Study K-501 July 5, 1996

Memorandum 96-53

Best Evidence Rule: Draft of Final Recommendation

Attached is a draft of a final recommendation calling for repeal of the best evidence rule and adoption of a new rule known as the secondary evidence rule. The notes discuss a number of issues. If other matters deserve attention, please plan on raising them at the meeting.

Respectfully submitted,

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#K-501

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

RECOMMENDATION

Best Evidence Rule

July 1996

California Law Revision Commission
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LETTER OF TRANSMITTAL

The best evidence rule (Evidence Code Section 1500) requires use of the original of a writing to prove the content of the writing. This recommendation calls for repeal of the best evidence rule and its exceptions, and adoption of a new rule known as the secondary evidence rule. The new rule would make secondary evidence (other than oral testimony) generally admissible to prove the content of a writing, but require 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. Its intended functions are to guard against fraud and prevent misinterpretation of writings. In civil cases, those functions are satisfactorily served by 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. In criminal cases, discovery is narrower, so the secondary evidence rule would incorporate a limited exception to address that difference.

Because the best evidence rule already has many exceptions, adoption of the secondary evidence rule would not dramatically change existing practice. The reform would, however, simplify the law, 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. The rule developed in the eighteenth century, when pretrial discovery was practically nonexistent and manual copying was the only means of reproducing documents.[1] Commentators questioned the rule and its many exceptions in the 1960s when the California Law Revision Commission developed the Evidence Code, 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, particularly in civil cases. Technological developments such as the dramatic rise in use of facsimile transmission and electronic communications pose new complications in applying the best evidence rule and its exceptions. 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 in civil cases and, with slight modification, in criminal cases. Because the best evidence rule already has broad exceptions, adoption of the new doctrine would not make a dramatic change in existing practice but would instead make the law more straightforward, efficient, just, and workable.

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."[2]

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1. Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, 9 U.C. Davis L. Rev. 257, 258 (1976); *see also* Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 Iowa L. Rev. 825 (1966). Evidence Code Section 1500 and its predecessors (former Code Civ. Proc. §§ 1855, 1937, 1938) codified a long-standing common law doctrine.

2. Evid. 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, *supra* note 1, at 260; *see also* McCormick, Evidence 409, 411-12 (1954).

There are many statutory exceptions to the rule's requirement that the proponent introduce the original of the writing.[3] In particular, duplicates are admissible to the same extent as the original unless "(a) a genuine question is raised as to the authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original."[4] Additionally, the best evidence rule does not exclude the following types of evidence:

- Printed representations of computer information and computer programs.[5]
- Secondary evidence of writings that have been lost or destroyed without fraudulent intent of the proponent of the evidence.[6]
- Secondary evidence of unavailable writings.[7]
- Secondary evidence of writings an opponent has but fails to produce as requested.[8]
- Secondary evidence of collateral writings that would be inexpedient to produce.[9]
- Secondary evidence of writings in the custody of a public entity.[10]
- 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.[11]
- Secondary evidence of voluminous writings.[12]
- Copies of writings that were produced at the hearing and made available to the other side.[13]
- Photographic copies made as business records.[14]
- Photographic copies of documents lost or destroyed, if properly certified.[15]

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3. See Evid. Code §§ 1500.5-1566. All further statutory references are to the Evidence Code, unless otherwise indicated.

4. Section 1511. For the definition of "duplicate," see Section 260. For the definition of "original," see Section 255.

5. Section 1500.5.

6. Sections 1501, 1505.

7. Sections 1502, 1505.

8. Sections 1503, 1505.

9. Sections 1504, 1505.

10. Sections 1506, 1508.

11. Sections 1507, 1508.

12. Section 1509.

13. Section 1510.

14. Section 1550.

15. Section 1551.

- Copies of business records produced in compliance with Sections 1560-1561.[16]

The number of these exceptions prompted one commentator to state that "the Best Evidence Rule has been treated by the judiciary and the legislature as an unpleasant fact which must be avoided through constantly increasing and broadening the number of 'loopholes.'"[17]

The Evidence Code has another complexity: In some situations it 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]

AN ALTERNATIVE: THE SECONDARY EVIDENCE RULE

The best evidence rule, with its many exceptions and emphasis on identifying the original, is not the only possible approach to admissibility of secondary evidence in proving the content of a writing. Commentators have suggested a number of other approaches, including a comparatively simple secondary evidence rule.[20] Instead of making secondary evidence presumptively inadmissible to prove the content of a writing, the secondary evidence rule would make such evidence generally admissible. The court would, however, be required to exclude secondary evidence if it finds that either (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion, or (2) admission of the secondary evidence would be unfair.

