Study K-501 March 28, 1996

Memorandum 96-27

Best Evidence Rule: Comments on Tentative Recommendation

This memorandum considers comments we have received on the tentative recommendation relating to the *Best Evidence Rule*, which was circulated for comment last November. The best evidence rule makes secondary evidence generally inadmissible to prove the content of a writing (see Evid. Code § 1500 *et seq.*). The tentative recommendation calls for repeal of the best evidence rule and adoption of a new rule known as the secondary evidence rule. This new 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. (Another copy of the tentative recommendation is attached for Commissioners.)

The tentative recommendation received mixed comments. Attached as an Exhibit are the following responses:

Professor Mendez, Professor Fisher, FLEXCOM, Jerome Fishkin, and James Birnberg generally support the tentative recommendation. The Attorney General's office and the three other State Bar groups oppose the proposed approach. Comments from Professor Gerald Uelman of the University of Santa Clara are forthcoming.

SUPPORT

Professor Miguel Mendez of Stanford Law School, author of treatises on evidence law, "concurs" in the recommendation to abolish the best evidence rule and replace it with "a general rule favoring the admissibility of secondary as well as original writings to prove the contents of the original writing." (Exhibit p. 4.) Professor Mendez offers suggestions on two specific aspects of the tentative recommendation, which are discussed below.

Professor George Fisher, who also teaches evidence law at Stanford but regards himself as "barely qualified" to comment, is likewise supportive of the tentative recommendation (Exhibit p. 2):

> The proposed new rule strikes me as a great improvement in form and clarity. It is unclear to me that there will be a big practical consequence, as the old rule (as your materials point out) had so many and such broad exceptions. But as clarity is in itself a virtue, the new rule seems preferable.

Professor Fisher urges the Commission to consider whether other states have eliminated or greatly narrowed their best evidence rules, and, if so, what their experience has been. (Exhibit p. 2.) As best the staff has been able to determine, there has been no experimentation along these lines. In this evidentiary area, as well as others, most states simply follow the federal approach. California's evidence rules tend to be more unique, perhaps because its Commission-drafted Evidence Code predated and served as a basis for the Federal Rules of Evidence. If California is first to reform its best evidence rule, it will be playing a familiar role.

In addition to Professors Mendez and Fisher, the Executive Committee of the Family Law Section of the State Bar supports the tentative recommendation. Its vote was unanimous. (Exhibit pp. 14-15.)

Two other practicing attorneys also expressed support for the tentative recommendation. James Birnberg "approve[s]" of the proposed approach. He offers that view as an individual, not as a member of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section. (Exhibit p. 1.)

Jerome Fishkin "support[s] in principle the proposal to repeal the 'best evidence' rule and replace it with a modern rule on secondary, non-testimonial evidence." In his opinion, "modern discovery and technology have eliminated the utility of the best evidence rule, as we know it, for the most part." Mr. Fishkin

points out that his views are based on close to 25 years of litigation experience. (Exhibit p. 3.)

SUGGESTIONS OFFERED BY SUPPORTERS

Criminal Cases

A critical premise of the tentative recommendation is that "litigants have broad opportunities for pretrial inspection of original documents" (p. 8; *see also* pp. 4-5). Professor Mendez asks whether the new criminal discovery rules enacted by Proposition 115 are broad enough to support this premise in the criminal context. Rather than venturing an opinion on this point, he suggests contacting someone with greater expertise in the area, such as Professor Gerald Uelman at the University of Santa Clara. (Exhibit p. 4.)

The staff followed up on this suggestion and solicited comments from Professor Uelman, who is a former Commission consultant in the criminal law area. He is interested in the tentative recommendation but has not submitted his comments as yet. The staff will supplement this memorandum when they arrive.

Quality of Evidence

Proposed Section 1520(a) states:

> (a) The content of a writing may be proved by an original of the writing that is otherwise admissible or by 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.*

Professor Mendez suggests that the term "quality" in the second sentence is ambiguous and "may invite unnecessary litigation" over its meaning. (Exhibit p. 4.)

The staff does not view this with as much concern as Professor Mendez. But the content of the second sentence is largely implicit in the first sentence. Accordingly, the staff is not opposed to deleting the second sentence as Professor Mendez recommends.

Alternate Versions of Proposed Section 1521

The tentative recommendation sets forth alternative versions of proposed Section 1521, which would govern oral testimony of the content of a writing. Both alternatives would, with exceptions, make oral testimony generally inadmissible to prove the content of a writing.

The short alternative is generally consistent with existing law, but in the interest of simplicity it does not rigorously adhere to the details of the existing statutes (Evidence Code Sections 1500, 1501-1509). The long alternative would more strictly preserve existing law regarding the admissibility of oral testimony to prove the content of a writing.

Professor Mendez favors the short alternative of Section 1521. (Exhibit p. 4.) In the interest of clarity, Professor Fisher would also "vote for the shorter form of § 1521, which seems synonymous with the longer form." (Exhibit p. 2.) Mr. Birnberg suggests, however, that "the longer version of proposed Section 1521 is preferable since it more accurately preserves the existing law on the admissibility of oral testimony." (Exhibit p. 1.)

The staff currently prefers the short alternative. As yet, there is no demonstrated need for the greater complexity of the long alternative. If the Commission goes forward with proposing the secondary evidence rule, and specific problems with the short alternative are identified, then this point warrants further study.

OPPOSITION

The Attorney General's office views the tentative recommendation with concern: "The present proposal, to discard [the best evidence rule] altogether, should be approached with more than a little caution." (Exhibit pp. 5-8.) The State Bar Committee on Administration of Justice (CAJ) (Exhibit pp. 9-11), the State Bar Committee on Rules and Procedures of Court (CRPC) (Exhibit pp. 12-13), and the State Bar Litigation Section also oppose the proposed approach. (Exhibit pp. 16-19).

A concern expressed by all of these groups is that the secondary evidence rule may be less effective in preventing fraud than the best evidence rule. Other issues are:

- Whether there are problems warranting reform
- Whether the secondary evidence rule would inappropriately shift the burden of proof
- Whether the secondary evidence rule would unjustifiably change the standard of review on appeal
- Whether the best evidence rule is justified because the trier of fact should be able to examine the originals of documents
- Whether a definition of secondary evidence is necessary

Because concern about fraud seems to be the major objection to the tentative recommendation, it may be helpful to (1) review the arguments against the fraud rationale for the best evidence rule, (2) discuss rebuttals to those arguments, and (3) describe possible ways of strengthening the tentative recommendation with regard to fraud control.

