Study K-202 September 3, 2004

Memorandum 2004-44

Conforming Evidence Code To Federal Rules: Role of Judge and Jury

The Commission is currently studying differences between the California Evidence Code and the Federal Rules of Evidence. The purpose of the study is to determine whether California law should be revised to incorporate aspects of the Federal Rules. Professor Miguel Méndez of Stanford Law School has prepared the third installment of a background study on the subject. See Méndez, *California Evidence Code — III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 1003 (2003) (attached to Memorandum 2004-19).

After considering the judge and jury issues raised in the background study, the Commission directed the staff to prepare a staff draft tentative recommendation implementing its decisions on those issues. The staff draft is attached. The Commission now needs to decide whether to circulate the staff draft, with or without changes, as a tentative recommendation.

In addition to describing the contents of the attached draft, this memorandum also considers two related issues: (1) application of the "Victims Bill of Rights" and (2) the role of judge and jury in determining the admissibility of hearsay under the exceptions for authorized admissions.

Except as otherwise indicated, all statutory references in this memorandum are to the Evidence Code. References to federal rules are to the Federal Rules of Evidence.

ISSUES ADDRESSED IN PROPOSED LAW

The proposed law addresses three issues:

(1) Whether the exclusionary rules of evidence should apply when a judge determines a preliminary fact.
(2) Whether a proceeding to determine the admissibility of an admission or confession in a criminal case should be conducted out of the presence and hearing of the jury.
(3) The role of the judge and jury in determining the admissibility of secondary evidence.

Those issues are discussed more fully below.

Application of Rules of Evidence to Judicial Determination of Preliminary Fact

Under Federal Rule 104(a), a judge deciding a preliminary fact question is not bound by exclusionary rules of evidence, other than the rules governing privileges. Exclusionary rules are generally intended to protect the jury from evidence that is unreliable or misleading. A judge does not require such protection.

The rules governing privileges are an exception, because privileges exist for policy reasons other than concern about reliability (e.g., to promote frank communication between a patient and physician). The policies served by privileges would be defeated if privileged testimony were compelled in determining a preliminary fact, even if the judge is the decisionmaker.

In 1964, more than a decade before the Federal Rules of Evidence were enacted, the Commission tentatively recommended a rule similar to the current federal approach. It withdrew that recommendation in response to last minute concerns about the possible adverse consequences of such a significant change in the law. Those concerns appear to have been unfounded. Nearly 30 years of experience in the federal courts has not revealed any serious problem with the rule.

The proposed law would revise Section 405 as follows:

Evid. Code § 405 (amended). Judicial determination of preliminary fact

405. With respect to preliminary fact determinations not governed by Section 403 or 404:

(a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.

(b) If a preliminary fact is also a fact in issue in the action:

(1) The jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact.

(2) If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact.

<u>(c) In making a determination under this section, the court is not bound by the rules of evidence except the rules governing privileges.</u>

Comment. Section 405 is amended to conform to the approach taken in Federal Rule of Evidence 104(a). This reverses prior law.

> See *People v. Plyler*, 126 Cal. 379, 58 Pac. 904 (1899) (affidavit cannot be used to show death of witness at preliminary hearing to establish foundation for introduction of former testimony at trial). Nothing in this section precludes a court from considering the proffered evidence itself in determining a preliminary fact. See also Sections 900-1070 (privileges).

A Note on "Bootstrapping"

If a judge is not bound by the exclusionary rules of evidence in finding a preliminary fact, a judge can consider the proffered evidence itself for whatever probative value it has in determining the preliminary fact. For example, suppose a proponent seeks to admit the hearsay declaration "Help, I'm falling down the stairs!" under the exception for a spontaneous statement describing a contemporaneous stressful event. To qualify for the exception, the proponent will need to prove that the statement was made during the stressful event described (i.e., falling down the stairs). If the judge is not bound by the exclusionary rules of evidence, then the hearsay statement itself can be considered in determining the preliminary fact. This is known as "bootstrapping," because the proffered evidence lifts itself into admissibility by its own bootstraps.

Bootstrapping is consistent with the rationale for exempting judicial determination of a preliminary fact from the rules of evidence. If a judge can be trusted to correctly weigh the probative value of hearsay in determining a preliminary fact, it should not matter that the hearsay being weighed happens to be the proffered evidence.

The proposed law is consistent with the Federal Rules of Evidence in not precluding bootstrapping. However, Federal Rule 801 does specifically require independent corroborating evidence to establish the preliminary facts necessary for introduction of hearsay under the exception for an authorized admission (including a statement by an agent or co-conspirator):

> The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority …, the agency or employment relationship and scope thereof …, or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered….

The Advisory Committee Note to Federal Rule 801 explains:

> This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement.

That apparent unanimity may result from the fact that, at common law, the hearsay exception for a co-conspirator statement specifically required "independent evidence" of the existence of the conspiracy. See *Bourjaily v. United States*, 483 U.S. 171, 188-96 (1987) (Blackmun, J., dissenting).

California also requires independent evidence of the existence of a conspiracy:

> Section 1223 permits none of [the preliminary facts necessary for admission of co-conspirator declaration] to be established through the evidence of the declaration itself, save insofar as the content of the evidence must be considered in determining whether the declaration was in furtherance of what is established prima facie by independent evidence to have been the object of the conspiracy.

People v. Leach, 15 Cal. 3d 419, 430 n.10, 541 P. 2d 296, 124 Cal. Rptr. 752 (1975).

However, in California, the determination of admissibility of an authorized admission (including a co-conspirator statement) is subject to a sufficiency standard under Section 403, rather than by the judge under Section 405. See Sections 1222(b), 1223(c). The proposed law would only waive the exclusionary rules in a Section 405 determination and *would therefore have no application to a co-conspirator hearsay case*. Thus, there is no need for a special rule of the type provided in Federal Rule 801.

The question of *whether* admission of an authorized admission should be decided under Section 403 or Section 405 is discussed below under "Authorized Admissions."

Evidentiary Hearing Conducted Out of Presence and Hearing of Jury

Consistent with Federal Rule 104(c), the proposed law requires that a hearing to determine the admissibility of an admission or confession in a criminal case is to be conducted out of the presence and hearing of the jury, regardless of whether a party so requests. The proposed law would revise Section 402 as follows:

> **Evid. Code § 402 (amended). Determination of preliminary fact**
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> 402. (a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.
>
> (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the

defendant out of the presence and hearing of the jury ~~if any party so requests~~.

(c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

Comment. Section 402 is amended to require that the question of admissibility of an admission or confession of a defendant in a criminal case be heard and determined out of the presence and hearing of the jury. See People v. Torrez, 188 Cal. App. 3d 723 (1987) (court abused its discretion by holding extended hearing on adequacy of *Miranda* warnings in presence of jury); People v. Rowe (22 Cal. App. 3d 1023, 1030 (1972) ("best rule for the trial court to follow in general is that the hearing should be private"); 1 Jefferson, Cal. Evidence Benchbook § 23.2 (2d Ed. 1982) ("The procedural rule for determining admissibility of a defendant's confession or admission out of the presence and hearing of the jury is a salutary one, as it prevents the jury from hearing evidence that may be extremely prejudicial to a defendant. If evidence of the defendant's admission or confession is excluded, still, the jury will have heard testimony regarding the circumstances under which defendant is alleged to have made a confession or admission. Herein lies the potential for prejudice if the hearing on admissibility is conducted in the presence and hearing of the jury.").

Secondary Evidence

Section 1521 provides for judicial exclusion of secondary evidence if a court finds either of the following conditions to be true:

(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.

At the June meeting, the Commission decided to make two changes to clarify the role of judge and jury under Section 1521:

(1) Make clear that the issue of whether an original ever existed is to be decided by the jury, as a matter of authentication. This is consistent with existing law. Section 1401(b) requires authentication of the original and of secondary evidence before secondary evidence can be admitted. Section 403(a)(3) provides that authentication of a writing is a jury question.

(2) Add Comment language to make clear that a dispute as to material accuracy of secondary evidence, by itself, is not sufficient to justify exclusion of the secondary evidence — the court must also find that it would be unfair to admit the evidence.

