STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Best Evidence Rule

November 1996

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

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369 (1996).

STATE OF CALIFORNIA PETE WILSON, Governor

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November 15, 1996

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

The Best Evidence Rule (Evidence Code Section 1500) requires that the content of a writing be proven by introducing the original. This recommendation calls for repeal of the Best Evidence Rule and its exceptions, and adoption of a new rule known as the "Secondary Evidence Rule." The new rule would make secondary evidence (other than oral testimony) admissible to prove the content of a writing, but require courts to exclude such evidence if (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion, or (2) admission of the secondary evidence would be unfair.

The Best Evidence Rule is unnecessary in a system with broad pretrial discovery. Its intended functions are to guard against fraud and prevent misinterpretation of writings. In civil cases, those functions are satisfactorily served by existing pretrial opportunities to inspect original documents, coupled with the proposed Secondary Evidence Rule and the normal motivation of the parties to present convincing evidence. In criminal cases, discovery is narrower, so the Secondary Evidence Rule would incorporate a limited exception to address that difference.

Because the Best Evidence Rule has many exceptions, most secondary evidence is already admissible to prove the content of a writing. Adoption of the Secondary Evidence Rule would, however, simplify the law, avoid difficulties in interpretation, and

reduce injustice and waste of resources, including scarce judicial resources.

This recommendation is submitted pursuant to Resolution Chapter 38 of the Statutes of 1996.

Respectfully submitted,

Allan L. Fink
Chairperson

BEST EVIDENCE RULE

INTRODUCTION

The Best Evidence Rule requires that the content of a writing be proven by introducing the original. 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.

In the last three decades, broad pretrial discovery has become routine, particularly in civil cases. Technological developments such as the dramatic rise in use of facsimile transmission and electronic communications pose new complications in applying the Best Evidence Rule and its exceptions. The rationale for the rule no longer withstands scrutiny. A simpler doctrine, making secondary evidence other than oral testimony generally admissible to prove the content of a writing, provides sufficient protection in civil cases and, with slight modification, in criminal cases. Because the Best Evidence Rule has broad exceptions, adoption of the new doctrine would not make a dramatic change in existing practice, but would make the law more straightforward, efficient, just, and workable.

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1. Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, 9 U.C. Davis L. Rev. 257, 258 (1976); *see also* Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 Iowa L. Rev. 825, 826-35 (1966). Evidence Code Section 1500 and its predecessors (former Code Civ. Proc. §§ 1855, 1937, 1938) codified a long-standing common law doctrine.

THE BEST EVIDENCE RULE AND ITS EXCEPTIONS

As codified in Evidence Code Section 1500, the Best Evidence Rule provides:

> 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]

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] Moreover, the Best Evidence Rule does not exclude the following types of evidence:

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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, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, *supra* note 1, at 260; *see also* C. McCormick, Evidence 409, 413-14 (4th ed. 1992).

3. See Evid. Code §§ 1500.5-1566; Penal Code § 872.5. 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.

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

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5. Section 1500.5.
6. Section 1500.6.
7. Sections 1501, 1505.
8. Sections 1502, 1505.
9. Sections 1503(a), 1505.
10. Sections 1504, 1505.
11. Sections 1506, 1508.
12. Sections 1507, 1508.
13. Section 1509.
14. Section 1510.
15. Sections 1530-1532.

- Photographic copies made as business records.[16]
- Photographic copies of documents lost or destroyed, if properly certified.[17]
- Copies of business records produced in compliance with Sections 1560-1561.[18]

The number of these exceptions prompted one commentator to state that "the Best Evidence Rule has been treated by the judiciary and legislature as an unpleasant fact which must be avoided through constantly increasing and broadening the number of 'loopholes.'"[19]

AN ALTERNATIVE: THE SECONDARY EVIDENCE RULE

The Best Evidence Rule, with its many exceptions and emphasis on identifying the original, is not the only possible approach to admissibility of secondary evidence in proving the content of a writing. Commentators have suggested a number of other approaches, including a comparatively simple rule on secondary evidence (hereinafter the "Secondary Evidence Rule").[20] Instead of making secondary evidence

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16. Section 1550.

17. Section 1551.

18. Sections 1562, 1564, 1566.

19. Taylor, *The Case for Secondary Evidence,* Case & Comment 46, 48 (Jan.-Feb. 1976). Many of the exceptions also appear in the Federal Rules of Evidence. See Fed. R. Evid. 1001-1008.

20. The rule discussed in the text is suggested in Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California, supra* note 1, at 282-83. Other proposed approaches include:

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

presumptively inadmissible to prove the content of a writing, this rule would make such evidence generally admissible. The court would, however, be required to exclude secondary evidence if it determines 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.