Critiques of the Fraud Rationale

As discussed at pages 3-4 of the tentative recommendation, fraud prevention is not the leading modern rationale for the best evidence rule. *See also* Seiler v. Lucasfilm, Ltd., 797 F.2d 1504 (9th Cir. 1986); Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 Iowa L. Rev. 825, 826-28, 830, 846, 847 (1966); 4 J. Wigmore, Evidence in Trials at Common Law 417-19 (J. Chadbourn ed. 1972); Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, 9 U.C. Davis L. Rev. 257, 259 (1976). Instead, the Commission's Official Comment to Section 1500 states that the rule is "designed to minimize the possibilities of misinterpretation of writings …."

Professors Cleary and Strong explain that the best evidence rule is not a very significant means of fraud control. Where "fraud is actually contemplated through the use of fabricated or distorted secondary evidence," it is unlikely

> that any litigant not in control of the original of a document would put himself in the position of introducing false or inaccurate testimony as to the terms of a document, or a false or inaccurate copy, only to be confounded by the adversary's production of the original. A litigant in possession of an original and totally bent on fraud might of course avert the above risk by failing to disclose the original on discovery and proceeding to introduce false or distorted secondary evidence with relative impunity. It may be noted, however, that the best evidence rule itself provides no absolute protection against this species of attempted fraud. 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.

[Cleary & Strong, *supra*, 51 Iowa L. Rev. at 847.]

Wigmore offers a different explanation for de-emphasizing the fraud rationale. He points out that the best evidence rule is not tailored to curtail fraud:

> The fallacy about [the fraud rationale] is that, even if [fraud] were shown not to exist, i.e., if the court were satisfied that the

> proponent of the document was acting in perfect good faith (as, where he had no reason to believe that the original's terms would be needed or would be disputed), it would still be proper to require the document ….
>
> Moreover, that this is not the reason actually relied upon is seen in certain details of the rule; for the possession of the document by a disinterested third person would relieve the proponent from the suspicion of fraudulent suppression, yet the rule applies equally to that case; and the possession by the opponent himself with the right not to produce it will also serve to dismiss the suspicion, yet the rule applies equally to that case.
>
> Finally, if the above reason were the correct one, the rule would equally apply to objects other than writings; yet it is generally conceded that it does not.…
>
> This reason, then, while it undoubtedly adds force to the rule in many instances, must be regarded as not forming the real and working reason of the rule.

[Wigmore, *supra*, at 418-19.]

Rebuttals in Support of the Fraud Rationale

Although the best evidence rule is flawed as a means of preventing fraud, no means of fraud control is perfect. The best evidence rule may be poorly tailored and often ineffective as a fraud deterrent, but it may still help prevent fraud to some extent. Those opposing the tentative recommendation view this, either by itself or together with other concerns, as sufficiently significant to warrant retention of the rule.

The Attorney General's office explains: "The Best Evidence Rule is obviously not a sole bulwark against fraudulent or otherwise questionable evidence." Rather, "[a]s a rule of evidence, it is a device that operates together with other rules to the end of ensuring, to the greatest extent possible, that judicial decisions will proceed from reliable evidence." (Exhibit pp. 7-8.) The Attorney General suggests that the Commission consider modifications to strengthen the best evidence rule "as a tool for prevention of fraudulent and other unreliable evidence in proving the contents of a writing." *Id.*

Similarly, CRPC comments (Exhibit p. 12):

> The suggested revision would eliminate the foundational requirements for secondary evidence of a writing. Those foundational requirements provide additional safeguards against fraud and protect the integrity of the judicial system. The safeguards in the proposed revision seemed to address fraud by attorneys, but we considered the greater threat to be fraud by the

> client, which we did not feel was adequately addressed by the proposal.

In asserting that the tentative recommendation "would eliminate the foundational requirements for secondary evidence of a writing," CRPC perhaps did not realize that the proposed secondary evidence rule expressly preserves the authentication requirement for secondary evidence. *See* Section 1520(d) & Comment. By itself, however, preservation of the authentication requirement may not suffice to alleviate CRPC's concerns regarding fraud.

Like the Attorney General's office and CRPC, the Litigation Section "still believes that fraud deterrence is a viable purpose for the Best Evidence Rule." (Exhibit p. 19.) Pointing out that "ability to manufacture or alter documentation is far more widespread than previously," the Litigation Section asserts that the best evidence rule addresses that situation better than the proposed secondary evidence rule. (*Id.*)

Lastly, CAJ made similar reference to fraud, commenting that "advances in technology have made it easier to forge documents and therefore the Best Evidence Rule may be more necessary than ever before." (Exhibit p. 11.) Coupling this sentiment with the comments of the Attorney General, CRPC, and the Litigation Section, it seems clear that the Commission should consider revising the tentative recommendation to provide greater protection against fraud, or else abandoning the tentative recommendation altogether.

Means of Bolstering the Tentative Recommendation with Respect to Fraud

Means of strengthening the tentative recommendation with regard to fraud control might include the following:

(1) Making Section 1520(b) mandatory rather than permissive. The Attorney General correctly observes that Section 1520(b) as currently drafted is permissive rather than mandatory: "[T]he tentative recommendation, in the sole circumstance in which the Best Evidence Rule would survive, proposes to make its application merely permissive, *notwithstanding* existence of dispute and potential unfairness." (Exhibit p. 7, emphasis in original.) The staff sees no problem with making Section 1520(b) mandatory:

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

(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.

(2) Modifying the Comment to Section 1520. The Comment to Section 1520 currently states in part:

> The court should invoke its discretion [to exclude secondary evidence] 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 generally* Taylor, *The Case for Secondary Evidence,* 81 Case & Comment 46, 48-49 (1976).

That language tends to undercut subdivision (b) as a means of excluding secondary evidence. Deleting it may strengthen the court's ability to exclude such evidence and thereby control fraud in some instances.

