#63.60 8/28/75

Memorandum 75-63

Subject: Study 63.60 - Admissibility of Duplicates

The Tentative Recommendation Relating to the Admissibility of Duplicates in Evidence (copy attached) was distributed for comment to various interested persons and organizations.

GENERAL REACTION

With one exception (see Exhibit I), the commentators all approved the tentative recommendation in principle although some suggested matters that they believed should be considered by the Commission. Most of the letters received are attached as exhibits to this memorandum. Other persons sent the following comments:

Paul Wyler, Referee, California Unemployment Insurance Appeals Board, comments: "I hereby approve the tentative recommendation relating to admissibility of duplicates in evidence."

David S. Kaplan, General Counsel, Sacramento Municipal Utility District, comments: "I approve the . . . recommendation."

SUGGESTIONS CONCERNING TENTATIVE RECOMMENDATION

General comment. The staff believes that it would not be desirable to change the text of the proposed section. We believe that the proposed section should adopt the text of the federal rules with only such revisions as are necessary to conform to the terminology of the California Evidence Code. At the same time, we believe that the various suggestions have merit and propose various revisions or additions in the Comment to the proposed section to cover matters raised by the persons commenting on the tentative recommendation. The copy of the tentative recommendation which is attached shows the various revisions in the Comment proposed by the staff. We discuss these below.

Electrostatic method of reproduction. Exhibit VI (District Attorney, County of Los Angeles) suggests that the text of the section make specific mention of the "electrostatic" method of reproducing duplicates. We have added the following sentence to the text of the Comment: "A counterpart produced by an electrostatic method of reproducing the writing would qualify as a duplicate since it is produced by an 'equivalent technique which accurately reproduces the writing itself.'" Is this addition desirable?

Duplicate prepared for litigation. Exhibit VI (District Attorney, County of Los Angeles) suggests that a subdivision be added to the text of the section to provide that a duplicate is not rendered inadmissible because it was prepared for litigation. We have added the following sentence to the text of the Comment: "The fact that the duplicate was prepared for litigation does not prevent its admission under Section 1500.5. Compare Dugar v. Happy Tiger Records, Inc., 41 Cal. App.3d 811, 816-817, 116 Cal. Rptr. 412, ___, ___ (1974)." This is merely a clarifying addition.

Colored documents, photographs, or movies. Exhibit IV (Marzon) and Exhibit V (Kohlman) suggest that some mention be made concerning how the section will apply to colored documents, photographs, or movies. In line with Mr. Kohlman's suggestion, we have added the following sentence to the text of the Comment: "If the original is in color (such as a multi-colored document, colored photograph, or color movie), the duplicate must be in the same colors as the original unless the coloring of the original is immaterial in view of the purpose for which the duplicate is to be received in evidence." This seems to be a sound rule and the rule that would apply absent any statement in the Comment.

Liberal finding concerning genuine question of authenticity of writing itself. The House Report concerning Federal Rule 1003 states: "The Committee approved this rule in the form submitted by the Court, with the expectation that the courts would be liberal in deciding that a 'genuine question is raised as to the authenticity

of the original.'" The staff believes that it is desirable to include the same policy expression in the Comment and we have revised the relevant portions of the Comment to read:

> Under subdivision (b), duplicates will not be admitted into evidence if either a genuine question is raised as to the authenticity of the writing itself or in the circumstances admission of the duplicate would be unfair. The courts should be liberal in finding that a "genuine question is raised as to the authenticity of the writing itself." See the Comment to Federal Rule of Evidence 1003 in the House Report, Report No. 93-650, accompanying H.R. 5463, 93d Cong. 1st Sess., Nov. 15, 1973. If, for For example, if a party opposing admission of a duplicate alleges specific facts indicating makes a good faith claim that the writing from which a duplicate has been made is a forgery not authentic and it would be impractical or more difficult to determine the authenticity of the writing itself from the duplicate, the court may should require that the original be produced for examination before permitting the duplicate to be introduced in evidence. See Section 1510.