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16. Sections 1562, 1564, 1566.

17. Taylor, *The Case for Secondary Evidence*, 81 Case & Comment 46, 48 (1976). Many of the exceptions also appear in the Federal Rules of Evidence. 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. In contrast, there is essentially no hierarchy of secondary evidence in the Federal Rules of Evidence. See Fed. R. Evid. 1001-1008.

19. Section 1509.

20. The rule discussed in the test is suggested in Note, *supra* note 1, at 282-83. Other proposed approaches include:

(1) Professor Broun's proposal, which would allow the court "to require the party seeking to offer secondary evidence of the contents of a writing to produce the original writing for inspection, if it is under his control, or to state his reasons for not producing it." Broun, *Authentication and Contents of Writings*, 1969 Law & Soc. Ord. 611, 617.

(2) Dean Wigmore's approach, under which "[p]roduction of the original may be dispensed with, in the trial court's discretion, whenever in the case in hand the opponent does not bona fide dispute the contents of the document and no other useful purpose will be served by requiring production. 4 J. Wigmore, Evidence in Trials at Common Law 434 (J. Chadbourn ed. 1972).

(3) Making secondary evidence of the content of a writing equally admissible to an original of the writing. *See* Taylor, *supra* note 17 at 48-49.

A variant on the secondary evidence rule would make the rule inapplicable to oral testimony of the content of a writing. Because such testimony is subject to the vagaries of perception and memory, it would remain generally inadmissible to prove the content of a writing.

In light of the broad exceptions to the best evidence rule, this variant of the secondary evidence rule would not amount to a major change in existing practice. In fact, the approach essentially already applies to duplicates.[21] It would, however, be a simpler and more straightforward doctrine than the complex best evidence rule. Meaningfully comparing this approach with the best evidence rule requires examination of the rationale for the best evidence rule.

RATIONALE FOR THE BEST EVIDENCE RULE

Section 1500 and most of its current exceptions were enacted in 1965 as part of the Evidence Code drafted by the Law Revision Commission.[22] Since then, there has been rapid technological change, including a sharp rise in use of photocopies and electronic communications. There have also been expansions in the breadth and the use of pretrial discovery. These developments prompted the Commission to review the continued utility of the best evidence rule.

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

Fraud Deterrence

Some courts and commentators maintain that the best evidence rule guards against incomplete or fraudulent proof.[23] 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 situations in which the rule is inapplicable yet ought to apply if it is intended to deter fraud. For example, the rule only applies to proof of the content of writings, but the fraud rationale extends to proof of other matters as well. Likewise, there are situations in which the rule applies yet ought not to apply if the goal is fraud deterrence, such as where the honesty of the proponent is not in question.[24]

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21. See Section 1511. See also Rule 1003 of the Federal Rules of Evidence. Cases interpreting those statutes would be a source of guidance in applying the secondary evidence 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).

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. *See, e.g.*, 5 J. Weinstein, M. Berger & J. McLaughlin, Weinstein's Evidence 1002-6 (hereinafter Weinstein's Evidence); *see also* Cleary & Strong, *supra* note 1, at 826-28.

24. *See* Wigmore, *supra* note 20, at 417-19; *see also* Cleary & Strong, *supra* note 1, at 826-27.

The fraud rationale is also undercut by the reality that even where the best evidence rule applies it may often be ineffective to prevent fraud. Litigants determined to introduce fabricated secondary evidence are unlikely to have qualms about manufacturing an excuse satisfying one of the rule's exceptions.[25]

For these reasons, fraud prevention is not the leading modern rationale for the best evidence rule. The Official Comment to Section 1500 does not even mention the fraud rationale.[26]

Still, no means of fraud control is perfect. The best evidence rule may be poorly tailored and often ineffective as a fraud deterrent, nonetheless it may help prevent fraud to some extent. That degree of protection would justify the rule, but not if there is another means of achieving a similar effect. The mandatory exceptions to the secondary evidence rule are directed to that end.

Minimizing Misinterpretation of Writings

The rationale given in the 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.
- 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 are imperfect.[27]

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25. Professors Cleary and Strong explain that 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* note 1, at 847; *see also* Note, *supra* note 1, at 259.