Additionally, it may be helpful to give examples of situations in which exclusion of secondary evidence would be appropriate. For instance, CAJ comments that "it is the surprise document which first appears to be insignificant but that might take a new twist at trial which would be the most likely subject of an appropriate best evidence objection." (Exhibit p. 10.) Perhaps the Comment to Section 1520 should state that reasonably unanticipated use of a document is a factor to consider in applying subdivision (b). The Comment could list other pertinent factors as well. As a first cut, the staff suggests replacing the above-quoted language with the following:

> Courts may consider a broad range of factors in determining whether admission of secondary evidence would be unfair or contrary to the interest of justice. Among other considerations, the following factors may be relevant: (1) whether the proponent attempts to use the writing in a manner that could not reasonably have been anticipated, (2) whether the original was suppressed in discovery, (3) whether discovery was reasonably diligent (as opposed to exhaustive) yet failed to result in production of the original, (4) whether there are dramatic differences between the original and the secondary evidence (e.g., the original but not the secondary evidence is in color and the colors provide significant clues to interpretation), (5) whether the original is unavailable and, if so, why, (6) whether the writing is central to the case or collateral.

(3) Sanctions for willfully misleading use of secondary evidence. The best evidence rule is a crude tool for controlling fraudulent use of secondary evidence. It applies even where honesty of the proponent of secondary evidence

is beyond dispute; it traps only perpetrators who do not manufacture an excuse satisfying one of the rule's many exceptions. Perhaps this variety of fraud could be attacked more directly. For instance, the secondary evidence rule could be coupled with a statute explicitly authorizing or even mandating sanctions for deliberately or recklessly misleading, or attempting to mislead, the trier of fact by using secondary evidence in place of an original writing.

The staff suggests something like the following:

§ 1523. Sanctions

1523. (a) If a person deliberately or recklessly misleads, or attempts to mislead, the trier of fact by introducing secondary evidence of a writing instead of the original, the court shall impose sanctions as justice requires.

(b) Before the court may impose sanctions on a person pursuant to this section, the person must receive notice and an opportunity to be heard. A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion shall be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought.

(c) Sanctions pursuant to subdivision (a) may include one or more of the following:

(1) A monetary sanction equivalent to all or part of the reasonable expenses, including attorneys' fees, incurred by anyone as a result of the sanctionable conduct.

(2) An issue sanction ordering that designated facts be taken as established in the action.

(3) An issue sanction prohibiting the sanctioned person from supporting or opposing designated claims or defenses.

(4) An evidence sanction prohibiting the sanctioned person from introducing designated matters into evidence.

(5) An order striking out the pleadings or parts of the pleadings.

(6) An order staying the action until the sanctioned persons produces the original writing.

(7) An order dismissing the action or part of the action.

(8) An order rendering a judgment by default against the sanctioned person.

(9) A contempt sanction.

(10) An order vacating or modifying a judgment.

Comment. Section 1523 directs the court to impose just sanctions upon finding that a person deliberately or recklessly misused or attempted to misuse Section 1520 (secondary evidence rule).

Subdivision (a) is modeled on Code of Civil Procedure Section 2023(b)(1).

Subdivision (b) is modeled on Code of Civil Procedure Section 2023(b) and (c).

Paragraphs (c)(1)-(c)(9) are modeled on Code of Civil Procedure Section 2023(b)(1)-(b)(5). Paragraph (c)(10) provides for relief from a judgment where the abusive use of secondary evidence is not discovered until after entry of the judgment.

(4) More explicit authority to subpoena and discover originals. The tentative recommendation is premised on existence of broad opportunities for pretrial inspection of original writings. (tentative recommendation, pp. 4-6, 8.) The principle that document discovery entails a right to inspect *original writings, not just copies or other secondary evidence*, seems to be so universally accepted and taken for granted that it is not explicitly stated in the discovery statutes or case law. Likewise, it is well-understood but not expressly stated that the power to subpoena a document is power to subpoena *the original.* Explicitly codifying these principles might help a little to alleviate concern that the secondary evidence rule would provide insufficient protection against fraud. Due to the apparent unquestioned acceptance of the concepts, however, the staff is inclined against tampering with the existing discovery statutes in this regard, unless there is strong support for such an approach.

Nevertheless, it may be helpful to state in Section 1520 that it does not preclude discovery of originals:

§ 1520. Proof of the content of a writing

1520. (a) The content of a writing may be proved by an original of the writing that is otherwise admissible or by 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 either of the following:

(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) Nothing in this section precludes discovery of originals pursuant to general discovery principles.

(f) This section shall be known as the secondary evidence rule.

(5) Replacing the secondary evidence rule with a more stringent rule. Another alternative would be to replace the secondary evidence rule with a rule more strict in requiring use of original writings. For example, Section 1520 could be revised to essentially state the best evidence rule and make the secondary evidence rule an exception:

> 1520. (a) The original of a writing is required to prove its content, unless it is unavailable or there is no genuine dispute concerning material terms of the writing.
>
> (b) If a writing is unavailable or there is no genuine dispute concerning material terms of the writing, the content of the writing may be proved by reliable, otherwise admissible secondary evidence.
>
> (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).

The staff wonders, however, whether a change like this would be a significant improvement over the best evidence rule. There would be fewer exceptions to track through, but perhaps greater ambiguity instead.

OTHER CONCERNS

The Attorney General's objections to the tentative recommendation focus on fraud prevention, but the State Bar groups opposing the tentative recommendation raised various other concerns in addition to fraud deterrence.

Lack of Problems Warranting Reform

CAJ raises the familiar "ain't broke" refrain, stating: "[O]ur Committee is unaware of any groundswell of complaints about the Best Evidence Rule; perhaps it is unbroken and not in need of fixing." (Exhibit p. 10.) CAJ also observes that "to the extent the Law Revision Commission's recommendation is prompted by changes in technology, Evidence Code Section 1500.5 addresses that issue." *Id.* at 9-10. Similarly, the members of CRPC "felt that the fundamental precept of the Best Evidence Rule was sound and … could not identify any conceptual problems that required alteration of the rule." (Exhibit p. 12.)

In asserting that there is no "groundswell of complaints" about the best evidence rule, CAJ is surely correct. As discussed at pages 6-8 of the tentative recommendation, however, the best evidence rule may at times engender needless inconvenience, expense, and even occasional injustice. Parties experiencing those problems simply might not find it worth their while to speak up about them.

With regard to technical advances, at least one person has been sufficiently troubled by ambiguity in the best evidence statutes to write the Commission. In May 1994, Gerald Genard voiced concerns about digital signatures, and it was this concern that suggested to the Commission that the best evidence rule requires review (Exhibit pp. 20-21):

> The current attempts to deal with admissibility of photographic and computer-generated copies of documents in the Evidence Code (see Sections 1500.5 and 1550) do not address the question of whether electronically recorded signatures (e.g., signatures directly on a remote computer screen or on a document transmitted via a facsimile (fax) machine) are "originals." Indeed the language of the current Evidence Code sections is so specific in categorizing methods of creating electronic copies that its failure to specifically include the two examples just mentioned leaves doubt as to whether those sections permit such electronic signatures to be admitted into evidence.

