Study K-500 August 10, 1995

Memorandum 95-41

Admissibility of Electronic Documents: Best Evidence Rule

INTRODUCTION

The best evidence rule is riddled with exceptions and was criticized by some commentators even in the 1960s, when it was codified in California as Evidence Code Section 1500 and in the Federal Rules of Evidence as Rule 1002. Criticism continues, and technological developments such as the Internet present new complications in applying the rule and its exceptions. Is the dramatic rise in paperless communications the straw that breaks the camel's back? Do the benefits of the best evidence rule still outweigh its detriments?

Because this would be a threshold issue if the Commission decides to update the Evidence Code to accommodate electronic evidence, and because the issue has significance even apart from the context of electronic evidence, it seems logical to consider it now. The discussion that follows (1) describes the best evidence rule and its exceptions, (2) traces some of the rule's history, (3) sets forth the traditional rationales for the rule, (4) relates the modern arguments for retaining the rule, (5) explains the arguments for abolishing or modifying the rule, (6) gives examples of best evidence issues posed by new technologies, (7) lists possible approaches, and (8) tentatively recommends replacement of the rule in civil cases with a new rule making secondary evidence of the content of a writing equally admissible to the original of the writing.

THE BEST EVIDENCE RULE AND ITS EXCEPTIONS

As codified in California at Evidence Code Section 1500, the best evidence rule provides:

> 1500. Except as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.

Significantly, the rule pertains only to proof of the content of a "writing," which is defined broadly in Evidence Code Section 250 to mean "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."

With respect to other types of proof, there is no "best evidence" requirement. "To subject all evidence to the scrutiny of the judge for determination of whether it is the best evidence would unnecessarily disrupt court proceedings and would unduly encumber the party having the burden of proof." Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, 9 U.C. Davis L. Rev. 257, 260 (1976) (hereafter "*The Best Evidence Rule: A Critical Appraisal*"); *see also* McCormick, Evidence 409, 411-12 (1954).

Even as to proof of the content of a "writing," there are many exceptions to the requirement that the "original" writing be introduced. See Evid. Code §§ 1500.5-1566, reproduced at Exhibit pp. 1-16. In particular, "duplicates" (defined in Evidence Code Section 260) are admissible to the same extent as the "original" (defined in Evidence Code Section 255) unless "(a) a genuine question is raised as to the authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Evid. Code § 1511. Additionally, the following types of secondary evidence are admissible:

• printed representations of computer information and computer programs (Evid. Code § 1500.5).

• secondary evidence of writings that have been lost or destroyed without fraudulent intent of the proponent of the evidence (Evid. Code §§ 1501, 1505).

• secondary evidence of unavailable writings (Evid. Code §§ 1502, 1505).

• secondary evidence of writings an opponent has but fails to produce as requested (Evid. Code §§ 1503, 1505).

• secondary evidence of collateral writings that would be inexpedient to produce (Evid. Code §§ 1504, 1505).

• secondary evidence of writings in the custody of a public entity (Evid. Code §§ 1506, 1508).

• secondary evidence of writings recorded in public records, if "the record or an attested or a certified copy thereof is made evidence of the writing by statute" (Evid. Code §§ 1507, 1508).

• secondary evidence of voluminous writings (Evid. Code § 1509).

• copies of writings that were produced at the hearing and made available to the other side (Evid. Code § 1510).

• photographic copies made as business records (Evid. Code § 1550).

• photographic copies of documents lost or destroyed, if properly certified (Evid. Code § 1551).

• copies of business records produced in compliance with Evidence Code Sections 1560-1561 (Evid. Code § 1562, 1564, 1566).

There are so many exceptions that one commentator stated: "[T]he Best Evidence Rule has been treated by the judiciary and the legislature as an unpleasant fact which must be avoided through constantly increasing and broadening the number of 'loopholes.'" Taylor, *The Case for Secondary Evidence*, 81 Case & Comment 46, 48 (1976) (hereafter "*The Case for Secondary Evidence*").

Many of these "loopholes" also appear in the Federal Rules of Evidence. *See* Fed. R. Evid. 1001-1008. But California's Evidence Code has a further complexity almost totally absent from the Federal Rules: In some but not all situations the Evidence Code recognizes degrees of secondary evidence, favoring copies over other types of secondary evidence. Thus, for example, *copies* of collateral writings are admissible pursuant to Evidence Code Section 1504, but *oral testimony* as to the contents of collateral writings is only admissible if the proponent *does not have a copy* of the collateral writing. Evid. Code § 1505; see also Evid. Code § 1501-1503, 1505-1508 (copies preferable to other types of secondary evidence). With respect to voluminous writings, however, all types of secondary evidence are treated equally. Evid. Code § 1509.

HISTORY OF THE BEST EVIDENCE RULE

The best evidence rule developed in the eighteenth century, when pretrial discovery was practically nonexistent and manual copying was the only means

of reproducing documents. Evidence Code Section 1500 and its predecessors (former Code of Civil Procedure Sections 1855, 1937, and 1938) thus codified a longstanding common law doctrine.

Section 1500 and most of its current exceptions were enacted in 1965, as part of the Evidence Code drafted by the Law Revision Commission. 1965 Cal. Stat. ch. 299, § 2. The Federal Rules of Evidence, including the federal version of the best evidence rule, were enacted just a few years later. Many states have since patterned their evidentiary rules on the Federal Rules. The staff has done only limited research on the laws of other states, but it appears that so far no state has abolished the best evidence rule.

Section 1500 has been amended just once, in 1977. The amendment, part of a bill adding definitions of "original" and "duplicate" to the Evidence Code, substituted "the original of a writing" for "the writing itself" in the first sentence of Section 1500.

TRADITIONAL RATIONALES FOR THE BEST EVIDENCE RULE

Rationales traditionally advanced for the best evidence rule include the following:

Fraud Prevention

Some courts and commentators maintain that the best evidence rule guards against incomplete or fraudulent proof. The underlying assumption is that "copies and oral testimony are more susceptible to fraudulent alteration than an original writing." *The Best Evidence Rule: A Critical Appraisal*, 9 U.C. Davis L. Rev. at 259. By excluding such secondary evidence and admitting only originals, the best evidence rule may serve to prevent fraud.