Consistent with those decisions, the proposed law would amend Section 1521 as follows:

> 1521. (a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines 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.
>
> (b) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing).
>
> (c) Nothing in this section excuses compliance with Section 1401 (authentication), and a dispute concerning authentication of a writing is determined pursuant to Section 1401 and not pursuant to this section.
>
> (d) This section shall be known as the "Secondary Evidence Rule."
>
> **Comment**. Section 1521 is amended to make clear that a dispute concerning authentication of a writing is to be determined pursuant to Section 1401 and not pursuant to this section. People v. Garcia, 201 Cal. App. 3d 324, 328-29, 247 Cal. Rptr. 94 (1988) ("The foundation for admission of a writing or copy is satisfied by the introduction of evidence sufficient to sustain a finding that the writing and copy are what the proponent of the evidence claims them to be."). See also Sections 403(a)(3), 1401(b).
>
> Ordinarily, a concern about the material accuracy of secondary evidence would go to the weight of the secondary evidence, rather than its admissibility. People v. Garcia, 201 Cal. App. 3d at 329 (Concerns about the accuracy of secondary evidence go "to the weight rather than the admissibility of the [evidence], because conflicting inferences are for the jury to resolve."). However, under unusual circumstances the incompleteness or inaccuracy of secondary evidence may raise issues of fairness that justify exclusion of the secondary evidence under subdivision (a).
>
> The bases for exclusion provided in subdivision (a) are modeled in part on Federal Rule of Evidence 1003. Commentary on that rule illustrates the sorts of unfairness that justify exclusion of secondary evidence:
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>> Three varieties of potential unfairness may be readily discerned.
>>
>> One turns upon the conduct of the proponent. If he has lost or destroyed the only original in bad faith, any doubts or suspicions which naturally arise from such behavior suggest reason enough to exclude any purported duplicate which he himself produces. Duplicates originating elsewhere may or may not fall under the shadow of such misconduct, and of

> course a loss or destruction of one of several originals should not preclude receipt of another, nor should innocent loss or destruction of the only original require exclusion of duplicates. Arguably, FRE 1004(1) applies where bad-faith loss or destruction of the original has occurred, and requires exclusion of duplicates. And where a party possesses an original but has refused to permit requested discovery, this conduct too may warrant a ruling that he cannot offer a duplicate instead.
>
> Another kind of unfairness occurs where the accuracy of the duplicate is thrown into doubt, as may happen in the case of rerecordings prepared in efforts to filter out background noise and reduce distortion in the original. Often, however, such efforts at electronic enhancement succeed in their purpose of making virtually unusable recordings at least minimally comprehensible.
>
> A third kind of unfairness involves apparent incompleteness of the duplicate. Gaps or omissions in the duplicate, or other discrepancies, such as might be caused by mechanical failure or the inability of the machine in question to replicate portions of the original, point toward exclusion if the missing material is important to the point to be proved or to the adversary's interpretation, particularly where an original is readily available. And where it appears that duplicates reproduce only selected portions of the original, and have been in effect edited in a way which might well mislead the jury as to the content of the original, this fact too suggests that duplicates should not be admitted.

C. Mueller & L. Kirkpatrick, Federal Evidence § 574 (2d ed. 2004) (footnotes omitted).

Professor Méndez has provided additional analysis of the role of judge and jury under Section 1521, which is attached as an Exhibit. He recommends against adding statutory language along the lines proposed above. He maintains that Section 1521 establishes an exception to the rule that authenticity is determined by the jury: "It empowers the judge to withhold the secondary evidence from the jurors whenever the opponent raises serious questions about the authenticity of either the secondary evidence or of the original, including the question whether the claimed original ever existed." See Exhibit p. 5. His conclusion is based in part on an analysis of Federal Rule 1003(1), after which Section 1521(a)(1) was modeled.

Federal Rule 1003(1)

Federal Rule 1003(1) provides for exclusion of a duplicate if "a genuine question is raised as to the authenticity of the original…." For example, in *United States v. Haddock*, 956 F.2d 1534, 1546 (1992), the court excluded alleged photocopies of several documents on the grounds that the opponent had raised a genuine issue as to the authenticity of the originals.

> With regard to each of these photocopies, evidence presented at trial indicates that only Haddock could recall ever seeing either the original or a copy of these documents. Except for Haddock, no one — including in some cases persons who allegedly typed the document and persons to whom the original allegedly was sent — was familiar with the contents of the photocopies. In addition, witnesses testified that several of the documents bore markings and included statements that did not comport with similar documents prepared in the ordinary course of business at the Bank of White City and at the Bank of Herington. Under these circumstances, we hold that the district court did not abuse its discretion by excluding these photocopied documents from evidence.

The court in that case did not specifically discuss what level of proof is sufficient to establish a "genuine dispute" as to the authenticity of the original. It merely held that the proof in that case was adequate, under the trial court's "broad discretion" to make evidentiary rulings. *Id*.

It is not clear how to reconcile judicial exclusion of secondary evidence under Rule 1003(1) with Rule 1008, which expressly provides that a dispute as to whether an original ever existed is to be determined by the jury:

> It is hard (perhaps impossible) to reconcile the language in FRE 1003 authorizing the judge to exclude a proffered duplicate if "a genuine question is raised as to the authenticity of the original" with the language in FRE 1008 saying the jury decides whether "the asserted writing ever existed" and whether "other evidence of contents correctly reflects the contents…."

C. Mueller & L. Kirkpatrick, Federal Evidence § 30 (2d ed. 2004).

Professors Mueller and Kirkpatrick attempt to resolve that conflict by interpreting Rule 1003(1) narrowly, as a specific expression of Rule 104(b), which allows the court to exclude proffered evidence if it finds that there is not sufficient evidence for the jury to determine the existence of a necessary preliminary fact:

> The preferred construction of the "genuine question" clause is to exclude a duplicate on account of the adverse party's attack

> upon authenticity of the original only where this attack amounts to cogent and compelling evidence which would *require* the jury to find that the original is not authentic. Questions allocated to the jury under FRE 104(b), including those questions described by the second sentence of FRE 1008, may be taken from the jury where proof and counterproof (or the absence of one or the other) are such that *a reasonable jury could only resolve the question one way*. Where a reasonable jury would necessarily find that the original is not authentic, the purported copy must be excluded.

Id. at § 574 (emphasis added).

Under that construction, Rule 1003(1) does not conflict with Rule 1008. The authenticity of an original is to be decided by the jury, subject to the usual judicial pre-screening for sufficiency.

That is also the approach recommended by Professors Charles Alan Wright and Victor James Gold:

> [The] meaning of the phrase "genuine question" is not defined, thus raising an issue concerning the extent of that burden.
>
> The starting point for analysis of this issue is the conclusion … that the proponent of evidence under Rule 1003 must offer proof sufficient to support a finding as to the authenticity of the original in order to qualify an item as a duplicate. This means that there must be enough evidence to permit a reasonable jury to conclude the original is authentic. If this minimal showing of authenticity is all that the proponent must make to admit an item, then logic dictates that the showing required of the opponent to raise "a genuine question" as to authenticity and exclude the item must be substantial: *the opponent must show that no reasonable jury could conclude the original is authentic.* This makes sense from the standpoint of policy since excluding evidence based on a minimal showing of doubt as to authenticity would be inconsistent with the notion, expressed repeatedly in the Evidence Rules, that close questions of authenticity are matters for the jury to resolve.

C. Wright & V. Gold, Federal Practice and Procedures § 8004 (2004) (emphasis added).

Thus, there appear to be two interpretations of Rule 1003(1). Under the first, the court may exclude secondary evidence if there is a "serious" dispute as to the authenticity of the original. The standard of proof is not spelled out specifically, but is probably something short of proof such that no reasonable jury could find that the original existed. Under the second interpretation, the court's authority to exclude secondary evidence on the basis of an objection to the authenticity of the original is limited to the court's authority under Federal Rule 104(b), i.e., the

court must admit the evidence if there is sufficient evidence to support a jury finding of the authenticity of the original.

Former Evidence Code Section 1511

Section 1521(a) was also modeled after former Section 1511 (which was substantively identical to Federal Rule 1003, allowing use of a duplicate unless there is a genuine question as to the authenticity of the original). Unfortunately, there are also differing interpretations of whether the judge or jury should review an objection to the authenticity of an original under that section.