As envisioned by the Law Revision Commission, the Secondary Evidence Rule would not extend to oral testimony of the content of a writing. Because people usually cannot accurately recall the words of a writing, oral testimony of the content of a writing would remain inadmissible, except in the circumstances where it is currently permitted.[21]

In light of the broad exceptions to the Best Evidence Rule, the Secondary Evidence Rule would not amount to a major change in existing practice. In fact, the basic approach already applies to duplicates.[22] It would, however, be a simpler and

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

(3) Making secondary evidence of the content of a writing and the original of the writing equally admissible. *See* Taylor, *supra* note 19, at 48-49.

21. As proposed in Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, *supra* note 1, at 282-83, the Secondary Evidence Rule would apply to oral testimony and documentary evidence. The authors acknowledge, however, that "the chance of error is substantial when a witness purports to recall from memory the terms of a writing." *Id.* at 259. *See also* Seiler v. Lucasfilm, Ltd., 808 F.2d 1316, 1319 (9th Cir. 1987), *cert. denied*, 484 U.S. 826 (1987) ("The human memory is not often capable of reciting the precise terms of a writing ….").

22. See Section 1511. See also Rule 1003 of the Federal Rules of Evidence. Cases interpreting those statutes would be a source of guidance in applying the Secondary Evidence Rule. *See, e.g.*, United States v. Sinclair, 74 F.3d 753, 760-61 (7th Cir. 1996) (admitting copies of expense account reports was not unfair); Ruberto v. Commissioner of Internal Revenue, 774 F.2d 61, 64 (2d Cir. 1985)

more straightforward doctrine than the exception-ridden Best Evidence Rule. Examining the rationale for the Best Evidence Rule provides further insight into the merits of the two rules.

RATIONALE FOR THE BEST EVIDENCE RULE

Section 1500 and most of its exceptions were enacted in 1965 as part of the Evidence Code drafted by the Law Revision Commission.[23] 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 pretrial discovery. These developments prompted the Commission to review the continued utility of the Best Evidence Rule.

There are two main 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.[24] The underlying assumption is that an original writing is less susceptible to fraudulent manipulation than a copy of the

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(tax court did not err in excluding photocopies of canceled checks, "since problems in matching the copies of the backs of the checks with copies of the fronts made them somewhat suspect"); Amoco Production Co. v. United States, 619 F.2d 1383, 1391 (10th Cir. 1980) (approving trial court's determination that "admission of the file copy would be unfair because the most critical part of the original conformed copy … is not completely reproduced in the 'duplicate'"); People v. Garcia, 201 Cal. App. 3d 324, 330, 247 Cal. Rptr. 94 (1988) (claim of unfairness "must be based on substance, not mere speculation that the original might contain some relevant difference").

23. 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).

24. *See, e.g.*, 5 J. Weinstein, M. Berger & J. McLaughlin, Weinstein's Evidence 1002-06 (hereinafter Weinstein's Evidence); *see also* Cleary & Strong, *supra* note 1, at 826-28.

writing or oral testimony about the writing.[25] By excluding secondary evidence and admitting only originals, the Best Evidence Rule is said to reduce fraud.

The fraud rationale is undercut by the reality that even where the Best Evidence Rule applies it may often be ineffective in preventing fraud. A litigant may fabricate secondary evidence and manufacture an excuse satisfying one of the rule's exceptions.[26]

Alternatively, an unscrupulous litigant may create false evidence and introduce it as an original, circumventing the rule. There are simple techniques for creating a fake original, as by replacing key pages with different text. New technologies, such as scanning and manipulating signatures, make it easier to fabricate a document that appears to be an original. That development undercuts the key assumption of the fraud rationale, that fraudulent manipulation of an original is more difficult than fraudulent manipulation of secondary evidence.

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25. Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, *supra* note 1, at 259.

26. Professors Cleary and Strong explain that where "fraud is actually contemplated through the use of fabricated or distorted secondary evidence," it is unlikely

> that any litigant not in control of the original of a document would put himself in the position of introducing false or inaccurate testimony as to the terms of a document, or a false or inaccurate copy, only to be confounded by the adversary's production of the original. A litigant in possession of an original and totally bent on fraud might of course avert the above risk by failing to disclose the original on discovery and proceeding to introduce false or distorted secondary evidence with relative impunity. It may be noted, however, that the best evidence rule itself provides no absolute protection against this species of attempted fraud. The litigant determined to introduce fabricated secondary evidence can hardly be expected to stick at manufacturing an excuse sufficient to procure its admission under one of the numerous currently recognized exceptions to the best evidence rule.

Cleary & Strong, *supra* note 1, at 847; *see also* Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, *supra* note 1, at 259.

As Wigmore and others have pointed out, the fraud rationale is also inconsistent with the scope of the Best Evidence Rule.[27] 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.[28]

Thus, fraud prevention is not the leading modern rationale for the Best Evidence Rule.[29] In explaining the intent of the rule, the Comment to Section 1500 refers to misinterpretation of writings, but does not mention the fraud rationale.[30]

Still, no means of fraud control is perfect. Although the Best Evidence Rule may be ineffective as a fraud deterrent, it may prevent fraud to some extent. The mandatory exceptions to the Secondary Evidence Rule may achieve a similar effect.

