Study K-501 September 22, 1995

Memorandum 95-47

Best Evidence Rule: Draft of Tentative Recommendation

Based on the discussion at the Commission's last meeting, attached is a draft of a tentative recommendation calling for replacement of the best evidence rule and its numerous exceptions with the Davis approach (the approach advocated in Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, 9 U.C. Davis L. Rev. 257, 282 (1976)), which the staff has now redenominated "the secondary evidence rule." The staff notes present a number of issues for discussion. If there are additional points warranting discussion, please plan on raising them at the meeting.

Respectfully submitted,

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#K-500

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

TENTATIVE RECOMMENDATION

Best Evidence Rule

September 1995

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **November 22, 1995.**

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

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SUMMARY OF TENTATIVE RECOMMENDATION

This recommendation calls for repeal of the best evidence doctrine (Article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of the Evidence Code) and adoption of a new rule known as the secondary evidence rule, which would make secondary evidence generally admissible to prove the content of a writing, but allow courts to exclude such evidence if (1) a genuine dispute exists concerning material terms of the writing, and justice requires the exclusion, or (2) admission of the secondary evidence would be unfair. The recommendation was prepared pursuant to Resolution Chapter 130 of the Statutes of 1965, continued in Resolution Chapter 87 of the Statutes of 1995.

The best evidence rule is unnecessary in a system with broad pretrial discovery. Existing pretrial opportunities to inspect original documents, coupled with the proposed secondary evidence rule and the normal motivation of the parties to present convincing evidence, should satisfactorily serve the primary asserted function of the best evidence rule: guarding against misinterpretation of writings. Repeal of the best evidence rule would also avoid difficulties in interpretation, eliminate traps for unwary litigants, and reduce injustice and waste of resources, particularly scarce judicial resources.

BEST EVIDENCE RULE

INTRODUCTION

The best evidence rule requires use of the original of a writing to prove the content of the writing. Commentators questioned the rule and its many exceptions in the 1960s, but there were still persuasive justifications for the rule and it was codified in California as Evidence Code Section 1500 and in the Federal Rules of Evidence as Rule 1002. Since then, the rule has received further criticism, and technological developments such as the dramatic rise in use of facsimiles and electronic communications pose new complications in applying the rule and its exceptions. Upon reexamination, the rationales for the rule no longer withstand scrutiny. A simpler doctrine, making secondary evidence generally admissible to prove the content of a writing, should provide sufficient protection against misinterpretation of writings, yet be more efficient, more just, and more readily applied.

THE BEST EVIDENCE RULE AND ITS EXCEPTIONS

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

> § 1500. Best evidence rule
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> 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.

The rule pertains only to proof of the content of a "writing," which is defined broadly to include "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."[1]

There are many exceptions to the rule's requirement that the proponent introduce the original of the writing.[2] In particular, duplicates are admissible to the same extent as the 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

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1. Evidence Code § 250. 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).

2. See Evid. Code §§ 1500.5-1566.

in lieu of the original."[3] Additionally, the best evidence rule does not exclude the following types of secondary evidence:

- printed representations of computer information and computer programs.[4]
- secondary evidence of writings that have been lost or destroyed without fraudulent intent of the proponent of the evidence.[5]
- secondary evidence of unavailable writings.[6]
- secondary evidence of writings an opponent has but fails to produce as requested.[7]
- secondary evidence of collateral writings that would be inexpedient to produce.[8]
- secondary evidence of writings in the custody of a public entity.[9]
- secondary evidence of writings recorded in public records, if "the record or an attested or certified copy thereof is made evidence of the writing by statute."[10]
- secondary evidence of voluminous writings.[11]
- copies of writings that were produced at the hearing and made available to the other side.[12]
- photographic copies made as business records.[13]
- photographic copies of documents lost or destroyed, if properly certified.[14]
- copies of business records produced in compliance with Evidence Code Sections 1560-1561.[15]

The number of these exceptions prompted one commentator to state: "[T]he Best Evidence Rule has been treated by the judiciary and the legislature as an

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3. Evid. Code § 1511. For the definition of "duplicate," see Evid. Code § 260. For the definition of "original," see Evid. Code § 255.
4. Evid. Code § 1500.5.
5. Evid. Code § 1501, 1505.
6. Evid. Code § 1502, 1505.
7. Evid. Code §§ 1503, 1505.
8. Evid. Code §§ 1504, 1505.
9. Evid. Code §§ 1506, 1508.
10. Evid. Code §§ 1507, 1508.
11. Evid. Code § 1509.
12. Evid. Code § 1510.
13. Evid. Code § 1550.
14. Evid. Code § 1551.
15. Evid. Code §§ 1562, 1564, 1566.

