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Memorandum 64-92

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1--Division 11)

Attached are two copies of the revised Comments to Division 11. Mr. Edwards is responsible for checking these Comments. Please mark any revisions you believe should be made on one copy of the Comments.

Respectfully submitted,

John H. DeMoully
Executive Secretary

# DIVISION 11. WRITINGS

## CHAPTER 1. AUTHENTICATION AND PROOF OF WRITINGS

### Article 1. Requirement of Authentication

### § 1400. Authentication defined

Comment. Before any tangible object may be admitted into evidence, the party seeking to introduce the object must make a preliminary showing that the object is in some way relevant to the issues to be decided in the action. When the object sought to be introduced is a writing, this preliminary showing of relevancy usually entails some proof that the writing is authentic--i.e., that the writing was made or signed by the person who is claimed by the proponent to have made or signed it. This showing is normally referred to as "authentication" of the writing. When the requisite preliminary showing has been made, the judge admits the writing into evidence for consideration by the trier of fact. However, the fact that the judge permits the writing to be admitted in evidence does not necessarily establish the authenticity of the writing; all that the judge has determined is that there has been a sufficient showing of the authenticity of the writing to permit the trier of fact to find that it is authentic. The trier of fact independently determines the question of authenticity, and, if the trier of fact does not believe the evidence of authenticity, it may find that the writing is not authentic despite the fact that the judge has determined that it was "authenticated." See 7 WIGMORE EVIDENCE §§ 2129-2135 (3d ed. 1940).

This chapter sets forth the rules governing this process of authentication.

Sections 1400-1402 (Article 1) define and state the general requirement of authentication--either by evidence sufficient to sustain a finding of authenticity or by other means sanctioned by law. Sections 1410-1454 (Articles 2 and 3) set forth some of the means that may be used to authenticate certain kinds of writings. The operation and effect of these sections is explained in separate Comments relating to them.

The definition of the process of authentication contained in Section 1400 follows well-settled California law. Verzan v. McGregor, 23 Cal. 339, 342-343 (1863). Under Section 1400, as under existing California law, the authenticity of a particular writing also may be established by some means other than the introduction of evidence of authenticity. Thus, the authenticity of a writing may be established by stipulation or by the pleadings. See, e.g., CODE CIV. PROC. §§ 447, 448. The requisite preliminary showing may also be supplied by a presumption. See, e.g., EVIDENCE CODE §§ 1450-1454, 1530. In some instances, a presumption of authenticity may also attach to a writing authenticated in a particular manner. See, e.g., EVIDENCE CODE § 643 (the ancient documents rule). Where a presumption applies, the trier of fact is required to find that the writing is authentic unless the requisite contrary showing is made. EVIDENCE CODE §§ 600, 604, 606.

§ 1401. Authentication required

Comment. Subdivision (a) of Section 1401 states the general rule that a showing of the authenticity of a writing, either by evidence sufficient to sustain a finding of authenticity or by any other means sanctioned by law (see the Comment to Section 1400), is required before the writing may be received in evidence. The rule stated in this subdivision is well settled.

Verzan v. McGregor, 23 Cal. 339, 342-343 (1863). However, there has never been an explicit statement of the rule in the California statutes.

The "writing" referred to in subdivision (a) is any writing offered in evidence; although it may be either an original or a copy, it must be authenticated before it may be received in evidence.

Subdivision (b) of Section 1401 requires that a writing be authenticated even when it is not offered in evidence but is sought to be proved by a copy or by testimony as to its content under the circumstances permitted by Sections 1500-1510 (the best evidence rule). This is declarative of existing California law. Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289 (1889); Smith v. Brannan, 13 Cal. 107, 115 (1859); Forman v. Goldberg, 42 Cal. App.2d 308, 316, 108 P.2d 983, 988 (1941). Under Section 1401, therefore, if a person offers in evidence a copy of a writing, he must make a sufficient preliminary showing of the authenticity of both the copy and the original (i.e., the writing sought to be proved by the copy).