In its Comment to former Section 1511, the Commission stated:

> The courts should be liberal in finding that a "genuine question is raised as to the authenticity of the writing itself." … For example, if a party opposing admission of a duplicate makes a good faith claim that the writing from which the duplicate has been made is not authentic and it would be impractical or more difficult to determine the authenticity of the writing itself from the duplicate, the court should require that the writing itself be produced for examination … before permitting the duplicate to be introduced in evidence."

See *Admissibility of Duplicates in Evidence*, 13 Cal. L. Revision Comm'n Reports 2115, 2125 (1975). Under that standard, the threshold for judicial exclusion of a duplicate is relatively low, requiring only good faith and practical necessity. The Commission's analysis does not address the potential problem of a court deciding that an original does not exist, when the existence of the original is an ultimate issue in the case. Nor does it suggest how to reconcile the court's role with the jury's traditional role of deciding the authenticity of a writing — except to note that in most cases the evidence offered to establish authenticity would be adequate to answer an objection to authenticity under former Section 1511.

Despite the intent expressed in the Commission's Comment, there are court decisions applying former Section 1511 that suggest that an objection based on a genuine dispute as to the authenticity of the original should be decided on a sufficiency basis, i.e., by the *jury* after judicial screening for sufficiency. In *People v. Garcia*, 201 Cal. App. 3d 324 (1988), the appellant objected to introduction of a copy of a police artist sketch on the grounds that there was a serious dispute as to the authenticity of the original. The court held that the duplicate was admissible because evidence sufficient to show the authenticity of the original had been introduced at trial.

> Appellant contends (1) the prosecution did not lay a proper foundation for admission of the photograph as a duplicate and (2) it was unfair, within the meaning of Evidence Code section 1511, to use the photograph in lieu of the original sketch. We find no merit to either contention.
>
> The foundation for admission of a writing or copy is satisfied by the introduction of evidence sufficient to sustain a finding that the writing and copy are what the proponent of the evidence claims them to be.

Id. at 328-29.

Although nonciteable because review was granted, *In re Marriage of Bonds*, 83 Cal. Rptr. 2d 783, 793 (1999), provides another example:

> Here, a duplicate was admitted, and Barry asserts it was admissible pursuant to former section 1511 of the Evidence Code. To establish the first criterion set forth in this section, authenticity, the party introducing the writing must introduce "evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is" or establish "such facts by any other means provided by law" (Evid. Code, 1400).

The staff could not find any case applying former Section 1511 that distinguished between a dispute over authenticity raised under Section 1511 and the general rule for authentication of an original under Section 1401.

Fraud Prevention

One of the functions served by the former best evidence rule was fraud prevention. When the Commission recommended replacing the best evidence rule with the secondary evidence rule, opposition to that proposal was primarily focused on the potential for an increase in the risk of fraud.

In cases of *obvious* fraud, the existing authentication requirement authorizes the court to exclude secondary evidence. Even though authentication of a writing presents a jury question, the judge may exclude the secondary evidence if there is not sufficient evidence for a jury to determine that the original existed. In a case where there is sufficient evidence for a jury to find that the writing is authentic, the evidence would be admitted for jury determination. The jury would then weigh the credibility of the conflicting evidence and make its own decision as to whether the secondary evidence is fraudulent.

Recommendation

As discussed above, it is not clear whether Section 1521(a)(1) authorizes the court to exclude secondary evidence based on an objection to the authenticity of an original, or if such an objection would instead be decided by the jury (subject to judicial pre-screening for the sufficiency of the evidence of authenticity). It would be helpful to settle the issue definitively, one way or the other.

Precedents aside, the policy arguments in favor of judicial determination are practical ones. In some cases the simplest way to resolve a dispute over the authenticity of an original is to require production of the original. Judicial determination of the authenticity of the original would also help prevent the admission of fraudulent evidence in some cases.

The main argument in favor of jury determination is simply that it is the role of the jury to determine the authenticity of a writing, including determining the weight and credibility of competing evidence offered on the issue. As Professors Mueller and Kirkpatrick observe:

> There is simply no good reason to exclude a purported duplicate where the adverse party's counterproof would merely suffice to enable a jury to find that the original is not authentic. The jury may properly be trusted to determine whether a so-called original is or is not authentic, and receipt of a purported duplicate is not likely to blind the jury to its responsibility where this question of authenticity remains at large.

C. Mueller & L. Kirkpatrick, Federal Evidence § 574 (2d ed. 2004). To allow the court to determine the authenticity of the original could result in judicial determination of an ultimate issue in the case.

The staff sees merit in both policy arguments but tentatively leans toward jury determination. It isn't clear that judicial determination of authenticity is required to protect against fraud or that any extra protection provided by judicial determination justifies taking the issue away from the jury.

If the Commission agrees, Section 1521 should be amended to make clear that the provision for judicial exclusion of secondary evidence based on a "genuine dispute as to material terms" does not encompass questions as to the authenticity of the original or the secondary evidence. Section 1521(a)(1) would still encompass disputes about the material accuracy of the secondary evidence, assuming that the circumstances are such that justice requires exclusion of the secondary evidence. That is the approach taken in the proposed law.

VICTIMS' BILL OF RIGHTS

The Victims' Bill of Rights, a ballot measure approved by the voters in 1982, includes a Truth-in-Evidence provision, which provides:

> Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, *relevant evidence shall not be excluded in any criminal proceeding,* including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

Cal. Const. art. I, § 28(d) (emphasis added). This acts as a potential constraint on any reform that would increase the scope of exclusion of evidence in a criminal case. The proposed law should not increase the scope of the exclusion of relevant evidence:

- A rule exempting judicial determination of a preliminary fact from the exclusionary rules of evidence would, on its face, be consistent with the general policy of limiting the exclusion of relevant evidence. Furthermore, the practical effect of the change would be to make it easier to establish preliminary facts necessary for the admission of proffered evidence.
- Requiring that the admissibility of an admission or confession in a criminal case be decided out of the presence and hearing of the jury is a matter of procedure that would have no substantive effect on the extent to which evidence is excluded.
- The changes to Section 1521 and its Comment are clarifications of existing law and would have no substantive effect on the extent to which evidence is excluded.

The Victim's Bill of Rights should not have any effect on the proposed law.

AUTHORIZED ADMISSIONS

As discussed briefly above, California law differs from the Federal Rules with respect to who determines the admissibility of an authorized admission by an out of court declarant (including a co-conspirator admission):

- Under Federal Rule 104, the admissibility of an authorized admission is determined by the court. The exclusionary rules of evidence do not apply, except for the rules regarding privileges.

> However, Rule 1008 provides that the hearsay statement itself is not sufficient to prove the preliminary facts for admissibility. There also must be some independent corroborative evidence.

- Under Sections 1222(b) and 1223(c), an authorized admission will be admitted after admission of "evidence sufficient to sustain a finding" of the necessary preliminary facts. This is the standard governing jury determination of a preliminary fact under Section 403. As a Section 403 matter, the exclusionary rules of evidence would apply, even under the proposed law.

In the background study, Professor Méndez discusses these differences, but makes no recommendation as to whether California should conform to the federal approach. See Méndez, *Comparison of Evidence Code with Federal Rules: Part I. Hearsay and Its Exceptions* 11-12 (May 2002) (attached to Staff Memorandum 2002-41). "Reasonable people might differ on whether the foundational facts for this hearsay exception should be proved by a sufficiency or higher standard." Méndez, *California Evidence Code — III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 1003, 1019 (2003).

In a study prepared for the Commission in 1976, Professor Jack Friedenthal discusses differences in the treatment of authorized admissions under the California Evidence Code and the Federal Rules. He describes the admissibility of an authorized admission as turning on a question of conditional relevance, i.e., if a statement is not authorized by a party or is not made in furtherance of a conspiracy of which the defendant is part, then it is inadmissible *because irrelevant*. Questions of conditional relevance are for the jury to determine under Section 403. Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code* (Jan. 1976), at 46-47, 50 (on file with the Commission). Professor Friedenthal does not recommend any substantive change in existing law on this issue.

