Study K-501 October 26, 1995

Memorandum 95-65

Best Evidence Rule: Draft of Tentative Recommendation

Attached is a draft of a tentative recommendation pertaining to the best evidence rule. As discussed at the last meeting, the draft follows the Davis approach (redenominated "the secondary evidence rule"), but preserves existing law governing the admissibility of oral testimony regarding the content of a writing. The draft would make secondary evidence other than oral testimony generally admissible to prove the content of a writing, but would 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 notes following the sections raise a number of issues for discussion. If there are other matters the Commission should consider, please plan on raising them at the meeting.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

SUMMARY OF TENTATIVE RECOMMENDATION

This recommendation calls for repeal of the best evidence rule (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. The secondary evidence rule would make secondary evidence other than oral testimony generally admissible to prove the content of a writing, but would 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 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, satisfactorily serve the 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, including scarce judicial resources.

This recommendation was prepared pursuant to Resolution Chapter 130 of the Statutes of 1965, continued in Resolution Chapter 87 of the Statutes of 1995.

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, broad pretrial discovery has become routine, and technological developments such as the dramatic rise in use of faxes and electronic communications pose new complications in applying the best evidence rule and its exceptions. Upon reexamination, the rationale for the rule no longer withstands scrutiny. A simpler doctrine, making secondary evidence other than oral testimony generally admissible to prove the content of a writing, provides sufficient protection against misinterpretation of writings, yet is more efficient, more just, and more readily applied.

THE BEST EVIDENCE RULE AND ITS EXCEPTIONS

As codified in 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.

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 statutory 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

---

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. All further statutory references are to the Evidence Code, unless otherwise indicated.

the duplicate 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 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 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

---

3. Section 1511. For the definition of "duplicate," see Section 260. For the definition of "original," see Section 255.
4. Section 1500.5.
5. Sections 1501, 1505.
6. Sections 1502, 1505.
7. Sections 1503, 1505.
8. Sections 1504, 1505.
9. Sections 1506, 1508.
10. Sections 1507, 1508.
11. Section 1509.
12. Section 1510.
13. Section 1550.
14. Section 1551.
15. Sections 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 largely 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 use of photocopying and electronic imaging. There have also been expansions in the breadth and the use of pretrial discovery. These developments have prompted the Commission to review the continued utility of the best evidence rule.

RATIONALE FOR THE RULE

There are two prevalent arguments for the best evidence rule: prevention of fraud and guarding against misinterpretation of writings.

Fraud Deterrence

---

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 Sections 1504-1505. For other examples of preference for copies over other types of secondary evidence, see Sections 1505-1508.

19. Section 1509.

20. *The Best Evidence Rule: A Critical Appraisal*, *supra* note 1, 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.

Some courts and commentators maintain that the best evidence rule guards against incomplete or fraudulent proof.[24] The underlying assumption is that an original writing is less susceptible to fraudulent alteration than a copy of the writing or oral testimony about the writing. By excluding secondary evidence and admitting only originals, the best evidence rule is said to reduce fraud.

If the purpose of the best evidence rule is to prevent fraud, however, 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).[25]

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 manufacturing an excuse sufficient to procure its admission under one of the numerous currently recognized exceptions to the best evidence rule."[26] Thus, the Official Comment to Section 1500 does not mention fraud prevention as a rationale for the rule.

Minimizing Misinterpretation 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.[27]

---

24. *See, e.g.,* 5 J. Weinstein, M. Berger & J. McLaughlin, Weinstein's Evidence 1002-6 (hereafter "Weinstein's Evidence"); *see also* Cleary & Strong, *supra* note 20, at 826-28.

25. *See* 4 J. Wigmore, Evidence in Trials at Common Law 417-19 (J. Chadbourn ed. 1972) (hereafter "Wigmore"); *see also* Cleary & Strong, *supra* note 20, at 826-27.

26. Cleary & Strong, *supra* note 20, at 847; *see also The Best Evidence Rule: A Critical Appraisal, supra* note 1, at 259.