The staff believes that this is a necessary revision if we are to conform to the federal rule and the legislative history that will be used to interpret that rule. Moreover, the addition will meet the objection made by Mr. Kipperman (Exhibit I) who opposes the tentative recommendation.

Filing duplicates for inspection by other party. Exhibit IV (Merzon) suggests that a procedure be provided for filing the duplicate with the court to allow the opposing party to inspect it and make an objection and that failure to so object would be a waiver of the right to object at the trial. This is basically the scheme we proposed in our recommendation relating to admissibility of business records. The Assembly Judiciary Committee rejected that recommendation because it was considered exceedingly complex and an unwary party might inadvertently waive his right to object to evidence at the trial. As our Comment points out, in a case where a party is concerned that the other party might object to the admission of the duplicate, he can seek to obtain a stipulation as to admissibility or can use the procedure set out in Code of Civil Procedure Section 2033 to obtain an admission of the genuineness of the original. Accordingly, the staff does not recommend that the procedure suggested by Mr. Merzon be incorporated into the recommendation.

Copy of copy. Mr. Kohlman (Exhibit V) suggests that the rule should provide, or the Comment make clear, that the "duplicate" is a reproduction of the original document unless the proponent satisfactorily justifies the use of a reproduction of a copy. If this is considered to be sound policy by the Commission, the staff believes that the rule should be incorporated into the text of the statute. An alternative would be to add to the paragraph of the Comment discussing the authentication requirement, the following sentence: "Thus, if the duplicate is a duplicate of a copy of the writing itself, the person offering the duplicate in evidence must make a sufficient preliminary showing of authenticity of the duplicate, the copy of which it is a counterpart, and the original writing itself. See Section 1401 and Comment thereto." This proposal would not incorporate the rule suggested by Mr. Kohlman.

Burden of explaining post-occurrence entries or alterations. Mr. Kohlman (Exhibit V) suggests that the Comment should make clear that the proponent of the duplicate should have the continued burden of explaining and justifying any post-occurrence entries, corrections, alterations, or modifications of the original document or copy of the document from which the duplicate is made. If this point is considered to have merit, the following might be added to the discussion of authentication in the Comment: "Nothing in Section 1500.5 relieves the person offering the duplicate in evidence from the burden of explaining and justifying any post-occurrence entries, corrections, changes, alterations, or modifications in the writing itself or in the copy of the writing itself from which the duplicate is made."

APPROVAL FOR PRINTING

The staff recommends that the tentative recommendation, with such revisions as the Commission determines should be made, be approved for printing and submission to the 1976 legislative session.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 75-63

EXHIBIT I

LAW OFFICES

KIPPERMAN, SHAWN & KEKER

407 SANSOME STREET, SUITE 400

SAN FRANCISCO, CALIFORNIA 94111

STEVEN M. KIPPERMAN
JOEL A. SHAWN
JOHN W. KEKER

TELEPHONE
(415) 788-2200

August 13, 1975

California Law Revision Commission
Stanford Law School
Stanford, California 94305

RE: ADMISSIBILITY OF "DUPLICATES" IN EVIDENCE (TENTATIVE RECOMMENDATION)

Gentlemen:

Inasmuch as there is little dissatisfaction with the present Best Evidence Rule, I oppose the further "tinkering" you propose in the above-referenced Tentative Recommendation.

In this modern day of the omnipresent xerox machine, genuine-appearing copies can easily be created which in fact are not at all true copies of original documents. That simple fact I think weighs equally with your observation that true copies are easily made and used by people as though they were originals.

The present Rule is adequate, in practice it is not a problem at all, and copies are routinely used in evidence. Perhaps the greatest risk with your proposal is that I fear the trial judges of this State will be quite loathe to find that a "genuine question" of authenticity exists with respect to copies. What your proposal is going to do is make any piece of paper run on a xerox machine an admissible piece of evidence. That, I think, is a disaster.