The principal argument against the California approach is that jurors will not properly condition their consideration of a purported authorized admission on whether or not the admission was in fact authorized. See J. Kaplan, *Of Mabrus and Zorgs — An Essay in Honor of David Louisell*, 66 Cal. L. Rev. 987, 997-99 (1978) (a "mabru" is a preliminary fact that properly should be decided by the judge; a "zorg" is a preliminary fact that should properly be decided by the jury):

> The jury will likely give short shrift to questions such as whether the declarant … was himself a member of the conspiracy or whether the statement was made in furtherance of the conspiracy. Rather, … the jurors probably will ignore our hearsay

> rule and decide whether to give the statement weight depending on whether they think [the declarant] was knowledgeable and truthful, regardless of whether he was a coconspirator.

Professor Kaplan makes a good point. However, Section 1223 does include some safeguards that help to ameliorate the problem described:

(1) Before the preliminary fact question is submitted to the jury, the court would screen the evidence to determine whether there is sufficient independent evidence to support a finding of the preliminary fact. In the absence of sufficient independent evidence, the proffered evidence would be excluded by the court.

(2) If the evidence is admitted, the court may instruct the jury that it should disregard the proffered evidence unless it finds the necessary preliminary fact to be true. See Section 403(c)(1). Jurors might find it hard to compartmentalize their thinking in that way, but at least they would be aware of the need to try.

Jury determination of a preliminary fact necessary for the admission of an authorized admission has been the law in California for over 37 years. Neither Professor Méndez nor Professor Friedenthal are recommending a substantive change to that approach. While the staff sees merit in the criticism offered by Professor Kaplan, it isn't clear that the problem he describes is actually creating practical difficulties significant enough to warrant reversal of long-standing law.

Finally, it isn't clear how the Victim's Bill of Rights might affect a proposal to make admissibility of co-conspirator statements a question for the judge. The preliminary fact question necessary for admission of such evidence would be unchanged. However, the procedure would be significantly different and evidence that is currently being presented to the jury (albeit on a conditional basis) might not be presented to the jury at all. Therefore, one could argue that the practical effect of giving the preliminary fact question to the judge would be to exclude relevant evidence that previously would have been presented to the jury. As a policy matter, the Victim's Bill of Rights expresses a preference for rules that further admissibility in a criminal case, a preference that should only be overcome where the need to do so is clear. The staff is not convinced that there is a pressing need for change in this area.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Exhibit

EMAIL SUBMISSION FROM PROFESSOR MIGUEL MENDEZ (8/20/04)

Functions of Judge and Jury and the Secondary Evidence Rule

Federal Rules. Under the Federal Rules, judges are required to exclude copies of writings unless the proponent persuades the judge by a preponderance of the evidence that non-production of the original writing is excused.[1] Accordingly, if the opponent objects to the introduction of a copy, the proponent must convince the judge by a preponderance of the evidence that the original has been lost or destroyed.[2] The persuasion burden is placed on the proponent because the Best Evidence Rule embodies a public policy favoring the use of original writings to prove the contents of writings.

The Rules, however, recognize that in some instances the power given to judges to exclude secondary evidence can impinge on the role traditionally assigned to jurors in American trials. If in a contract dispute, for example, the opponent disputes the proponent's claim that the original has been lost and objects to the introduction of a copy on the ground that no original contract ever existed, a ruling in favor of the opponent would result in a directed verdict for the opponent. To ensure that the jurors determine whether the original contract existed, the Rules reserve this question for the jurors.[3] Similarly, the Rules reserve for the jurors two additional questions—whether the exhibit offered by the proponent is the original of the writing and whether the exhibit correctly reflects the contents of the writing.[4]

Judges, however, are given greater power to withhold duplicates from the jurors. Federal Rule of Evidence 1003 generally allows a party to offer a duplicate in lieu of the original writing.[5] Since a duplicate is a counterpart produced by the same impression as the original,[6] a counterpart should serve as well as the original in getting the words or other contents before the fact finder with accuracy and precision.[7] But a federal judge may exclude a duplicate where "(1) a genuine

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1. Federal Rule of Evidence 1001.
2. Federal Rule of Evidence 1008.
3. Id.
4. *Id.*
5. See Méndez, Evidence: The California Code and the Federal Rules–A Problem Approach § 13.06 (West Group 3d ed. 2004).
6. Federal Rule of Evidence 1001(4).
7. *Id.* (Advisory Committee Note).

question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."[8]

Since jurors are generally charged with resolving questions of authenticity, the two exceptions to the use of duplicates warrant discussion. With regard to the first exception, it should be noted that the objection is not that the duplicate is an unfaithful reproduction. Rather, the objection is that the duplicate cannot be a reproduction of the writing the proponent seeks to prove because no such writing, for example, ever existed. Since production of the original, if there was one, would facilitate the resolution of this issue, the judge, by excluding the copy, can force the proponent to offer the original.[9] More than a bare objection is required, however. The opponent must provide the judge with reasons why production of the original is justified. United States v. Haddock[10] is illustrative. The reviewing court upheld the trial judge's discretion excluding duplicates of bank records offered by the defendant in a bank fraud prosecution where in objecting to the introduction of the duplicates the government offered the following evidence:

> With regard to each of these photocopies, evidence presented at trial indicates that only Haddock could recall ever seeing either the original or a copy of these documents. Except for Haddock, no one—including in some cases persons who allegedly typed the document and persons to whom the original allegedly was sent—was familiar with the contents of the photocopies. In addition, witnesses testified that several of the documents bore markings and included statements that did not comport with similar documents prepared in the ordinary course of business at the Bank of White City and at the Bank of Herington.[11]

Federal Rule of Evidence 1003(2) also empowers judges to exclude duplicates if "in the circumstances it would be unfair to admit the duplicate in lieu of the original."[12] The Advisory Committee describes one set of circumstances when it would be unfair to admit a duplicate: "Other reasons for requiring the original may be present when [the duplicate reproduces only a part of the original] and the remainder [of the original] is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party."[13] Professors Muller and Kirkpatrick provide other examples of circumstances requiring the exclusion of duplicates. Duplicates may be excluded because of their poor quality, because of questions about the accuracy of the process used to reproduce them, or because the proponent has destroyed the originals in bad faith.[14] Their concern, it should be noted, is both with the authenticity of the

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8. Federal Rule of Evidence 1003.
9. Michael H. Graham, Handbook of Federal Evidence § 1003.1 (West Group 5th ed. 2001).
10. 956 F.2d 1534 (10th Cir. 1992).
11. *Id.* at 1545-1546.
12. Federal Rule of Evidence 1003(2).
13. *Id.*
14. Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 10.8 (Aspen 2d ed. 1999).

duplicates (whether they are faithful reproductions of the original writings) and with the authenticity of the original writings (whether the proponent destroyed the originals in bad faith to prevent their use in proving their contents). Although whether a copy is a faithful reproduction of the original is generally deemed to be a jury question, the Federal Rules empower the judge to keep a duplicate from the jurors whenever in the judge's estimation it would be "unfair" to the opponent to receive the duplicate. In this instance, however, sharp practices may not be the only reason for giving the judge the power to exclude duplicates. Their poor quality, as Professors Muller and Kirkpatrick point out, might suffice.

California Evidence Code. Prior to its replacement by the Secondary Evidence Rule, California's Best Evidence Rule was in most ways identical with its federal counterpart. Like the Federal Rules, California's preference for an original to prove the contents of a writing was relaxed when the proponent offered a duplicate. California used the federal definition of a duplicate[15] and allowed the use of duplicates to the same extent as the Federal Rules.[16] Former § 1511 provided that a duplicate was "admissible to the same extent as an original unless (a) a genuine question [was] 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."[17]

Former § 1511 was repealed by the enactment of the Secondary Evidence Rule, which allows proof of the contents of a writing by an otherwise admissible original or secondary evidence.[18] The judge, however, is empowered to exclude secondary evidence when (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.[19] As the Commission acknowledged in its Comment, the exceptions are modeled on the exceptions to former §1511 and Federal Rule 1003.[20]

As in the case of Rule 1003(2), the second exception empowers the judge to withhold secondary evidence from the jurors whenever the judge is convinced that the proponent has engaged in sharp practices. As the Commission notes, "A classic circumstance for exclusion pursuant to subdivision (a)(2) is [where] the proponent destroyed the original with fraudulent intent * * *."[21] Also like Rule 1003(2), the second exception is concerned with the authenticity of the secondary

15 . West's Ann. California Evidence Code § 260.