In some instances, however, authentication of a copy will provide the necessary evidence to authenticate the original writing at the same time. For example: If a copy of a recorded deed is offered in evidence, Section 1401 requires that the copy be authenticated--proved to be a copy of the official record. It also requires that the official record be authenticated--proved to be the official record--because the official record is a writing of which secondary evidence of its content is being offered. Finally, Section 1401 requires the original deed itself to be authenticated--proved to have been executed by its purported maker--for it, too, is a writing of which secondary evidence of its content is being offered. The copy offered in evidence may be authenticated by the attestation or certification of the

official custodian of the record as provided by Section 1530. Under Section 1530, the authenticated copy is prima facie evidence of the official record itself; therefore, it necessarily is evidence that there is an official record, i.e., the record being proved by the copy. Thus, the authenticated copy supplies the necessary authenticating evidence for the official record. Under Section 1600, the official record is prima facie evidence of the content of the original deed and of its execution by the person by whom it purports to have been executed; hence, the official record is the requisite authenticating evidence for the original deed. Thus, the duly attested or certified copy of the record meets the requirement of authentication for the copy itself, for the official record, and for the original deed.

§ 1402. Authentication of altered writing

Comment. Section 1402 restates and supersedes Code of Civil Procedure Section 1982. See Miller v. Luco, 80 Cal. 257, 265, 22 Pac. 195, 197 (1889); King v. Tarabino, 53 Cal. App. 157, 199 Pac. 890 (1921).

Article 2. Means of Authenticating and Proving Writings

§ 1410. Construction of article

Comment. This article (Sections 1410-1421) lists many of the evidentiary means for authenticating writings and supersedes the existing statutory expressions of such means.

Section 1410 is included in this article in recognition of the fact that it would be impossible to specify all of the varieties of circumstantial evidence that may be sufficient in particular cases to sustain a finding of

the authenticity of a writing. Hence, Section 1410 ensures that the means of authentication listed in this article or stated elsewhere in the codes will not be considered the exclusive means of authenticating writings. Although Section 1410 has no counterpart in previous legislation, the California courts have never considered the listing of certain means of authentication in the various California statutes as precluding reliance upon other means of authentication. See, e.g., People v. Ramsey, 83 Cal. App.2d 707, 189 P.2d 802 (1948) (authentication by evidence of possession). See also the Comments to Sections 1419, 1420, and 1421.

§ 1411. Subscribing witness' testimony unnecessary

Comment. When Section 1940 of the Code of Civil Procedure was enacted in 1872, it stated the common law rule that a subscribing witness to a witnessed writing must be produced to authenticate the writing or his absence must be satisfactorily accounted for. See Stevens v. Irwin, 12 Cal. 306 (1859). Section 1940 was amended by the Code Amendments of 1873-74 to remove the requirement that the subscribing witness be produced. Cal. Stats. 1873-74, Ch. 383, § 231, p. 386. Instead, three alternative methods of authenticating a writing were listed. This list is not exclusive, however, and other means of authenticating writings have been recognized by statute or court decision. See, e.g., CODE CIV. PROC. §§ 1944, 1945 (superseded by EVIDENCE CODE §§ 1417, 1418); House Grain Co. v. Finerman & Sons, 116 Cal. App.2d 485, 253 P.2d 1034 (1953).

Section 1411 states directly what the 1873-74 amendment to Code of Civil Procedure Section 1940 stated indirectly--that the common law rule requiring

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the production of a subscribing witness to a witnessed writing is not the law in California unless a statute specifically so requires.

§ 1412. Use of other evidence when subscribing witness' testimony required

Comment. When enacted in 1872, Code of Civil Procedure Section 1941 stated a limitation on the common law rule requiring proof of witnessed writings by a subscribing witness. Section 1941 provided, in effect, that this rule did not prohibit the authentication of a witnessed writing by other evidence if the subscribing witness denied or did not remember the execution of the writing. Evidence Code Section 1412, which supersedes Code of Civil Procedure Section 1941, retains this limitation on the subscribing witness rule in those few cases, such as wills, where a statute requires the testimony of a subscribing witness to authenticate a writing.

§ 1413. Witness to the execution of a writing

Comment. Section 1413 restates and supersedes the provisions of subdivisions 1 and 3 of Code of Civil Procedure Section 1940.

§ 1414. Authentication by admission

Comment. Section 1414 restates and supersedes the provisions of Code of Civil Procedure Section 1942. Section 1942 is difficult to understand. It was amended in 1901 to make it more intelligible. Cal. Stats. 1901, Ch. 102, § 480, p. 247. However, the code revision of which the 1901 amendment was a part was held unconstitutional because of technical defects in the title of the act and because the act embraced more than one subject. Lewis v. Dunne, 134 Cal. 291, 66 Pac. 478 (1901). Evidence Code Section 1414 is based on the 1901 amendment of Section 1942.

§ 1415. Authentication by handwriting evidence

Comment. Section 1415 restates and supersedes the provisions of subdivision 2 of Code of Civil Procedure Section 1940.