26. *See also* Seiler v. Lucasfilm, Ltd., 797 F.2d 1054 (9th Cir. 1986).

27. *See* Weinstein's Evidence, *supra* note 23, at 1002-6; Note, *supra* note 1, at 258-59.

Preventing misinterpretation of writings is an important goal. 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]

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] In particular, they and others focused on the following contexts:

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 favor 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 may be admissible under an exception to the best evidence rule. Even if the best evidence rule requires use of the original, in many such instances no benefit will flow from use of the original as opposed to secondary evidence.[32] Only in a tiny subset of cases involving unanticipated documents or unanticipated use of known documents will the best evidence rule be of any use. Those situations could also be addressed through application of the secondary evidence rule. For instance, in applying the rule's mandatory exceptions, attempted use of a writing in a manner that could not reasonably have been anticipated would be a factor for the court to consider.

Documents outside the jurisdiction. Some authorities claim that the best evidence rule is useful with regard to documents beyond the court's jurisdiction.[33] Professors Cleary and Strong observed, however, that the rule is largely ineffective to obtain production of original writings in the control of persons beyond the

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28. Note, *supra* note 1, at 258, 279; *see also* Broun, *supra* note 20, at 617-18.
29. Cleary & Strong, *supra* note 1, at 837.
30. *Id.* at 847.
31. *Id.* at 839-40; *see also* 5 D. Louisell & C. Mueller, Federal Evidence 394 (1981).
32. *See* Broun, *supra* note 20, at 616, 618-19.
33. *See, e.g.,* Advisory Committee Note to Rule 1001 of the Federal Rules of Evidence.

court's jurisdiction.[34] Instead, courts commonly find that such evidence falls within one or more of the rule's exceptions.[35] For instance, Section 1502 specifically directs that a copy "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." In light of this exception, 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] Any such instances could also be addressed by the unfairness exception to the secondary evidence rule.

Criminal cases. When the best evidence rule was codified in the 1960s, proponents of the rule maintained that it 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, although it remains narrower than in civil cases.[38]

Thus, even in the criminal context the continued utility of the best evidence rule is questionable.[39] With an exception to account for the limits on discovery in criminal cases, the secondary evidence rule would provide similar protection against fraud and misinterpretation of writings. Specifically, the exception for criminal cases would, with limitations, condition use of secondary evidence on making the original reasonably available if the proponent has it. That would discourage use of any misleading secondary evidence.

OTHER SAFEGUARDS AGAINST FRAUD AND MISINTERPRETATION

The best evidence rule is not the only protection against fraud and 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]

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34. Cleary & Strong, *supra* note 1, at 844.

35. *Id.*

36. *Cf.* Broun, *supra* note 20, at 618 (documents outside the jurisdiction do not justify federal version of the best evidence rule).

37. *See* Cleary & Strong, *supra* note 1, 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 20, at 619 (arguing that the best evidence rule was unnecessary under the then-existing federal discovery scheme).

40. Note, *supra* note 1, at 282; *see also* Cleary & Strong, *supra* note 1, at 846-47.

Indeed, Section 412 specifically directs: "If 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]

COSTS OF THE BEST EVIDENCE RULE

Commentators have pointed out significant costs of the best evidence rule.[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 is complicated and presents difficulties in determining points

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41. *See* Taylor, *supra* note 17, at 48-49.

42. *See* Broun, *supra* note 20, at 611-24; Note, *supra* note 1, at 258, 279-80, 283; J. Wigmore, *supra* note 20, at 434-35; Taylor, *supra* note 17, at 48-49; Note, *Best Evidence Rule — The Law in Oregon*, 41 Ore. L. Rev. 138, 153 (1962).

43. Broun, *supra* note 20, 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. J. Wigmore, *supra* note 20, at 435.

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 fax machines, electronic mail systems, and computer networks, pose new possibilities for confusion and inconsistencies in application of the best evidence rule.[46] These complexities may trap 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.

The secondary evidence rule would not differ dramatically in content, but would help alleviate these problems. It is a simpler, more straightforward doctrine than the best evidence rule, so it should be easier for courts and litigants to apply. The doctrine also de-emphasizes the form of the writing (whether it is an original or secondary evidence) and properly focuses on the genuineness of secondary evidence and fairness of using it. By directing attention to substance rather than technicalities, the rule would help eliminate unnecessary disputes and injustice.