Ensuring Accuracy in Interpretation of Writings

The best evidence rule "is designed to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available." Cal. Evid. Code § 1500 Comment. Underlying this rationale are several concepts:

• In litigation, the exact words of a writing are often especially important, particularly with regard to contracts, wills, and other such instruments. The exact

words of a document may be easier to discern from an original than from secondary evidence.

• An original document may provide clues to interpretation not present on copies or other secondary evidence, such as the presence of staple holes or the color of ink used.

• Secondary evidence of the contents of a document, such as copies and oral testimony, may not faithfully reflect the original. Memories are fallible and copying techniques sometimes imperfect.

See J. Weinstein, M. Berger, J. McLaughlin, Weinstein's Evidence, vol. 5, at 1002-6 (hereafter "Weinstein's Evidence"); *The Best Evidence Rule: A Critical Appraisal*, 9 U.C. Davis L. Rev. at 258-59.

MODERN JUSTIFICATIONS FOR THE BEST EVIDENCE RULE

The leading modern exposition in favor of the best evidence rule is a 1966 article by Professors Cleary and Strong: *The Best Evidence Rule: An Evaluation in Context*, 51 Iowa L. Rev. 825 (1966) (hereafter "Cleary & Strong"). The article has been widely discussed and cited, including in the Advisory Committee Note to Rule 1001 of the Federal Rules of Evidence.

Decreased Emphasis on the Fraud Rationale

Professors Cleary and Strong, as well as other modern commentators, placed relatively little emphasis on the fraud rationale for the best evidence rule. In explaining this, Cleary and Strong referred to Wigmore's criticism of that rationale, which points out (1) situations in which the rule is inapplicable yet ought to apply if it is intended to deter fraud (e.g., proof of matters other than the content of writings), and (2) situations in which the rule applies yet ought not to apply if the goal is fraud deterrence (e.g., when the honesty of the proponent is not in question). 51 Iowa L. Rev. at 826-27; *see* J. Wigmore, Evidence in Trials at Common Law, vol. 4, at 417-19 (J. Chadbourn ed., 1972).

Additionally, the fraud rationale is undercut by the reality that the best evidence rule is an imperfect means of fraud prevention. As Cleary and Strong acknowledged, "[t]he litigant determined to introduce fabricated secondary evidence can hardly be expected to stick at manufacturing an excuse sufficient to procure its admission under one of the numerous currently recognized

exceptions to the best evidence rule." 51 Iowa L. Rev. at 847; *see also The Best Evidence Rule: A Critical Appraisal,* 9 U.C. Davis L. Rev. at 259.

Acknowledged Decrease In Importance of the Best Evidence Rule Generally

Cleary and Strong also recognized that modern discovery rules diminish the importance of the best evidence rule, whatever its rationale:

> In current practice a number of factors other than the best evidence rule tend to promote the achievement of some of or all the objectives which the rule itself has been asserted to serve. Among the most significant of these factors, certainly, are the discovery techniques currently available under statutes or rules providing for production of documents.

51 Iowa L. Rev. at 837. When litigants are able to examine original documents in discovery, they can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the best evidence rule in the midst of trial. Thus, "[t]he great enlargement of the scope of discovery and related procedures in recent times has measurably reduced the need for the rule." Advisory Committee Note to Rule 1001.

Identification of Areas of Continued Importance

While acknowledging inroads on the significance of the best evidence rule, Cleary and Strong maintained that "[a]reas remain in which the best evidence rule continues to operate usefully." 51 Iowa L. Rev. at 847. In particular, they stressed its continued importance with respect to (1) unanticipated documents, (2) documents held by third persons outside the jurisdiction, and (3) criminal cases. *See id.* at 837-48.

• **Unanticipated documents.** Under California and federal law, a request for discovery of documents must specify with reasonable particularity which documents are sought. Cal. Code Civ. Proc. § 2031; Fed. R. Civ. Proc. 34. "[E]ven if other available discovery devices are fully utilized, there will remain at least some possibility that relevant documents will continue to lurk undesignated and undesignatable in the hands of any opponent." Cleary & Strong, 51 Iowa L. Rev. at 839. Further, discovery is expensive and reasonable discovery may fail to disclose documents that might be obtainable through exhaustive but cost-prohibitive discovery. D. Louisell & C. Mueller, Federal Evidence, vol. 5, at 394 (1981) (hereafter "Louisell & Mueller"). "Since the best evidence rule might

presumably be invoked upon an attempt by a party holding these unanticipated documents to introduce secondary evidence of their contents, the evidentiary rule may on occasion function to force production of documentary originals which discovery has failed to secure." Cleary & Strong, 51 Iowa L. Rev. at 839-40.

• **Documents held by third persons outside the jurisdiction.** Similarly, Cleary and Strong pointed out that there may be difficulties in discovering documents from third persons beyond the jurisdiction of the court. 51 Iowa L. Rev. at 841-44. Such discovery may also be expensive. Louisell & Mueller, vol. 5, at 395-96. Cleary and Strong acknowledged, however that "the best evidence rule itself as commonly applied is largely ineffective to secure production in court of original documents in the hands of persons outside the jurisdiction of the court." 51 Iowa L. Rev. at 844. That is because courts commonly find that such evidence falls within one or more of the many exceptions to the best evidence rule. *Id.* In California, for instance, "[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." Cal. Evid. Code § 1502.

• **Criminal cases.** Finally, Cleary and Strong's 1966 article argued that "[i]t would be unrealistic to contend that adequate alternatives to the best evidence rule today exist in the area of the criminal law." 51 Iowa L. Rev. at 844-45. "The primary explanation, of course, lies in the restricted nature of current criminal discovery." *Id.* at 845. Specifically, Cleary and Strong pointed out that in federal court documentary discovery was available only against the government and reached "only a rather narrowly defined class of documents." *Id.* Additionally, they found it significant that criminal rules lacked devices like those in civil actions through which the existence, description, and location of documents could be learned. *Id.* As for state courts, Cleary and Strong observed that many of them afforded essentially no pretrial discovery of documents in criminal cases, and even in the more progressive jurisdictions the scope of document discovery was much more limited in criminal cases than in civil cases. *Id.*

Cleary and Strong's Conclusion

Based on their analysis, Cleary and Strong concluded that the best evidence rule should be retained. Instead of giving the rule a ringing endorsement, however, their support was lukewarm:

> Areas remain in which the best evidence rule continues to operate usefully. As the scope of discovery increases, they will diminish correspondingly, but it seems unlikely that they will disappear entirely in the foreseeable future, due to the unlikelihood that any totally comprehensive scheme of discovery will be evolved or can be evolved. A sensibly administered best evidence rule still has a place in a modern system of evidence.