unpleasant fact which must be avoided through constantly increasing and broadening the number of 'loopholes.'"[16]

Many of these exceptions also appear in the Federal Rules of Evidence.[17] But California's Evidence Code has another 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, 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.[18] With respect to voluminous writings, however, all types of secondary evidence are treated equally.[19]

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.[20] Evidence Code Section 1500 and its predecessors[21] thus codified a long-standing common law doctrine.

Section 1500 and most of its current exceptions were enacted in 1965, as part of the Evidence Code drafted by the California Law Revision Commission.[22] The Federal Rules of Evidence, including the federal version of the best evidence rule,[23] were enacted just a few years later.

Since then, there has been rapid technological change, including a sharp rise in photocopying and electronic imaging. There have also been expansions in the breadth and the use of pretrial discovery. These developments prompted the Law Revision Commission to review the continued utility of the best evidence rule.

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16. Taylor, *The Case for Secondary Evidence,* 81 Case & Comment 46, 48 (1976) (hereafter "*The Case for Secondary Evidence*").

17. See Fed. R. Evid. 1001-1008.

18. See Evid. Code §§ 1504-1505. For other examples of preference for copies over other types of secondary evidence, see Evid. Code §§ 1505-1508.

19. Evid. Code § 1509.

20. *The Best Evidence Rule: A Critical Appraisal,* 9 U.C. Davis L. Rev. at 258; *see also* Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context,* 51 Iowa L. Rev. 825 (1966) (hereafter "Cleary & Strong").

21. Former Code Civ. Proc. §§ 1855, 1937, 1938.

22. 1965 Cal. Stat. ch. 299, § 2. For the Commission's recommendation proposing the Evidence Code, see *Recommendation proposing an Evidence Code,* 7 Cal. L. Revision Comm'n Reports 1 (1965).

23. Fed. R. Evid. 1001-1008.

THE BEST EVIDENCE RULE HAS COSTS

Like any rule of law, the best evidence rule is imperfect and this has been a source of criticism.[24] For example, Professor Broun stated in 1969 that the 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.[25]

Similarly, Wigmore commented that the best evidence 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.[26]

These remarks may overstate the detriments of the best evidence rule, but it is clear that the rule may present difficulties in determining points such as: 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

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24. *See* Broun, *Authentication and Contents of Writings*, 1969 Law and the Social Order 611, 611-24 (hereafter "Broun"); *The Best Evidence Rule: A Critical Appraisal* , 9 U.C. Davis L. Rev. 257, 258, 279-80, 283; Wigmore, Evidence in Trials at Common Law, vol. 4, at 434-35 (J. Chadbourn ed., 1972) (hereafter "Wigmore"); *The Case for Secondary Evidence*, 81 Case & Comment at 48-49 (1976); Note, *Best Evidence Rule — The Law in Oregon,* 41 Ore. L. Rev. 138, 153 (1962).

25. Broun, 1969 Law and the Social Order at 611-12. Professor Broun supported his points with case illustrations and identified issues that posed problems in applying the rule. *See id.* at 620-24.

26. Wigmore, vol. 4, at 435.

admissible?[27] Advances in technology, such as the increasing use of facsimiles, electronic mail, and computer networks, pose new possibilities for confusion and inconsistencies in application of the best evidence rule.[28] These complexities may be a trap for inexperienced litigators and, regardless of the experience of counsel, 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."[29] The ultimate consequence may be injustice or waste of resources, particularly scarce judicial resources that are devoted to determining fine points of the best evidence rule on appeal or retrying a case reversed on best evidence grounds.

THE BEST EVIDENCE RULE IS UNNECESSARY

Counterbalancing the costs of the best evidence rule are the two prevalent rationales for the rule: prevention of fraud and guarding against misinterpretation of writings. Under modern California law, those rationales are no longer persuasive.

The Best Evidence Rule Is Not an Effective Means of Preventing Fraud

Some courts and commentators maintain that the best evidence rule guards against incomplete or fraudulent proof.[30] The underlying assumption is that "copies and oral testimony are more susceptible to fraudulent alteration than an original writing."[31] By excluding such secondary evidence and admitting only originals, the best evidence rule is said to reduce fraud.