In opposing the tentative recommendation, the Litigation Section describes other new technologies, cautioning that they may pose complications in applying the secondary evidence rule. (Exhibit pp. 18, 19.) While that may prove true, such technologies also present problems in applying the best evidence rule, which places emphasis on determining what constitutes the original of a document. These problems are only beginning to surface because the technologies are so new. Even if the Commission decides to drop the proposed secondary evidence rule, it may be worthwhile to reform the best evidence rule to accommodate new technology.

In short, the "ain't broke" argument standing alone strikes the staff as insufficient reason for curtailing the Commission's study of the best evidence rule. Lack of complaints about the status quo is not necessarily a reason to refrain from attempting improvement. Coupled with other considerations, however, it may be grounds for retaining the best evidence rule, modified to adapt it to modern technology, rather than adopting the secondary evidence rule.

Shifting the Burden

CRPC (Exhibit p. 12) and the Litigation Section (Exhibit pp. 16, 17-18) both point out that the tentative recommendation would shift the burden regarding introduction of secondary evidence of a writing. Instead of requiring the proponent of secondary evidence to prove that the evidence satisfies an exception to the best evidence rule, the tentative recommendation would require the person opposing introduction of the evidence to show that the evidence should be excluded.

CRPC opposes that change but does not say why. The Litigation Section takes the same stance, but explains that "[s]hifting the burden of proof for the admissibility of a 'secondary' document merely because it is easier or more convenient in many cases is inadequate reason to change long-established rules proven to be reasonably effective." (Exhibit p. 17.) The Litigation Section questions a premise underlying the proposed burden shift: the tentative recommendation's assertion (at p. 5) that there is "relatively little likelihood that a diligent civil litigant will be confronted a significant unanticipated document at trial." According to the Litigation Section, civil litigation today "is not what it was even only five years ago." (Exhibit p. 17.) "Increased costs of litigation, budget constraints of clients and lawyers alike, and the pressure of 'Fast Track" limitations" may mean that reasonable discovery is less than exhaustive. *Id.* By insisting on use of original writings, the best evidence rule may protect against misinterpretation of writings that slip through the cracks in discovery.

As the tentative recommendation points out, however, if a critical document surfaces for the first time at trial, it generally will not matter whether the proponent introduces the original writing as opposed to secondary evidence. (p. 5.) The best evidence rule would make a difference with regard to unanticipated documents only where (1) it would require use of the original but the secondary evidence rule would not, *and* (2) misinterpretation would flow from use of secondary evidence in place of the original.

The number of instances in which these conditions are satisfied could be reduced by modifying the secondary evidence rule to make it easier to exclude secondary evidence. In particular, concerns about burden shifting may be alleviated to some extent if the Commission makes some of the revisions suggested in connection with fraud deterrence:

- Making Section 1520(b) mandatory rather than permissive
- Modifying the Comment to Section 1520

Still, such revisions may be insufficient to fully resolve the concerns voiced. The only solution satisfying those opposed to the tentative recommendation may be to retain the best evidence rule, or at least replace the secondary evidence rule with a rule more like the best evidence rule.

Standard of Review on Appeal

Another point the Litigation Section makes pertains to the standard of review on appeal (Exhibit pp. 18-19):

> It appears that the admissibility of secondary evidence under the proposed new rule would be subject to a substantial evidence test if challenged on appeal. That is, was there substantial evidence to support the secondary evidence as an accurate reproduction of the contents of the original writing. This would be a change from the current status where secondary evidence admitted at trial under an exception to the Best Evidence Rule would be tested against the preponderance-of-evidence test, a higher standard.

The staff agrees that rulings under the secondary evidence rule as currently phrased would be subject to a less stringent standard of appellate review than applications of the best evidence rule. Contrary to what the Litigation Section says, however, rulings pursuant to the secondary evidence rule would seem to be subject to the abuse of discretion test, not the substantial evidence test. *See* proposed Section 1520(b); B. Witkin, California Procedure, *Appeal,* §§ 275-276 (3d ed. 1985).

The standard of review could be stiffened by making Section 1520(b) mandatory rather than permissive. The staff believes that rulings pursuant to the secondary evidence rule would then be subject to the same standard of review as determinations under the best evidence rule. That should suffice to address the Litigation Section's concern regarding the appellate standard. Alternatively, the concern could be resolved by expressly stating the applicable standard of review in Section 1520 or another provision.

Affording the Trier of Fact an Opportunity To See the Original Writing

CRPC "felt strongly that the trier of fact is entitled to have the originals of documents whenever possible." (Exhibit p. 13.) "Marginalia, corrections, and even the color of the ink can often make a difference in close cases." *Id.; see also* Exhibit p. 18 (Litigation Section).

Those are legitimate points, but the best evidence rule has so many and such broad exceptions that switching to the secondary evidence rule may not have

much of an impact in this area. Moreover, the secondary evidence rule would not preclude use of original writings. It would simply authorize use of secondary evidence. When one party introduces secondary evidence, the other side could still introduce the original.

Nonetheless, in some instances the best evidence rule might result in use of an original that would not be introduced if the secondary evidence rule were in effect. Making the secondary evidence rule mandatory and modifying the Comment to Section 1520 might help reduce the likelihood of such instances. Again, however, such revisions may not entirely resolve the concern expressed.

Definition of Secondary Evidence

Lastly, the Litigation Section criticizes the tentative recommendation for failing to define secondary evidence (Exhibit p. 18):

> Secondary evidence apparently means any evidence other than the original document, including oral. In the past, secondary evidence has generally referred to secondary physical evidence. No longer. The advances in technology, for instance, about which comment is made in the Tentative Recommendation, contemplates some of the new computer-, Internet-oriented telephone and other rapidly advancing areas of technology. How broad will 'secondary evidence' be defined to permit reproduction of contents of [a] document?

The Litigation Section then poses hypotheticals regarding various new technologies. *Id.* It concludes that the tentative recommendation's failure to define secondary evidence "widens the type of evidence that may be introduced without sufficient experience or study to determine its reliability." *Id.* at 16.