§ 1416. Proof of handwriting by person familiar therewith

Comment. Section 1416 is based on Code of Civil Procedure Section 1943 as amended in the code revision of 1901. Cal. Stats. 1901, Ch. 102, § 481, p. 247. See the Comment to Section 1414.

§ 1417. Comparison of writing with exemplar

Comment. Section 1417 is based on Code of Civil Procedure Section 1944. Although Section 1944 does not expressly require that the witness making the comparison be an expert witness (as Evidence Code Section 1417 does), the cases have nonetheless imposed this requirement. E.g., Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289 (1889). The witness' expertise may, of course, be derived from practical experience instead of from technical training. In re Newell's Estate, 75 Cal. App. 554, 243 Pac. 33 (1926) (experienced banker).

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§ 1418. Exemplars when writing 30 years old

Comment. Section 1418 restates and supersedes the provisions of Code of Civil Procedure Section 1945. The apparent purpose of Section 1945, continued without change in Evidence Code Section 1418, is to permit the judge to be satisfied with less proof of the authenticity of an exemplar when the writing offered in evidence is more than 30 years old.

§ 1419. Authentication by age, appearance, and custody

Comment. The effect of Section 1419 is to declare that the circumstantial evidence of authenticity specified in paragraphs (1), (2), and (3) of subdivision (a) is always sufficient to warrant admission of the writing to which it relates. Whether such circumstantial evidence establishes the authenticity of the writing, however, is a question that must be decided by the trier of fact. See EVIDENCE CODE § 1400 and the Comment thereto. Under subdivision (b), a lesser showing may also be sufficient to sustain a finding of authenticity and to warrant admission of a writing. For example, in People v. Ramsey, 83 Cal. App.2d 707, 189 P.2d 802 (1948), the custody of a writing alone was held sufficient to authenticate a writing. However, a judge could determine in a particular case that a lesser showing is insufficient to sustain a finding of authenticity and could exclude the writing from evidence.

The rule stated in Section 1419 is similar to the ancient documents rule stated in subdivision 34 of Code of Civil Procedure Section 1963 (superseded by Evidence Code Section 643; see the Comment to Section 643) but there are two major differences. First, the requirement in Section 1963 of a showing that the writing has been acted upon as genuine by persons with

an interest in the matter does not appear in Section 1419. Second, Section 1419 requires that the appearance of the writing be such as to create no suspicion concerning its authenticity; no similar requirement appears in Section 1963. These differences reflect a difference in the basic nature of the rules. The ancient documents rule stated in Section 1419 is a rule of authentication only. It merely provides that the writing must be received in evidence when the specified showing is made; thereafter, it is for the trier of fact to determine the authenticity of the writing. However, Section 1963--and Evidence Code Section 643 which supersedes it--provides a presumption of authenticity when the requisite showing has been made. Under the presumption, the trier of fact is required--not merely permitted--to find that the writing is authentic when the matters specified in the statute have been shown (unless, of course, credible evidence that it is not authentic is also introduced).

Although the requirement that the writing be acted upon as authentic is a reasonable requirement as a foundation for a presumption of authenticity, it is an unreasonably strict requirement to impose as a condition for admissibility only. Many ancient writings are not dispositive in nature; hence, interested parties will neither have acted nor have failed to act upon the writing as if it were authentic. In many instances, evidence will be lacking as to whether a writing has been acted upon as authentic. In such an instance, the writing should nonetheless be admitted if it is produced from the custody of those who would be likely to have the writing if it were authentic and if its appearance gives rise to no suspicion concerning its authenticity. Of course, the opponent of the evidence is not precluded by this section from showing that those concerned with the

writing acted in a manner tending to indicate that it is not authentic, nor is he precluded from showing lack of authenticity in any other manner.

Section 1419 provides a method of authentication recognized in California case law but not previously reflected in California statutes. Geary St. etc. R.R. v. Campbell, 39 Cal. App. 496, 179 Pac. 453 (1919) (corporate stock record book authenticated by age, appropriate custody, and unsuspicious appearance).

§ 1420. Authentication by evidence of reply

Comment. Section 1420 provides a method of authentication recognized in California case law but not previously reflected in California statutes. House Grain Co. v. Finerman & Sons, 116 Cal. App.2d 485, 253 P.2d 1034 (1953).

§ 1421. Authentication by content

Comment. Section 1421 provides a method of authentication recognized in California case law but not previously reflected in California statutes. Chaplin v. Sullivan, 67 Cal. App.2d 728, 734, 155 P.2d 368, 372 (1945).