More fundamentally, the breadth of modern discovery severely undercuts not only the fraud rationale but also the other rationale for the Best Evidence Rule: minimizing misinterpretation of writings.

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27. Wigmore, *supra* note 20, at 417-19; *see also* Seiler v. Lucasfilm, Ltd., 808 F.2d 1316, 1319 (9th Cir. 1987), *cert. denied,* 484 U.S. 826 (1987); Cleary & Strong, *supra* note 1, at 827 & n.18.

28. Wigmore, *supra* note 20, at 418. Wigmore further explains that "certain details of the rule" show that fraud deterrence is not the actual reason for it:

> [P]ossession of the document by a disinterested third person would relieve the proponent from the suspicion of fraudulent suppression, yet the rule applies equally to that case; and the possession by the opponent himself with the right not to produce it will also serve to dismiss the suspicion, yet the rule applies equally to that case.
>
> Finally, if the above reason were the correct one, the rule would equally apply to objects other than writings; yet it is generally conceded that it does not.

Id.; *see also* Cleary & Strong, *supra* note 1, at 827 n. 18.

29. Seiler v. Lucasfilm, Ltd., 808 F.2d 1316, 1319 (9th Cir. 1987), *cert. denied,* 484 U.S. 826 (1987).

30. The Comment to Section 1500 states in relevant part: "The rule is designed to minimize the possibilities of misinterpretation of writings by requiring production of the original writings themselves, if available."

Minimizing Misinterpretation of Writings

The rationale given in the 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. Copying techniques are imperfect and memories are fallible.[31]

Preventing misinterpretation of writings is an important goal. Yet modern expansion of the breadth of discovery undermines this as a justification for the Best Evidence Rule. Because 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.[32]

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.[33]

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31. *See* Weinstein's Evidence, *supra* note 24, at 1002-06; Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, *supra* note 1, at 258-59.

32. Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, *supra* note 1, at 258, 279; *see also* Broun, *supra* note 20, at 617-18.

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

Nonetheless, they maintained that the rule continued to operate usefully in certain areas:[34]

Unanticipated documents and unanticipated use of known documents. Exhaustive discovery is not always reasonable discovery, and reasonable discovery may fail to disclose all relevant documents or focus attention on all possible uses of those documents. Thus, even with broad pretrial discovery, a litigant may on occasion confront an opponent with an unanticipated document at trial, or an unexpected emphasis on a known document. In such circumstances, the Best Evidence Rule may force production of an original that might otherwise be withheld in favor of secondary evidence.[35]

Still, today there is relatively little likelihood that a diligent civil litigant will be confronted with a significant unanticipated document at trial. Although broad pretrial discovery was a relatively new phenomenon when Professors Cleary and Strong championed the Best Evidence Rule, it is now so routine that litigants are almost always quite familiar with the critical documents by the time of trial.

If a key document does surface for the first time at trial, it may be admissible under an exception to the Best Evidence Rule. Even if the rule requires use of the original, in many such instances no benefit will flow from use of the original as opposed to secondary evidence. Only in a tiny subset of cases involving unanticipated documents, or unanticipated use of known documents, will the Best Evidence Rule be of any use.[36]

Those situations could also be addressed through application of the Secondary Evidence Rule. For instance, attempted use of a writing in a manner that could not reasonably have

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34. *Id.* at 847.

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

36. *See* Broun, *supra* note 20, at 616, 618-19.

been anticipated would be a factor for the court to consider in applying the rule's mandatory exceptions.

Documents outside the jurisdiction. Some authorities claim that the Best Evidence Rule is useful with regard to documents beyond the court's jurisdiction.[37] Professors Cleary and Strong observed, however, that the rule is largely ineffective in obtaining production of original writings in the control of persons beyond the court's jurisdiction.[38] Instead, courts commonly rule that such evidence falls within one or more of the rule's exceptions.[39] For example, 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.[40] Any such instances could also be addressed by the unfairness exception to the Secondary Evidence Rule.

Criminal cases. When the Best Evidence Rule was codified in the 1960s, proponents of the rule maintained that it was important in criminal cases, because opportunities for pretrial discovery in those cases were more limited than in civil cases.[41] The scope of pretrial discovery in criminal cases has

37. *See, e.g.*, Fed. R. Evid. 1001 advisory committee's note.

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

39. *Id.*

40. *Cf.* Broun, *supra* note 20, at 618 (documents outside the jurisdiction do not justify federal version of the Best Evidence Rule).

41. *See* Cleary & Strong, *supra* note 1, at 844-45; Fed. R. Evid. 1001 advisory committee's note.

expanded greatly since that time, although it remains narrower than in civil cases.[42]

Thus, even in the criminal context the continued utility of the Best Evidence Rule is questionable.[43] With an extra exception to account for the limits on discovery in criminal cases, the Secondary Evidence Rule would provide similar protection against fraud and misinterpretation of writings. Specifically, a mandatory exception for criminal cases would, with limitations, condition use of secondary evidence on making the original reasonably available if the proponent has it. That would discourage use of any misleading secondary evidence.