Very truly yours,

STEVEN M. KIPPERMAN

SMK:lb

Memorandum 75-64 EXHIBIT II

GIBSON, DUNN & CRUTCHER
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WRITER'S DIRECT DIAL NUMBER

OUR FILE NUMBER

July 21, 1975

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Tentative Recommendation Relating to
Admissibility of Duplicates in Evidence

Dear John:

I think that the statute as recommended by the Commission on admissibility of duplicates in evidence represents a much needed change in the law, to accord with modern circumstances. I also think that the statute is satisfactorily drafted to accomplish the intended purpose.

Sincerely,

Dick Wolford

Richard H. Wolford

RHW:ndb

Memo 75-63 EXHIBIT III

DINKELSPIEL, PELAVIN, STEEFEL & LEVITT

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CHARLES DE Y. ELKUS, JR.
HERBERT H. SALINGER
CLAUDE N. ROSENBERG

IN REPLY REFER TO:

July 14, 1975

California Law Review Commission
Stanford Law School
Stanford, California 94305

Re: Tentative Recommendation Relating to Admissibility of Duplicates in Evidence

Gentlemen:

I have received your tentative recommendation dated June 30, 1975 regarding admissibility of duplicates in evidence and concur wholeheartedly with the report and recommendation.

Organizations have grown to the point where it is often difficult and outrageously expensive to obtain possession of originals for use in protracted litigation. At the same time, Xerox copies are commonly used in the most important business transactions without any distinction.

Therefore the adoption of the Federal Rule relating to duplicates will come as a welcome change to California law.

Sincerely,

Thomas B. Donovan

TBD:yay

Memo 75-63 EXHIBIT IV

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July 21, 1975

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Tentative Recommendation Relating to Admissibility of Duplicates in Evidence

My comments with respect to the above-referenced recommendation are as follows:

1. I agree with the concept proposed.

2. Using the example of a motion picture (a writing as defined by Evidence Code Section 250), does the definition of "duplicate" include a black and white copy of a color movie? The same question could be posed with respect to a black and white Xerox of a multi-colored document. If it is a "duplicate," then the proponent would only have to be concerned with an objection to the effect that it would be unfair to admit the duplicate on account of the importance of the colors involved to the question at issue. However, if it does not qualify as a "duplicate," then the suggested change doesn't do much good because there are a great many writings in which the original contains more than two colors. Therefore, I feel that the definitional section should be expanded to make it clear whether or not the color scheme has to be reproduced in order for a copy to qualify as a "duplicate."

3. Although it is suggested that CCP 2033 be used to satisfy foundational problems, it might be preferable to set forth a procedure whereby the proponent can, for example, file the "duplicates" with the court and allow the opposing party a certain period of time in which to file objections thereto pursuant to Section 1500.5(b) or otherwise such objections will be deemed waived. In other words, there has to be some sure way of walking into court knowing that the "duplicates" can be used without one of the indicated objections being made, otherwise the utility of the section is destroyed.

Sincerely,

JAMES B. MERZON
JBM:ljt

Memo 75-63 EXHIBIT V

BOWERS, PRIEST, NOBLER & KOHLMAN
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DAVID H. BOWERS
MICHAEL PRIEST
ALAN L. NOBLER
RICHARD J. KOHLMAN
IAN M. CRIBBS

July 30, 1975

California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

RE: Tentative Recommendation relating to Admissibility of "Duplicates" in Evidence

Gentlemen:

I have received and reviewed the tentative recommendation relating to admissibility of "duplicates" in evidence dated June 30, 1975.

As a trial lawyer with twelve years experience and having recently taught evidence at the University of Santa Clara School of Law, I am intimately familiar with the problems that the tentative recommendation deals with. I am in general support of the recommendation.

However, I foresee two possible problems which should be considered before the final recommendation is submitted.