27. *See* Weinstein's Evidence, *supra* note 24, at 1002-6; *The Best Evidence Rule: A Critical Appraisal, supra* note 1, at 258-59.

The goal of preventing misinterpretation of writings is weighty. Yet modern expansion of the breadth of discovery undermines it as a rationale for the best evidence rule. 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.[28]

Even Professors Cleary and Strong, leading proponents of the best evidence rule, acknowledged in 1966 that increases in the breadth of discovery diminished the rule's significance.[29] Nonetheless, they maintained that the rule continued to operate usefully in certain areas.[30]

Unanticipated documents. Exhaustive discovery is not always reasonable discovery, and reasonable discovery may fail to disclose all relevant documents. Thus, even with broad pretrial discovery, a litigant may on occasion confront an opponent with an unanticipated document at trial. In such circumstances, the best evidence rule may force production of an original that might otherwise be withheld in lieu of secondary evidence.[31]

Still, today there is relatively little likelihood that a diligent civil litigant will be confronted with a significant unanticipated document at trial. Although broad pretrial discovery was a relatively new phenomenon when Professors Cleary and Strong championed the best evidence rule, it is now so routine that litigants are almost always quite familiar with the critical documents by the time of trial. If a key document does surface for the first time at trial, it usually will make no difference whether the proponent introduces the original writing as opposed to secondary evidence.[32] Only in a tiny subset of cases involving unanticipated documents will the best evidence rule be of any use.

Documents Outside the Jurisdiction. Some authorities claim that the best evidence rule is useful with regard to documents beyond the court's jurisdiction.[33] As Professors Cleary and Strong observed, however, the rule is largely ineffective to obtain production of original writings in the control of persons beyond the court's jurisdiction.[34] Instead, courts commonly find that such evidence falls within one or more of the rule's many exceptions.[35] For instance, Section 1502 specifically directs that a copy "is not made inadmissible by the best evidence rule if the

---

28. *The Best Evidence Rule: A Critical Appraisal*, *supra* note 1, at 258, 279; *see also* Broun, *Authentication and Contents of Writings*, 1969 Law & Soc. Ord. 611, 617-18 (hereafter "Broun").

29. Cleary & Strong, *supra* note 20, at 837.

30. *Id.* at 847.

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

32. *See* Broun, *supra* note 28, at 616, 618-19.

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

34. Cleary & Strong, *supra* note 20, at 844.

35. *Id.*

writing was not reasonably procurable by the proponent by use of the court's process or by other available means." In light of that exception to the best evidence rule, there may not be any cases, much less a significant number of such cases, in which the rule excludes secondary evidence of the contents of documents outside the jurisdiction.[36]

Criminal Cases. When the best evidence rule was being codified in the 1960s, proponents of the rule maintained that the rule was important in criminal cases, because opportunities for pretrial discovery in those cases were more limited than in civil cases.[37] The scope of pretrial discovery in criminal cases has expanded greatly since that time, however, and the law now permits liberal reciprocal discovery in criminal cases.[38] Thus, even in the criminal context the continued utility of the best evidence rule is questionable.[39]

OTHER SAFEGUARDS AGAINST MISINTERPRETATION

The best evidence rule is not the only protection against misinterpretation of writings, nor even the only incentive for litigants to use original documents. Rather, there is also the normal motivation of the parties to present the most convincing evidence in support of their cases. If a litigant inexplicably proffers secondary evidence instead of an original, the trier of fact is likely to discount the probative value of the evidence, particularly if opposing counsel draws attention to the point in cross-examination or closing argument.[40] Indeed, 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."

Additionally, Section 352 gives the court discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." In some cases, Section 352 may serve as a basis for excluding unreliable secondary evidence.[41]

---

36. *Cf.* Broun, *supra* note 28, at 618 (documents outside the jurisdiction do not justify federal version of the best evidence rule).

37. *See* Cleary & Strong, *supra* note 20, at 844-45; Advisory Committee Note to Rule 1001 of the Federal Rules of Evidence.

38. *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).

39. *Cf.* Broun, *supra* note 28, at 619 (arguing that the best evidence rule was unnecessary under the then-existing federal discovery scheme).