The staff does not view this as an insurmountable hurdle to adoption of the secondary evidence rule. Already, a wide range of secondary evidence is admissible pursuant to exceptions to the best evidence rule. If specific types of secondary evidence are shown to be sufficiently unreliable to warrant blanket exclusion, through a statutory definition or otherwise, that could be achieved. The more significant concern is the opposite — determining what is an original. That probably presents greater challenges to application of the best evidence rule than the task of determining what types of secondary evidence should be admissible under the secondary evidence rule.

At this point, however, the Commission needs to resolve a more fundamental issue: Whether, in light of the various concerns raised about the secondary evidence rule, it makes sense to pursue that approach at all.

STAFF RECOMMENDATION

There is support for the tentative recommendation but also considerable opposition. The chief concern is that the proposed secondary evidence rule may be less effective in deterring fraud than the existing best evidence rule. In light of that concern, as well as some of the other concerns raised, it may ultimately prove inadvisable to proceed with the proposed secondary evidence rule.

At this point, however, the staff thinks it is still worth exploring the prospect of revising the tentative recommendation to:

(1) Incorporate the suggestions of supporters.
(2) Make Section 1520(b) mandatory rather than permissive.
(3) Modify the Comment to Section 1520 so as to strengthen the court's ability to exclude secondary evidence.
(4) Add a provision directing courts to impose just sanctions for willfully misleading use of secondary evidence in place of an original.
(5) Expressly state in Section 1520 that it does not preclude discovery of originals.
(6) Possibly add a definition of secondary evidence or preclude use of problematic categories of secondary evidence.

Whether such revisions will suffice to meet the concerns raised may become clear at the meeting to consider this memorandum. If not, the Commission may wish to circulate a revised tentative recommendation.

Even if the Commission abandons the proposed secondary evidence rule, it may be appropriate to proceed with best evidence reform. Instead of repealing the best evidence rule, modifications to account for technological advances may be in order.

Alternatively, the Commission could attempt to fashion a test that is strict in requiring use of originals yet still has advantages over the convoluted best evidence rule.

Respectfully submitted,

Barbara S. Gaal
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Law Revision Commission
RECEIVED
JAN 24 1996
File: K-501

California Law Revision Commission
4000 Middlefield Road, Room D-1
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Attn: Nat Sterling

Re: Best Evidence Rule, Study K# 501

Dear Nat:

I had received a copy of the November 2, 1995 Tentative Recommendation to repeal the current best evidence rule and replace it with a new rule on secondary evidence. Although I am a member of the State Bar Estate Planning, Trust and Probate Law Section Executive Committee, I am only responding as an attorney.

I approve of the approach proposed in the Tentative Recommendation, with the suggestion that the longer version of proposed Section 1521 is preferable since it more accurately preserves the existing law on the admissibility of oral testimony.

Very truly yours,

James R. Birnberg

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February 7, 1996

Barbara Gaal
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Ms. Gael,

I have read the proposed new best evidence rule that you sent me some weeks back. Instead of making any formal comment, let me just offer a few words. Please bear in mind that I was a criminal practitioner in Massachusetts and have taught only the Federal Rules. So I am barely qualified to offer any comment at all.

The proposed new rule strikes me as a great improvement in form and clarity. It is unclear to me that there will be a big practical consequence, as the old rule (as your materials point out) had so many and such broad exceptions. But as clarity is in itself a virtue, the new rule seems preferable. For that same reason, I would vote for the shorter form of § 1521, which seems synonymous with the longer form.

My only concern is that, unless I missed it, there is no indication here that the experience of other states has been studied. There must be other states that have eliminated or greatly narrowed their best evidence rules. Has that led to problems?

I hope you have sent these same materials to Miguel Méndez. As the former California civil practitioner and current California Evidence Code expert, he is of course the far better authority on this question.

Thanks for passing these materials on. I've enjoyed looking at them.

Sincerely,

George Fisher

Crown Quadrangle Stanford University Stanford California 94305-8610

From: FISHKINJ@aol.com
Date: Wed, 28 Feb 1996 21:41:28 -0500
To: webmaster@clrc.ca.gov
Subject: Secondary Evidence Rule

I support in principle the proposal to repeal the "best evidence" rule and replace it with a modern rule on secondary, non-testimonial evidence. I have been a litigation attorney for most of the past 25 years, and modern discovery and technology have eliminated the utility of the best evidence rule, as we know it, for the most part.

JEROME FISHKIN 415/403-1300

FILE : K-501

January 28, 1996

To: Barbara Gaal
From: Miguel A. Méndez
RE: Proposed Changes to the Best Evidence Rule

Barbara, I didn't get the proposed changes until after I had left for my Christmas vacation and was unable to review them when I returned at the end of the month because I taught evidence in the January Term. That term is only ten days long and requires my teaching each day more material than I would normally cover in a week of a regular semester. It was not until today (Super Bowl Sunday) that I have been able to give the material some attention.

I concur in the recommendation that the Best Evidence Rule be abolished and replaced with a general rule favoring the admissibility of secondary as well as of original writings to prove the contents of the original writing. I also favor the short alternative with regard to the inadmissibility of testimony to prove the contents of a writing. Obviously, where a written copy is available, it should be preferred over testimony.

I do have two concerns. First, your proposed § 1520 provides that the "quality" of the evidence offered to prove the contents of a writing goes to weight, not admissibility. The comment does not amplify this directive. What do you mean by quality? Since in most instances objections to "quality" will probably made to a writing, what conditions do you foresee that in the absence of the directive could result in the exclusion of the writing. Since the writing offered still must be authenticated as the original or a true reflection of the original, I have difficulty imagining what you have in mind. Unless you have specific concerns (in which case you should mention them in the comment), I think that using the term "quality" may invite unnecessary litigation over what it meant.

Second, you justify the new rule in part because of liberal discovery rules in civil cases. Are you confident that the new criminal discovery rules enacted by Proposition 115 are sufficiently broad to allow similar discovery in criminal cases? I haven't practiced since the enactment of Proposition 115 and so am hesitant to venture an opinion. If you have doubts, I suggest that you consult a California specialist, perhaps Gerry Uelman at Santa Clara.

Let me know if I can be further help.

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

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February 29, 1996

Nathaniel Sterling, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Tentative Recommendation: Best Evidence Rule

Dear Mr. Sterling:

We take this opportunity to comment on the proposal currently being considered by the California Law Revision Commission to replace the Best Evidence Rule (Evid. Code § 1500) with a "Secondary Evidence Rule." These comments are based upon observations of practitioners within the Civil Law Division of this office, and are offered in contemplation of the Commission's stated practice of revising tentative recommendations as a result of comments received. As such they do not represent a final position of this office on the Commission's proposal.