OTHER SAFEGUARDS AGAINST FRAUD AND MISINTERPRETATION

The Best Evidence Rule is not the only protection against fraud and misinterpretation of writings, nor is it the only incentive for litigants to use original documents. 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.[44] Indeed, Section 412 specifically directs: "If weaker and less satisfactory evidence is offered when it was within the power of the

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42. *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).

43. *Cf.* Broun, *supra* note 20, at 619 (arguing that the Best Evidence Rule was unnecessary under the then-existing federal discovery scheme).

44. Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, *supra* note 1, at 282; *see also* Cleary & Strong, *supra* note 1, at 846-47.

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.[45]

COSTS OF THE BEST EVIDENCE RULE

Commentators have pointed out significant costs of the Best Evidence Rule.[46] For example, Professor Broun stated in 1969 that the rule

> has produced and will continue to produce … results that not only waste precious judicial time but that are clearly unjust. While the rule ostensibly protects against fraud and inaccuracy, it has been blindly applied as a technical hurdle that must be overcome if documentary evidence is to be admitted, despite the fact that fraud or inaccuracy are but minute possibilities in the particular case. The single valuable function of the rule — that is, to insure that the original of a writing is available for inspection so that its genuineness and the accuracy of secondary evidence with regard to it can be tested under the scrutiny of the adversary system — is often ignored in favor of a rigid application of the exclusionary feature of the rule. Thus, exclusion may be required under the rule even though the party opposing the document has had adequate opportunity to scrutinize the original writing, and

45. *See* Taylor, *supra* note 19, at 48-49.

46. *See* Broun, *supra* note 20, at 611-24; Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, *supra* note 1, at 258, 279-80, 283; Wigmore, *supra* note 20, at 434-35; Taylor, *supra* note 19, at 48-49; Note, *Best Evidence Rule — The Law in Oregon*, 41 Or. L. Rev. 138, 153 (1962).

> 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.[47]

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.[48]

These remarks may overstate the detriments of the best evidence rule, but it is clear that the rule is complicated and presents difficulties in determining points such as: When is an object with words on it a "writing" within the meaning of the rule? When is a litigant seeking to prove the content of a writing? What is the "original" of a writing?[49] Advances in technology, such as fax machines, electronic mail systems,

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47. Broun, *supra* note 20, at 611-12. Professor Broun supported his points with case illustrations and identified issues that posed problems in applying the rule. *See id.* at 620-24.

48. Wigmore, *supra* note 20, at 435.

49. *See, e.g.,* United States v. Jones, 958 F.2d 520 (2d Cir. 1992) (IRS transcript of 1982 tax liability was admissible because it was not being offered to prove content of 1982 tax return); Doe v. United States, 805 F. Supp. 1513, 1517 (D. Hawaii 1992) (Best Evidence Rule inapplicable because computer records were offered to prove HIV test results, not content of writing); People v. Bizieff, 226 Cal. App. 3d 1689, 1696-98, 277 Cal. Rptr. 678 (1991) (credit card was the original, credit card receipt was not a duplicate, Best Evidence Rule did not preclude oral testimony of name on credit card); People v. Mastin, 115 Cal. App. 3d 978, 982-86, 171 Cal. Rptr. 780 (1981) (applicability of Best Evidence Rule to inscribed chattels); B. Jefferson, California Evidence Benchbook §§ 31.1-31.7 (2d ed. 1982 & Supp. June 1990); J. Weinstein, J. Mansfield, N. Abrams & M. Berger, Cases & Materials on Evidence 211-40 (8th ed. 1988).

and computer networks, pose new possibilities for confusion and inconsistencies in application of the Best Evidence Rule.[50] These complexities may trap inexperienced litigators and, regardless of the experience of counsel, may lead to disputes over application of the Best Evidence Rule.

In some cases, the result may be exclusion of reliable evidence, injustice, and reversal on appeal followed by a costly retrial.[51] More often, the trial court may resolve the dispute

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50. For example, if a document is downloaded from a computer network, is the downloaded information an "original" or an admissible "duplicate?" What about a printout of that information? Is the answer different if the document is converted from one word processing system to another? What if formatting adjustments are made, such as changes in page width, pagination, paragraph spacing, font size, or font? Is the answer different for a pagination change in a document with internal page references than for a pagination change in a document lacking such references? Is the answer different if the change is from Courier font (abcd) to Monaco (abcd), rather than from Courier to Zapf Dingbats (❁✲❃❄)?

Similarly, suppose a document is prepared on a computer and faxed directly from the computer without making a printout. What is the "original" of the document? Is the answer the same as for a document that is printed from a computer and then faxed? What if a document is printed from a computer, signed manually, and then faxed? Does the Best Evidence Rule apply differently if a digital, rather than manual, signature is attached and the same document is faxed directly from the computer without ever being printed?