51 Iowa L. Rev. at 847-48.

Adoption of Cleary and Strong's Analysis in the Federal Rules

Professor Strong was a moving force behind the Federal Rules of Evidence, and his analysis of the best evidence rule prevailed in the drafting process. The Advisory Committee Note to Rule 1001 reads in pertinent part:

> In an earlier day, when discovery and other related procedures were strictly limited, the misleading named "best evidence rule" afforded substantial guarantees against inaccuracies and fraud by its insistence upon production of original documents. The great enlargement of the scope of discovery and related procedures in recent times has measurably reduced the need for the rule. Nevertheless, important areas of usefulness persist: discovery of documents outside the jurisdiction may require substantial outlay of time and money; the unanticipated document may not practically be discoverable; criminal cases have built-in limitations on discovery. Cleary and Strong, The Best Evidence Rule: An Evaluation in Context, 51 Iowa L. Rev. 825 (1966).

ARGUMENTS FOR MODIFYING OR ABOLISHING THE BEST EVIDENCE RULE

In 1969, Professor Broun countered Cleary and Strong's analysis of the best evidence rule, arguing that the rule had "outlived its usefulness, at least in the federal courts." Broun, *Authentication and Contents of Writings,* 1969 Law and the Social Order 611 (hereafter "Broun"). Broun's article is the leading attack on the best evidence rule, but it is not the only one. *See, e.g.*, J. Wigmore, Evidence in Trials at Common Law, vol. 4, at 434-35 (J. Chadbourn ed., 1972) (hereafter "Wigmore"); Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California,* 9 U.C. Davis L. Rev. 257, 260 (1976) (hereafter *"The Best Evidence Rule: A Critical Appraisal"*); Taylor, *The Case for Secondary Evidence,* 81 Case & Comment 46 (1976) (hereafter *"The Case for Secondary Evidence"*); Note, Best Evidence Rule

— The Law in Oregon, 41 Ore. L. Rev. 138 (1962) (hereafter "Oregon Note"). The arguments against the best evidence rule include the following:

As a General Matter, the Best Evidence Rule is Unnecessary

As discussed above, Cleary and Strong concede that modern expansion of the scope of discovery has reduced the importance of the best evidence rule in most contexts. That is perhaps the strongest argument for eliminating or substantially modifying the rule, and opponents of the rule have emphasized it. *See, e.g.*, Broun, 1969 Law and the Social Order at 617-18; *The Best Evidence Rule: A Critical Appraisal,* 9 U.C. Davis L. Rev. at 258, 279. There are, however, a number of additional reasons why the best evidence rule is arguably unnecessary as a general matter:

• The best evidence rule is not the only incentive for litigants to use original documents. Rather, there is also "the normal motivation of the litigants to bring the most convincing evidence before the trier of fact." *The Best Evidence Rule: A Critical Appraisal,* 9 U.C. Davis L. Rev. at 282. If a litigant inexplicably proffers secondary evidence instead of an original, "the jury will likely discount the probative value of the evidence," particularly if opposing counsel draws attention to the point in cross-examination or closing argument. *Id.; see also* Cleary & Strong, 51 Iowa L. Rev. at 846-47.

• The best evidence rule is not the only means of excluding unreliable evidence, such as far-fetched oral testimony regarding the contents of a document that may never have existed. Under Evidence Code Section 352, courts may exclude evidence if "its probative value is substantially outweighed by the probability that its admission will … create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." That may afford sufficient protection against outrageous secondary evidence. *The Case for Secondary Evidence,* 81 Case & Comment at 49. Further, even if secondary evidence were not subject to a best evidence objection, it would still have to be properly authenticated. See Evid. Code § 1401(b) ("Authentication of a writing is required before secondary evidence of its content may be received in evidence"); B. Jefferson, Jefferson's Synopsis of California Evidence Law, § 30.1, at 468 (1985).

• Lastly and less importantly, when the best evidence rule developed in the eighteenth century, copies were made by hand and routinely contained

errors. “Today the possibility of inadvertent error is substantially reduced when copies are produced by modern methods.” *The Best Evidence Rule: A Critical Appraisal*, 9 U.C. Davis L. Rev. at 258. Of course, “while modern techniques of reproduction generally ensure accuracy, oral testimony does not.” J. Weinstein, M. Berger & J. McLaughlin, Weinstein’s Evidence, vol. 5, at 1002-7 (hereafter “Weinstein’s Evidence”).

The Best Evidence Rule Creates Problems

Opponents of the best evidence rule also point out that it entails problems. In particular, critics argue that it is difficult to apply, can be a trap for the unwary, and can result in injustice and waste of resources, particularly scarce judicial resources. For example, Wigmore states:

> The general rule, sound at core as it is, tends to become encased in a stiff bark of rigidity. Thousands of times it is enforced needlessly. Hundreds of appeals are made upon nice points of its detailed application which bear no relation at all to the truth of the case at bar. For this reason the whole rule is in an unhealthy state. The most repugnant features of technicalism … are illustrated in this part of the law of evidence.

Wigmore, vol. 4, at 435. Similarly, Broun maintains that the best evidence rule

> has produced and will continue to produce … results that not only waste precious judicial time but that are clearly unjust. While the rule ostensibly protects against fraud and inaccuracy, it has been blindly applied as a technical hurdle that must be overcome if documentary evidence is to be admitted, despite the fact that fraud or inaccuracy are but minute possibilities in the particular case. The single valuable function of the rule — that is, to insure that the original of a writing is available for inspection so that its genuineness and the accuracy of secondary evidence with regard to it can be tested under the scrutiny of the adversary system — is often ignored in favor of a rigid application of the exclusionary feature of the rule. Thus, exclusion may be required under the rule even though the party opposing the document has had adequate opportunity to scrutinize the original writing, and even though that party could himself have introduced the original if he had any question as to either its genuineness or the accuracy of the secondary evidence introduced by his opponent.