As Wigmore pointed out, however, if the purpose of the best evidence rule is to prevent fraud, it is poorly tailored. There are both (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).[32]

Additionally, the fraud rationale is undercut by the reality that the best evidence rule is an imperfect means of fraud prevention. "The litigant determined to introduce fabricated secondary evidence can hardly be expected to stick at

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27. *See, e.g.,* J. Weinstein, J. Mansfield, N. Abrams & M. Berger, Cases & Materials on Evidence, at 211-40.

28. *See, e.g.,* Letter from Gerald H. Genard to California Law Revision Commission (May, 4, 1994) (attached to Memorandum 95-34, on file with California Law Revision Commission) (expressing uncertainty regarding application of the best evidence doctrine to facsimiles and digital signatures); Memorandum 95-41 (on file with California Law Revision Commission), at pp. 13-14 (describing potential issues relating to electronic technology).

29. *The Best Evidence Rule: A Critical Appraisal*, 9 U.C. Davis L. Rev. at 279.

30. *See, e.g.,* [insert cites].

31. *The Best Evidence Rule: A Critical Appraisal*, 9 U.C. Davis L. Rev. at 259.

32. *See* Wigmore, vol. 4, at 417-19; *see also* Cleary & Strong, 51 Iowa L. Rev. at 826-27.

manufacturing an excuse sufficient to procure its admission under one of the numerous currently recognized exceptions to the best evidence rule."[33] Thus, the official comment to Section 1500 does not even mention fraud prevention as a rationale for the rule.

As a General Matter, the Best Evidence Rule is Not Needed to Ensure Accuracy in Interpretation of Writings

The rationale given in official comment to Evidence Code Section 1500 is that 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." 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.[34]

The rationale of preventing misinterpretation of writings has force. Yet modern expansion of the breadth of discovery undermines it. 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.[35] As Professors Cleary and Strong, leading proponents of the best evidence rule, acknowledged in 1966:

> 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.[36]

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33. Cleary & Strong, 51 Iowa L. Rev. at 847; *see also The Best Evidence Rule: A Critical Appraisal*, 9 U.C. Davis L. Rev. at 259.

34. *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.

35. *The Best Evidence Rule: A Critical Appraisal*, 9 U.C. Davis L. Rev. at 258, 279; *see also* Broun, 1969 Law and the Social Order at 617-18.

36. 51 Iowa L. Rev. at 837.

Unanticipated Documents Are Not a Sufficient Justification for the Rule

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."[37] One of the areas they pointed to was the introduction of unanticipated documents at trial.[38]

Even with broad pretrial discovery, exhaustive discovery is not always reasonable discovery, and reasonable discovery may fail to disclose all relevant documents, The best evidence rule "may on occasion function to force production of documentary originals which discovery has failed to secure."[39] Still, there is relatively little likelihood that a diligent civil litigant will be unexpectedly confronted with the contents of a *significant* document at trial. In those probably uncommon situations, most of the time it will make no difference whether the original document is used, instead of secondary evidence. Only in infrequent situations would the best evidence rule be of any significance. The benefits of retaining the best evidence rule for such infrequent situations seem weak in comparison to the costs.[40]

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

A second area in which the best evidence rule is still said to be useful is with regard to documents beyond the court's jurisdiction.[41] Even Cleary and Strong do not place much weight on this point, acknowledging 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."[42] That is because courts commonly find that such evidence falls within one or more of the many exceptions to the best evidence rule.[43] That observation is particularly apt with respect to California, where "[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."[44] Accordingly, there may only be a very narrow to nonexistent set of cases in which the rule excludes secondary evidence of the contents of documents outside the

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37. *Id.* at 847.

38. *Id.* at ___.

39. *Id.* at 839-40; *see also* D. Louisell & C. Mueller, Federal Evidence, vol. 5, at 394 (1981) (hereafter "Louisell & Mueller").

40. *See* Broun, 1969 Law and the Social Order at 616, 618-19.

41. *See, e.g.,* Advisory Committee Note to Rule 1001 of the Federal Rules of Evidence.