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). See also Section 1500.6 (1996 Cal. Stat. ch. 345), which is a new exception to the Best Evidence Rule for images stored on video or digital media.

51. For examples of cases reversed on best evidence grounds, see Moretti v. Commissioner of Internal Revenue, 77 F.3d 637, 645 (2d Cir. 1996) (exclusion of photocopies without affording opportunity to establish best evidence exception was erroneous); Amoco Production Co. v. United States, 619 F.2d 1383, 1389-91 (10th Cir. 1980) (trial court erred in ruling that "the availability of a properly recorded version of the 1942 deed precluded admission of any other evidence of the contents of the deed"); Brown v. Bowen, 668 F. Supp. 146, 149 (E.D.N.Y. 1987) ("The ALJ incorrectly applied a rigid evidentiary rule of exclusion by requiring that the 'best evidence' of the acknowledgment, the original document, be produced."). See also Osswald v. Anderson, __ Cal. App. 4th __, 57 Cal. Rptr. 2d 23, 27 (1996), in which the trial court admitted a copy of a

correctly, but only after the litigants and the court devote scarce resources to determining fine points of the Best Evidence Rule, which may have to be relitigated on appeal at further expense.[52] Waste may also occur in a third way: To preclude a best evidence objection, a litigant may expend effort tracking down the original of a writing, even though secondary evidence of the writing may be easier to obtain and equally valuable in the pursuit of justice.

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

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deed, even though there were "genuine questions regarding the authenticity of the original deed and the copy, thus invalidating the exception to the best evidence rule under Evidence Code section 1511." Under the Secondary Evidence Rule, instead of considering a panoply of exceptions, the trial court would have focused on the critical point, whether a genuine dispute existed concerning material terms of the writing and justice required the exclusion.

52. *See, e.g.*, People v. Atkins, 210 Cal. App. 3d 47, 53-55, 258 Cal. Rptr. 113 (1989) (upholding trial court ruling that photocopies of certain documents were admissible); People v. Garcia, 201 Cal. App. 3d 324, 327-30, 247 Cal. Rptr. 94 (1988) (upholding trial court ruling that photo of sketch of suspect was admissible).

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 the comparatively simple Secondary Evidence Rule.[53] Rather than making secondary evidence presumptively inadmissible to prove the content of a writing, the new rule makes such evidence admissible, but requires the court to exclude secondary evidence if it determines either that (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion, or that (2) admission of the secondary evidence would be unfair.

As proposed here, the Secondary Evidence Rule would not govern the admissibility of oral testimony of the content of a writing. Such evidence is less reliable than other types of secondary evidence.[54] To safeguard the truth-seeking process,

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53. Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, *supra* note 1, at 282-83.

54. *See, e.g., id.* at 258-59; Cleary & Strong, *supra* note 1, at 828-29. Oral testimony is also more difficult to control than documentary evidence. The witness may blurt out statements that cannot effectively be set aside through a

the proposed legislation would preserve existing law making oral testimony inadmissible to prove the content of a writing, except in limited circumstances.

The proposed legislation also incorporates an exception to the Secondary Evidence Rule to account for limitations on discovery in criminal cases. Specifically, if the proponent of secondary evidence in a criminal case has possession of the original, secondary evidence would generally be admissible only if the proponent made the original reasonably available for inspection. With this provision, the Secondary Evidence Rule would be a straightforward, effective approach, adaptable to new technologies.

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limiting instruction. In contrast, opposing counsel has an opportunity to review documentary evidence before it is used at trial.

PROPOSED LEGISLATION

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

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

Note. The text of Sections 1500-1511 is set out *infra* at pp. 400-06.

Evid. Code §§ 1520-1523 (added). Proof of content of writing

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

Article 1. Proof of the Content of a Writing

§ 1520. Proof of content of writing by original

1520. The content of a writing may be proved by an otherwise admissible original.

Comment. Section 1520 continues former Section 1500 insofar as it permitted proof of the content of a writing by an original of the writing. See also Sections 1521 (Secondary Evidence Rule), 1522 (exclusion of secondary evidence in criminal action), 1523 (oral testimony of content of writing).

§ 1521. Proof of content of writing by secondary evidence (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 a 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).

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

Comment. Sections 1520 (proof of content of writing by original), 1521 (Secondary Evidence Rule), 1522 (exclusion of secondary evidence in criminal action), and 1523 (oral testimony of content of writing) replace the Best Evidence Rule and its exceptions. For background, see *Best Evidence Rule,* 26 Cal. L. Revision Comm'n Reports 369 (1996). Because of the breadth of the exceptions to the Best Evidence Rule, this reform is not a major departure from former law, but primarily a matter of clarification and simplification. Discovery principles remain unchanged.

