#63.60 4/22/75

Memorandum 75-33

Subject: Study 63.60 - Duplicate Originals

At the April meeting, the Commission raised the question of whether the adoption of proposed Section 1500.5 regarding the admissibility of duplicates into evidence might create some confusion with regard to what constitutes an original under the Evidence Code. The staff undertook to examine the present provisions of the Evidence Code with a view toward determining whether a definition of "original" should be added. As is indicated by Exhibit I, attached, it was found that the terms "the writing," "the writing itself," or "original" are used interchangeably in the present Evidence Code to mean what has been traditionally recognized as an original of a writing, and what has been defined as an original under Federal Rule 1001. Additionally, as will be noted from Exhibit I, the courts have had no difficulty with the lack of definition and have in fact been able to arrive at fair solutions even when faced with unique fact situations.

The staff has concluded that addition of a definition of the term "original" at this time is not required by the adoption of a definition of "duplicate" in proposed Section 1500.5. In view of the practical approach which the California courts have taken regarding what writings should be considered originals, and in view of the number of sections which would have to be adjusted because of the use of varying terms throughoutthe Evidence Code, it is unnecessary and impractical to insert a definition of the term "original" into the Evidence Code and to alter the large number of sections involved. We suggest that this matter is one that should be considered when the Commission considers the study of the Federal Rules of Evidence.

Enclosed herewith is the revised recommendation, proposed statute, and revised Comment.

As suggested at the last meeting, the Comment to Section 1500.5 has been revised to make clear that the section does not affect the existing rule that a counterpart intended to have the same effect as the original by the person executing or issuing it is admissible as an "original."

As requested by the Commission, we have obtained copies of the Federal Rules of Evidence as adopted and are enclosing them with this memorandum. We have additionally requested copies of a pamphlet put out by another publisher which contains the Advisory Committee notes. We will distribute these for use in the study of the new Federal Rules as compared with the California Evidence Code as soon as they are received.

Respectfully submitted,

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Legal Counsel

Memorandum 75-33

EXHIBIT I

Evidence Code Section 250 defines "writing" as follows:

> "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.

However, the Evidence Code lacks any definition of "the writing," or "writing itself," or "original" for purposes of the Best Evidence Rule. The Commission expressed some concern regarding the question of whether, by introducing a definition of "duplicate" into the code in Section 1500.5, we might create some ambiguity regarding the admissibility of such evidence as simultaneously executed copies of leases or contracts or carbons of sales receipts or letters which have routinely been considered admissible as the original or the writing itself under present California law. See 4 J. Wigmore Evidence, § 1233 (Chadbourn ed. 1972), B. Witkin, California Evidence, § 690 (2d ed. 1966), Recommendation Relating to Admissibility of "Duplicates" in Evidence, 13 Cal. L. Revision Comm'n Reports 000 (1976).

Initially it should be pointed out that the staff determined not to adopt the definition of original contained in the new Federal Rule 1001(3) specifically because our code uses various different phrases to describe the "original" writing and, introduction of a definition of original into the statute as it is presently structured, would have only resulted either in confusion or the necessity of amending a large number of sections to conform to the new terminology.

Evidence Code Section 1500 contains California's statement of the Best Evidence Rule. It 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.

The section was derived from Uniform Rules of Evidence 70. The definition of "writing" contained in Evidence Code Section 250 is identical to Uniform Rule 1(13). Professor Chadbourn, in A Study Relating to the Authentication Article of the Uniform Rules of Evidence, 6 Cal. L. Revision Comm'n Reports at 133-159, concluded that the Best Evidence Rule as stated in the Uniform Rule was virtually identical in form to prior California law. The Uniform Rules do not contain a definition of either "original" or "writing itself." The California Code of Civil Procedure previously contained three sections similar to Uniform Rule 70. These sections used the terms "writing," "writing itself," and "original" interchangeably without defining the latter terms.