40. *The Best Evidence Rule: A Critical Appraisal*, *supra* note 1, at 282; *see also* Cleary & Strong, *supra* note 20, at 846-47.

41. *See The Case for Secondary Evidence*, *supra* note 16, at 48-49.

COSTS OF THE RULE

Like any rule of law, the best evidence rule is imperfect, and this has been a source of criticism.[42] 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.[43]

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.[44]

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 admissible?[45] Advances in technology, such as the increasing use of fax machines,

---

42. *See* Broun, *supra* note 28, at 611-24; *The Best Evidence Rule: A Critical Appraisal*, *supra* note 1, at 258, 279-80, 283; Wigmore, *supra* note 25, at 434-35; *The Case for Secondary Evidence*, *supra* note 16, at 48-49; Note, *Best Evidence Rule — The Law in Oregon*, 41 Ore. L. Rev. 138, 153 (1962).

43. Broun, *supra* note 28, 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.

44. Wigmore, *supra* note 25, at 435.

45. *See, e.g.*, B. Jefferson, California Evidence Benchbook §§ 31.1-31.7 (2nd ed. 1982 & June 1990 Supp.); J. Weinstein, J. Mansfield, N. Abrams & M. Berger, Cases & Materials on Evidence 211-40 (8th

electronic mail systems, and computer networks, pose new possibilities for confusion and inconsistencies in application of the best evidence rule.[46] 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, resulting in exclusion of reliable evidence and establishing technical grounds for reversal on appeal. The ultimate consequence may be injustice or waste, particularly of scarce judicial resources that are unnecessarily devoted to determining fine points of the best evidence rule on appeal or retrying a case reversed on best evidence grounds.

RECOMMENDED LEGISLATION

The best evidence doctrine is an anachronism. It made sense in yesterday's world of manual copying of documents and limited pretrial discovery, but the justifications for it are weak under the current scheme in which high quality photocopies are standard and litigants have broad opportunities for pretrial inspection of original documents. Because the doctrine's costs now outweigh its benefits, the Law Revision Commission recommends that it be repealed.

In general, normal motivations to present convincing evidence deter use of unreliable secondary evidence. To further protect against misinterpretation of writings, the best evidence rule and its numerous exceptions should be replaced with the secondary evidence rule, which is comparatively simple.[47] Rather than making secondary evidence presumptively inadmissible to prove the content of a writing, the secondary evidence rule makes all such evidence admissible, but gives the court discretion to exclude secondary evidence if it finds that either (1) a

---

ed. 1988); *see also* Daddario v. Snow Valley, Inc., __ Cal. App. 4th __, 43 Cal. Rptr. 2d 726, 732-33, 736 (1995) (application of best evidence rule where private record is destroyed and court conducts special proceeding pursuant to Code of Civil Procedure Sections 1953.10 through 1953.13 to establish prior existence and authenticity of the record); People v. Bizieff, 226 Cal. App. 3d 1689, 1696-98, 277 Cal. Rptr. 678 (1991) (admissibility of oral testimony regarding content of credit card receipt).

46. For example, if a document is downloaded from a computer network, 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 (❁✲❃❄)?

Similarly, suppose 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?

For additional discussion along these lines, see 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 faxes and digital signatures).

47. *See The Best Evidence Rule: A Critical Appraisal, supra* note 1, at 282-83.

genuine dispute exists concerning material terms of the writing, and justice requires the exclusion, or (2) admission of the secondary evidence would be unfair.[48]

As proposed, the secondary evidence rule would not apply to oral testimony regarding the contents of a writing. Such evidence is subject to the vagaries of perception and memory and thus less reliable than other types of secondary evidence.[49] To safeguard the truth-finding process, the proposed legislation would preserve existing law making oral testimony generally inadmissible to prove the contents of a writing.

48. The exceptions to the proposed rule 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 the new rule. *See, e.g.*, People v. Atkins, 210 Cal. App. 3d 47, 258 Cal. Rptr. 113 (1989); People v. Garcia, 201 Cal. App. 3d 324, 247 Cal. Rptr. 94 (1988).