42. Cleary & Strong, 51 Iowa L. Rev. at 844.

43. *Id.*

44. Evid. Code § 1502.

jurisdiction. The benefits of the best evidence rule in those limited circumstances do not justify applying the rule in all cases.[45]

The Best Evidence Rule is Unnecessary in Criminal Cases

Lastly, when the best evidence rule was being codified, proponents of the rule rightly maintained that the rule was important in criminal cases, because opportunities for pretrial discovery in those cases were more limited than in civil cases.[46] The scope of pretrial discovery in criminal cases has expanded greatly since that time, however, and today's California scheme permits liberal reciprocal discovery in criminal cases.[47] Thus, even in the criminal context the continued utility of the best evidence rule is questionable.[48]

There Are Other Safeguards Against Misinterpretation of Writings

In evaluating the proffered justifications for the best evidence rule, it is important to consider the existence of other protections against misinterpretation of writings. In particular, 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."[49] 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.[50] Indeed, Evidence Code Section 412 specifically directs that "[i]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

RECOMMENDED LEGISLATION

The best evidence doctrine is an anachronism, better-suited to yesterday's world of limited pretrial discovery than the current California scheme under which litigants have broad opportunities for pretrial inspection of original documents. The California Law Revision Commission recommends that the best evidence doctrine be repealed. It should be replaced with the proposed secondary evidence rule, which is comparatively simple. Further protection against misinterpretation

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45. *Cf.* Broun, 1969 Law and the Social Order at 618 (documents outside the jurisdiction do not justify federal version of the best evidence rule).

46. *See* Cleary & Strong, 51 Iowa L. Rev. at 844-45; Advisory Committee Note to Rule 1001 of the Federal Rules of Evidence.

47. *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).

48. *Cf.* Broun, 1969 Law and the Social Order at 619 (arguing that the best evidence rule was unnecessary under the then-existing federal discovery scheme).

49. *The Best Evidence Rule: A Critical Appraisal,* 9 U.C. Davis L. Rev. at 282.

50. *Id.; see also* Cleary & Strong, 51 Iowa L. Rev. at 846-47.

of writings could be obtained through replacement of the best evidence rule and its numerous exceptions with the proposed secondary evidence rule, which is comparatively simple.[51] Rather than making secondary evidence presumptively inadmissible to prove the content of a writing, the secondary evidence rule would make all such evidence admissible, but would give the court discretion to exclude secondary evidence if it finds that either (1) a genuine dispute exists concerning material terms of the writing, and justice requires the exclusion, or (2) admission of the secondary evidence would be unfair. The exceptions to the proposed rule are modeled on the exceptions to former Section 1511 and Rule 1003 of the Federal Rules of Evidence, and cases interpreting those statutes may provide guidance in applying the new rule.[52] Although the proposed rule would not entirely eliminate problems in interpretation, such as distinguishing an original from secondary evidence, it should decrease the volume and impact of those problems.

The California Law Revision Commission recommendation would be implemented by enactment of the following measure:

51. *See The Best Evidence Rule: A Critical Appraisal*, 9 U.C. Davis L. Rev. at 260.

52. *See, e.g.*, People v. Atkins, 210 Cal. App. 3d 47, 258 Cal. Rptr. 113 (1989); People v. Garcia, 201 Cal. App. 3d 324 (1988).

BEST EVIDENCE RULE

SEC. ___. Article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of the Evidence Code is repealed.

Article 1 heading (repealed). Best Evidence Rule

~~Article 1. Best Evidence Rule~~

Comment. Article 1 (commencing with Section 1500) is repealed because the best evidence rule and its numerous exceptions create difficulties yet serve little purpose in a system with broad pretrial discovery. Under new Article 1 (commencing with Section 1520), secondary evidence is generally admissible to prove the content of a writing, but the court has discretion to exclude secondary evidence if it finds that a genuine dispute exists concerning material terms of the writing, or admission of the secondary evidence would be unfair. *See* California Law Revision Commission, Tentative Recommendation, *Best Evidence Rule* (1995).

§ 1500 (repealed). 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.~~

Comment. Section 1500 is superseded by Section 1520 (secondary evidence rule). [To the extent that Section 1500 recognized that the original of a writing is superior to other evidence of the content of the writing, that aspect is preserved in Section 1522.]

Staff Note. The bracketed portion of the Comment would be included only if the Commission decides to incorporate Section 1522 into its tentative recommendation.

§ 1500.5 (repealed). Computer 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.~~

Comment. Section 1500.5 is repealed to reflect the repeal of the best evidence rule. See Comment to Section 1520. The last three sentences of the second paragraph of Section 1550.5 are

continued in Section 1552 without substantive change, except that the reference to "best available evidence" is changed to "an accurate representation," due to the replacement of the best evidence doctrine with the secondary evidence rule.