COMMISSION RECOMMENDATION

The best evidence rule is an anachronism. In yesterday's world of manual copying and limited pretrial discovery, it served as a safeguard against misleading use of secondary evidence. Under contemporary circumstances, in which high quality photocopies are standard and litigants have broad opportunities for pretrial inspection of original documents, the best evidence rule is no longer necessary to protect against unreliable secondary evidence. Because the rule's costs now

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45. *See, e.g.,* B. Jefferson, California Evidence Benchbook §§ 31.1-31.7 (2nd ed. 1982 & Supp. June 1990); J. Weinstein, J. Mansfield, N. Abrams & M. Berger, Cases & Materials on Evidence 211-40 (8th ed. 1988).

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).

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 comparatively simple secondary evidence rule.[47] Rather than making secondary evidence presumptively inadmissible to prove the content of a writing, the new rule makes such evidence admissible, but requires the court to exclude secondary evidence if it finds that either (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion, or (2) admission of the secondary evidence would be unfair.

The secondary evidence rule would not apply to oral testimony of the content of a writing. Such evidence is less reliable than other types of secondary evidence.[48] To safeguard the truth-seeking process, the proposed legislation would preserve existing law making oral testimony generally inadmissible to prove the contents of a writing.

The proposed legislation also incorporates an exception to the secondary evidence rule to account for limitations on discovery in criminal cases. Specifically, if the proponent of secondary evidence in a criminal case has possession of the original, secondary evidence would generally be admissible only if the proponent made the original reasonably available for inspection.

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47. Note, *supra* note 1, at 282-83.

48. *See, e.g.*, Note, *supra* note 1, at 258-59; Cleary & Strong, *supra* note 1, 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 §§ 1520-1522 (added). Secondary Evidence Rule

SEC. 2. 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

Note. At its meeting on June 14, 1996, the Commission directed the staff to propose alternative means of addressing Professor Uelmen's concern about the scope of discovery in criminal cases. The bracketed material shown below (Section 1520(c)) is one alternative. See also proposed Section 1520.5. The Staff Note below compares the alternatives and raises issues.

In addition to considering and evaluating Section 1520(c) and Section 1520.5, the staff urges the Commission to suggest and explore other ways of addressing Professor Uelmen's concern. Proposals from other sources would also be helpful.

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.

(b) Notwithstanding subdivision (a), the court shall exclude 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) [Notwithstanding subdivision (a), in a criminal action or proceeding the court shall exclude secondary evidence of the content of a writing, other than a duplicate, if it is closely related to the controlling issues and the court finds both of the following:

(1) The original is in the proponent's possession, custody, or control.

(2) The proponent has not made the original reasonably available for inspection at or before trial.]

(d) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1521.

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

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

Comment. Section 1520 (secondary evidence rule) and Section 1521 (oral testimony about content of writing) replace the best evidence rule and its exceptions. Because of the breadth of the exceptions to the best evidence rule, this reform is not a major departure from former law but primarily a matter of clarification and simplification. Discovery principles remain unchanged.

Subdivision (a) makes secondary evidence generally admissible to prove the content of a writing. The nature of the evidence offered affects its weight, not its admissibility. 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) provides further protection against unreliable secondary evidence. *See* Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California,* 9 U.C. Davis L. Rev. 257, 282-83 (1976). The mandatory exceptions set forth in subdivision (b) are modeled on the exceptions to former Section 1511 and to Rule 1003 of the Federal Rules of Evidence. Cases interpreting those statutes 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). Courts may consider a broad range of factors, for example: (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, and (6) whether the writing is central to the case or collateral.

[Subdivision (c) is a special rule for criminal cases, which are governed by narrower discovery rules than civil cases. See Penal Code §§ 1054-1054.7. Subdivision (c) does not expand discovery obligations, it simply conditions use of noncollateral secondary evidence, aside from duplicates (see Section 260), on making the original reasonably available for inspection if the proponent has it.

In determining whether the proponent of secondary evidence made the original "reasonably available," the court should examine specific circumstances, such as the time, place, and manner of allowing inspection. The concept is fluid, not rigid. For example, making the original available moments before using secondary evidence may suffice if a defendant is rebutting a surprise contention, but not if the prosecution is presenting its case in chief. Similarly, what constitutes reasonable access to computer evidence may vary from system to system.]