16 . West's Ann. California Evidence Code § 1511, repealed by the enactment of the Secondary Evidence Rule. See West's Ann. California Evidence Code §§ 1500 to 1511.

17 . West's Ann. California Evidence Code § 1511.

18 . West's Ann. California Evidence Code §§ 1520-1521.

19 . West's Ann. California Evidence Code § 1521.

20 . *Id.* (Comment).

21 . *Id.*

evidence. As an example of this exception, the Commission cites Amoco Production Co. v. United States[22] for the proposition that it would be unfair to admit a copy that lacked a critical part included in the original.[23]

A federal judge, as discussed, may also exclude a duplicate when the judge finds that the opponent has raised a genuine question as to the authenticity of the original.[24] But, as noted, more than a bare objection is required for exclusion. The opponent must provide the judge with reasons why production of the original is justified. Similarly, the language of the first exception to the Secondary Evidence Rule appears to embrace serious questions about the authenticity of the original. It empowers the judge to exclude secondary evidence whenever the opponent convinces the judge that a genuine dispute exists concerning material terms of the writing and justice requires its exclusion. Why the Commission chose this language instead of the language of former § 1511 is unclear from the Comment. It may be that the Commission wanted to make sure that California judges had the power to exclude secondary evidence when the parties disagreed about material terms of the original, not just about the existence of the original, and production of the original was necessary to resolve the dispute.

The Law Revision Commission's Comment is not particularly helpful in this regard. The three federal cases and one California case cited by the Commission involve the authenticity of the secondary evidence, not of the original.[25] That may be unimportant, however, since what matters is that the Commission appears to have intended to follow the lead set by Federal Rule of Evidence 1003 and former § 1511: although authenticity is normally a matter for jury resolution, in some instances California judges should be empowered to exclude secondary evidence when serious questions about the authenticity of either the secondary evidence or the original are raised by the opponent.

As a matter of policy, the Best Evidence Rule expresses a preference for the use of originals to prove the contents of a writing, unless an exception applies. The Rules' duplicate original doctrine and the California Secondary Evidence Rule turn that policy on its head by allowing the use of duplicates in federal courts and of secondary evidence (including duplicates) in California courts to prove the contents of a writing without accounting for the original. But the generous treatment accorded duplicates in federal courts and secondary evidence in California courts comes with a special price: if the opponent raises serious questions about the authenticity of either the original or the secondary evidence, the judge may exclude the secondary evidence and require the use of the original. The Commission's Comment includes a useful non-exclusive list of factors judges should consider in determining whether to exclude the secondary evidence offered.

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22 . 619 F.2d 1383 (10th Cir. 1980).

23 . West's Ann. California Evidence Code § 1521 (Comment).

24 . Federal Rule of Evidence 1003(1).

25 . West's Ann. California Evidence Code § 1521 (Comment).

It would be helpful, however, if § 1521 or its Comment made clear that judges should normally allow the jurors to determine disputes concerning the authenticity of the secondary evidence or of the original unless the evidence offered by the opponent raises the dispute to the level contemplated by § 1521.

At the Commission's June 2004 meeting, the Commission staff suggested amending § 1521 to provide that the "question of whether the original writing ever existed shall be determined under subdivision (b) of Section 1401 [relating to authentication] and not under this section."[26] Unlike the federal Best Evidence Rule, California's old Best Evidence Rule did not reserve for the jurors the question whether the original writing ever existed. Neither does the Secondary Evidence Rule, and the language is designed to remedy this omission. In retrospect, however, it seems unwise to recommend the proposed amendment. Objections to the use of secondary evidence on the ground (1) that it does not conform to the original (that the original, for example, contains material terms different from those claimed by the proponent) or (2) that no original ever existed, raise questions of authenticity that would normally be reserved for resolution by the jurors. Section 1521, however, creates two exceptions to this rule. It empowers the judge to withhold the secondary evidence from the jurors whenever the opponent raises serious questions about the authenticity of either the secondary evidence or of the original, including the question whether the claimed original ever existed. The point can be made explicit in one of two ways. First, § 1521 could be amended to read as follows:

§ 1521. Secondary evidence rule

(a) The content of a writing may be proved by otherwise admissible secondary evidence. Although the authenticity of a writing or of secondary evidence of a writing is ordinarily a question to be determined by the jurors, the ~~The~~ court shall exclude secondary evidence of the content of a writing if the court determines either of the following:

Second, the Comment to § 1521 could be amended to make clear that in the exceptional circumstances described in the section, the judge has the power to withhold the secondary evidence from the jurors.

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26 . Staff Memorandum 2004-19, California Law Revision Commission, Study K-202, May 27, 2004.

CONFORMING THE EVIDENCE CODE TO THE FEDERAL RULES OF EVIDENCE: THE ROLE OF JUDGE AND JURY

1 The Law Revision Commission is conducting a multi-year study of differences
2 between the California Evidence Code and the Federal Rules of Evidence. The
3 purpose of the study is to determine whether California law should be revised to
4 incorporate aspects of the corresponding federal provisions.[1]
5 This is the first in a series of tentative recommendations on conforming the
6 Evidence Code to the Federal Rules of Evidence. It focuses on the role of the
7 judge and jury in deciding questions on the admissibility of evidence.[2]

8 ## BACKGROUND

9 In many cases, the admissibility of a piece of "proffered evidence" will depend
10 on the existence or nonexistence of a "preliminary fact."[3] In California, there are
11 two general standards for determining a preliminary fact, provided in Evidence
12 Code Sections 403 and 405.[4]
13 Under Section 403, the proffered evidence is inadmissible unless the court finds
14 that there is evidence sufficient to sustain a finding of the existence of the
15 preliminary fact. The question is then put to the jury. Section 403 applies if the
16 preliminary fact question involves the relevance of proffered evidence, the
17 authenticity of a writing, the personal knowledge of a lay witness, or whether a
18 statement or conduct was correctly attributed to a person.[5] The Assembly Judiciary
19 Committee Comment to Section 403 explains the application of that section:

> 20 The preliminary fact questions … to be determined under the Section 403
> 21 standard, are not finally decided by the judge because they have been traditionally
> 22 regarded as jury questions. The questions involve the credibility of testimony or
> 23 the probative value of evidence that is admitted on the ultimate issues. It is the
> 24 jury's function to determine the effect and value of the evidence addressed to it.
> 25 … Hence, the judge's function on questions of this sort is merely to determine
> 26 whether there is evidence sufficient to permit a jury to decide the question. … If
> 27 the judge finally determined the existence or nonexistence of the preliminary fact,

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1. The Commission is assisted in this study by Professor Miguel Méndez of Stanford Law School.

2. See Méndez, *California Evidence Code — III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 1003 (2003).

3. See Evid. Code §§ 400 ("preliminary fact" defined), 401 ("proffered evidence" defined). For example, P is suing D on an alleged agreement. P negotiated the agreement with a third party, A. The proffered evidence of negotiations between P and A is irrelevant (and therefore inadmissible) unless P can prove the preliminary fact that A was D's agent.

4. But see Evidence Code Section 404, which provides a specific procedure for determining a preliminary fact with respect to the privilege against self incrimination. It is not relevant to the issues discussed in this recommendation and is not discussed further.

5. See Evid. Code § 403(a).

he would deprive a party of a jury decision on a question that the party has a right to have decided by the jury.

A preliminary fact question that is not governed by Section 403 is determined by the judge alone, under Section 405.[6] The Assembly Judiciary Committee Comment to Section 405 explains the application of that section: "Section 405 deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion." For example, a preliminary fact necessary for admission of hearsay, or of a confession in a criminal case, or to establish an evidentiary privilege, will be decided by the judge, so as to shield the jury from potentially misleading, prejudicial, or privileged evidence until it can be determined whether there is grounds for its admission.

Federal Rule of Evidence 104 provides a substantively similar system for determination of preliminary facts: a preliminary fact relating to relevance is decided by the jury (after the judge determines that there is sufficient evidence of the preliminary fact).[7] All other preliminary facts are decided by the judge alone.[8]

The proposed law would conform the Evidence Code more closely to the Federal Rules of Evidence and make minor clarifications, in three areas:

(1) Admissibility of evidence in judicial determination of a preliminary fact.