Broun, 1969 Law and the Social Order at 611-12.

Broun supports his points with case illustrations and identifies issues that pose problems in applying the best evidence rule. *See id.* at 620-24. To give but a few examples, the rule may present difficulties in determining points such as: What is a "writing" covered by the rule? When is a litigant seeking to prove the content of a writing? What is the "original" of a writing? When is secondary evidence collateral to a case and therefore admissible? *See, e.g.*, J. Weinstein, J. Mansfield, N. Abrams & M. Berger, Cases and Materials on Evidence, at 211-40. These complexities may lead to needless application of the best evidence rule, which "not only results in the exclusion of reliable evidence, but also creates technical grounds for reversal on appeal." *The Best Evidence Rule: A Critical Appraisal,* 9 U.C. Davis L. Rev. at 279.

Unanticipated Documents Are Not a Sufficient Justification for the Rule

With regard to Cleary and Strong's concern regarding unanticipated documents, it is true that discovery is expensive and even diligent litigants may fail to discover all pertinent documents in advance of trial. But is the best evidence rule worth retaining for that reason? How often will a diligent civil litigant be unexpectedly confronted with secondary evidence of the contents of a *significant* document? In those probably infrequent situations, how often will it really matter whether the original document is used instead of secondary evidence? As Broun says: "The question … is not whether the [best evidence rule] serves its purposes; clearly it often does. Rather, the question is whether the price we pay for its existence, the occasional exclusion of valuable evidence, is worth the value received." Broun, 1969 Law and the Social Order at 616. Broun concludes that it is not. *Id.* Further, Broun argues, the problem of secondary evidence of unanticipated documents could be solved simply by allowing courts to require *production* of the originals of such documents at trial, rather than by excluding the secondary evidence. *Id.* at 618-19.

Difficulties in Obtaining Documents Outside the Jurisdiction Are Not a Sufficient Justification

Documents beyond the court's jurisdiction are the second area in which the best evidence rule is still said to be useful. As described above, however, even Cleary and Strong do not place much weight on this point. Given California's exception to the best evidence rule for writings that are not reasonably procurable (Evidence Code Section 1502), there may only be a very narrow set of

cases in which the rule excludes secondary evidence of the contents of documents outside the jurisdiction. Arguably, the benefits of the rule in that narrow or even nonexistent set of cases are not enough to tip the cost-benefit balance in favor of applying the rule to all cases. *Cf.* Broun, 1969 Law and the Social Order at 618 (documents outside the jurisdiction do not justify federal version of the rule).

The Best Evidence Rule is Unnecessary Even in Criminal Cases

Lastly, Broun argued that the scope of discovery in criminal cases was broad enough to make the best evidence rule unnecessary even in the criminal context. Broun, 1969 Law and the Social Order at 619. Broun focused on the then-existing federal discovery scheme, which had been substantially broadened since Cleary and Strong wrote their article, but a similar argument could be made with respect to today's California scheme, which permits liberal reciprocal discovery. *See* Penal Code §§ 1054.1, 1054.3; Izazaga v. Superior Court, 54 Cal. 3d 356, 372, 377, 815 P.2d 304, 285 Cal. Rptr. 231 (1991); People v. Jackson, 15 Cal. App. 4th 1197, 1201, 19 Cal. Rptr. 2d 80 (1993).

Specifically, the Penal Code disclosure requirements are:

> 1054.1. The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
>
> (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
>
> (b) Statements of all defendants.
>
> (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
>
> (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
>
> (e) Any exculpatory evidence.
>
> (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.
>
> 1054.3. The defendant and his or her attorney shall disclose to the prosecuting attorney:

> (a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.
>
> (b) Any real evidence which the defendant intends to offer in evidence at the trial.

While these provisions afford a measure of protection against surprise at trial, including, to some extent, surprise use of secondary evidence where there has been no opportunity to inspect the original, criminal discovery remains less expensive than civil discovery. Arguably, however, the differences are not significant enough to warrant retention of the best evidence rule.

THE IMPACT OF NEW TECHNOLOGY

What do technological advances such as increasing use of facsimiles, scanners, e-mail, the Internet, and the like have to do with the merits of the best evidence rule? One answer is that they pose new complications for the courts in applying the rule, such as:

• Gerald Genard's confusion regarding how the best evidence rule applies to digital signatures. See Memorandum 95-34, Exhibit pp. 1-2.

• If a document is downloaded from the Internet, is the downloaded information an "original" or an admissible "duplicate?" What about a printout of that information? Is the answer different if the document is converted from one word processing system to another? What if formatting adjustments are made, such as changes in page width, pagination, paragraph spacing, font size, or font? Is the answer different for a pagination change in a document with internal page references than for a pagination change in a document lacking such references? Is the answer different if the change is from Courier font (abcd) to Monaco (abcd), rather than from Courier to Zapf Dingbats (❁✲❃❄)?

• If a document is prepared on a computer and faxed directly from the computer without making a printout, what is the "original" of the document? Is the answer the same as for a document that is printed from a computer and then

faxed? What if a document is printed from a computer, signed manually, and then faxed? Does the best evidence rule apply differently if a digital, rather than manual, signature is attached and the same document is faxed directly from the computer without ever being printed out?

Problems such as these are by no means unsolvable. The issue, however, is whether the benefits of the best evidence rule justify the expense and effort of reaching solutions.

ALTERNATIVES

What are the Commission's alternatives with respect to the best evidence rule? Here are some possibilities:

(1) Leave the rule as is.

(2) Retain the rule, but make modifications to accommodate new technology.

(3) Retain the rule, but simplify it by eliminating the existing hierarchy of secondary evidence. *See The Best Evidence Rule: A Critical Appraisal*, 9 U.C. Davis L. Rev. at 278.

(4) Broun's proposal: Replace the best evidence rule with a rule

> that would specifically give to the court the power to require the party seeking to offer secondary evidence of the contents of a writing to produce the original writing for inspection, if it is under his control, or to state his reasons for not producing it. Any statement of reasons would be sufficient to satisfy the court's order. Evidence would be excluded under such a rule only as a sanction for a willful refusal to comply with the court's order. An order permitted by the rule proposed here should be necessary only in rare instances.