## Article 3. Acknowledged Writings and Official Writings

§ 1450. Classification of presumptions in article

Comment. This article (Sections 1450-1454) lists several presumptions that may be used to authenticate particular kinds of writings. Section 1450 prescribes the effect of these presumptions. They require a finding of authenticity unless the adverse party produces evidence sufficient to sustain a finding that the writing in question is not authentic. See EVIDENCE CODE § 604 and the Comment thereto.

§ 1451. Acknowledged writings

Comment. Section 1451 continues in effect and restates a method of authenticating private writings that is contained in Code of Civil Procedure Section 1948.

§ 1452. Official seals

Comment. Sections 1452 and 1453 eliminate the need for formal proof of the genuineness of certain official seals and signatures when such proof would otherwise be required by the general requirement of authentication.

Under existing law, formal proof of many of the signatures and seals mentioned in Sections 1452 and 1453 is not required because such signatures and seals are the subject of judicial notice. CODE CIV. PRCC. § 1875(5), (6), (7), (8). (Section 1875 is superseded by Division 4, Sections 450-459, of the Evidence Code.) The parties may not dispute a matter that has been judicially noticed. CODE CIV. PRCC. § 2102 (superseded by EVIDENCE CODE § 458). However, judicial notice of facts should be confined to matters concerning which there can be no reasonable dispute. The authenticity of writings purporting to be official writings should not be determined conclusively by the judge when there is serious dispute as to such authenticity. Hence, Sections 1452 and 1453 provide that the official seals and signatures mentioned shall be presumed genuine and authorized until evidence is introduced sufficient to sustain a finding that they are not genuine or authorized. When there is such evidence disputing the authenticity of an official seal or signature, the trier of fact is required to determine the question of authenticity without regard to any presumption created by this section. See EVIDENCE CODE § 604 and the Comment thereto.

This procedure will dispense with the necessity for proof of authenticity

when there is no real dispute as to such authenticity, but it will assure the parties the right to contest the authenticity of official writings when there is a real dispute as to such authenticity.

§ 1453. Domestic official signatures

Comment. See the Comment to Section 1452.

§ 1454. Foreign official signatures

Comment. Section 1454 supersedes the somewhat complex procedure for authenticating foreign official writings that is contained in subdivision 8 of Code of Civil Procedure Section 1918. Section 1454 is based on a proposed amendment to Rule 44 of the Federal Rules of Civil Procedure that has been prepared by the Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure, and the Columbia Law School Project on International Procedure. Proposed Amendments to Rules of Civil Procedure for the United States District Courts with Advisory Committee's Notes (mimeo., Feb. 25, 1964). That rule and the proposed amendment, however, deal only with the question of authenticating copies of foreign official writings. Section 1454 relates to the authentication of any foreign official writing, whether it be an original or a copy.

Section 1454 is based on the fact that a United States foreign service officer may not be able to certify to the official position and signature of many foreign officials. Accordingly, this section permits the original signature to be certified by a higher official, whose signature can in turn be certified by a still higher official, and such certifications can be continued in a chain until a foreign official is reached as to whom the United States foreign service officer has adequate information upon which to base his final certification. See, e.g., New York Life Ins. Co. v. Aronson, 38 F. Supp. 687 (W.D. Pa. 1941).

See also the Comment to Section 1452.

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## CHAPTER 2. SECONDARY EVIDENCE OF WRITINGS

### Article 1. Best Evidence Rule

§ 1500. The best evidence rule

Comment. Section 1500 states the best evidence rule. This rule is found in existing California law in Sections 1855 and 1937 of the Code of Civil Procedure, which are superseded by this article. The rule is that, unless certain exceptional conditions exist, the content of a writing must be proved by the original writing and not by testimony as to its content or a copy of the writing. The rule is designed to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available.

The rule stated in Section 1500 applies "except as otherwise provided by statute." Sections 1501-1510 list certain exceptions to the rule. Other statutes may create further exceptions. See, e.g., EVIDENCE CODE §§ 1550 and 1562, making copies of particular records admissible to the same extent as the originals would be.

§ 1501. Copy of lost or destroyed writing

Comment. Section 1501 states an exception to the best evidence rule now found in Section 1855, subdivision 1, of the Code of Civil Procedure. Section 1501 requires the loss or destruction of the writing to have been without fraudulent intent on the part of the proponent of the evidence. Although no similar requirement appears in Section 1855, the cases construing this section have nonetheless imposed this requirement. Bagley v. McMickle, 9 Cal. 430, 446-447 (1858).