(2) Admissibility of a confession or admission in a criminal case.

(3) Admissibility of secondary evidence.

ADMISSIBILITY OF EVIDENCE IN JUDICIAL DETERMINATION OF A PRELIMINARY FACT

Application of Exclusionary Rules to Judicial Determination of Preliminary Fact

In 1964, the Law Revision Commission tentatively recommended that the rules of evidence, other than the rules governing privilege, should not apply to the judicial determination of a preliminary fact:

> Under existing California law, which would be changed by the revised rule, the rules governing the competency of evidence *do* apply during the preliminary hearing. *People v. Plyler*, 126 Cal. 379, 58 Pac. 904 (1899) (affidavit cannot be used to show death of witness at preliminary hearing to establish foundation for introduction of former testimony at trial). This change in California law is desirable. Many reliable (and, in fact, admissible) hearsay statements must be held inadmissible if the formal rules of evidence are made to apply to the preliminary hearing. For example, if Witness W hears X shout, "Help! I'm falling down the stairs!", the statement is admissible only if the judge finds that X actually was

6. See Evid. Code § 405.

7. Fed. R. Evid. 104(b).

8. Fed. R. Evid. 104(a).

> falling down the stairs while the statement was being made. If the only evidence that he was falling down the stairs is the statement itself, or the statements of bystanders who no longer can be identified, the statement must be excluded. Although the statement is admissible as a substantive matter under the hearsay rule, it must be held inadmissible if the formal rules of evidence are rigidly applied during the judge's preliminary inquiry.
>
> The formal rules of evidence have been developed largely to prevent the presentation of weak and unreliable evidence to a jury of laymen, untrained in sifting evidence. Thayer, Preliminary Treatise on Evidence 509 (1898). The hearsay rule is designed to assure the right of a party to cross-examine the authors of statements being used against him. Morgan, Some Problems of Proof 106-117 (1956). Where factual determinations are to be made solely by the judge, the right of cross-examination is not uniformly required; frequently, he is permitted to determine the facts entirely from hearsay in the form of affidavits and to base his ruling thereon. Code Civ. Proc. § 2009 (general rule); Code Civ. Proc. § 657(2) (affidavits used to show jury misconduct); *Buhl v. Wood Truck Lines*, 62 Cal. App. 2d 542, 144 P.2d 847 (1944) (jury misconduct); *Church v. Capital Freight Lines*, 141 Cal. App. 2d 246, 296 P.2d 563 (1956) (competency of juror). See California Condemnation Practice 208 (Cal Cont. Ed. Bar 1960) (affidavits used to determine amount of immediate possession deposit in eminent domain case). See also 2 Witkin, California Procedure, *Proceedings Without Trial*, § 10 at 1648 (1954)
>
> There is no apparent reason for insisting on a more strict observation of the rules of evidence on questions to be decided by the judge alone when such questions are raised during trial instead of before or after trial. In ruling on the admissibility of evidence, the judge should be permitted to rely on affidavits and other hearsay that he deems reliable.[9]

That proposal was withdrawn in response to generalized concern from the State Bar that the change was unnecessary and "would work far greater harm than would be justified by the magnitude of any problem it might cure."[10]

Federal Rule of Evidence 104(a) includes a provision consistent with the approach recommended by the Commission. Section 104 of the Uniform Rules of Evidence (1999) includes a substantively identical provision. The Uniform Rules of Evidence have been adopted in 38 states.[11]

In 1976, Professor Jack Friedenthal prepared a study for the Commission reviewing differences between the Federal Rules of Evidence and the California Evidence Code. Professor Friedenthal recommended that the Commission reconsider whether the rules of evidence should apply to judicial determination of

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9. Tentative Recommendation and Study relating to *The Uniform Rules of Evidence, Article 1. General Provisions*, 6 Cal. L. Revision Comm'n Reports 1, 19-21 (1964) (emphasis in original).

10. Letter from State Bar Committee to Consider the Uniform Rules of Evidence to John H. DeMoully (November 3, 1964) (attached to Staff Memorandum 64-101, on file with Commission). See also Minutes of November 19-21, 1964, Commission Meeting, p. 6 (on file with Commission).

11. See <http://www.law.cornell.edu/uniform/evidence.html>.

1 a preliminary fact. He notes that California's rule "goes against the views of
2 virtually every commentator who has considered the matter."[12]
3 The Commission's rationale for the proposed change remains logically
4 compelling. Exclusionary rules are intended to shield the jury from potentially
5 unreliable or prejudicial evidence. A judge is trained to weigh the probative value
6 of evidence and does not need such protection. Application of the rules of
7 evidence to the judicial determination of a preliminary fact provides little benefit
8 but could result in the exclusion of evidence that should be admissible.
9 The rules governing privileges are an exception, because privileges exist for
10 policy reasons other than concern about reliability (e.g., to promote frank
11 communication between a patient and physician). The policies served by
12 privileges would be defeated if privileged testimony were compelled in
13 determining a preliminary fact, even if the judge is the decisionmaker.
14 The approach originally proposed by the Commission has now been the law in
15 the federal courts for nearly 30 years and is the law in at least 38 states. The
16 Commission is unaware of any significant problems that have resulted.
17 The proposed law renews the Commission's original recommendation, providing
18 that the rules of evidence, other than rules relating to privilege, do not apply to
19 judicial determination of a preliminary fact under Evidence Code Section 405.

20 **"Bootstrapping"**

21 There is one significant question that arose under the federal approach: to what
22 extent may a judge consider the proffered evidence itself in determining its
23 admissibility? Consideration of proffered evidence is known as "bootstrapping,"
24 because presumptively inadmissible evidence can lift itself into admissibility by its
25 own bootstraps.
26 *Glasser v. United States*[13] was a seminal case disapproving of bootstrapping. It
27 involved an out-of-court statement made by an alleged co-conspirator. The
28 prosecution sought to admit the hearsay under the doctrine that a statement made
29 in furtherance of a conspiracy is admissible against co-conspirators. The court held
30 that such declarations "are admissible over the objection of an alleged co-
31 conspirator, who was not present when they were made, only if there is proof
32 aliunde that he is connected with the conspiracy. … Otherwise hearsay would lift

12. Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code* (Jan. 1976), at 7 (on file with the Commission). See e.g., E. Cleary, McCormick's Handbook of the Law of Evidence § 53 at 122-23, n.91 (2d ed. 1972) ("Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay."); Maguire and Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 Yale L.J. 1101, 1112 (1927) (The chief argument in favor of not applying most exclusionary rules to judicial determination of preliminary fact "is that the common law has matured its system of technical rules solely for the protection of *jurors*. … How much less, runs the contention, are these restrictions required by a judge, who is accustomed to the atmosphere of litigation and far exceeds a layman in the asserted poise and acuity of his mind.") (emphasis in original).

13. 315 U.S. 60 (1942).

itself by its own bootstraps to the level of competent evidence."[14] In other words, there must be some evidence other than the hearsay statement itself to establish the preliminary fact of the defendant's participation in the conspiracy.

After enactment of Federal Rule of Evidence 104, the Supreme Court weakened the prohibition on bootstrapping, holding that in determining the admissibility of co-conspirator hearsay, the hearsay statement itself could be considered by the judge:

> Rule 104(a) provides: "Preliminary questions concerning … the admissibility of evidence shall be determined by the court. … In making its determination it is not bound by the rules of evidence except those with respect to privileges." … The question thus presented is whether any aspect of *Glasser's* bootstrapping rule remains viable after the enactment of the Federal Rules of Evidence.
>
> …
>
> The Rule on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege. We think that the Rule is sufficiently clear that to the extent that it is inconsistent with petitioner's interpretation of *Glasser* and *Nixon*, the Rule prevails. …[15]

Because there was other evidence of the defendant's participation in the conspiracy in that case, the Court did not need to decide whether a hearsay statement, *standing alone*, could be sufficient to bootstrap itself into admissibility.[16]

A subsequent rule amendment answered that question, at least as to co-conspirator hearsay (or other authorized admission). Federal Rule of Evidence 801 now makes clear that a hearsay statement is not, by itself, sufficient to establish the preliminary facts necessary for the statement to be admitted as an authorized admission: "The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority…." The Advisory Committee Note to Rule 801 explains: "This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement."[17] That apparent unanimity may result

14. *Id*. at 62. See also Black's Law Dictionary 48 (6th ed. 1991) ("aliunde" means "from another source; from elsewhere; from outside.").