Subdivision (a) makes secondary evidence generally admissible to prove the content of a writing. The nature of the evidence offered affects its weight, not its admissibility. The normal motivation of parties to support their cases with convincing evidence is a deterrent to introduction of unreliable secondary evidence. See also Section 412 (if party offers weaker and less satisfactory evidence despite ability to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust).

The mandatory exceptions set forth in subdivisions (a)(1) and (a)(2) provide further protection against unreliable secondary evidence. Those exceptions are modeled on the exceptions to former Section 1511 and to Rule 1003 of the Federal Rules of Evidence. Cases interpreting those statutes provide guidance in applying subdivisions (a)(1) and (a)(2). *See, e.g.,* United States v. Sinclair, 74 F.3d 753, 760-61 (7th Cir. 1996) (admitting copies of expense account reports was not unfair); Ruberto v. Commissioner of Internal Revenue, 774 F.2d 61, 64 (2d Cir. 1985) (tax court did not err in excluding photocopies of canceled checks, "since problems in matching the copies of the backs of the checks with copies of the fronts made them somewhat suspect"); Amoco Production Co. v. United States, 619 F.2d 1383, 1391 (10th Cir. 1980) (upholding trial court's determination that "admission of the file copy would be unfair because the most critical part of the original conformed copy … is not completely reproduced in the 'duplicate'"); People v. Garcia, 201 Cal. App. 3d 324, 330, 247 Cal. Rptr. 94 (1988) (claim of unfairness "must be based on substance, not mere speculation that the original might contain some relevant difference"). Courts may consider a broad range of factors, for example: (1) whether the proponent attempts to use the writing in a manner that could not reasonably have been anticipated, (2) whether the original was suppressed in discovery, (3) whether discovery conducted in

a reasonably diligent (as opposed to exhaustive) manner failed to result in production of the original, (4) whether there are dramatic differences between the original and the secondary evidence (e.g., the original but not the secondary evidence is in color and the colors provide significant clues to interpretation), (5) whether the original is unavailable and, if so, why, and (6) whether the writing is central to the case or collateral. A classic circumstance for exclusion pursuant to subdivision (a)(2) is if the proponent destroyed the original with fraudulent intent or the doctrine of spoliation of evidence otherwise applies.

Subdivision (b) explicitly establishes that Section 1523 (oral testimony of the content of writing), not Section 1521, governs the admissibility of oral testimony to prove the content of a writing.

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

§ 1522. Exclusion of secondary evidence in criminal action

1522. (a) In addition to the grounds for exclusion authorized by Section 1521, in a criminal action the court shall exclude secondary evidence of the content of a writing if the court determines that the original is in the proponent's possession, custody, or control, and the proponent has not made the original reasonably available for inspection at or before trial. This section does not apply to any of the following:

(1) A duplicate as defined in Section 260.

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

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

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

(b) In a criminal action, a request to exclude secondary evidence of the content of a writing, under this section or other law, shall not be made in the presence of the jury.

Comment. Subdivision (a) of Section 1522 sets forth a mandatory exception applicable only in criminal cases, which are governed by narrower discovery rules than civil cases. See Section 130 ("criminal action" includes criminal proceedings). See also Penal Code §§ 1054-1054.7 (discovery in criminal cases). Section 1522 does not expand discovery obligations, it simply conditions use of secondary evidence on making the original reasonably available for inspection if the proponent has it. In determining whether the proponent of secondary evidence has made the original "reasonably available," the court should examine specific circumstances, such as the time, place, and manner of allowing inspection. The concept is fluid, not rigid. For example, making the original available moments before using secondary evidence may in general suffice if a defendant is rebutting a surprise contention, but not if the prosecution is presenting its case in chief. Similarly, what constitutes reasonable access to computer evidence may vary from system to system.

The exceptions in subdivisions (a)(1)-(a)(4) are drawn from exceptions to the former Best Evidence Rule (former Section 1500). Subdivision (a)(1) is drawn from former Section 1511. Subdivision (a)(2) is drawn from former Section 1504. Subdivision (a)(3) is drawn from former Section 1506. Subdivision (a)(4) is drawn from former Section 1507.

Subdivision (b) continues the requirement of the second sentence of former Section 1503(a), but applies it to all requests for exclusion of secondary evidence in a criminal trial.

See also Sections 1520 (proof of content of writing by original), 1521 (Secondary Evidence Rule), and 1523 (oral testimony of content of writing).

§ 1523. Oral testimony of content of writing

1523. (a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing.

(b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

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

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

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

(d) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time and the evidence sought from them is only the general result of the whole.

Comment. Section 1523 preserves former law governing the admissibility of oral testimony to prove the content of a writing. See former Sections 1500, 1501-1509.

Subdivision (a) is based on an assumption that oral testimony as to the content of a writing is typically less reliable than other proof of the content of a writing. For background, see *Best Evidence Rule,* 26 Cal. L. Revision Comm'n Reports 369 (1996).