§ 1502. Copy of unavailable writing

Comment. The exception stated in Section 1502 is not stated in the existing California statutes. However, writings not subject to production through use of the court's process have been treated as "lost" writings, and secondary evidence has been admitted under the provisions of subdivision 1 of Section 1855. See, e.g., Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786 (1893). Because such writings have been treated as lost, the cases have admitted secondary evidence even when the original has been procurable by the proponent of the evidence. See, e.g., Koenig v. Steinbach, 119 Cal. App. 425, 6 P.2d 525 (1931); Mackroth v. Sladky, 27 Cal. App. 112, 148 Pac. 978 (1915). Section 1502 will change the rule of these cases to make secondary evidence inadmissible if the proponent has any reasonable means available to procure the writing, even though it is beyond the reach of the court's process.

§ 1503. Copy of writing under control of opponent

Comment. Subdivision (a) of Section 1503 states an exception now found in subdivision 2 of Section 1855 and in Section 1938 of the Code of Civil Procedure. Under existing law, notice to produce the writing is unnecessary where the writing is itself a notice or where it has been wrongfully obtained or withheld by the adverse party. There is no apparent reason for not requiring a notice to produce the writing in these cases, too. In most instances, the pleadings will give the requisite pretrial notice; in those cases where they do not, little hardship is imposed upon the proponent by requiring notice.

The California courts have held that, in a criminal case, pretrial notice to the defendant is unnecessary and request for the writing at the trial is

improper. People v. Powell, 71 Cal. App. 500, 236 Pac. 311 (1925); People v. Chapman, 55 Cal. App. 192, 203 Pac. 126 (1921). Secondary evidence of the content of a writing is admissible if a prima facie showing is made that the writing is in the possession of the defendant. People v. Chapman, supra. If the defendant objects to the introduction of secondary evidence of the writing, the prosecution apparently may then request the defendant to produce it. People v. Rial, 23 Cal. App. 713, 139 Pac. 661 (1914). The possible prejudice to a defendant that may be caused by a request in the presence of the jury for the production of a writing is readily apparent; but, even if the impropriety of such a request is conceded, there appears to be no reason to deprive the defendant completely of his right to a pretrial notice and request at the trial for production of the original. The notice and request to not require the defendant to produce the writing; they merely authorize the proponent to introduce secondary evidence of the writing upon the defendant's failure to produce it. Thus, subdivision (a) preserves the defendant's rights but avoids the possible prejudice to him by requiring the request at the trial to be made out of the presence and hearing of the jury.

Similarly, subdivision (a) avoids any possible prejudice to the prosecution that might result from a request being made by the defendant in the presence of the jury for the production of a writing that is protected by a privilege. For the possible consequences of the prosecution's reliance on a privilege in a criminal action, see EVIDENCE CODE § 1042.

Subdivision (b) of Section 1503 restates and supersedes the provisions of Code of Civil Procedure Section 1939.

§ 1504. Copy of collateral writing

Comment. Section 1504 states an exception for writings that are collateral to the principal issues in the case. The exception is well recognized elsewhere. See McCORMICK, EVIDENCE § 200 (1954). However, an early California case rejected it in dictum, and the issue apparently has not been raised on appeal since then. Poole v. Gerrard, 9 Cal. 593 (1858). See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IX. Authentication and Content of Writings), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 100, 154 (1964). The exception is desirable, for it precludes hypertechnical insistence on the best evidence rule when production of the writing in question would be impractical and its contents are not closely related to any important issue in the case.

§ 1505. Other secondary evidence of writings described in Sections 1501-1504

Comment. Sections 1501-1504 permit a copy of a writing described in those sections to be admitted despite the best evidence rule. Section 1505 provides that oral testimony of the content of a writing described in Sections 1501-1504 may be admitted when the proponent of the evidence does not have a copy of the writing in his possession or under his control.

The final paragraph of Code of Civil Procedure Section 1855 provides that either a copy or oral testimony may be used to prove the content of a writing when the original is unavailable. However, despite the language in Section 1855, two California cases have held that the proponent must prove the content of such writings by a copy if he has one. Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403 (1890); Murphy v. Nielsen, 132 Cal. App.2d 396, 282 P.2d 126 (1955).

Section 1505 codifies the requirement of these cases. A copy is better evidence of the content of a writing than testimony; hence, when a person seeking to prove such content has a copy in his possession or control, he should be required to produce it. 4 WIGMORE, EVIDENCE §§ 1266-1268 (3d ed. 1940).