Broun, 1969 Law and the Social Order at 617.

(5) Wigmore's approach: Adopt a provision stating that "[p]roduction of the original may be dispensed with, in the trial court's discretion, whenever in the case in hand the opponent does not bona fide dispute the contents of the document and no other useful purpose will be served by requiring production." Wigmore, vol. 4, at 434; *see also* Oregon Note, 41 Ore. L. Rev. at 153 (endorsing Wigmore's approach).

(6) The Davis Approach: Replace the best evidence rule with a rule that would "make secondary evidence of a writing's content admissible unless the trial judge finds, as a preliminary fact, that (1) a genuine dispute exists concerning the material terms of the writing or (2) it would be unfair to admit the secondary evidence in lieu of the original writing." *The Best Evidence Rule: A Critical Appraisal*, 9 U.C. Davis L. Rev. at 282.

(7) Make secondary evidence of the content of a writing equally admissible to an original of the writing. *See The Case for Secondary Evidence*, 81 Case & Comment at 48-49. In urging this approach, Taylor argues for "swift reform of a rule of law when needed," rather than the more typical "gradual whittling away through interpretations, exceptions and limitations until there is little left, and that little is then ignored." *Id.* at 47. Such a reform could be limited to civil cases, or extended to both civil and criminal cases. It could be accomplished by replacing the best evidence rule with a rule substantially as follows:

> The content of a writing may be proved through an original of the writing, if otherwise admissible, or secondary evidence of the writing, if otherwise admissible. The quality of the evidence offered to prove the content of a writing goes to its weight, not its admissibility. Nothing in this Section excuses compliance with Section 1401 (authentication).

(8) Eliminate the best evidence rule in some or all cases without offering a statutory replacement. This may lead to confusion and subsequent resurrection of the rule as a judicial doctrine.

RECOMMENDATION

With respect to civil cases, the staff tentatively recommends Alternative #7 (making secondary evidence of the content of a writing equally admissible to an original of the writing), but ensuring that the discovery rules unequivocally require production of the original of any writing, as well as all nonidentical versions of the writing. In today's world, the justifications for the rule seem weak as compared to its costs, at least in the civil context. Halfway measures such as Broun's proposal, Wigmore's approach, and the Davis approach would engender new difficulties in interpretation and application, which may not warrant the benefits to be gained from them, particularly given existing authentication requirements for secondary evidence, as well as Evidence Code Section 352,

which could be used to exclude items of low probative value. Alternative #7 seems simpler and more straightforward.

With respect to criminal cases, the best evidence rule may still be important, although the staff is unsure exactly how important. Based on the information it now has, the staff tentatively recommends retaining the rule in criminal cases but updating the rule in light of new technology. Alternatively, in criminal cases the rule could simply be left as is until there is an opportunity to review the effect of the reform in civil cases and determine whether to extend it to the criminal context.

Respectfully submitted,

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§ 250. "Writing"

250. "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.

Enacted 1965 Cal. Stat. ch 299.

Comment. "Writing" is defined very broadly to include all forms of tangible expression, including pictures and sound recordings.

§ 255. "Original"

255. "Original" means the writing itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

Added 1977 Cal. Stat. ch 708.

§ 260. "Duplicate"

260. A "duplicate" is 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 technique which accurately reproduces the original.

Added 1977 Cal. Stat. ch 708.

§ 1500. The best evidence rule

1500. Except as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.

Enacted 1965 Cal. Stat. ch 299; Amended 1977 Cal. Stat. ch 708.

Comment. Section 1500 states the best evidence rule. This rule is now found in Code of Civil Procedure Sections 1855, 1937, and 1938, 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.

§ 1500.5. Computed recorded information and computer programs

1500.5. Notwithstanding the provisions of Section 1500, a printed representation of computer information or a computer program which is being

used by or stored on a computer or computer readable storage media shall be admissible to prove the existence and content of the computer information or computer program.

Computer recorded information or computer programs, or copies of computer recorded information or computer programs, shall not be rendered inadmissible by the best evidence rule. Printed representations of computer information and computer programs will be presumed to be accurate representations of the computer information or computer programs that they purport to represent. This presumption, however, will be a presumption affecting the burden of producing evidence only. If any party to a judicial proceeding introduces evidence that such a printed representation is inaccurate or unreliable, the party introducing it into evidence will have the burden of proving, by a preponderance of evidence, that the printed representation is the best available evidence of the existence and content of the computer information or computer programs that it purports to represent.

Added 1983 Cal. Stat. ch 933.

§ 1501. Copy of lost or destroyed writing

1501. A copy of a writing is not made inadmissible by the best evidence rule if the writing is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

Enacted 1965 Cal. Stat. ch 299.

Comment. Section 1501 states an exception to the best evidence rule that is 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

1502. 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.

Enacted 1965 Cal. Stat. ch 299.

Comment. The exception stated in Section 1502 is not stated in the existing 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 by means other than the court's process. 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 changes the rule of these cases and makes 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

1503. (a) A copy of a writing is not made inadmissible by the best evidence rule if, at a time when the writing was under the control of the opponent, the opponent was expressly or impliedly notified, by the pleadings or otherwise, that the writing would be needed at the hearing, and on request at the hearing the opponent has failed to produce the writing. In a criminal action, the request at the hearing to produce the writing may not be made in the presence of the jury.

(b) Though a writing requested by one party is produced by another, and is thereupon inspected by the party calling for it, the party calling for the writing is not obliged to introduce it as evidence in the action.

Enacted 1965 Cal. Stat. ch 299.

Comment. Subdivision (a) of Section 1503 states an exception to the best evidence rule that is 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. Section 1503 requires 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.

Under existing law, secondary evidence of the content of a writing is admissible in a criminal case without notice to the defendant upon a prima facie showing that the writing is in the defendant's possession. People v. Chapman, 55 Cal. App. 192, 203 Pac. 126 (1921). In fact, a request for the document at the trial is improper. People v. Powell, 71 Cal. App. 500, 236 Pac. 311 (1925). However, if the defendant objects to the introduction of secondary evidence of the writing, the prosecution 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 a request at the trial for production of the original. The notice and request do 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

1504. A copy of a writing is not made inadmissible by the best evidence rule if the writing is not closely related to the controlling issues and it would be inexpedient to require its production.