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

☞ **Staff Note.** Professor Uelmen expressed concern that the scope of discovery is narrower in criminal cases than in civil cases, increasing the likelihood that a party will introduce secondary evidence without having provided an opportunity for comparison with the original. Subdivision (c), shown in brackets, is the staff's preferred means of addressing that concern. Neither it nor the staff's alternative proposal (Section 1520.5, *infra*) would apply where the proponent lacks access to the original of the writing. The exceptions in Section 1520(b) would, however, provide a buffer against misleading use of secondary evidence in that situation. In addition, in many instances where the proponent lacks access to the original, the other side may have such access.

Because the best evidence rule currently incorporates exceptions for collateral evidence (Evid. Code § 1504) and duplicates (Evid. Code § 1511), subdivision (c) includes similar limitations. The staff's alternative proposal, Section 1520.5, is similar to subdivision (c) but adds two more exceptions to the requirement of making the original "reasonably available" if the proponent has it: (1) a copy of a writing in the custody of a public entity, and (2) a copy of a writing that is

recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute. These exceptions are drawn from Evidence Code Sections 1506 and 1507, respectively.

By omitting these two exceptions, subdivision (c) would stiffen requirements for admissibility of these types of secondary evidence. Whereas now such evidence is admissible by invoking Section 1506 or 1507 as appropriate, under subdivision (c) a proponent who has the original would have to make it reasonably available for inspection or the secondary evidence would be inadmissible. The offsetting virtue of subdivision (c) is its simplicity.

Even the staff's more complex alternative, Section 1520.5, would not precisely track all the existing exceptions to the best evidence rule. See Evid. Code §§ 1500.5-1511 (reproduced *infra*). For the following reasons, the staff does not consider this necessary:

Exception	*Why Unnecessary in Section 1520(c) or Section 1520.5*
(1) § 1500.5 (computer evidence)	Covered by proposed § 1552 and the reference to computer evidence in the Comment to § 1520(c) and § 1520.5.
(2) § 1501 (lost or destroyed writing)	If a writing is lost or has been destroyed, the proponent could not make it available for inspection. The Commission may want to consider whether secondary evidence of a writing destroyed by the proponent with fraudulent intent should be made per se inadmissible under § 1520, instead of relying on § 1520(b) to cover the situation.
(3) § 1502 (unavailable writing)	If a writing is unavailable to the proponent, the proponent could not make it available for inspection.
(4) § 1503 (writing under opponent's control)	If a writing is under the opponent's control, the proponent could not make it available for inspection.
(5) § 1505 (other secondary evidence of writings described in §§ 1501-1504	Same as for §§ 1501-1503, above. Section 1504 pertains to collateral writings and is covered in proposed § 1520(c) and § 1520.5.
(6) § 1508 (other secondary evidence of writings described in §§ 1506-1507)	If the Commission favors proposed § 1520.5, it may want to make adjustments to incorporate the gist of § 1508. The staff's inclination is towards § 1520(c), which does not have exceptions comparable to §§ 1507-1508.
(7) § 1509 (voluminous writings)	Under § 1509, secondary evidence of a voluminous writing is admissible with restrictions, but the court has discretion to require production of the writing. Proposed § 1520(c) and § 1520.5 would not change the situation much, except that production of the writing would be mandatory if the proponent has it, not discretionary with the court.
(8) § 1509 (copy of writing produced at the hearing)	If a writing is produced at the hearing, then §§ 1520(c) and 1520.5 are necessarily satisfied, unless production at the hearing is not equivalent to making the original "reasonably available for inspection."

[§ 1520.5. Exclusion of secondary evidence in criminal cases

Note. At its meeting on June 14, 1996, the Commission directed the staff to propose alternative means of addressing Professor Uelmen's concern about the scope of discovery in criminal cases. Section 1520.5, shown below, is one alternative. See also proposed Section 1520(c). The Staff Note for Section 1520 compares the alternatives and raises issues.

In addition to considering and evaluating Section 1520(c) and Section 1520.5, the staff urges the Commission to suggest and explore other ways of addressing Professor Uelmen's concern. Proposals from other sources would also be helpful.

1520.5. (a) Notwithstanding Section 1520, in a criminal action or proceeding the court shall exclude secondary evidence of the content of a writing if the court finds both of the following:

(1) The original is in the proponent's possession, custody, or control.

(2) The proponent has not made the original reasonably available for inspection at or before trial.

(b) Subdivision (a) does not apply to any of the following:

(1) A duplicate as defined in Section 260.