Unlike Section 1508 (pertaining to official writings), Section 1505 does not require a showing of reasonable diligence to obtain a copy as a foundation for the introduction of testimonial secondary evidence. Although the proponent of the evidence may easily obtain a copy of a writing in official custody or show that the writing has been destroyed so that none is available, he may find it extremely difficult to show the unavailability of copies of writings in private custody. He may have no means of knowing whether any copies have been made or, if made, who has custody of them; yet, his right to introduce

testimonial secondary evidence might be defeated merely by the oponent's showing that a copy, previously unknown to the proponent, does exist and is within reach of the court's process. The proponent's right to introduce testimonial secondary evidence of such writings should not be so easily defeated. Hence, Section 1505 requires no showing of reasonable diligence to obtain a copy of the writing. Of course, if the opponent knows of a copy that is available, he can compel its production and thus protect himself against any misrepresentation of the content of the writing made in the proponent's evidence.

§ 1506. Copy of public writing

Comment. Section 1506 restates an exception to the best evidence rule found in subdivision 3 of Code of Civil Procedure Section 1855.

§ 1507. Copy of recorded writing

Comment. Section 1506 restates an exception to the best evidence rule found in subdivision 4 of Code of Civil Procedure Section 1855.

§ 1508. Other secondary evidence of writings described in Sections 1506 and 1507

Comment. The final paragraph of Code of Civil Procedure Section 1855 requires that the content of official writings be proved by a copy. Despite the unequivocal language of that section, the courts have permitted testimonial secondary evidence when a copy could not be procured because of the destruction of the original. Hibernia Savings & Loan Soc. v. Boyd, 155 Cal. 193, 100 Pac. 239 (1909); Seaboard Nat'l Bank v. Ackerman, 16 Cal. App. 55, 116 Pac. 91 (1911).

Section 1508 also permits testimonial evidence of the content of an official writing when a copy cannot be obtained. However, because copies of official writings usually can be readily obtained, Section 1508 requires a party to exercise reasonable diligence to obtain such a copy.

§ 1509. Voluminous writings

Comment. Section 1509 restates an exception found in subdivision 5 of Code of Civil Procedure Section 1855. The final clause, permitting the judge to require production of the underlying records, is based on a principle that has been recognized in dicta by the California courts. See, e.g., People v. Doble, 203 Cal. 510, 515, 265 Pac. 184, 187 (1928) ("we, of course, are not intending to hold that the books in each case must be actually received in evidence to warrant the introduction of such summary so long as they are available for use of the opposing party . . .").

§ 1510. Copy of writing produced at the hearing

Comment. Section 1510 is designed to permit the owner of a writing that is needed for evidence to leave a copy for the court's use and to retain the original in his own possession. The exception is valuable for business records that are needed in the continuing operation of the business. If the original is produced in court for inspection, a copy may be left for the court's use and the original returned to the owner. Of course, if the original shows erasures or other marks of importance that are not apparent on the copy, the adverse party may place the original in evidence himself.

## Article 2. Official Writings and Recorded Writings

### § 1530. Copy of writing in official custody

Comment. Section 1530 deals with three evidentiary problems. First, it is concerned with the problem of proving the content of an original writing by means of a copy, i.e., the best evidence rule. See EVIDENCE CODE § 1500. Second, it is concerned with authentication, for the copy must be authenticated as a copy of the original writing. EVIDENCE CODE § 1401. Finally, it is concerned with the hearsay rule, for a certification or attestation of authenticity is "a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated." EVIDENCE CODE § 1200. Because this section is principally concerned with the use of a copy of a writing to prove the content of the original, it is located in the division relating to secondary evidence of writings.

Under existing California law, certain official records may be proved by copies purporting to have been published by official authority or by copies with attached certificates containing certain requisite seals and signatures. The rules are complex and detailed and appear for the most part in Article 2 (beginning with Section 1892) of Chapter 3, Title 2, Part 4 of the Code of Civil Procedure.

Section 1530 substitutes for these rules a uniform rule that can be applied to all writings in official custody found within the United States and another rule applicable to all writings in official custody found outside the United States.

Subdivision (a)(1). Subdivision (a)(1) of Section 1530 provides that an official writing may be proved by a copy purporting to be published by official authority. Under Section 1918 of the Code of Civil Procedure, the acts and proceedings of the executive and legislature of any state, the United States, or a foreign government may be proved by documents and journals published by official authority. Subdivision (a)(1) in effect makes these provisions of Section 1918 applicable to all classes of official documents. This extension of the means of proving official documents will facilitate the proof of many official documents the authenticity of which is presumed (EVIDENCE CODE § 644) and is seldom subject to question.

