#K-501

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Best Evidence Rule

November 1995

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

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **February 29, 1996.**

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

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
(415) 494-1335 FAX: (415) 494-1827

SUMMARY OF TENTATIVE RECOMMENDATION

The best evidence rule makes secondary evidence generally inadmissible to prove the content of a writing (see Article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of the Evidence Code). This tentative recommendation calls for repeal of the best evidence rule 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 would allow courts to exclude such evidence if (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion, or (2) admission of the secondary evidence would be unfair.

The best evidence rule is unnecessary in a system with broad pretrial discovery. Existing pretrial opportunities to inspect original documents, coupled with the proposed secondary evidence rule and the normal motivation of the parties to present convincing evidence, satisfactorily serve the asserted function of the best evidence rule: guarding against misinterpretation of writings. Repeal of the best evidence rule would 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, and technological developments such as the dramatic rise in use of faxes and electronic communications pose new complications in applying the best evidence rule and its exceptions. The rationale for the rule no longer withstands scrutiny. A simpler doctrine, making secondary evidence other than oral testimony generally admissible to prove the content of a writing, provides sufficient protection against misinterpretation of writings, yet is more efficient and just, and easier to apply.

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]

---

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]

---

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]

RATIONALE FOR THE 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.[20] 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 have 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.[21] 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.

---

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. 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).

21. *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.

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.[22]

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.[23] Understandably, the Official Comment to Section 1500 does not mention fraud prevention as a rationale for the rule.

Minimizing Misinterpretation of Writings

The rationale given in 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.[24]

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.[25]

---

22. *See* 4 J. Wigmore, Evidence in Trials at Common Law 417-19 (J. Chadbourn ed. 1972); *see also* Cleary & Strong, *supra* note 1, at 826-27.

23. Cleary & Strong, *supra* note 1, at 847; *see also* Note, *supra* note 1, at 259.

24. *See* Weinstein's Evidence, *supra* note 21, at 1002-6; Note, *supra* note 1, at 258-59.

25. Note, *supra* note 1, at 258, 279; *see also* Broun, *Authentication and Contents of Writings*, 1969 Law & Soc. Ord. 611, 617-18.

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.[26] Nonetheless, they maintained that the rule continued to operate usefully in certain areas.[27] 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.[28]

Still, today there is relatively little likelihood that a diligent civil litigant will be confronted with a significant unanticipated document at trial. Although broad pretrial discovery was a relatively new phenomenon when Professors Cleary and Strong championed the best evidence rule, it is now so routine that litigants are almost always quite familiar with the critical documents by the time of trial. If a key document does surface for the first time at trial, it usually will make no difference whether the proponent introduces the original writing as opposed to secondary evidence.[29] Only in a tiny subset of cases involving unanticipated documents will the best evidence rule be of any use.

Documents outside the jurisdiction. Some authorities claim that the best evidence rule is useful with regard to documents beyond the court's jurisdiction.[30] 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 court's jurisdiction.[31] Instead, courts commonly find that such evidence falls within one or more of the rule's exceptions.[32] 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.[33]

---

26. Cleary & Strong, *supra* note 1, at 837.

27. *Id.* at 847.

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

29. *See* Broun, *supra* note 25, at 616, 618-19.

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

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

32. *Id.*

33. *Cf.* Broun, *supra* note 25, at 618 (documents outside the jurisdiction do not justify federal version of the best evidence rule).

Criminal cases. When the best evidence rule was being 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.[34] The scope of pretrial discovery in criminal cases has expanded greatly since that time, however, and the law now permits liberal reciprocal discovery in criminal cases.[35] Thus, even in the criminal context the continued utility of the best evidence rule is questionable.[36]

OTHER SAFEGUARDS AGAINST MISINTERPRETATION

The best evidence rule is not the only protection against misinterpretation of writings, nor even the only incentive for litigants to use original documents. Rather, there is also the normal motivation of the parties to present the most convincing evidence in support of their cases. If a litigant inexplicably proffers secondary evidence instead of an original, the trier of fact is likely to discount the probative value of the evidence, particularly if opposing counsel draws attention to the point in cross-examination or closing argument.[37] 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.[38]

COSTS OF THE RULE

Commentators have pointed out significant costs of the best evidence rule.[39] For example, Professor Broun stated in 1969 that the rule

---

34. *See* Cleary & Strong, *supra* note 1, at 844-45; Advisory Committee Note to Rule 1001 of the Federal Rules of Evidence.