The first problem concerns colored originals. Reproduction technology has now reached a point where a multi-colored document can be copied and reproduced in the colors as the original. I think the proposed statute or the comment should make it clear that the duplicate should be the same colors as the original unless the coloring of the document is immaterial in the purpose for which it is offered into evidence.

The second problem concerns copies of copies and post-occurrence alterations of the original document or copies of the document from which "duplicates" are made. I think the rule should provide, or the comment make clear, that the "duplicate" is a reproduction of the original document unless the proponent satisfactorily justifies the use of a reproduction of a copy of the original. Also, you should have the continued burden of explaining and justifying any alterations or post-occurrence entries, corrections, changes, or modifications.

BOWERS, PRIEST, NOBLER & KOHLMAN
ATTORNEYS AT LAW

Thank you very much.

Very truly yours,

RICHARD J. KOHLMAN

RJK:cjk

Memo 75-63 EXHIBIT VI

COUNTY OF LOS ANGELES

OFFICE OF THE DISTRICT ATTORNEY
BUREAU OF SPECIAL OPERATIONS
CRIMINAL COURTS BUILDING
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JOSEPH P. BUSCH, DISTRICT ATTORNEY
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GORDON JACOBSON, ASSISTANT DISTRICT ATTORNEY

RICHARD W. HECHT, DIRECTOR

July 30, 1975

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

This is to indicate that our office is in accord with the addition of section 1500.5 to the Evidence Code. We suggest that for the sake of making the rule as clear as possible, there might be two modifications (essentially of form rather than of substance):

First, the new section 1500.5 (a) should specifically mention the electrostatic method (perhaps in lines 4-5, so that clause would read ". . . or by electrostatic or chemical reproduction, . . . ".

Second, by addition of a third paragraph to specifically alter the Dugar rule (Dugar v. Happy Tiger Records, Inc., 41 CA 3d 811). For example, it might read

> "(c) A duplicate is not rendered inadmissible because it was prepared for litigation."

Very truly yours,

JOHN E. HOWARD
Acting District Attorney

By Robert E. Remer

ROBERT E. REMER
Acting Director

as

Memo 75-63 EXHIBIT VII

RICHARD H. KEATINGE
THE SIXTH FLOOR · BROADWAY PLAZA
700 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90017

August 5, 1975

Mr. John De Moully
Executive Secretary
California Law Revision
Commission
Stanford University
School of Law
Stanford, California 94305

Dear John:

I just reviewed the Commission's tentative Recommendation Relating to Admissibility of "Duplicates" in Evidence dated June 30, 1975, and find myself in complete agreement with it.

In view of your interest in evidence law, I am enclosing herewith a copy of a document which we recently prepared covering the legislative history of each of the new Federal Rules of Evidence. As a matter of information, we should point out that the document we have prepared is not intended to be a treatise on evidence law, but is basically a cut-and-paste job of the respective comments on each individual rule from the Advisory Committee Recommendations, the House Judiciary Committee Report, the Senate Judiciary Committee Report, the Conference Committee Report and by the House Floor Manager of the Bill.

We originally prepared this document for the litigators in our firm, as we were unable to find anything else which contained the same material organized in quite this fashion. We felt it was important to have the legislative history materials organized in this manner, as the precise provisions of many of the rules were substantially changed as

the bill went through the legislative process, and it is often difficult to know exactly what the rules mean unless you can trace their legislative history from beginning to end.

Sincerely,

Richard H. Keatinge

RHK:mw
Encl.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

ADMISSIBILITY OF "DUPLICATES" IN EVIDENCE

June 30, 1975

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN AUGUST 20, 1975.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

#63.60 June 30, 1975

TENTATIVE RECOMMENDATION

relating to

ADMISSIBILITY OF "DUPLICATES" IN EVIDENCE

The development of accurate methods of copying documents and writings and the commonplace use of methods of reproduction which produce copies identical to the original have resulted in a reexamination by the courts and evidence authorities of the need for the production of original writings as required by the "best evidence rule."[1] The newly adopted Federal Rules of Evidence,[2] while generally continuing the requirement of the production of the original,[3] contain a provision, Federal Rule of Evidence 1003, permitting admission into evidence of a "duplicate." This rule provides:

> A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstance it would be unfair to admit the duplicate in lieu of the original.