49. *See, e.g., The Best Evidence Rule: A Critical Appraisal, supra* note 1, at 258-59; Cleary & Strong, *supra* note 20, at 828-29.

PROPOSED LEGISLATION

Evid. Code §§ 1500-1511 (repealed). Best Evidence Rule

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

Note. The text of Sections 1500-1511 is set out *infra*. See material under "Comments to Repealed Sections."

Evid. Code § 357 (added). No obligation to use evidence requested

SEC. 2. Section 357 is added to the Evidence Code, to read:

357. (a) A party who has subpoenaed or otherwise requested the attendance of a witness at a hearing is under no obligation to call the witness to testify.

(b) A party who has subpoenaed or otherwise requested production of a writing or other tangible thing at a hearing is under no obligation to introduce it as evidence or use it in any other manner at the hearing.

Comment. Section 357 continues and generalizes subdivision (b) of former Section 1503.

Note. Is Section 357 necessary? It would codify existing practice, which does not seem to be codified elsewhere, except to a limited extent in subdivision (b) of Section 1503.

Evid. Code §§ 1520-1522 (added). Secondary Evidence Rule

SEC. 3. Article 1 (commencing with Section 1520) is added to Chapter 2 of Division 11 of the Evidence Code, to read:

Article 1. Secondary Evidence Rule

§ 1520. Proof of the content of a writing

1520. (a) The content of a writing may be proved through an original of the writing that is otherwise admissible or secondary evidence of the writing that is otherwise admissible. The quality of the evidence offered to prove the content of a writing affects 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 conditions is satisfied:

(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 makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1521.

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

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

Comment. Section 1520 (the secondary evidence rule) and Section 1521 (admissibility of oral testimony about the content of a writing) replace the best evidence rule and its exceptions. For

background, 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 also Section 412 (if a party offers weaker and less satisfactory evidence despite ability to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust).

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 (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. *See* Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, 9 U.C. Davis L. Rev. 257, 282-83 (1976). 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, 247 Cal. Rptr. 94 (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 (d) 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).

§ 1521. Oral testimony about content of writing

1521. (a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing.

(b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of the writing or a copy of the writing and any of the following conditions is satisfied:

(1) The writing is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

(2) The writing was not reasonably procurable by the proponent by use of the court's process or by other available means.

(3) At a time when the writing was in the possession or 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.

(4) The writing is not closely related to the controlling issues and it would be inexpedient to require its production.

(c) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of the writing or a copy of the writing, the proponent could not in the exercise of reasonable diligence have obtained the writing or a copy of the writing, and any of the following conditions is satisfied:

(1) The writing is in the custody of a public entity.

(2) The writing has been recorded in the public records and the record or a certified copy of the writing is made evidence of the writing by statute.

(d) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) 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.

(e) Subdivision (b) does not apply to a writing that is also described in subdivision (c).

Comment. Section 1521 preserves preexisting law regarding the admissibility of oral testimony to prove the contents of a writing.

Subdivisions (b) and (e) are drawn from former Sections 1501-1505.

Subdivision (c) is drawn from former Sections 1506-1508.

Subdivision (d) is drawn from former Section 1509.

Note. Is it necessary to retain such a complicated approach to oral testimony?

§ 1522. Requests for exclusion of secondary evidence in criminal actions

1522. In a criminal action, a request to exclude secondary evidence of the content of a writing shall not be made in the presence of the jury.

Comment. Section 1522 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.

Heading of Article 3 (commencing with Section 1550) (amended)

SEC. 4. 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 article heading is amended to reflect the repeal of the best evidence rule and the addition of Section 1552 to this article. See Comments to Section 1520 and former Section 1500.5.

Evid. Code § 1552 (added). Computer printouts

SEC. 5. Section 1552 is added to the Evidence Code, to read:

1552. A printed representation of computer information or a computer program is presumed to 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 rule with the secondary evidence rule. See Section 1520 Comment. See also Section 255 (accurate printout of computer data is an "original").