Enacted 1965 Cal. Stat. ch 299.

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

1505. If the proponent does not have in his possession or under his control a copy of a writing described in Section 1501, 1502, 1503, or 1504, other secondary evidence of the content of the writing is not made inadmissible by the best evidence rule. This section does not apply to a writing that is also described in Section 1506 or 1507.

Enacted 1965 Cal. Stat. ch 299.

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 opponent'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 made in the proponent's evidence of the content of the writing.

§ 1506. Copy of public writing

1506. A copy of a writing is not made inadmissible by the best evidence rule if the writing is a record or other writing that is in the custody of a public entity.

Enacted 1965 Cal. Stat. ch 299.

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

§ 1507. Copy of recorded writing

1507. A copy of a writing is not made inadmissible by the best evidence rule if the writing has been recorded in the public records and the record or an attested or a certified copy thereof is made evidence of the writing by statute.

Enacted 1965 Cal. Stat. ch 299.

Comment. Section 1507 restates an exception to the best evidence rule that is now found in subdivision 4 of Code of Civil Procedure Section 1855.

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

1508. If the proponent does not have in his possession a copy of a writing described in Section 1506 or 1507 and could not in the exercise of reasonable diligence have obtained a copy, other secondary evidence of the content of the writing is not made inadmissible by the best evidence rule.

Enacted 1965 Cal. Stat. ch 299.

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

1509. Secondary evidence, whether written or oral, of the content of a writing is not made inadmissible by the best evidence rule if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole; but the court in its discretion may require that such accounts or other writings be produced for inspection by the adverse party.

Enacted 1965 Cal. Stat. ch 299.

Comment. Section 1509 restates an exception to the best evidence rule that is found in subdivision 5 of Code of Civil Procedure Section 1855. The final clause, permitting the court 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

1510. 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.

Enacted 1965 Cal. Stat. ch 299.

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.

§ 1511. Duplicate of writing

1511. A duplicate is admissible to the same extent as an original unless (a) a genuine question is raised as to the authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Added 1985 Cal. Stat. ch 100.

§ 1530. Copy of writing in official custody

1530. (a) A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing or entry if:

(1) The copy purports to be published by the authority of the nation or stats, or public entity therein in which the writing is kept;

(2) The office in which the writing is kept is within the United States or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, and the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing; or

(3) The office in which the writing is kept is not within the United States or any other place described in paragraph (2) and the copy is attested as a correct copy of the writing or entry by a person having authority to make attestation. The attestation must be accompanied by a final statement certifying the genuineness of the signature and the official position of (i) the person who attested the copy as a correct copy or (ii) any foreign official who has certified either the genuineness of the signature and official position of the person attesting the copy or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person attesting the copy. Except as provided in the next sentence, the final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. Prior to January 1, 1971, the final statement may also be made by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation in which the writing is kept, authenticated by the seal of his office. If reasonable opportunity has been given to all parties to investigate the

authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without the final statement or (ii) permit the writing or entry in foreign custody to be evidenced by an attested summary with or without a final statement.

(b) The presumptions established by this section are presumptions affecting the burden of producing evidence.

Enacted 1965 Cal. Stat. ch 299; Amended 1970 Cal. Stat. ch 41.

Comment (1965). 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 that was made other than by a witness while testifying at the hearing and 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 IV 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.

Subdivision (a)(2) and (a)(3) generally. Paragraphs (2) and (3) of subdivision (a) 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 certain writings to be "certified." Section 1923 of the Code of Civil Procedure (superseded by Evidence Code Section 1531) provides that the certificate affixed to a certified copy must state that the copy 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 words "attested" and "certified" is that the existing statutory definition of "certified" requires the use of a seal, if the authenticating officer has one, whereas the definition of "attested" does not. Section 1530 eliminates the requirement of the seal by the use of the word "attested." However, Section 1530 retains, in addition, the word "certified" because it is the more familiar term in California practice.

Subdivision (a)(2). Under existing 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 §6600. 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 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 foreign 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.

Comment (1970). Section 1530 of the Evidence Code is concerned with the use of a copy of a writing in official custody to prove the content of the original. Section 1530 was deficient insofar as it prescribed, in subdivision (a)(3), the procedure for proof of foreign official writings. Subdivision (a)(3) requires that the copy of the foreign official record be attested as a correct copy by "a person having authority to make the attestation." The subdivision further requires that the first attester's signature and his official position be certified by a higher foreign official, whose signature can in turn be certified by a still higher official. Under the section as it formerly read, such certifications could be continued in a chain until a foreign official was reached as to whom a United States foreign service officer "stationed in the nation in which the writing is kept" had adequate information upon which to base his final certification. In other words, to prove a copy of a foreign official record, it was necessary to have a certificate of a United States foreign service officer stationed in the nation in which the writing was kept.

In some situations, it was impossible to satisfy the basic requirement of subdivision (a)(3) of Section 1530 because there were no United States foreign service officials in the particular foreign country (such as East Germany) and, hence, there was no one who could make the certificate required by subdivision (a)(3). As a result, in some situations, it was extremely difficult and expensive or even impossible to establish such matters as birth, legitimacy, marriage, death, or a will.

The problem described above was particularly troublesome in the case of a foreign will because Probate Code Section 361 was amended at the 1969 session to provide that a copy of a foreign will (and the related documents concerning the establishment or proof of the will in the foreign country) can be admitted in California "if such copy or other evidence satisfies the requirements of Article 2 (commencing with Section 1530) of Chapter 2 of Division 11 of the Evidence Code."

When Section 1530 of the Evidence Code was drafted in 1964, the Commission had the benefit of a proposed amendment to Rule 44 of the Federal Rules of Civil Procedure and based subdivision (a)(3) on that proposed amendment. After the Evidence Code was enacted in 1965, Rule 44 was revised (in 1966) to provide for proof of foreign official records. In the revision of Rule 44 in 1966, the defect pointed out above was discovered and provision was made in Rule 44 to cover the problem.