The Best Evidence Rule requires production of the original writing to prove its contents unless a copy is admissible under one of numerous exceptions. The rule and its exceptions are substantially identical to their counterpart in the Federal Rules of Evidence. Non-copy secondary evidence is also admissible in specified circumstances and a duplicate is admissible to the same extent as an original unless a genuine question of authenticity of the original is raised, or the circumstances make it unfair to admit the duplicate instead of the original.

The tentative recommendation would make secondary evidence, other than oral testimony, generally admissible to prove the content of a writing. It would authorize, but not require, courts to exclude such evidence in the event that a genuine dispute exists concerning the terms of the writing and justice

requires exclusion, and in the event admission of the secondary evidence would be unfair. As we understand the proposal, the only time an original of a writing would be required would be when a genuine dispute is found, or when admission of secondary evidence is unfair, and then only in the court's discretion.

We appreciate and generally share the evident desire of the Commission to streamline the admission of evidence of writings. At the same time, any proposal to relax statutory insistence on production of originals to prove the contents of writings should recognize that fabrication of evidence has not disappeared from litigation, and that any measure which would make fabrication easier requires critical examination. With this in mind, a number of civil practitioners may tend to view the wholesale authorization of secondary evidence with some concern. This concern would not necessarily be alleviated by the proposal to make insistence on the original merely a matter of judicial discretion when a genuine dispute concerning the content of the writing has been raised.

The argument accompanying the proposal's handling of the admission of duplicates in disputed situations infers support from views advanced in certain law review articles and other works. Two such instances are believed to warrant comment here.

The proposal places general reliance on Grad & Prairie, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, 9 U.C. Davis L. Rev. 257 (1976). The article concluded that the Best Evidence Rule is of diminished importance but serves a valid function in limited contexts, and recommended revision to prevent mechanical application of the rule from causing exclusion of valuable evidence at trial. (*Id.*, at 283.) A specific proposal made by the article for avoidance of such mechanical application was to adopt the provisions of Rule 1003 of the Federal Rules of Evidence. (*Id.*, at 280-281, 283.) That was subsequently accomplished by the California Legislature in 1985, with the enactment of Evidence Code section 1511, which embodies insistence on the original when a genuine question of authenticity has been raised, and when admission of the duplicate would be unfair.

The tentative recommendation, on the other hand, appears to be patterned after a second alternative considered in the 1976 article: to condition insistence on the original on a preliminary finding of "a genuine dispute concerning the terms of the writing" or "prejudice to the opponent resulting from the

admission of the secondary evidence." (*Id.*, at 282.) The tentative recommendation goes beyond this alternative, however, by introducing a change which the authors of the 1976 article never suggested: to render insistence on the original, even in the event of dispute or potential unfairness, merely discretionary with the trial judge. Thus, whereas the article recognized a valid function of the Best Evidence Rule, albeit in "limited contexts", and concluded that it should be applied in circumstances of dispute and potential unfairness, the tentative recommendation, in the sole circumstance in which the Best Evidence Rule would survive, proposes to make its application merely permissive, *notwithstanding* existence of dispute and potential unfairness.

The tentative recommendation also places reliance on Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 Iowa L. Rev. 825 (1966), characterizing the authors as "leading proponents of the best evidence rule", and citing them for the proposition that "[l]itigants determined to introduce fabricated secondary evidence are unlikely to have qualms about manufacturing an excuse satisfying one of the rule's exceptions." Assuming the accuracy of this baleful observation, the despairing approach taken by the tentative recommendation weakens the ability of parties to prevent such frauds and impositions, and -- evidently on the ground that such improprieties will occur in any event -- removes what is conceded to be at least a sometimes-important impediment to just such violations.

The Best Evidence Rule is obviously not a sole bulwark against fraudulent or otherwise questionable evidence.[1] As a rule of evidence, it is a device that operates together with other rules to the end of ensuring, to the greatest extent possible, that judicial decisions will proceed from reliable evidence. To the extent it might be improved as a tool for prevention of fraudulent and other unreliable evidence in proving the contents of a writing, the Commission might wish to consider

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1. Nor, obviously, is exclusion of fraudulent evidence its only, or even principal, purpose. As the tentative proposal points out, minimization of possibilities of misinterpretation of writings is the rationale for the rule stated in the Official Comment to Evidence Code section 1500.

modifications to strengthen it. The present proposal, to discard it altogether, should be approached with more than a little caution.

These comments are offered in the hope that they will be of use to the Commission in its consideration of the tentative recommendation. We appreciate this opportunity to provide comment and look forward to receiving information on any modifications made upon further consideration of the proposal by the Commission.

Sincerely,

DANIEL E. LUNGREN
Attorney General

ROBERT L. MUKAI
Chief Assistant Attorney General

THE STATE BAR
OF CALIFORNIA

OFFICE OF RESEARCH

555 FRANKLIN STREET, SAN FRANCISCO, CALIFORNIA 94102-4498 (415) 561-8200

March 8, 1996

Nat Sterling
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: California Law Revision Commission's Tentative Recommendation on the Best Evidence Rule

Dear Nat:

Enclosed are the February 26, 1996 comments of the Committee on Administration of Justice re: the Law Revision Commission's Tentative Recommendation on the Best Evidence Rule.

These comments are submitted on behalf of the Committee on Administration of Justice and have not been considered or approved by the State Bar Board of Governors.

Thank you for giving the State Bar an opportunity to comment on these proposals. If you have questions, please feel free to contact me.

Sincerely,

David C. Long
Director of Research

Enclosures

cc: Curtis Karnow
Jean Bertrand
Monroe Baer
Ellen Miller

Marvin D. Morgenstein*
Eliot S. Jubelirer
Lee Ann Huntington
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February 26, 1996

Via Facsimile

David C. Long
Director of Research
State Bar of California
555 Franklin Street
San Francisco, CA 94102-4498

Re: *Law Revision Commission's Tentative Recommendation on the Best Evidence Rule*

Dear Dave:

The Law Revision Commission has proposed repeal of the Best Evidence Rule, substituting a rule that favors the admission of all evidence of the content of a writing, including secondary evidence. The trial court would be given discretion to exclude secondary evidence only under certain circumstances. Oral evidence of the content of the writing would remain presumptively excluded.