35. *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).

36. *Cf.* Broun, *supra* note 25, at 619 (arguing that the best evidence rule was unnecessary under the then-existing federal discovery scheme).

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

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

39. *See* Broun, *supra* note 25, at 611-24; Note, *supra* note 1, at 258, 279-80, 283; J. Wigmore, *supra* note 22, at 434-35; Taylor, *supra* note 16, at 48-49; Note, *Best Evidence Rule — The Law in Oregon*, 41 Ore. L. Rev. 138, 153 (1962).

> 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.[40]

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.[41]

These remarks may overstate the detriments of the best evidence rule, but it is clear that the rule presents difficulties in determining points such as: When is a litigant seeking to prove the content of a writing? What is the "original" of a writing? When is secondary evidence collateral to a case and therefore admissible?[42] 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.[43] These complexities may

---

[40]. Broun, *supra* note 25, 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.

[41]. J. Wigmore, *supra* note 22, at 435.

[42]. *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); *see also* Daddario v. Snow Valley, Inc., 36 Cal. App. 4th 1325, 43 Cal. Rptr. 2d 726, 732-33, 736 (1995) (application of best evidence rule where private record is destroyed and court conducts special proceeding pursuant to Code of Civil Procedure Sections 1953.10 through 1953.13 to establish prior existence and authenticity of the record); People v. Bizieff, 226 Cal. App. 3d 1689, 1696-98, 277 Cal. Rptr. 678 (1991) (admissibility of oral testimony regarding content of credit card receipt).

[43]. 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 (❁✲✾❁)?

be a trap for inexperienced litigators and, regardless of the experience of counsel, may lead to needless application of the best evidence rule, resulting in exclusion of reliable evidence and establishing technical grounds for reversal on appeal. The ultimate consequence may be injustice or waste, particularly of scarce judicial resources that are unnecessarily devoted to determining fine points of the best evidence rule on appeal or retrying a case reversed on best evidence grounds.

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 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 a comparatively simple secondary evidence rule.[44] Rather than making secondary evidence presumptively inadmissible to prove the content of a writing, the secondary evidence rule makes all such evidence admissible, but gives the court discretion to exclude secondary evidence if it finds that either (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion, or (2) admission of the secondary evidence would be unfair.[45]

As proposed, the secondary evidence rule would not apply to oral testimony regarding the contents of a writing. Such evidence is subject to the vagaries of perception and memory and thus is less reliable than other types of secondary evidence.[46] To safeguard the truth-seeking process, the proposed legislation would

---

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).

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

45. The exceptions to the proposed rule are modeled on the exceptions to former Section 1511 and Rule 1003 of the Federal Rules of Evidence. Cases interpreting those statutes provide guidance in applying the new rule. *See, e.g.*, People v. Atkins, 210 Cal. App. 3d 47, 258 Cal. Rptr. 113 (1989); People v. Garcia, 201 Cal. App. 3d 324, 247 Cal. Rptr. 94 (1988).

46. *See, e.g.*, Note, *supra* note 1, at 258-59; Cleary & Strong, *supra* note 1, at 828-29.

preserve existing law making oral testimony generally inadmissible to prove the contents of a writing.

[If Section 1521 (short alternative) is used, this Comment would state: "Insofar as Section 1508 pertains to oral testimony regarding the content of a writing, it is substantially continued in Section 1521. See Comments to former Sections 1507, 1508."]

[If Section 1521 (long alternative) is used, this Comment would state: "Insofar as Section 1508 pertains to oral testimony regarding the content of a writing, it is continued in Section 1521."]

§ 1509 (repealed). Voluminous writings

1509. Secondary evidence, whether written or oral, of the content of a writing is not made inadmissible by the best evidence rule if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole; but the court in its discretion may require that such accounts or other writings be produced for inspection by the adverse party.

Comment. Section 1509 is repealed to reflect the repeal of the best evidence rule. See 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 regarding voluminous writings, it is continued in Section 1521.

§ 1510 (repealed). Copy of writing produced at the hearing

1510. A copy of a writing is not made inadmissible by the best evidence rule if the writing has been produced at the hearing and made available for inspection by the adverse party.

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