Subdivisions (a)(2) and (a)(3)--generally. Subdivisions (a)(2) and (a)(3) of Section 1530 set forth the rules for proving the content of writings in official custody by attested or certified copies. A person who "attests" a writing merely affirms it to be true or genuine by his signature. BLACK, LAW DICTIONARY (4th ed. 1951). Existing California statutes require writings to be "certified." Section 1923 of the Code of Civil Procedure, defining the term "certified copy," provides that a certified copy must state that it is a correct copy of the original, must be signed by the certifying officer, and must be under his seal of office, if he has one. Thus, the only difference between the two words is that the statutory definition of "certified" requires the use of a seal, if the authenticating officer has one, whereas the definition of "attested" does not. Although the requirement of the seal has been eliminated by the use of the word "attest," Section 1530 retains, in addition, the word "certified" because it is the more familiar term in California practice.

Subdivision (a)(2). Under existing California law, copies of many records of the United States government and of the governments of sister states may be proved by a copy certified or attested by the custodian alone. See, e.g., CODE CIV. PROC. §§ 1901 and 1918(1), (2), (3), (9); CORP. CODE § 6000. Yet, other official writings must be certified or attested not only by the custodian but also by a higher official certifying the authority and signature of the custodian. In order to provide a uniform rule for the proof of all domestic official writings, subdivision (a)(2) extends the simpler and more expeditious procedure to all official writings within the United States.

Subdivision (a)(3). Under existing California law, some foreign official records may be proved by a copy certified or attested by the custodian alone. See CODE CIV. PROC. §§ 1901 and 1918(4). Yet, other copies of foreign official writings must be accompanied by three certificates: one executed by the custodian, another by a higher official certifying the authority and signature of the custodian, and a third by still another official certifying the signature and official position of the second official. See CODE CIV. PROC. §§ 1906 and 1918(8).

For these complex rules, subdivision (a)(3) of Section 1530 substitutes a relatively simple and uniform procedure that is applicable to all classes of foreign official writings. Subdivision (a)(3) is based on a proposed amendment to Rule 44 of the Federal Rules of Civil Procedure that has been prepared by the Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure, and the Columbia Law School Project on International Procedure. Proposed Amendments to Rules of Civil Procedure for the United States District Courts with Advisory Committee's Notes (mimeo., Feb. 25, 1964).

Subdivision (a)(3) requires that the copy be attested as a correct copy by "a person having authority to make the attestation." In some foreign countries, the person with authority to attest a copy of an official writing is not necessarily the person with legal custody of the writing. See 2B BARRON & HOLTZOFF, FEDERAL PRACTICE PROCEDURE § 992 (Wright ed. 1961). In such a case, subdivision (a)(3) requires that the attester's signature and official position be certified by another official. If this is a United States foreign service officer stationed in the country, no further certificates are required. If a United States foreign service officer is not able to certify to the signature and official position of the attester, subdivision (a)(3) permits the attester's signature and official position to be certified by a higher official, whose signature can in turn be certified by a still higher official. Such certifications can be continued in a chain until a foreign official is reached as to whom the United States foreign service officer has adequate information upon which to base his final certification. See, e.g., New York Life Ins. Co. v. Aronson, 38 F. Supp. 687 (W.D. Pa. 1941).

Subdivision (b). Where evidence is introduced that is sufficient to sustain a finding that the copy is not a correct copy, the trier of fact is required to determine whether the copy is a correct copy without regard to the presumptions created by this section. See EVIDENCE CODE § 604 and the Comment thereto.

§ 1531. Certification of copy for evidence

Comment. Section 1531 is based on the provisions of Section 1923 of the Code of Civil Procedure. The language has been modified to define the process of attestation as well as the process of certification. Since

Section 1530 permits a writing to be attested or certified for purposes of evidence without the attachment of an official seal, Section 1531 omits any requirement of a seal.

§ 1532. Official record of recorded writing

Comment. Section 1530 authorizes the use of a copy of a writing in official custody to prove the content of that writing. When a writing has been recorded, Section 1530 merely permits a certified copy of the record to be used to prove the record, not the original recorded writing. Section 1532 permits the official record to be used to prove the content of the original recorded writing. However, under the provisions of Section 1401, the original recorded writing must be authenticated before the copy can be introduced. If the writing was executed by a public official, or if a certificate of acknowledgement or proof was attached to the writing, the original writing is presumed to be authentic and no further evidence of authenticity is required. EVIDENCE CODE §§ 1450, 1451, and 1453.