15. Bourjaily v. United State*s*, 483 U.S. 171, 177-79, 107 S.Ct. 2775 (1987).

16. *Id*. at 181 ("It is sufficient for today to hold that a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted.").

17. See, e.g., United States v. Beckham, 968 F.2d 47, 51 (D.C. Cir. 1992); United States v. Sepulveda, 15 F.3d 1161, 1181-82 (1st Cir. 1993), cert. denied, 114 S.Ct. 2714 (1994); United States v. Daly, 842 F.2d 1380, 1386 (2d Cir.), cert. denied, 488 U.S. 821 (1988); United States v. Clark, 18 F.3d 1337, 1341-42 (6th Cir.), cert. denied, 115 S.Ct. 152 (1994); United States v. Zambrana, 841 F.2d 1320, 1344-45 (7th Cir. 1988); United States v. Silverman, 861 F.2d 571, 577 (9th Cir. 1988); United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1988); United States v. Hernandez, 829 F.2d 988, 993 (10th Cir. 1987), cert. denied, 485 U.S. 1013 (1988); United States v. Byrom, 910 F.2d 725, 736 (11th Cir. 1990).

from the fact that, at common law, the co-conspirator hearsay exception specifically required "independent evidence" of the existence of the conspiracy.[18]

In other contexts, the Federal Rules of Evidence allow exclusive reliance on proffered evidence to prove a preliminary fact necessary for introduction of that evidence. For example, the Advisory Committee Note to Federal Rule of Evidence 803 does not foreclose the possibility of bootstrapping in the context of the "excited utterance" hearsay exception:

> Whether proof of the startling event may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. … Nevertheless, on occasion the only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as "increasing," … and as the "prevailing practice,"…. Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Consistent with the federal approach, the proposed law would not preclude reliance on proffered evidence to prove a preliminary fact necessary for admission of that evidence. A special exception for authorized admissions is not required in California because a preliminary fact necessary for admission of such hearsay is subject to determination by the jury under Evidence Code Section 403.[19] The proposed law would not affect determination of a preliminary fact under Section 403.

ADMISSIBILITY OF A CONFESSION OR ADMISSION IN A CRIMINAL CASE

Under Evidence Code Section 402, the court generally has discretion to "hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury."[20] However, if the preliminary question involves the admissibility of a confession or admission in a criminal case, the matter must be considered out of the presence and hearing of the jury *if either party so requests.*[21]

Despite the unambiguous language used in Section 402, some courts have suggested that a determination of a preliminary fact relating to an admission or confession in a criminal case should always be held outside the presence of the jury, regardless of whether a party so requests:

> While no request was made herein for an in camera session, it is a matter of common knowledge in the legal profession that in all instances where the defendant objects to the admission of a confession that the court, whether requested or not, should conduct the hearing outside the presence of the jury, the

18. Bourjaily v. United States, 483 U.S. 171, 188-96, 107 S.Ct. 2775 (1987) (Blackmun, J., dissenting).

19. Evid. Code §§ 403 & Comment, 1222(b), 1223(c).

20. Evid. Code § 402(b).

21. *Id*.

> painfully obvious reason being that in the event the hearing is held in the jury's presence and the court finds the confession to be involuntary, the court would undoubtedly be confronted with a motion for mistrial or a claim of prejudicial error on appeal. While there may be circumstances where a defendant would want his hearing in the presence of the jury, the best rule for the trial court to follow in general is that the hearing should be private.[22]

Other courts have disagreed, upholding a judge's decision to consider admissibility in front of the jury, when neither party has requested an in camera hearing.[23]

The California Evidence Benchbook advises that judges hold such hearings out of the presence of the jury routinely, "even though no party so requests":

> The procedural rule for determining admissibility of a defendant's confession or admission out of the presence and hearing of the jury is a salutary one, as it prevents the jury from hearing evidence that may be extremely prejudicial to a defendant. If evidence of the defendant's admission or confession is excluded, still, the jury will have heard testimony regarding the circumstances under which defendant is alleged to have made a confession or admission. Herein lies the potential for prejudice if the hearing on admissibility is conducted in the presence and hearing of the jury.[24]

That advice probably reflects common practice in the courts.

The proposed law would eliminate any ambiguity by requiring that all objections to the admissibility of an admission or confession in a criminal case be decided out of the presence and hearing of the jury. That would conform to the federal approach.[25]

ADMISSIBILITY OF SECONDARY EVIDENCE

Evidence Code Section 1521(a) permits the use of secondary evidence to prove the content of an original writing, unless the court finds either of the following to be true:

> (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.

These exceptions were modeled on Federal Rule of Evidence 1003,[26] which permits use of a duplicate to the same extent as an original unless:

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22. People v. Rowe, 22 Cal. App. 3d 1023, 1030, 99 Cal. Rptr. 816 (1972). See also People v. Torrez, 188 Cal. App. 3d 723, 236 Cal. Rptr. 299 (1987) (court abused its discretion by holding extended hearing on adequacy of *Miranda* warnings in presence of jury).

23. People v. Fowler, 109 Cal. App. 3d 557, 167 Cal. Rptr. 235 (1980).

24. 1 Jefferson, Cal. Evidence Benchbook § 23.2 (2d Ed. 1982).

25. See Fed. R. Evid. 104(c).

26. See Evid. Code § 1521 & Comment.

1 (1) a genuine question is raised as to the authenticity of the original or (2) in the
2 circumstances it would be unfair to admit the duplicate in lieu of the original.

3 Section 1521(a)(1) could be read to encompass questions about the authenticity
4 of an original or of secondary evidence, questions that would ordinarily be decided
5 by the jury as a matter of authentication.[27] A similar conflict between the role of
6 the judge and jury in determining the authenticity of an original writing exists
7 under the Federal Rules.

8 **Objection as to Authenticity**

9 Under Federal Rule of Evidence 1003, the judge may exclude a duplicate if there
10 is a genuine dispute as to the authenticity of the original.[28] However, under Federal
11 Rule of Evidence 1008, the question of whether an asserted writing ever existed is
12 expressly reserved for the jury. The Advisory Committee Note to Federal Rule
13 1008 explains:

14 [Questions] may arise which go beyond the mere administration of the rule
15 preferring the original and into the merits of the controversy. For example,
16 plaintiff offers secondary evidence of the contents of an alleged contract, after
17 first introducing evidence of loss of the original, and defendant counters with
18 evidence that no such contract was ever executed. If the judge decides that the
19 contract was never executed and excludes the secondary evidence, the case is at
20 an end without ever going to the jury on a central issue.

21 Rules 1003(1) and 1008 appear to conflict in their allocation of responsibility for
22 determining the authenticity of an original:

23 It is hard (perhaps impossible) to reconcile the language in FRE 1003
24 authorizing the judge to exclude a proffered duplicate if "a genuine question is
25 raised as to the authenticity of the original" with the language in FRE 1008 saying
26 the jury decides whether "the asserted writing ever existed" and whether "other
27 evidence of contents correctly reflects the contents…"[29]

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27. See Evid. Code §§ 403(a)(3) (authenticity of writing to be determined by jury); 1401, 1521(c) (original and secondary evidence must be authenticated).

28. Fed. R. Evid. 1003(1).

29. C. Mueller & L. Kirkpatrick, Federal Evidence § 30 (2d ed. 2004). See also C. Wright & V. Gold, Federal Practice and Procedures § 8004 (2004):

[The] meaning of the phrase "genuine question" is not defined, thus raising an issue concerning the extent of that burden.

The starting point for analysis of this issue is the conclusion … that the proponent of evidence under Rule 1003 must offer proof sufficient to support a finding as to the authenticity of the original in order to qualify an item as a duplicate. This means that there must be enough evidence to permit a reasonable jury to conclude the original is authentic. If this minimal showing of authenticity is all that the proponent must make to admit an item, then logic dictates that the showing required of the opponent to raise "a genuine question" as to authenticity and exclude the item must be substantial: the opponent must show that no reasonable jury could conclude the original is authentic. This makes sense from the standpoint of policy since excluding evidence based on a minimal showing of doubt as to authenticity would be inconsistent with the notion, expressed repeatedly in the Evidence Rules, that close questions of authenticity are matters for the jury to resolve.

