

2. Prohibit Description of Video Recording

Note: This motion can be adapted to audio recordings, still photographs, or other evidence that comes within the definition of “writing.”

TO THE COURT AND THE PROSECUTION, PLEASE TAKE NOTICE that Defendant moves the Court for an order prohibiting any witnesses from commenting or in any way mentioning any matter they may have seen on any video recording related to this action and a further order prohibiting the Prosecution from any way mentioning what any witness may have seen on any recording.

Date:

Attorney for Defendant

POINTS, AUTHORITIES, AND ARGUMENT

Law enforcement seized and viewed video recordings of events related to the instant case. These recordings are a “writing” as per *Evidence Code* §250. Under *Evidence Code* §1520 “the content of a writing may be proved by an otherwise admissible original.”

The Prosecution has offered the testimony of the arresting officer who described matters depicted in the recordings without offering the original or a duplicate of the recording. *Evidence Code* §1521, entitled Secondary Evidence Rule, requires that “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.” The video recordings come under both prongs of the test. There is a genuine dispute as to what the recordings depict, and admission would be unfair.

Evidence Code §1521(b) holds that, “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).” As stated in the law revision commission comments, (b) explicitly establishes that §1523, not §1521, governs the admissibility of “oral testimony” to prove the content of a writing. Subdivision (c) makes clear that secondary evidence is admissible only if it is properly authenticated, i.e. the proponent must authenticate the original writing as well as establish that the proffered evidence is secondary evidence of the original.

Evidence Code §1523(a) entitled “Oral Testimony of the Content of a Writing; Admissibility” states “Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing.” (As noted in the law revision commission comments, “oral testimony of the content of a writing is less reliable than other proof of the content of a writing.”

In *People v. Myers* (2014) 227 Cal. App. 4th 1219, the prosecution “sought to introduce oral testimony of the contents of a surveillance video without an audio component” the court affirmed that “Oral testimony is inadmissible as secondary evidence to prove the content of a writing or video unless ‘the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.’” (id. fn. 1)

Proffering testimony about what the officer claims he saw instead of introducing the recordings is improper. In *U.S. v. Bennett* (2004) 363 F. 3rd 947, the court noted the impropriety of “proffering testimony describing security camera footage of an event to prove the facts of the event instead of introducing the footage itself.” The court noted that “[t]his is precisely the kind of situation in which the best evidence rule applies.” The *Bennett* court also noted the fact that the government did not offer any “evidence that it would have been impossible or even difficult to download or print out the data...”

The jury is qualified to view the video recording and determine whether it depicts Defendant or some other person, the actions of the person on the video recording, and the apparent intent of the person depicted in the video recording. It would be error for the Prosecution to subvert the function of the jury by offering opinions as to what the video recording shows.