The Committee on Administration of Justice (North and South divisions) opposes the Law Revision Commission's tentative recommendation for several reasons. First, our Committee is unaware of any groundswell of complaints about the Best Evidence Rule; perhaps it is unbroken and not in need of fixing. Second, although the Commission makes much out of the assertion that few "significant" documents will first surface at trial, it is the surprise document which first appears to be insignificant but that might take a new twist at trial which would be the most likely subject of an appropriate best evidence objection. Third, to the extent the Law

Revision Commission's recommendation is prompted by changes in technology, Evidence Code section 1500.5 addresses that issue. Moreover, advances in technology have made it easier to forge documents and therefore the Best Evidence Rule may be more necessary than ever before.

Very truly yours,

Jean L. Bertrand

JLB/mm

cc: Monroe Baer (*Via Facsimile*)
Curtis E.A. Karnow
Bill Swank

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GEOFFREY T. GLASS

February 29, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

VIA FACSIMILE
(415) 494-1827

Re: Tentative Recommendation Regarding the Best Evidence Rule
Our File No.: 910002-0024

Dear Sirs:

I am the Chairman of the State Bar Committee on Rules and Procedures of Court. Our committee received the California Law Revision Commission "Tentative Recommendation" regarding the Best Evidence Rule.

The consensus of our committee was that the Best Evidence Rule does not need to be revised.

Our group felt that the fundamental precept of the Best Evidence Rule was sound and we could not identify any conceptual problems that required alteration of the rule. We were concerned that the proposed revision shifted the burden from the person introducing the secondary evidence of a document to the person opposing the introduction. We thought that the burden should remain with the proponent of the "second best" evidence to prove the exception to the rule.

The suggested revision would eliminate the foundational requirements for secondary evidence of a writing. Those foundational requirements provide additional safeguards against fraud and protect the integrity of the judicial system. The safeguards in the proposed revision seemed to address fraud by attorneys, but we considered the greater threat to be fraud by the client, which we did not feel was adequately addressed by the proposal.

The Code of Civil Procedure has processes for verifying the authenticity of documents and the examination of original documents. We felt that the revision would penalize those who prepare by making it harder to require the introduction of original documents.

We also felt strongly that the trier of fact is entitled to have the originals of documents whenever possible. Marginalia, corrections, and even the color of the ink can often make a difference in close cases.

Thank you for the opportunity to comment on the proposed recommendation.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI

Geoffrey T. Glass
Chair of the State Bar Committee on Rules and Procedures

GTG/pr
cc: Monroe Baer

THE STATE BAR OF CALIFORNIA
OFFICE OF GOVERNMENTAL AFFAIRS

FACSIMILE COVER SHEET

TELEPHONE: 916/444-2762 TELECOPIER: 916/443-0562

TO: NAT STERLING

FROM: LARRY DOYLE

DATE: March 21, 1996

TOTAL NUMBER OF PAGES 2 (INCLUDING COVER SHEET)

PLEASE CALL (916) 444-2762 IF YOU DO NOT RECEIVE ALL OF THE PAGES

MESSAGE: I evidently mis-placed the attached message that the Family Law Section Executive Committee voted unanimously to support CLRC's recommendation regarding the Best Evidence Rule. My apologies for the delay in transmission.

TRANSMITTING TO FAX NUMBER(S): (415) 494-1827

FAMILY LAW SECTION
THE STATE BAR OF CALIFORNIA

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Law Revision Commission
RECEIVED
MAR 2 1 1996
File: _____

February 26, 1996

Larry Doyle
Office of Governmental Affairs
State Bar of California
915 'L' Street, Suite 1260
Sacramento, CA 95814-3705

Re: CLRC Tentative Recommendation: Best Evidence Rule

Dear Larry:

At our meeting on February 24, 1996 FLEXCOM voted unanimously to support the California Law Review Commission's recommendations regarding the Best Evidence Rule contained in their November 1995 report.

Very truly yours,

SUSAN STEPHENS COATS

SSC:fb

SSC\Rule.let

LITIGATION SECTION
THE STATE BAR OF CALIFORNIA

565 FRANKLIN STREET
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March 19, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: November 1995 Tentative Recommendation on Best Evidence Rule

Ladies and Gentlemen:

The Litigation Section of the State Bar has reviewed the Tentative Recommendation regarding the Best Evidence Rule and wishes to provide comment.

Position: The Litigation Section suggests that the Tentative Recommendation not be adopted at this time and that the matter be submitted for further study and evaluation.

Discussion: The Litigation Section acknowledges that, as referenced in the Tentative Recommendation, there have been vast, substantive changes in both document production and reproduction methods and in trial and pretrial procedures since promulgation of the Best Evidence Rule. It is appropriate to review the rule's "*raison d'être*". Nevertheless, having done so, the Litigation Section believes that the Best Evidence Rule continues to play an important role in assuring fairness and accuracy in the pursuit of a just result through the litigation process.

The major concerns are: (1) The proposed rule shifts the burden of proof regarding the genuineness and accuracy of the evidence, and that shift does not appear to be warranted. (2) There is no definition of secondary evidence; this substantially widens the type of evidence that may be introduced without sufficient experience or study to determine its reliability. (3) On appeal from an adverse judgment or ruling, the proposed rule appears to require a "substantial evidence" test for admissibility rather than preponderance of the evidence as under the present law, a reduction in the standard of proof. That

could substantially reduce the reliability of the evidence. (4) It will virtually eliminate the fraud deterrence effect of the current rule.

(1) **Shifting the burden:** Currently, the Best Evidence Rule requires the proponent of the document to introduce the original or "best evidence" of the proposed document into evidence. The exceptions, while there are many, are the result of a long history of experience, trial and error that reflects cumulative wisdom. The described circumstances of each exception have sufficient safeguards to assure the accuracy of secondary evidence. However, the burden remains, as it should, on the proponent of the use of secondary evidence to bring it within the exception.

Shifting the burden of proof for the admissibility of a "secondary" document merely because it is easier or more convenient in many cases is inadequate reason to change long-established rules proven to be reasonably effective. If the original document is not truly available, proof of that fact is reasonably straightforward and, under the Best Evidence Rule, the secondary evidence, if of appropriate type, will likely be admissible. The Tentative Recommendation does not adequately discuss how this shift in the burden of proof is likely to affect the fact-finding process.