Professors Mueller and Kirkpatrick suggest a means of reconciling the conflict: Rule 1003(1) should be construed narrowly, allowing the court to exclude secondary evidence on the basis of an objection to the authenticity of the original "only where this attack amounts to cogent and compelling evidence which would require the jury to find that the original is not authentic."[30] Under this interpretation, Rule 1003(1) is a specific expression of the general rule provided in Rule 104(b), which provides that a court may exclude evidence if the judge finds that there is not sufficient evidence to support a finding by the jury of the existence of a necessary preliminary fact.

Professors Mueller and Kirkpatrick see no reason to deny the jury its role of determining questions of authentication: "The jury may properly be trusted to determine whether a so-called original is or is not authentic, and receipt of a purported duplicate is not likely to blind the jury to its responsibility where this question of authenticity remains at large."[31]

However, there are practical arguments in favor of judicial determination of the authenticity of an original or of secondary evidence. Production of the original may be the simplest way to resolve a dispute as to authenticity. In cases where there are serious indicia of fraud, it may be appropriate to require the proponent to produce the original. However, if an original is unavailable, judicial determination of its authenticity could decide an ultimate issue in the case, without the jury being permitted to make its own determination of authenticity.

As noted, California law may present a similar conflict. If Section 1521(a)(1) is read to encompass questions of authentication, then it conflicts with Section 403, which expressly provides for jury determination of the authentication of a writing.

The proposed law would resolve that potential conflict by making clear that authentication of a writing is to be determined pursuant to Section 1401 and not pursuant to Section 1521. That would not preclude a judge from excluding secondary evidence if there is not sufficient evidence for a jury to determine that the original or secondary evidence is authentic.[32]

The requirement that both the original and secondary evidence be authenticated before admitting secondary evidence provides significant protection against fraud. The proponent of the secondary evidence bears the burden of proving that the purported original and secondary evidence are what they are claimed to be.

Objection as to Material Accuracy

Section 1521 provides for exclusion of secondary evidence where the court finds that there is a genuine dispute as to material terms of the writing and that justice requires exclusion. Ordinarily, a concern about the material accuracy of secondary evidence would go to the weight of the secondary evidence, rather than its

30. *Id.* at § 574.

31. *Id.*

32. See Evid. Code § 403.

admissibility.[33] However, under unusual circumstances the incompleteness or inaccuracy of secondary evidence may raise issues of fairness that justify judicial exclusion of the secondary evidence under Section 1521.

The proposed law would not affect the application of Section 1521 to a dispute regarding the material accuracy of secondary evidence. The proposed Comment to Section 1521 provides examples of the sorts of factors that might justify exclusion of secondary evidence for reasons of unfairness.

33. People v. Garcia, 201 Cal. App. 3d 324, 329, 247 Cal. Rptr. 94 (1988) (Concerns about the accuracy of secondary evidence go "to the weight rather than the admissibility of the [evidence], because conflicting inferences are for the jury to resolve.").

PROPOSED LEGISLATION

Evid. Code § 402 (amended). Determination of preliminary fact

402. (a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury ~~if any party so requests~~.

(c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

Comment. Section 402 is amended to require that the question of admissibility of an admission or confession of a defendant in a criminal case be heard and determined out of the presence and hearing of the jury. This is consistent with Federal Rule of Evidence 104(c). See People v. Torrez, 188 Cal. App. 3d 723, 236 Cal. Rptr. 299 (1987) (court abused its discretion by holding extended hearing on adequacy of *Miranda* warnings in presence of jury); People v. Rowe, 22 Cal. App. 3d 1023, 1030, 99 Cal. Rptr. 816 (1972) ("best rule for the trial court to follow in general is that the hearing should be private"); 1 Jefferson, Cal. Evidence Benchbook § 23.2 (2d Ed. 1982) ("The procedural rule for determining admissibility of a defendant's confession or admission out of the presence and hearing of the jury is a salutary one, as it prevents the jury from hearing evidence that may be extremely prejudicial to a defendant. If evidence of the defendant's admission or confession is excluded, still, the jury will have heard testimony regarding the circumstances under which defendant is alleged to have made a confession or admission. Herein lies the potential for prejudice if the hearing on admissibility is conducted in the presence and hearing of the jury.").

Evid. Code § 405 (amended). Judicial determination of preliminary fact

405. With respect to preliminary fact determinations not governed by Section 403 or 404:

(a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.

(b) If a preliminary fact is also a fact in issue in the action:

(1) The jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact.

(2) If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact.

(c) In making a determination under this section, the court is not bound by the rules of evidence except the rules governing privileges.

Comment. Section 405 is amended to conform to the approach taken in Federal Rule of Evidence 104(a). This reverses prior law. See *People v. Plyler*, 126 Cal. 379, 58 Pac. 904 (1899) (affidavit cannot be used to show death of witness at preliminary hearing to establish foundation for introduction of former testimony at trial). Nothing in this section precludes a court from considering the proffered evidence itself in determining a preliminary fact. See also Sections 900-1070 (privileges).

Evid. Code § 1521 (amended). Secondary evidence rule

1521. (a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines 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.

(b) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing).

(c) Nothing in this section excuses compliance with Section 1401 (authentication). A dispute concerning the authenticity of a writing is not governed by paragraph (1) of subdivision (a).

(d) This section shall be known as the "Secondary Evidence Rule."

Comment. Section 1521 is amended to make clear that a dispute concerning authentication of a writing is to be determined pursuant to Section 1401 and not pursuant to this section. People v. Garcia, 201 Cal. App. 3d 324, 328-29, 247 Cal. Rptr. 94 (1988) ("The foundation for admission of a writing or copy is satisfied by the introduction of evidence sufficient to sustain a finding that the writing and copy are what the proponent of the evidence claims them to be."). See also Sections 403(a)(3), 1401(b).

Ordinarily, a concern about the material accuracy of secondary evidence would go to the weight of the secondary evidence, rather than its admissibility. People v. Garcia, 201 Cal. App. 3d at 329 (Concerns about the accuracy of secondary evidence go "to the weight rather than the admissibility of the [evidence], because conflicting inferences are for the jury to resolve."). However, under unusual circumstances the incompleteness or inaccuracy of secondary evidence may raise issues of fairness that justify exclusion of the secondary evidence under subdivision (a).

The bases for exclusion provided in subdivision (a) are modeled in part on Federal Rule of Evidence 1003. Commentary on that rule illustrates the sorts of unfairness that justify exclusion of secondary evidence:

> Three varieties of potential unfairness may be readily discerned.
>
> One turns upon the conduct of the proponent. If he has lost or destroyed the only original in bad faith, any doubts or suspicions which naturally arise from such behavior suggest reason enough to exclude any purported duplicate which he himself produces. Duplicates originating elsewhere may or may not fall under the shadow of such misconduct, and of course a loss or destruction of one of several originals should not preclude receipt of another, nor should innocent loss or destruction of the only original require exclusion of duplicates. Arguably, FRE 1004(1) applies where bad-faith loss or destruction of the original has occurred, and requires exclusion of duplicates. And where a party possesses an original but has refused to permit requested discovery, this conduct too may warrant a ruling that he cannot offer a duplicate instead.
>
> Another kind of unfairness occurs where the accuracy of the duplicate is thrown into doubt, as may happen in the case of rerecordings prepared in efforts to filter out background noise

> and reduce distortion in the original. Often, however, such efforts at electronic enhancement succeed in their purpose of making virtually unusable recordings at least minimally comprehensible.
>
> A third kind of unfairness involves apparent incompleteness of the duplicate. Gaps or omissions in the duplicate, or other discrepancies, such as might be caused by mechanical failure or the inability of the machine in question to replicate portions of the original, point toward exclusion if the missing material is important to the point to be proved or to the adversary's interpretation, particularly where an original is readily available. And where it appears that duplicates reproduce only selected portions of the original, and have been in effect edited in a way which might well mislead the jury as to the content of the original, this fact too suggests that duplicates should not be admitted.

C. Mueller & L. Kirkpatrick, Federal Evidence § 574 (2d ed. 2004) (footnotes omitted).