Federal Rule of Evidence 1001(4) defines a duplicate as:

> [A] counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

In a recent California case, Dugar v. Happy Tiger Records, Inc.,[4] the court was specifically presented with the question of whether photostatic or "xeroxed" copies of original invoices prepared specifically

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1. See C. McCormick, Evidence § 236 (2d ed. 1972); 4 J. Wigmore, Evidence § 1191 (Chadbourn rev. 1972); B. Witkin, California Evidence § 690 (2d ed. 1966). Indeed, one commentator has suggested that the best evidence rule be eliminated completely as having outlived its usefulness. Broun, Authentication and Contents of Writings, 1969 Law and the Social Order 611 (1969).

2. Pub. L. No. 93-595 (Jan. 2, 1975).

3. Pub. L. No. 93-595, Rule 1002 (Jan. 2, 1975).

4. 41 Cal. App.3d 811, 116 Cal. Rptr. 412 (1974).

for the litigation could properly be used as evidence without either producing or accounting for the original. The court--while noting that commentators have urged the adoption of the broad federal "duplicate original" rule--stated that, until the California Legislature amends the best evidence rule, Evidence Code Section 1500, photostatic copies such as those offered in that case are secondary evidence which are admissible only if they fall within one of the statutory exceptions.[5]

Under Evidence Code Section 1500[6] the content of a writing normally must be proved by the original writing itself and not by a copy of the writing or testimony as to its content. The only circumstances under which secondary evidence may be used are specifically set out in the code.[7] Additionally, the case law which provided for priority between types of secondary evidence has been codified;[8] when the original writing is unavailable, the proponent of the evidence must prove the content of a writing by a copy if he has one in his possession or, in the case of official writing, can obtain one by reasonable diligence before testimonial secondary evidence can be admitted.

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5. Id. at 816-817, 116 Cal. Rptr. at 415.

6. Section 1500 provides:

> Except as otherwise provided by statute, no evidence other than the writing itself is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.

7. Evid. Code §§ 1501 (lost or destroyed writing), 1502 (unavailable writing), 1503 (writing under control of opponent), 1504 (collateral writing), 1505 (other secondary evidence if proponent does not have copy), 1506 (copy of public writing), 1507 (copy of recorded writing), 1508 (other secondary evidence of public or recorded writing), 1509 (voluminous writings), 1510 (copy of writing produced at hearing), 1530 (writing in official custody), 1532 (official record of a recorded writing), 1550 (photographic copies made as business records), 1551 (photographic copies where original destroyed or lost), 1562 (copy of business records).

8. Evidence Code Section 1505 codifies Ford v. Cunningham, 87 Cal. 209, 25 P. 403 (1890), and Murphy v. Nielsen, 132 Cal. App.2d 396, 282 P.2d 126 (1955). Evidence Code Section 1508 codifies Hibernia Sav. & Loan Soc. v. Boyd, 155 Cal. 193, 100 P. 239 (1909), adding the requirement that the party exercise reasonable diligence to obtain a copy in the case of writings in the custody of a public entity or recorded in public records.