(2) A writing that is not closely related to the controlling issues in the action or proceeding.

(3) A copy of a writing in the custody of a public entity.

(4) A copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

Comment. Section 1520.5 is a special rule for criminal cases, which are governed by narrower discovery rules than civil cases. See Penal Code §§ 1054-1054.7.

Subdivision (a) does not expand discovery obligations, it simply conditions use of secondary evidence on making the original reasonably available for inspection if the proponent has it. In determining whether the proponent of secondary evidence made the original "reasonably available," the court should examine specific circumstances, such as the time, place, and manner of allowing inspection. The concept is fluid, not rigid. For example, making the original available moments before using secondary evidence may suffice if a defendant is rebutting a surprise contention, but not if the prosecution is presenting its case in chief. Similarly, what constitutes reasonable access to computer evidence may vary from system to system.

The exceptions in subdivision (b) are drawn from exceptions to the former best evidence rule (former Evidence Code Section 1500). Subdivision (b)(1) is drawn from former Section 1511. Subdivision (b)(2) is drawn from former Section 1504. Subdivision (b)(3) is drawn from former Section 1506. Subdivision (b)(4) is drawn from former Section 1507.

See Section 1520 (proof of the content of a writing), Section 1521 (oral testimony about content of writing).]

§ 1521. Oral testimony about content of writing (intermediate alternative)

Note. The Commission's tentative recommendation included alternative versions of Section 1521: a short alternative and a long alternative. Some comments favored the short alternative, while others favored the long alternative. At its last meeting, the Commission directed the staff to prepare an intermediate alternative, which is set forth below. For the Commission's reference, the staff has also reproduced the short alternative and the long alternative in brackets. The staff recommends use of the intermediate alternative, which is intended to combine the advantages of the other alternatives.

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 a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

(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 original or a copy of the writing and any of the following conditions is satisfied:

(1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means.

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

(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.

Comment. Section 1521 preserves former law regarding the admissibility of oral testimony to prove the content of a writing. See former Sections 1500, 1501-1509.

Subdivision (a) is based on an assumption that oral testimony as to the content of a writing is typically less reliable than other proof of the content of a writing. For background, see Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, 9 U.C. Davis L. Rev. 257, 258-59 (1976); Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 Iowa L. Rev. 825, 828-29 (1966).

Subdivision (b) continues former Sections 1501 and 1505 without substantive change as to oral testimony of the content of a writing that is lost or has been destroyed..

Subdivision (c)(1) continues former Sections 1502 and 1505 without substantive change as to oral testimony of the content of a writing that was not reasonably procurable. In effect, subdivision (c)(1) also continues former Sections 1503 and 1505 without substantive change as to oral testimony of the content of a writing that the opponent has but fails to produce at the hearing despite being expressly or impliedly notified that it would be needed. Under such circumstances, the writing was not reasonably procurable. Finally, subdivision (c)(1) continues former Sections 1506-1508 without substantive change as to oral testimony of the content of a writing where: (1) the writing is in the custody of a public entity and the proponent could not have obtained it or a copy of it in the exercise of reasonable diligence, or (2) the writing has been recorded in the public records, the record or a certified copy of the writing is made evidence of the writing by statute, and the proponent could not have obtained it or a copy of it in the exercise of reasonable diligence. Subdivision (c)(2) continues former Sections 1504 and 1505 as to oral testimony of the content of a collateral writing.

Subdivision (d) continues former Section 1509 without substantive change as to oral testimony.

[§ 1521. Oral testimony about content of writing (short alternative)

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 original or a copy of the writing and either of the following conditions is satisfied:

(1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means.

(2) 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 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.

Comment. Section 1521 generally preserves former law regarding the admissibility of oral testimony to prove the content of a writing. See former Sections 1500, 1501-1509.

Subdivision (a) is based on an assumption that oral testimony as to the content of a writing is typically less reliable than other proof of the content of a writing. For background, see Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, 9 U.C. Davis L. Rev. 257, 258-59 (1976); Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 Iowa L. Rev. 825, 828-29 (1966).

Paragraph (b)(1) continues the combined effect of former Sections 1502 and 1505 without substantive change as to oral testimony. Paragraph (b)(1) also substantially continues the combined effect of former Sections 1501 and 1505 as to oral testimony, as well as the combined effect of former Sections 1503 and 1505 as to such testimony, the combined effect of former Sections 1506 and 1508 as to such testimony, and the combined effect of former Sections 1507 and 1508 as to such testimony. See Comments to former Sections 1501, 1503, 1506, and 1507. As to oral testimony, paragraph (b)(2) continues the combined effect of former Sections 1504 and 1505 without substantive change .