Additionally, in the comments about its Tentative Recommendation, the Commission states that "There is relatively little likelihood that a diligent civil litigant will be confronted with a significant unanticipated document at trial." Tentative Recommendation, page 5, lines 10-11. Civil litigation today is not what it was even only five years ago. Increased costs of litigation, budget constraints of clients and lawyers alike, and the pressure of "Fast Track" limitations tempers the accuracy of the Commission's quoted comment. Rather, the quote attributed to Cleary & Strong as footnote 28 that "exhaustive discovery is not always reasonable discovery, and reasonable discovery may fail to disclose all relevant documents" seems to be a more cogent observation today than, perhaps, when Professors Cleary and Strong wrote it. Litigators may be diligent, prudent, and reasonable. They are not, however, infallible, despite their diligence and best efforts. With today's constraints, this is felt to be more particularly true than in the past. Further, a *pro se* litigant, often a difficult adversary to deal with, may not be as responsive—inadvertently. The rules of evidence should be formed to assist the trier of fact in reaching the most just result by assuming that the evidence presented is the most likely to accurately reflect the matter in controversy. For this purpose and for the reasons discussed here and elsewhere in this

comment, the Litigation Section believes the Best Evidence Rule is aptly named and is better suited, compared to the proposed Secondary Evidence Rule.

(2) **No definition of secondary evidence:** Secondary evidence apparently means any evidence other than the original document, including oral. In the past, secondary evidence has generally referred to secondary physical evidence. No longer. The advances in technology, for instance, about which comment is made in the Tentative Recommendation, contemplates some of the new computer-, Internet-oriented telephone and other rapidly advancing areas of technology. How broad will "secondary evidence" be defined to permit reproduction of purported contents of document? Documents taken from the Internet? Documents or information transferred or even "stolen" from private repositories via electronic or similar means? Electronic impulses or readings taken from the cell sites for cellular telephones? And since it is digitized for transmission, can its accuracy be assured? Can it be imperceptibly manipulated? Can a party in a relatively low-stakes case afford to scrutinize the secondary evidence through laboratory or other scientific testing to determine its relative accuracy? These are the rather easy and traditional questions. What, however, of the electronic memory banks or similar type of memory itself? Could a memory chip be utilized as secondary evidence? And what is the evidence, the chip or the device itself? Unless there is a method available to directly "show" the encrypted memory of the chip or device, is evidence taken from the chip by devices which themselves interpret the encryption admissible secondary evidence? How can one prove that the memory is faithfully reproduced? Or unaltered?

Even in more traditional circumstances, such as photocopied records, aside from fraudulent manipulation, secondary evidence fails to provide other clues of intent, meaning, and authenticity of the original documents; such things as texture, ink color, bends, creases, tears, and holes in the paper, etc. are all important in determining the genuineness of the document and may even help in its interpretation, but these are lacking in secondary evidence. Permitting secondary evidence as the primary means of proof tends to eliminate these safeguards. And with the burden-of-proof shift, discussed above, it can substantially alter the fact-finding process.

(3) **Effect on appeal:** It appears that the admissibility of secondary evidence under the proposed new rule would be subject to a substantial evidence test if challenged on appeal. That is, was there substantial evidence to support the secondary evidence as an accurate reproduction of the contents of the original

writing. This would be a change from the current status where secondary evidence admitted at trial under an exception to the Best Evidence Rule would be tested against the preponderance-of-evidence test, a higher standard. Thus, it appears that secondary evidence, admitted to prove the content of a writing, will not be subject to the scrutiny it has in the past because of a lower standard of admissibility and the shift in the burden of proof, making it much easier to use.

(4) **Fraud deterrence:** Finally, the Litigation Section still believes that fraud deterrence is a viable purpose for the Best Evidence Rule. The ability to manufacture or alter documentation is far more widespread than previously. The alteration of a document may not be intentional; fax transmissions are frequently blurred; photocopies, depending upon the equipment used, may not pick up certain markings (highlighting), certain colors, etc., and sometimes blur and "curve" text, distorting it (such as copies from bound documents, not lying flat); electronic transfers via fax modems are not always accurate; and the list goes on. Fraud or misrepresentation by introduction of intentionally or unintentionally altered documents is addressed better by the Best Evidence Rule.

Conclusion: It is the opinion of the Litigation Section that further study of this Tentative Recommendation is warranted and that adoption should be delayed for that purpose. Although the world, including lawyers, is always in pursuit of a better mousetrap, the proposed Secondary Evidence Rule, at least in its proposed form, does not seem to be one. The Best Evidence Rule is well established, well understood, and appears to be easier to apply for its intended purpose than the proposed replacement. Further study and probable substantial revision is warranted for the Secondary Evidence Rule before it is adopted.

Very truly yours,

Paul J. Steiner

PJS/bdm
cc: Office of Research, State Bar of California
Janet K. Hayes, Litigation Section Administrator
Ruth L. Robinson, Esq., Secretary Referrals Committee Chair
Jerome Sapiro, Jr., Esq., Secretary Referrals Committee Chair Emeritus
F:\PJS\CLRC-01.LTR

564 Mission Street #609
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May 3, 1994

Law Revision Commission
State of California
4000 Middlefield Road #D-2
Palo Alto, CA 94303-4739

Ladies and Gentlemen:

Re: Suggested Amendment to Civil and Evidence Codes Covering "Original" Documents and Signatures

The current attempts to deal with admissibility of photographic and computer-generated copies of documents in the Evidence Code (see Sections 1500.5 and 1550) do not address the question of whether electronically recorded signatures (e.g., signatures directly on a remote computer screen or on a document transmitted via a facsimile (fax) machine) are "originals." Indeed, the language of the current Evidence Code sections is so specific in categorizing methods of creating electronic copies that its failure to specifically include the two examples just mentioned leaves doubt as to whether those sections permit such electronic signatures to be admitted into evidence.

My suggestion is that given the widespread use of fax machines and the coming paperless environment and use of portable computers in business transactions, the Civil Code and Evidence Code be amended to add sections indicating that "written contracts" include contracts where signatures are obtained on computer screens or on faxed documents, that, in such cases, either a printout of such documentation, in the case of the computer screen example, or the fax received is the <u>original</u> document, and that the computer screen version or a printout or a fax document is admissible in evidence. In the use of a faxed

document, the original ink signature of the party to be charged would not be needed as long as the other party has a faxed document showing the signature of the party to be charged. The signature of each party, appearing on the fax, would be the original for the purpose of contract formation and also for the purpose of the best evidence rule. This is a particularly important rule where each contracting party signs and faxes a duplicate original to the other.

Very truly yours,

Gerald H. Genard

Gerald H. Genard

GHG:tln