Former Code of Civil Procedure Section 1855 provided:

> There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:
>
> One—When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made.
>
> Two—When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.
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> Three—When the original is a record or other document in the custody of a public officer.
>
> Four—When the original has been recorded, and a certified copy of the record is made evidence by this Code or other statute.
>
> Five—When the original consists of numerous accounts or other documents, which cannot be examined in Court without great loss of time, and the evidence sought from them is only the general result of the whole.
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> In the cases mentioned in subdivisions three and four, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents.

Former Code of Civil Procedure Section 1937 provided:

> The original writing must be produced and proved, except as provided in Sections 1855 and 1919. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents in some authentic document, or by the recollection of a witness, as provided in Section 1855.

Former Code of Civil Procedure Section 1938 provided:

> If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party.

The Comment to Evidence Code Section 1500 clearly assumes that "writing itself" means the original writing. The Comment states:

> 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 numerous exceptions to the Best Evidence Rule generally refer to what would be the original as "the writing." For example, Section 1502 provides:

> A copy of a writing is not made inadmissible by the best evidence rule if the writing was not reasonably procurable by the proponent by use of the court's process or by other available means.

Section 1510 provides:

> A copy of a writing is not made inadmissible by the best evidence rule if the writing has been produced at the hearing and made available for inspection by the adverse party.

However, several other sections have used the terms "writing itself" or "original writing" apparently where necessary for clarity or to avoid repetition. For example, 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.
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> See also Sections 1551 and 1562.

The staff has been unable to find any instance in which a court has questioned the lack of definition of these terms or has found them confusing.

Additionally, Professor Chadbourn clearly assumes that the terms can and do encompass the concept of duplicate originals, meaning contemporaneously executed or prepared writings intended by the parties to have the same effect as the original. Chadbourn, in comparing the Uniform Rules which use the phrase "writing itself" with California law prior to the adoption of the Evidence Code section states:

> A writing may exist in two or more forms, each form being equal in all respects to the other form or forms. In that event, each is as much original as the other or others. That is, all are duplicate or multiplicate originals. This doctrine is recognized in California. It would continue to be recognized under the Uniform Rules. [6 Cal. L. Revision Comm'n Reports at 146-147 (1964).]

The California cases have basically involved carbon copies. See, e.g., Pratt v. Phelps, 23 Cal. App. 755, 139 P. 906 (1914). However, the courts and commentators seem to have assumed that a contemporaneously executed document would be an a fortiori case for admission as an original. See, e.g., 4 J. Wigmore, Evidence, §§ 1233, 1234 (Chadbourn rev. 1972).

Thus addition of the definition to the statute would appear to be unnecessary.

#63 April 24, 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 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. 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 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 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, 725 (1964); Pratt v. Phelps, 23 Cal. App. 755, 757, 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).

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 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 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, 116 Cal. Rptr. 412 (1974).

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

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 rerecording of a taped telephone 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.[18] 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.[19] However, Federal Rule 1003 contains safeguards in that the production of the original is required where there is

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

17. Evid. Code § 1502.

18. Evid. Code § 1510.

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

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.[20]

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.

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

(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 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); B. Witkin, California Evidence § 690 (2d ed. 1966); J. Wigmore, Evidence § 1234 (Chadbourn ed. 1972). See discussion in Dugar v. Happy Tiger Records, Inc., 41 Cal. App.3d 811, 116 Cal. Rptr. 412 (1974).

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 files or when carbon copies are involved. See C. McCormick, Evidence § 235 (2d ed. 1972); B. Witkin, California Evidence § 690 (2d ed. 1966); J. Wigmore, Evidence §§ 1233, 1234 (Chadbourn ed. 1972); 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).

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. If, for example, a party opposing admission of a duplicate alleges specific facts indicating 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 unique size, shape, or certain physical characteristics of the original make it necessary for 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.

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, (1) obtain a stipulation as to admissibility or (2) utilize the procedure set out in Code of Civil Procedure Section 2033 to obtain an admission of the genuineness of the original. If a party opposes introduction of the duplicate, 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.

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).