out if the entry on that "copy" was a 6 or an 8, let me know how you did it!

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