Where evidence is introduced that is sufficient to sustain a finding that the original writing is not authentic, the trier of fact is required to determine the authenticity of the original writing without regard to the presumption created by this section. See EVIDENCE CODE § 604 and the Comment thereto.

Code of Civil Procedure Section 1951 (superseded by Evidence Code Section 1600) is similar to Section 1532, but the Code of Civil Procedure section relates only to writings affecting property. Section 1532 extends the principle of the Code of Civil Procedure section to all recorded writings. There is no comparable provision in existing law.

## Article 3. Photographic Copies of Writings

### § 1550. Photographic copies made as business records

Comment. Section 1550 continues in effect those provisions of the Uniform Photographic Copies of Business and Public Records as Evidence Act that are now found in Code of Civil Procedure Section 1953i.

Section 1550 omits the requirement, contained in Section 1953i of the Code of Civil Procedure, that the original writing be a business record. As long as the original writing is admissible under any exception to the hearsay rule, its trustworthiness is sufficiently assured; the requirement that the photographic copy be made in the regular course of business sufficiently assures the trustworthiness of the copy. If the original is admissible not as an exception to the hearsay rule but as evidence of an ultimate fact in the case (e.g., a will or a contract), a photographic copy, the trustworthiness of which is sufficiently assured by the fact that it was made in the regular course of business, should be as admissible as the original.

### § 1551. Photographic copies where original destroyed or lost

Comment. Section 1551 restates without substantive change the provisions of Code of Civil Procedure Section 1920b.

## Article 4. Hospital Records

§ 1560. Compliance with subpoena duces tecum for hospital records

Comment. Section 1560 restates without substantive change the provisions of Code of Civil Procedure Section 1998.

§ 1561. Affidavit accompanying records

Comment. Section 1561 restates without substantive change the provisions of Code of Civil Procedure Section 1998.1.

§ 1562. Admissibility of affidavit and copy of records

Comment. Section 1562 restates without substantive change the provisions of Code of Civil Procedure Section 1998.2.

§ 1563. One witness and mileage fee

Comment. Section 1563 restates without substantive change the provisions of Code of Civil Procedure Section 1998.3.

§ 1564. Personal attendance of custodian and production of original records

Comment. Section 1564 restates without substantive change the provisions of Code of Civil Procedure Section 1998.4.

§ 1560
§ 1561
§ 1562
§ 1563
§ 1564

§ 1565. Service of more than one subpoena duces tecum

Comment. Section 1565 restates without substantive change the provisions of Code of Civil Procedure Section 1998.5.

§ 1566. Applicability of article

Comment. This section has no counterpart in the portion of the Code of Civil Procedure from which this article is taken. Section 1566 is intended to preserve the original effect of Code of Civil Procedure Sections 1998-1998.5 by removing Sections 1560-1565 from the limiting provisions of Section 300.

## CHAPTER 3. OFFICIAL WRITINGS AFFECTING PROPERTY

§ 1600. Official record of document affecting property interest

Comment. The sections in this chapter all relate to official writings affecting property. The provisions of some sections provide hearsay exceptions, other sections provide exceptions to the best evidence rule; still others provide authentication procedures.

Section 1600 is based on Section 1951 of the Code of Civil Procedure which it supersedes. It is similar to Section 1532 of the Evidence Code, which applies to all recorded writings, but it gives an added effect to the writings covered by its provisions. Under Section 1600, as under existing law, if an instrument purporting to affect an interest in property is recorded, a presumption of execution and delivery of the instrument arises. Thomas v. Peterson, 213 Cal. 672, 3 P.2d 306 (1931).

§ 1565
§ 1566
§ 1600

§ 1601. Proof of content of lost official record affecting property

Comment. Section 1601 restates without substantive change the provisions of Section 1855a of the Code of Civil Procedure.

§ 1602. Recital in patent for mineral lands

Comment. Section 1602 restates without substantive change the provisions of Section 1927 of the Code of Civil Procedure.

§ 1603. Deed by officer in pursuance of court process

Comment. Section 1603 restates without substantive change the provisions of Section 1928 of the Code of Civil Procedure.

§ 1604. Certificate of purchase or of location of lands

Comment. Section 1604 restates without substantive change the provisions of Section 1925 of the Code of Civil Procedure.

§ 1605. Authenticated Spanish title records

Comment. Section 1605 restates without substantive change the provisions of Section 1927.5 of the Code of Civil Procedure.



§ 1601
§ 1602
§ 1603
§ 1604
§ 1605