#63.60 2/21/75

Memorandum 75-18

Subject: Study 63.60 - Duplicate Originals

Attached hereto is a tentative recommenation relating to admissibility of "duplicates" in evidence. The subject was approved for study as a result of the recent case of Dugar v. Happy Tiger Records, Inc., 41 Cal. App.3d 811 (1974), which pointed out the lack of any provision in the present Evidence Code for the admission into evidence of photographic copies which are prepared specifically for litigation. The proposed addition to the Evidence Code, Section 1500.5, would basically adopt the new Federal Rule which permits introduction of a "duplicate" that is a product of a method which insures accuracy and genuineness.

Proposed Section 1500.5 varies from the Federal Rule in order to conform to all other exceptions to the best evidence rule.

Respectfully submitted,

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#63 February 21, 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, has resulted in a reexamination by the courts and evidence experts of the need for the requirement of 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

1. C. McCormick, Evidence § 236 (2d ed. 1972); B. Witkin, California Evidence § 690 (2d ed. 1966); J. Wigmore, Evidence § 1234 (Chadbourn ed. 1972). 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, § 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[5] which are admissible only if they fall within one of the statutory exceptions.

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

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

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 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), 1531 (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 official writings.

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.

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 extention 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 disinguishing 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.

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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, ___ (1964); Pratt v. Phelps, 23 Cal. App. 755, 757, 139 P. 906, ___ (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).

In 1951, California made a significant advance in the recognition of photographically reproduced copies of writing by enacting the Uniform 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 sufficiently 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 the 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 the statute must be strictly construed according to its terms unless and until such time as it is broadened along the lines of the new federal rule as urged by many prominent commentators.[15]

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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, ___ Cal. Rptr. ___ (1974).

15. Id. at 816-817, ___ Cal. Rptr. at ___.

There are a number of reasons supporting the adoption of a rule similar to new Federal Rule 1003 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[16] and have it available for inspection.[17] 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]

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

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16. Evid. Code § 1502.

17. Evid. Code § 1510.

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).

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 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. Thus, a subsequent copy of a document, whether handwritten or typed, cannot qualify as a "duplicate." Because a "duplicate" is a product of a method which

insures accuracy [illegible], many commentators 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); B. Witkin, California Evidence § 690 (2d ed. 1966); J. Wigmore, Evidence § 1234 (Chadbourn ed. 1972). The courts have consistently permitted carbon copies to be admitted into evidence, treating them as originals. The courts have relied in these cases on the fact that the carbons were produced contemporaneously with the original. See Edmunds v. Atchison, Topeka & Santa Fe Ry., 174 Cal. 246, 162 P. 1038 (1917); People v. Lockhart, 200 Cal. App.2d 862, 871, 19 Cal. Rptr. 719, ___ (1964); Pratt v. Phelps, 3 Cal. App. 755, 757, 139 P. 906, ___ (1914). Evidence Code Section 1550 provides that photographic copies made and preserved in the ordinary course of business satisfy the requirements of the best evidence rule. However, under existing statutes, it has been held that the California courts lack power to go beyond these special cases to permit the admission of photographic copies made, for example, specifically for litigation. Dugar v. Happy Tiger Records, Inc., 41 Cal. App.3d 811, 116 Cal. Rptr. 412 (1974).

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 circumstances in which admission of the duplicate would be unfair. If, for example, a party opposing admission of a duplicate produces an affidavit containing specific facts showing that the writing from which a duplicate has been made is a forgery, the court may require that the original be produced for examination before permitting the copy to be introduced into evidence. Additionally, if the duplicate contains only a portion of the writing itself and the opposing party indicates that the entire record is needed for effective cross-examination or fully to explain the portion offered, the court may require that the original be introduced rather than the duplicate. In such a case, it would be unfair to admit the duplicate.