§ 1501 (repealed). 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.~~

Comment. Section 1501 is repealed to reflect the repeal of the best evidence rule. See Comment to Section 1520.

§ 1502 (repealed). 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.~~

Comment. Section 1502 is repealed to reflect the repeal of the best evidence rule. See Comment to Section 1520.

§ 1503 (repealed). 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.~~

Comment. Section 1503 is repealed to reflect the repeal of the best evidence rule. See Comment to Section 1520. The requirement of the second sentence of subdivision (a) remains significant in the context of the secondary evidence rule (Section 1520), which replaces the best evidence rule. Section 1521 applies the requirement to all requests for exclusion of secondary evidence in criminal actions.

§ 1504 (repealed). 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.~~

Comment. Section 1504 is repealed to reflect the repeal of the best evidence rule. See Comment to Section 1520.

§ 1505 (repealed). 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.~~

Comment. Section 1505 is repealed to reflect the repeal of the best evidence rule. See Comment to Section 1520. [To the extent that former Section 1505 recognized that a copy of a writing is superior to other secondary evidence of the content of the writing, that aspect is preserved in Section 1522.]

Staff Note. The bracketed portion of the Comment would be included only if the Commission decides to incorporate Section 1522 into its tentative recommendation.

§ 1506 (repealed). 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.~~

Comment. Section 1506 is repealed to reflect the repeal of the best evidence rule. See Comment to Section 1520.

§ 1507 (repealed). 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.~~

Comment. Section 1507 is repealed to reflect the repeal of the best evidence rule. See Comment to Section 1520.

§ 1508 (repealed). 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.~~

Comment. Section 1508 is repealed to reflect the repeal of the best evidence rule. See Comment to Section 1520. [To the extent that former Section 1508 recognized that a copy of a writing is superior to other secondary evidence of the content of the writing, that aspect is preserved in Section 1522.]

Staff Note. The bracketed portion of the Comment would be included only if the Commission decides to incorporate Section 1522 into its tentative recommendation.

§ 1509 (repealed). 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.~~

Comment. Section 1509 is repealed to reflect the repeal of the best evidence rule. See Comment to Section 1520. To the extent that Section 1509 provided a means of obtaining production of accounts or other writings for inspection, continuation of that aspect is unnecessary because other statutes afford sufficient opportunities for such inspection. *See, e.g.,* Code Civ. Proc. §§ 1985.3, 1987, 2020, 2031; Penal Code §§ 1054.1, 1054.3.

§ 1510 (repealed). 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.~~

Comment. Section 1510 is repealed to reflect the repeal of the best evidence rule. See Comment to Section 1520.

§ 1511 (repealed). 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.~~

Comment. Section 1511 is repealed to reflect the repeal of the best evidence rule. See Comment to Section 1520. The exceptions to the secondary evidence rule (Section 1520) are modeled on the exceptions in former Section 1511. [To the extent that former Section 1511 recognized that a duplicate of a writing is superior to other secondary evidence of the content of the writing, that aspect is preserved in Section 1522.]

Staff Note. The bracketed portion of the Comment would be included only if the Commission decides to incorporate Section 1522 into its tentative recommendation.

SEC. ___. Article 1 (commencing with Section 1520) is added to Chapter 2 of Division 11 of the Evidence Code, to read:

Article 1. The Secondary Evidence Rule

§ 1520 (added). Proof of the content of a writing

1520. (a) 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.

(b) Notwithstanding subdivision (a), the court may exclude some or all secondary evidence of the content of a writing, if the court finds that either of the following circumstances exists:

(1) A genuine dispute exists concerning material terms of the writing, and justice requires the exclusion.

(2) Admission of the secondary evidence would be unfair.

(c) Nothing in this section excuses compliance with Section 1401 (authentication).

(d) This section shall be known and may be cited as the secondary evidence rule.

Comment. Section 1520, the secondary evidence rule, replaces the best evidence rule and its numerous exceptions, which create difficulties yet serve little purpose in a system with broad pretrial discovery. *See* California Law Revision Commission, Tentative Recommendation, *Best Evidence Rule* (1995).

By making secondary evidence generally admissible to prove the content of a writing, subdivision (a) recognizes that the normal motivation of parties to support their cases with convincing evidence is a deterrent to introduction of unreliable secondary evidence. *See* Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California,* 9 U.C. Davis L. Rev. 257,

282 (1976) (hereafter *"The Best Evidence Rule: A Critical Appraisal"*); *see also* Cleary and Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 Iowa L. Rev. 825, 846-47 (1966).