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

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

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

See Sections 1520 (proof of content of writing by original), 1521 (Secondary Evidence Rule), and 1522 (exclusion of secondary evidence in criminal action).

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

SEC. 3. The heading of Article 3 (commencing with Section 1550) of Chapter 2 of Division 11 of the Evidence Code is amended to read:

Article 3. Photographic Copies *and Printed Representations* of Writings

Comment. The article heading is amended to reflect the repeal of the Best Evidence Rule and the addition of Sections 1552 (computer printouts) and 1553 (printouts of images stored on video or digital media) to this article. See Comments to Section 1521 and former Sections 1500.5 and 1500.6.

Evid. Code § 1552 (added). Computer printout

SEC. 4. Section 1552 is added to the Evidence Code, to read:

1552. (a) A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent.

(b) Subdivision (a) shall not apply to computer-generated official records certified in accordance with Section 452.5 or 1530.

Comment. Subdivision (a) of Section 1552 continues former Section 1500.5(c) without substantive change, except that the reference to "best available evidence" is changed to "an accurate representation," due to the replacement of the Best Evidence Rule with the Secondary Evidence Rule. See Section 1521 Comment. See also Section 255 (accurate printout of computer data is an "original").

Subdivision (b) continues former Section 1500.5(d) without substantive change.

Evid. Code § 1553 (added). Printout of images stored on video or digital media

SEC. 5. Section 1553 is added to the Evidence Code, to read:

1553. A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent.

Comment. Section 1553 continues the last three sentences of the second paragraph of former Section 1500.6 without substantive change, except that the reference to "best available evidence" is changed to "an accurate representation," due to the replacement of the Best Evidence Rule with the Secondary Evidence Rule. See Section 1521 Comment.

Penal Code § 872.5 (repealed). Best Evidence Rule in preliminary examination

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

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

Comment. Former Section 872.5 is repealed to reflect the repeal of the Best Evidence Rule and adoption of the Secondary Evidence Rule. See Evid. Code §§ 1520-1523 & Comments. See also new Section 872.5.

Penal Code § 872.5 (added). Secondary evidence in preliminary examination

SEC. 7. Section 872.5 is added to the Penal Code, to read:

872.5. Notwithstanding Article 1 (commencing with Section 1520) of Chapter 2 of Division 11 of the Evidence Code, in a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

Comment. Section 872.5 is added to reflect the repeal of the Best Evidence Rule and adoption of the Secondary Evidence Rule. See Evid. Code §§ 1520-1523 & Comments. See also former Section 872.5.

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

SEC. 8. Section 1417.7 of the Penal Code is amended to read:

1417.7. Not less than 15 days before any proposed disposition of an exhibit pursuant to Section 1417.3, 1417.5, or 1417.6, the court shall notify the district attorney (or other prosecuting attorney), the attorney of record for each party, and each party who is not represented by counsel of the proposed disposition. Before the disposition, any party, at his or her own expense, may cause to be prepared a photographic record of all or part of the exhibit by a person who is not a party or attorney of a party. The clerk of the court shall observe the taking of the photographic record and, upon receipt of a declaration of the person making the photographic record that the copy and negative of the photograph delivered

to the clerk is a true, unaltered, and unretouched print of the photographic record taken in the presence of the clerk ~~and~~, the clerk shall certify the photographic record as such without charge and retain it unaltered for a period of 60 days following the final determination of the criminal action or proceeding. A certified photographic record of exhibits ~~shall be deemed a certified copy of a writing in official custody pursuant to Section 1507~~ *shall not be deemed inadmissible pursuant to Section 1521 or 1522* of the Evidence Code.

Comment. Section 1417.7 is amended to reflect the repeal of the Best Evidence Rule and the adoption of the Secondary Evidence Rule. See Evid. Code §§ 1520-1523 & Comments. Section 1417.7 is also amended to make technical changes.

Uncodified (added). Operative date

SEC. 9. (a) This act shall become operative on January 1, 1998.

(b) This act applies in an action or proceeding commenced before, on, or after January 1, 1998.

(c) Nothing in this act invalidates an evidentiary determination made before January 1, 1998, that evidence is inadmissible pursuant to a provision of former article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of the Evidence Code. However, if an action or proceeding is pending on January 1, 1998, the proponent of evidence excluded pursuant to a provision of former article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of the Evidence Code may, on or after January 1, 1998, and before entry of judgment in the action or proceeding, make a new request for admission of the evidence on the basis of this act.

COMMENTS TO REPEALED SECTIONS

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

Note. The text of repealed Sections 1500-1511 is reproduced below for reference purposes.

Article 1. Best Evidence Rule

Comment. The Best Evidence Rule is repealed and replaced with the Secondary Evidence Rule. See new Article 1 (commencing with Section 1520).

§ 1500 (repealed). Best Evidence Rule

~~1500. Except as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.~~

Comment. Former Section 1500 is superseded by Sections 1520 (proof of content of writing by original), 1521 (Secondary Evidence Rule), 1522 (exclusion of secondary evidence in criminal action) and 1523 (oral testimony of content of writing).