Subdivision (c) continues former Section 1509 without substantive change as to oral testimony.]

[§ 1521. Oral testimony about content of writing (long alternative)

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 original 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 either 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 former law regarding the admissibility of oral testimony to prove the content of a writing. See former Sections 1500, 1501-1509.

Subdivision (a) is based on an assumption that oral testimony as to the content of a writing is typically less reliable than other proof of the content of a writing. For background, see Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, 9 U.C. Davis L. Rev. 257, 258-59 (1976); Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 Iowa L. Rev. 825, 828-29 (1966).

Subdivisions (b) and (e) continue former Sections 1501-1505 without substantive change as to oral testimony.

Subdivision (c) continues former Sections 1506-1508 without substantive change as to oral testimony.

Subdivision (d) continues former Section 1509 without substantive change as 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 former Section 1503(a), but applies it to all requests for exclusion of secondary evidence in criminal trials.

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

SEC. 3. 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. 4. 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 without substantive change the second, third, and fourth sentences of the second paragraph of former Section 1500.5, 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). Secondary evidence in preliminary examinations

SEC. 5. Section 872.5 of the Penal Code is amended, to read:

872.5. ~~The best evidence rule shall not apply to preliminary examinations.~~ Notwithstanding Article 1 (commencing with Section 1520) of Chapter 2 of Division 11 of the Evidence Code, in a preliminary examination 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.

Comment. Section 872.5 is amended to reflect the repeal of the best evidence rule and adoption of the secondary evidence rule. See Evid. Code §§ 1520-1522 & Comments.

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

SEC. 6. 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 Evid. Code § 1520 Comment. Section 1417.7 is also amended to make technical changes.

Uncodified (added). Operative date

SEC. 7. (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.

(d) As used in subdivision (c), "best evidence rule" means Sections 1500-1511 of the Evidence Code, which are repealed by this act.

COMMENTS TO REPEALED SECTIONS

Note. These Comments assume that the recommendation incorporates Section 1520(c) and the intermediate alternative of Section 1521, and omits Section 1520.5. Minor adjustments would be necessary if the Commission follows a different approach.

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 must 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).

§ 1500 (repealed). 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 Sections 1520 (secondary evidence rule) and 1521 (oral testimony about content of 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 Section 1520 Comment. 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 Section 1520 Comment. As to oral testimony of the content of a writing that is lost or has been destroyed, the combined effect of former Sections 1501 and 1505 is continued in Section 1521 without substantive change.

§ 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 Section 1520 Comment. As to oral testimony of the content of a writing that was not reasonably procurable, the combined effect of Sections 1502 and 1505 is continued without substantive change 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 Section 1520 Comment. As to oral testimony of the content of a writing, the combined effect of former Section 1505 and the first sentence of subdivision (a) is continued without substantive change in Section 1521.

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 that requirement to all requests for exclusion of secondary evidence in criminal actions.

Subdivision (b) is not continued, because it is subsumed in the general principle that parties are under no obligation to introduce evidence they subpoena. That principle remains unchanged even though the specific language of subdivision (b) is not continued.

§ 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 Section 1520 Comment. As to oral testimony of the content of a collateral writing the combined effect of former Sections 1504 and 1505 is continued without substantive change 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 Section 1520 Comment. Insofar as Section 1505 pertains to oral testimony of the content of a writing, it is continued without substantive change in Section 1521. See Comments to former Sections 1501-1504.

§ 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 Section 1520 Comment. As to oral testimony of the content of a writing in the custody of a public entity, the combined effect of former Sections 1506 and 1508 is continued without substantive change 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 Section 1520 Comment. As to oral testimony of the content of a writing that has been recorded in the public records, the combined effect of former Sections 1507 and 1508 is continued without substantive change 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 Section 1520 Comment. Insofar as Section 1508 pertains to oral testimony of the content of a writing, it is continued without substantive change in Section 1521. See Comments to former Sections 1506, 1507.

§ 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 Section 1520 Comment. 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 of the content of voluminous writings, it is continued without substantive change 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 Section 1520 Comment.

§ 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 Section 1520 Comment. The exceptions to the secondary evidence rule (Section 1520) are modeled on the exceptions in former Section 1511.