In California, carbon copies produced contemporaneously with the original writing have generally been accepted as duplicate originals and have been introduced without the necessity of showing that the original is unavailable.[9] The courts have relied on the fact that the carbon copy is in fact prepared at the same time as the original as, for example, a carbon of a sales receipt. Thus, the possibility of error arising from subsequent hand copying is eliminated. However, the rule regarding carbon copies was not, either in California or in other states, extended to cover modern photographic or electronic reproduction. In advocating the extension of the rule regarding carbons to copies produced by modern technological copying techniques, McCormick states:[10]

> The resulting state of authority, favorable to carbons but unfavorable to at least equally reliable photographic reproductions, appears inexplicable on any basis other than that the courts, having fixed upon simultaneous creation as the characteristic distinguishing of carbons from copies produced by earlier methods have on the whole been insufficiently flexible to modify that concept in the face of newer technological methods which fortuitously do not exhibit that characteristic. Insofar as the primary purpose of the original documents requirements is directed at securing accurate information from the contents of material writings, free of the infirmities of memory and the mistakes of handcopying, we may well conclude that each of these forms of mechanical copying is sufficient to fulfill the policy. Insistence upon the original, or accounting for it, places costs, burdens of planning and hazards of mistake upon the litigants. These may be worth imposing where the alternative is accepting memory or handcopies. They are probably not worth imposing when risks of inaccuracy are reduced to a minimum by the offer of a mechanically produced copy.

In 1951, California made a significant advance in the recognition of photographically reproduced copies of writing by enacting the Uniform

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9. Edmunds v. Atchison, T. & S.F. Ry., 174 Cal. 246, 162 P. 1038 (1917); People v. Lockhart, 200 Cal. App.2d 862, 871, 19 Cal. Rptr. 719, 725 (1964). See Pratt v. Phelps, 23 Cal. App. 755, 757-758, 139 P. 906, 907 (1914). For a compilation of cases from other states, see Annot., 65 A.L.R.2d 342 (1959).

10. C. McCormick, Evidence § 236, at 569 (2d ed. 1972).

Photographic Copies of Business and Public Records as Evidence Act.[11] As amended, this provision--which is presently Evidence Code Section 1550--provides:

> A photostatic, microfilm, microcard, miniature photographic or other photographic copy or reproduction, or an enlargement thereof, of a writing is as admissible as the writing itself if such copy or reproduction was made and preserved as a part of the records of a business (as defined by Section 1270) in the regular course of such business. The introduction of such copy, reproduction, or enlargement does not preclude admission of the original writing if it is still in existence.

Similar legislation has been adopted in 38 states.[12] The present California provision, by requiring only that the copy be made and preserved in the ordinary course of business, is broader than the Uniform Act itself as it was first enacted in California. Former Code of Civil Procedure Section 1953i required that the original writing be a business record. Under Evidence Code Section 1550, the requirement that the photographic copy be made in the regular course of business is considered sufficient to assure the trustworthiness of the copy. If the original writing is either admissible under any exception to the hearsay rule or as evidence of an ultimate fact in the case (e.g., a will or a contract), a photographic copy made in the regular course of business is as admissible as the original.[13]

In the Dugar case,[14] the court specifically held that Evidence Code Section 1550 did not apply to copies made solely for purposes of litigation and indicated that photostatic copies remain only secondary evidence unless and until the Evidence Code is broadened along the lines of the new federal rule as urged by many prominent commentators.[15]

In People v. Marcus,[16] a California court has indicated its predeliction toward admissibility of reliable copies produced by sophisticated electronic techniques. The court admitted into evidence a re-

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11. Cal. Stats. 1951, Ch. 346, § 1, as amended by Cal. Stats. 1953, Ch. 294, § 1; 9A Uniform Laws Ann. 584.

12. 9A Uniform Laws Ann. 117 (1967 Supp.).

13. See Comment--Law Revision Commission to Evid. Code § 1550 (West 1966).

14. 41 Cal. App.3d 811, 116 Cal. Rptr. 412 (1974).

15. Id. at 816-817, 116 Cal. Rptr. at 415.

16. 31 Cal. App.3d 367, 107 Cal. Rptr. 264 (1973).

recording of a taped conversation which made audible an original tape of insufficient quality to be understood. Although the court indicated its inclination to rule that the rerecording was the original made usable, the original tape itself was also placed in evidence, and the court was able to hold the duplicate admissible under Evidence Code Section 1510. The court was thus not required to make a direct holding on the duplicate question.