Subdivision (b) bolsters that protection by giving the court discretion to exclude secondary evidence of the content of a writing if the court finds that a genuine dispute exists concerning material terms of the writing, or admission of the secondary evidence would be unfair. *See The Best Evidence Rule: A Critical Appraisal*, 9 U.C. Davis L. Rev. at 260. Those exceptions are modeled on the exceptions to former Section 1511 and Rule 1003 of the Federal Rules of Evidence. Cases interpreting those statutes may provide guidance in applying subdivision (b). *See, e.g.*, People v. Atkins, 210 Cal. App. 3d 47, 258 Cal. Rptr. 113 (1989); People v. Garcia, 201 Cal. App. 3d 324 (1988). The court should invoke its discretion under subdivision (b) sparingly: In a borderline case, the court should admit the secondary evidence, and trust in the fact finder's ability to weigh it intelligently. *See* Taylor, *The Case for Secondary Evidence*, 81 Case & Comment 46, 48-49 (1976).

Subdivision (c) makes clear that like other evidence, secondary evidence is admissible only if it is properly authenticated. Under Section 1401, the proponent must not only authenticate the original writing, but must also establish that the proffered evidence is secondary evidence *of the original*. *See* B. Jefferson, Jefferson's Synopsis of California Evidence Law, § 30.1, at 470-71 (1985).

Staff Note. Based on the discussion at the last Commission meeting, this draft follows the Davis approach. Other possibilities are set forth at pages 14-15 of Memorandum 95-41.

§ 1521 (added). Requests for exclusion of secondary evidence in criminal actions

1521. In a criminal action, a request to exclude secondary evidence of the content of a writing pursuant to Section 1520 shall not be made in the presence of the jury.

Comment. Section 1521 continues the requirement of the second sentence of subdivision (a) of former Section 1503, but applies it to all requests for exclusion of secondary evidence in criminal trials.

[§ 1522 (added). Hierarchy of forms of evidence

1522. If a genuine dispute exists concerning material terms of a writing, evidence of the content of the writing shall receive the following relative weight:

(a) The original of the writing is the best evidence.

(b) A duplicate of the writing is superior to a copy.

(c) A copy of the writing is superior to other secondary evidence of the writing.]

Comment. Section 1522 preserves the hierarchy of forms of evidence previously recognized in former Sections 1500, 1505, 1508, and 1511. The hierarchy reflects the relative unreliability of oral testimony as to the content of a writing. On the impact of introducing weaker and less satisfactory evidence when it was within the power of the party to produce stronger and more satisfactory evidence, see Section 412. "Original" is defined in Section 255 and "duplicate" is defined in Section 260.

Staff Note. Section 1522 is shown in brackets because the staff has reservations about whether to include a provision along these lines. Does it make sense to statutorily recognize a hierarchy of forms of evidence, when under the secondary evidence rule the form of the evidence would generally go only to its weight and not to its admissibility? Would such a provision be helpful in providing guidance to the jury (through an appropriate jury instruction) or to the court as trier of fact in evaluating evidence introduced at trial? Or would it be a source of confusion and contention, without usefully supplementing what is already self-evident about the relative value of the various forms of evidence of the content of a writing?

SEC. ___. The heading of Article 3 (commencing with Section 1550) of Chapter 2 of Division 11 of the Evidence Code is amended, to read:

Article 3. Photographic Copies *and Printed Representations* of Writings

Comment. The heading of Article 3 (commencing with Section 1550) is amended to reflect the repeal of the best evidence rule and the consequent addition of Section 1552 to Article 3. See Comments to Section 1520 and former Section 1500.5.

SEC. ___. Section 1552 is added to the Evidence Code, to read:

§ 1552 (added). Computer printouts

1552. A printed representations of computer information or a computer program is presumed be an accurate representation of the computer information or computer program that it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent.

Comment. Section 1552 continues the second, third, and fourth sentences of the second paragraph of former Section 1500.5 without substantive change, except that the reference to "best available evidence" is changed to "an accurate representation," due to the replacement of the best evidence doctrine with the secondary evidence rule. See Comment to Section 1520. See also Section 255 (accurate printout of computer data is an "original").

CONFORMING REVISIONS

[The staff will set forth the conforming revisions in a supplement to Memorandum 95-47.]