Rule 44 (as revised in 1966) includes the following provision to deal with the East Germany type case:

If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

The Note of the Advisory Committee regarding revised Rule 44 states:

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. There may be no United States consul in a particular foreign country; the foreign officials may not cooperate; peculiarities may exist or arise hereafter in the law or practice of a foreign country. See United States v Grabina, 119 F2d 863 (2d Cir 1941); and generally, Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L J 515, 548-49 (1953). Therefore the final sentence of subdivision (a)(2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. See Rep. of Comm. on Comparative Civ. Proc. & Prac., Proc. A.B.A., Sec. Int'l & Comp. L. 123, 130-31 (1952); Model Code of Evidence §§517, 519 (1942). This relaxation should be permitted only when it is shown that the party has been unable to satisfy the basic requirements of the amended rule despite his reasonable efforts. Moreover it is specially provided that the parties must be given a reasonable opportunity in these cases to examine into the authenticity and accuracy of the copy or summary.

Senate Bill No. 266 adds the substance of the sentence of Rule 44 quoted above, making only those changes needed to conform the language of that sentence to the language used in Section 1530. The bill also adopts the language of Rule 44 which specifies the officers who can make the final certificate. The change made by adopting this language is to restrict the United States foreign service officers who can make the final certificate to certain specified responsible officers and to liberalize the provision by permitting "a diplomatic or consular official of the foreign country assigned or accredited to the United States" to make the final certificate. This latter conforming change achieves desirable conformity with Rule 44 and liberalizes the rule but at the same time assures that a responsible official will make the final certificate.

§ 1531. Certification of copy for evidence

1531. For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be.

Enacted 1965 Cal. Stat. ch 299.

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 seal.

§ 1532. Official record of recorded writing

1532. (a) The official record of a writing is prima facie evidence of the existence and content of the original recorded writing if:

(1) The record is in fact a record of an office of a public entity; and

(2) A statute authorized such a writing to be recorded in that office.

(b) The presumption established by this section is a presumption affecting the burden of producing evidence.

Enacted 1965 Cal. Stat. ch 299.

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 acknowledgment 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.

§ 1550. Photographic copies made as business records

1550. A nonerasable optical image reproduction provided that additions, deletions, or changes to the original document are not permitted by the technology, 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 the 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 that business. The introduction of the copy, reproduction, or enlargement does not preclude admission of the original writing if it is still in existence. A court may require the introduction of a hard copy printout of the document.

Enacted 1965 Cal. Stat. ch 299; Amended 1992 Cal. Stat. ch 876.

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;

and 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

1551. A print, whether enlarged or not, from a photographic film (including a photographic plate, microphotographic film, photostatic negative, or similar reproduction) of an original writing destroyed or lost after such film was taken or a reproduction from an electronic recording of video images on magnetic surfaces is admissible as the original writing itself if, at the time of the taking of such film or electronic recording, the person under whose direction and control it was taken attached thereto, or to the sealed container in which it was placed and has been kept, or incorporated in the film or electronic recording, a certification complying with the provisions of Section 1531 and stating the date on which, and the fact that, it was so taken under his direction and control.

Enacted 1965 Cal. Stat. ch 299 §2; Amended 1969 Cal. Stat. ch 646.

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

§ 1560. Compliance with subpoena duces tecum for business records

1560. (a) As used in this article:

(1) "Business" includes every kind of business described in Section 1270.

(2) "Record" includes every kind of record maintained by such a business.

(b) Except as provided in Section 1564, when a subpoena duces tecum is served upon the custodian of records or other qualified witness of a business in an action in which the business is neither a party nor the place where any cause of action is alleged to have arisen, and the subpoena requires the production of all or any part of the records of the business, it is sufficient compliance therewith if the custodian or other qualified witness, within five days after the receipt of the subpoena in any criminal action or within the time agreed upon by the party who served the subpoena and the custodian or other qualified witness, or within 15 days after the receipt of the subpoena in any civil action or within the time agreed upon by the party who served the subpoena and the custodian or other qualified witness, delivers by mail or otherwise a true, legible, and durable copy of all the records described in the subpoena to the clerk of the court or to the judge if there be no clerk or to such other person as described in subdivision (c) of Section 2026 of the Code of Civil Procedure, together with the affidavit described in Section 1561.

(c) The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness, and date of subpoena clearly inscribed thereon; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and directed as follows:

(1) If the subpoena directs attendance in court, to the clerk of such court, or to the judge thereof if there be no clerk.

(2) If the subpoena directs attendance at a deposition, to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business.

(3) In other cases, to the officer, body, or tribunal conducting the hearing, at a like address.

(d) Unless the parties to the proceeding otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are original documents and which are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received. Records which are copies may be destroyed.

(e) As an alternative to the procedures described in subdivisions (b), (c), and (d), the subpoenaing party may direct the witness to make the records available for inspection or copying by the party's attorney or the attorney's representative at the witness' business address under reasonable conditions during normal business hours. It shall be the responsibility of the attorney's representative to deliver any copy of the records as directed in the subpoena.

Enacted 1965 Cal. Stat. ch 299; Amended 1969 Cal. Stat. ch 199; 1982 Cal. Stat. ch 452; 1984 Cal. Stat. ch 481; 1986 Cal. Stat. ch 603; 1991 Cal. Stat. ch 1090.

Comment. Section 1560 is the same in substance as Code of Civil Procedure Section 1998, except for the clarifying definition of "hospital" added in subdivision (a).

§ 1561. Affidavit accompanying records

1561. (a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

(1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records.

(2) The copy is a true copy of all the records described in the subpoena duces tecum, or pursuant to subdivision (e) of Section 1560 the records were delivered to the attorney or the attorney's representative for copying at the custodian's or witness' place of business, as the case may be.

(3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.

(b) If the business has none of the records described, or only part thereof, the custodian or other qualified witness shall so state in the affidavit, and deliver the affidavit and such records as are available in the manner provided in Section 1560.

(c) Where the records described in the subpoena were delivered to the attorney or his or her representative for copying at the custodian's or witness' place of business, in addition to the affidavit required by subdivision (a), the records shall be accompanied by an affidavit by the attorney or his or her representative stating that the copy is a true copy of all the records delivered to the attorney or his or her representative for copying.