There are a number of reasons supporting the adoption of a rule similar to new Federal Rule 1003, which would permit admission of "duplicates," in California. First, there are many cases in which the ability to introduce a duplicate would save considerable time and expense. For example, if the original writing is in the hands of a third person who is reluctant to part with it, the party seeking its admission must, under current law, seek to obtain the original by process[17] and have it available for inspection. The third party would rarely be as reluctant merely to permit a duplicate to be made. Second, the best evidence rule often operates as a trap for the unwary attorney who, having obtained a duplicate which is obviously recognized as reliable by all of the parties, nevertheless finds that it is objected to and excluded at trial under the best evidence rule. Third, as previously noted, a copy which meets the standards of the federal "duplicate" rule is highly reliable. It is conceivable that the party in possession of the original document may attempt to perpetrate a deliberate fraud by use of a false photocopy.[18] However, Federal Rule 1003 contains safeguards in that the production of the original is required where there is a genuine question as to its authenticity or when the court has reason to believe that the use of a duplicate would be unfair. Furthermore, it should be obvious that a party bent on deliberate fraud is able, under current rules, to introduce a false copy under one of the exceptions to the rule, for example, merely by destroying or secreting the original and testifying that it cannot be found.[19]

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17. Evid. Code § 1502.

18. See C. McCormick, Evidence § 236, at 569 (2d ed. 1972).

19. See Cleary & Strong, The Best Evidence Rule: An Evaluation in Context, 51 Iowa L. Rev. 825, 847 (1965-1966).

The Commission recommends that Section 1500.5 be added to the Evidence Code to adopt the substance of Rule 1003 of the Federal Rules of Evidence by providing that a "duplicate" is not made inadmissible by the best evidence rule unless a genuine question is raised as to the authenticity of the writing itself or, in the circumstances, it would be unfair to admit the duplicate in lieu of the writing itself. The definition of a "duplicate" should adopt the substance of the definition provided in Rule 1001(4) of the Federal Rules of Evidence which requires that the duplicate be a copy produced by a technique which accurately reproduces the writing itself.

The Commission's recommendation would be effectuated by enactment of the following measure:

Evidence Code § 1500.5. Admissibility of duplicates

SECTION 1. Section 1500.5 is added to the Evidence Code, to read:

1500.5. (a) For purposes of this section, a "duplicate" is a counterpart produced by the same impression as the writing itself, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the writing itself.

(b) A duplicate of a writing is not made inadmissible by the best evidence rule unless (1) a genuine question is raised as to the authenticity of the writing itself or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the writing itself.

Comment. Section 1500.5 states an exception to the best evidence rule not now contained in existing California statutes but adopted by the United States Congress in the Federal Rules of Evidence. Pub. L. No. 93-595 (Jan. 2, 1975). Subdivision (a) defines a "duplicate" in the

The fact that the duplicate was prepared for litigation does not prevent its admission under Section 1500.5. Compare Dugar v. Happy Tiger Records, Inc., 41 Cal. App. 3d 811, 816-817, 116 Cal. Rptr. 412, ___ (1974).

same terms as does Federal Rule of Evidence 1001(4), and subdivision (b) provides, in conformity with Federal Rule of Evidence 1003, that such duplicates are not normally made inadmissible by the best evidence rule.

As defined by subdivision (a), a "duplicate" must be produced by a technique which accurately reproduces the writing itself. On the other hand, a subsequently prepared copy of a document ~~which is~~ handwritten or typed cannot qualify as a "duplicate." Because a "duplicate" is a product of a method which insures accuracy, many authorities have urged that it should be admitted into evidence as if it were the original writing itself. See, e.g., C. McCormick, Evidence § 236 (2d ed. 1972); 4 J. Wigmore, Evidence § 1234 (Chadbourn rev. 1972); B. Witkin, California Evidence § 690 (2d ed. 1966). See discussion in Dugar v. Happy Tiger Records, Inc., 41 Cal. App.3d 811, 816-817, 116 Cal. Rptr. 412, ___ (1974).