Pen. Code § 872.5 (repealed). Best evidence rule inapplicable to preliminary examinations

SEC. 6. Section 872.5 of the Penal Code is repealed.

~~872.5. The best evidence rule shall not apply to preliminary examinations.~~

Comment. Section 872.5 is repealed to reflect the repeal of the best evidence rule. See Comment to Section 1520.

Pen. Code § 1417.7 (amended). Photographic records of exhibits

SEC. 7. Section 1417.7 of the Penal Code is amended, to read:

1417.7. Not less than 15 days before any proposed disposition of an exhibit pursuant to Section 1417.3, 1417.5, or 1417.6, the court shall notify the district attorney (or other prosecuting attorney), the attorney of record for each party, and each party who is not represented by counsel of the proposed disposition. Before the disposition, any party, at his or her own expense, may cause to be prepared a photographic record of all or part of the exhibit by a person who is not a party or attorney of a party. The clerk of the court shall observe the taking of the photographic record and, upon receipt of a declaration of the person making the photographic record that the copy and negative of the photograph delivered to the clerk is a true, unaltered, and unretouched print of the photographic record taken in the presence of the clerk ~~and~~, the clerk shall certify the photographic record as such without charge and retain it unaltered for a period of 60 days following the final determination of the criminal action or proceeding. ~~A certified photographic record of exhibits shall be deemed a certified copy of a writing in official custody pursuant to Section 1507 of the Evidence Code.~~

Comment. Section 1417.7 is amended to reflect the repeal of the best evidence rule. See Comment to Section 1520.

Section 1417.7 is also amended to make technical changes.

Uncodified (added). Operative date

SEC. 8. (a) This act is operative on January 1, 1997.

(b) This act applies in an action or proceeding commenced before, on, or after January 1, 1997.

(c) Nothing in this act invalidates an evidentiary determination made before January 1, 1997, excluding evidence on the basis of the best evidence rule. However, if an action or proceeding is pending on January 1, 1997, the proponent of evidence excluded on the basis of the best evidence rule may, on or after January 1, 1997, and before entry of judgment in the action or proceeding, make a new request for admission of the evidence on the basis of this act.

COMMENTS TO REPEALED SECTIONS

Evid. Code §§ 1500-1511 (repealed). Best Evidence Rule

Note. Sections 1500-1511 are set out below for reference purposes, with proposed Comments.

Article 1. Best Evidence Rule

Comment. The best evidence rule is repealed and replaced with the secondary evidence rule, under which secondary evidence other than oral testimony is generally admissible to prove the content of a writing, but the court has discretion to exclude secondary evidence if it finds that (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. See new Article 1 (commencing with Section 1520). For background, 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. Former Section 1500 is superseded by Section 1520 (secondary evidence rule) and Section 1521 (admissibility of oral testimony about the content of a writing).

§ 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 rule 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. The combined effect of Sections 1501 and 1505 on oral testimony regarding the content of a writing is continued in Section 1521.

§ 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. The combined effect of Sections 1502 and 1505 on oral testimony regarding the content of a writing is continued in Section 1521.

§ 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 1522 applies the requirement to all requests for exclusion of secondary evidence in criminal actions.

The combined effect of Sections 1503 and 1505 on oral testimony regarding the content of a writing is continued in Section 1521. Subdivision (b) is generalized and continued in Section 357.

§ 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. The combined effect of Sections 1504 and 1505 on oral testimony regarding the content of a writing is continued in Section 1521.

§ 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. Insofar as Section 1505 pertains to oral testimony regarding the content of a writing, it is continued in Section 1521.

§ 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. The combined effect of Sections 1506 and 1508 on oral testimony regarding the content of a writing is continued in Section 1521.

§ 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. The combined effect of Sections 1507 and 1508 on oral testimony regarding the content of a writing is continued in Section 1521.

§ 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. Insofar as Section 1508 pertains to oral testimony regarding the content of a writing, it is continued in Section 1521.

§ 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. Insofar as Section 1509 pertains to oral testimony regarding voluminous writings, it is continued in Section 1521.

§ 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.