Enacted 1965 Cal. Stat. ch 299; Amended 1969 Cal. Stat. ch 199; 1986 Cal. Stat. ch 603; 1987 Cal. Stat. ch 19.

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

1562. If the original records would be admissible in evidence if the custodian had been present and testified to the matters stated in the affidavit, and if the requirements of Section 1271 have been met, the copy of the records is admissible in evidence. The affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the matters so stated are presumed true. When more than one person has knowledge of the facts, more than one affidavit may be made. The presumption established by this section is a presumption affecting the burden of producing evidence.

Enacted 1965 Cal. Stat. ch 299; Amended 1989 Cal. Stat. ch 1416.

Comment. Section 1562 supersedes the provisions of Code of Civil Procedure Section 1998.2. Under Section 1998.2, the presumption provided in this section could be overcome only by a preponderance of the evidence. Section 1562, however, classifies the presumption as one affecting the burden of producing evidence only. See Evidence Code §§603 and 604 and the Comments thereto. Section 1562 makes it clear, too, that the presumption relates only to the truthfulness of the matters required by Section 1561 to be stated in the affidavit. (As amended in the Legislature.)

§ 1563. Witness and mileage fees; Recovery of "reasonable costs"

1563. (a) This article shall not be interpreted to require tender or payment of more than one witness fee and one mileage fee or other charge unless there is an agreement to the contrary.

(b) All reasonable costs incurred in a civil proceeding by any witness which is not a party with respect to the production of all or any part of business records the production of which is requested pursuant to a subpoena duces tecum may be charged against the party serving the subpoena duces tecum.

(1) "Reasonable cost," as used in this section, shall include, but not be limited to, the following specific costs: ten cents ($0.10) per page for standard reproduction of documents of a size 81/2 by 14 inches or less; twenty cents ($0.20) per page for copying of documents from microfilm; actual costs for the reproduction of oversize documents or the reproduction of documents requiring special processing which are made in response to a subpoena; reasonable clerical costs incurred in locating and making the records available to be billed at the maximum rate of sixteen dollars ($16) per hour per person, computed on the basis

of four dollars ($4) per quarter hour or fraction thereof; actual postage charges; and actual costs, if any, charged to the witness by a third person for the retrieval and return of records held by that third person.

(2) The requesting party shall not be required to pay those costs or any estimate thereof prior to the time the records are available for delivery pursuant to the subpoena, but the witness may demand payment of costs pursuant to this section simultaneous with actual delivery of the subpoenaed records, and until such time as payment is made, is under no obligation to deliver the records.

(3) The witness shall submit an itemized statement for the costs to the requesting party setting forth the reproduction and clerical costs incurred by the witness. Upon demand by the requesting party, the witness shall furnish a statement setting forth the actions taken by the witness in justification of the costs.

(4) The requesting party may petition the court in which the action is pending to recover from the witness all or a part of the costs paid to the witness, or to reduce all or a part of the costs charged by the witness, pursuant to this subdivision, on the grounds that such costs were excessive. Upon the filing of the petition the court shall issue an order to show cause and from the time the order is served on the witness the court has jurisdiction over the witness. The court may hear testimony on the order to show cause and if it finds that the costs demanded and collected, or charged but not collected, exceed the amount authorized by this subdivision, it shall order the witness to remit to the requesting party, or reduce its charge to the requesting party by an amount equal to, the amount of the excess. In the event that the court finds the costs excessive and charged in bad faith by the witness, the court shall order the witness to remit the full amount of the costs demanded and collected, or excuse the requesting party from any payment of costs charged but not collected, and the court shall also order the witness to pay the requesting party the amount of the reasonable expenses incurred in obtaining the order including attorney's fees. If the court finds the costs were not excessive, the court shall order the requesting party to pay the witness the amount of the reasonable expenses incurred in defending the petition, including attorney's fees.

(5) If a subpoena is served to compel the production of business records and is subsequently withdrawn, or is quashed, modified or limited on a motion made other than by the witness, the witness shall be entitled to reimbursement pursuant to paragraph (1) for all costs incurred in compliance with the subpoena to the time that the requesting party has notified the witness that the subpoena has been withdrawn or quashed, modified or limited. In the event the subpoena is withdrawn or quashed, if those costs are not paid within 30 days after demand therefor, the witness may file a motion in the court in which the action is pending for an order requiring payment, and the court shall award the payment of expenses and attorney's fees in the manner set forth in paragraph (4).

(6) Where the records are delivered to the attorney or the attorney's representative for inspection or photocopying at the witness' place of business, the only fee for complying with the subpoena shall not exceed fifteen dollars ($15), plus actual costs, if any, charged to the witness by a third person for retrieval and return of records held offsite by the third person. If the records are retrieved from microfilm, the reasonable cost, as defined in paragraph (1), shall also apply.

(c) When the personal attendance of the custodian of a record or other qualified witness is required pursuant to Section 1564, in a civil proceeding, he or she shall be entitled to the same witness fees and mileage permitted in a case where the subpoena requires the witness to attend and testify before a court in which the action or proceeding is pending and to any additional costs incurred as provided by subdivision (b).

Enacted 1965 Cal. Stat. ch 299; Amended 1972 Cal. Stat. ch 396; 1981 Cal. Stat. ch 1014; 1982 Cal. Stat. ch 452; 1986 Cal. Stat. ch 603; 1987 Cal. Stat. ch 19.

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

1564. The personal attendance of the custodian or other qualified witness and the production of the original records is not required unless, at the discretion of the requesting party, the subpoena duces tecum contains a clause which reads:

"The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena."

Enacted 1965 Cal. Stat. ch 299; Amended 1984 Cal. Stat. ch 603; 1986 Cal. Stat. ch 603; 1987 Cal. Stat. ch 19.

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

§ 1565. Service of more than one subpoena duces tecum

1565. If more than one subpoena duces tecum is served upon the custodian of records or other qualified witness and the personal attendance of the custodian or other qualified witness is required pursuant to Section 1564, the witness shall be deemed to be the witness of the party serving the first such subpoena duces tecum.

Enacted 1965 Cal. Stat. ch 299; Amended 1969 Cal. Stat. ch 199.

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

§ 1566. Applicability of article

1566. This article applies in any proceeding in which testimony can be compelled.

Added 1965 Cal. Stat. ch 299.

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.