A counterpart produced by any electrostatic method of reproducing the writing would qualify as a duplicate since it is produced by an equivalent technique which accurately reproduces the writing itself.

If the original is in color (such as a multi-colored document, colored photograph or color movie), the duplicate must be in the same colors as the original unless the coloring of the original is immaterial in view of the purpose for which the duplicate is to be received in evidence.

Section 1500.5, by use of the term "duplicate," in no way alters existing practice which recognizes that more than one document can be admissible as the writing itself--such as the case in which the parties to a contract or lease execute sufficient copies in order that each may have one for his file or when carbon copies are involved. See C. McCormick, Evidence § 235 (2d ed. 1972); 4 J. Wigmore, Evidence §§ 1233, 1234 (Chadbourn rev. 1972); B. Witkin, California Evidence § 690 (2d ed. 1966); Recommendation Relating to Admissibility of "Duplicates" in Evidence, 13 Cal. L. Revision Comm'n Reports 0000 (1976). Section 1500.5 goes beyond existing practice to permit admission of "duplicates" where there is no danger that they might be inaccurate and subject to the limitations of subdivision (b).

The courts should be allowed in finding that a "genuine question is raised as to the authenticity of the writing itself." See the Comment to Federal Rule of Evidence 1003 in the House Report, Report No. 93-650, accompanying H.R. 5463, 93d Cong., 1st Sess., Nov. 15, 1973.

Under subdivision (b), duplicates will not be admitted into evidence if either a genuine question is raised as to the authenticity of the writing itself or in the circumstances admission of the duplicate would be unfair. ~~For~~ if, for example, a party opposing admission of a duplicate ~~alleges specific facts indicating~~ makes a good faith claim that a duplicate has been made is ~~a forgery~~, the writing from which the court may should require that the original be produced for examination before permitting the copy to be introduced into evidence. See Section 1510. Additionally, if the unique size, shape, or certain physical characteristics of the original make it necessary for

not authentic and it would be impractical or more difficult to determine the authenticity of the writing itself from the duplicate,

the original to be presented in court in order for a party properly to examine or cross-examine witnesses, it may be unfair in the circumstances to admit the duplicate in lieu of the original writing itself.

If a party opposes introduction of the duplicate on the ground of unfairness, the court should consider the conduct of the parties in determining whether it would be unfair "in the circumstances" to admit the duplicate including, for example, whether or not the parties have relied on the duplicate either during their dealings prior to litigation or during the preliminary stages of the litigation or whether or not the party opposing the introduction reasonably could have been expected to demand production of the original (see Code Civ. Proc. § 2031) or to use other discovery procedures to obtain the original.

As in all cases involving introduction of a writing, when offering a duplicate, the proponent of the evidence must authenticate it. See Evid. Code §§ 1400-1421. In the vast majority of cases, such authenticating evidence will also be sufficient to meet any claim that the duplicate should not be admitted under Section 1500.5(b). If the proponent of the duplicate is concerned that a challenge to admission cannot be overcome by the evidence on authentication, the proponent may, for example, be able to obtain a stipulation as to admissibility or to use the procedure set out in Code of Civil Procedure Section 2033 to obtain an admission of the genuineness of the original.

If the duplicate contains only a portion of the writing itself or is in some respect incomplete, and the opposing party indicates that the entire writing is, or may be, needed for effective cross-examination or fully to explain the portion offered, the court may require that the proponent produce at his option either the entire original or an adequate duplicate of the entire writing. See Evid. Code § 356. Cf. United States v. Alexander, 326 F.2d 726 (4th Cir. 1964).