§ 1500.5 (repealed). Computer recorded information and computer programs

~~1500.5. (a) Notwithstanding the provisions of Section 1500, a printed representation of computer information or a computer program which is being used by or stored on a computer or computer readable storage media shall be admissible to prove the existence and content of the computer information or computer program.~~

~~(b) Computer recorded information or computer programs, or copies of computer recorded information or computer programs, shall not be rendered inadmissible by the best evidence rule.~~

~~(c) Printed representations of computer information and computer programs will be presumed to be accurate~~

representations of the computer information or computer programs that they purport to represent. This presumption, however, will be a presumption affecting the burden of producing evidence only. If any party to a judicial proceeding introduces evidence that such a printed representation is inaccurate or unreliable, the party introducing it into evidence will have the burden of proving, by a preponderance of evidence, that the printed representation is the best available evidence of the existence and content of the computer information or computer programs that it purports to represent.

(d) Subdivision (c) shall not apply to computer-generated official records certified in accordance with Section 452.5 or 1530.

Comment. Section 1500.5 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. Subdivisions (c) and (d) are continued in Section 1552 (computer printout) without substantive change, except that the reference to "best available evidence" is changed to "an accurate representation," due to the replacement of the Best Evidence Rule with the Secondary Evidence Rule.

§ 1500.6 (repealed). Images stored on video or digital media

1500.6. (a) Notwithstanding Section 1500, a printed representation of an image stored on video or digital media shall be admissible to prove the existence and content of the image stored on the video or digital media.

Images stored on video or digital media, or copies of images stored on video or digital media, shall not be rendered inadmissible by the best evidence rule. Printed representations of images stored on video or digital media shall be presumed to be accurate representations of the images that they purport to represent. This presumption, however, is a presumption affecting the burden of producing evidence only. If any party to a judicial proceeding introduces evidence that such a printed representation is inaccurate or unreliable, the party introducing it into evidence shall have the burden of proving,

~~by a preponderance of evidence, that the printed representation is the best available evidence of the existence and content of the images that it purports to represent.~~

~~(b) This section shall not be construed to abrogate the holding of People v. Enskat, (1971) 20 Cal. App. 3d Supp. 1.~~

Comment. Section 1500.6 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. The last three sentences of the second paragraph of Section 1500.6 are continued in Section 1553 (printout of images stored on video or digital media) without substantive change, except that the reference to "best available evidence" is changed to "an accurate representation," due to replacement of the Best Evidence Rule with the Secondary Evidence Rule.

§ 1501 (repealed). Copy of lost or destroyed writing

~~1501. A copy of a writing is not made inadmissible by the best evidence rule if the writing is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.~~

Comment. Section 1501 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. As to oral testimony of the content of a writing that is lost or has been destroyed, the combined effect of former Sections 1501 and 1505 is continued in Section 1523 (oral testimony of content of writing) without substantive change.

§ 1502 (repealed). Copy of unavailable writing

~~1502. A copy of a writing is not made inadmissible by the best evidence rule if the writing was not reasonably procurable by the proponent by use of the court's process or by other available means.~~

Comment. Section 1502 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. As to oral testimony of the content of a writing that was not reasonably procurable, the combined effect of Sections 1502 and 1505 is continued without substantive change in Section 1523 (oral testimony of content of writing).

§ 1503 (repealed). Copy of writing under control of opponent

~~1503. (a) A copy of a writing is not made inadmissible by the best evidence rule if, at a time when the writing was under~~

~~the control of the opponent, the opponent was expressly or impliedly notified, by the pleadings or otherwise, that the writing would be needed at the hearing, and on request at the hearing the opponent has failed to produce the writing. In a criminal action, the request at the hearing to produce the writing may not be made in the presence of the jury.~~

~~(b) Though a writing requested by one party is produced by another, and is thereupon inspected by the party calling for it, the party calling for the writing is not obliged to introduce it as evidence in the action.~~

Comment. Section 1503 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. As to oral testimony of the content of a writing, the combined effect of former Section 1505 and the first sentence of subdivision (a) is continued without substantive change in Section 1523 (oral testimony of content of writing).

The requirement of the second sentence of subdivision (a) is continued without substantive change in Section 1522 (exclusion of secondary evidence in criminal action), except that Section 1522 applies that requirement to all requests for exclusion of secondary evidence in a criminal action.

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

§ 1504 (repealed). Copy of collateral writing

~~1504. A copy of a writing is not made inadmissible by the best evidence rule if the writing is not closely related to the controlling issues and it would be inexpedient to require its production.~~

Comment. Section 1504 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. As to oral testimony of the content of a collateral writing, the combined effect of former Sections 1504 and 1505 is continued without substantive change in Section 1523 (oral testimony of content of writing).

§ 1505 (repealed). Other secondary evidence of writings described in Sections 1501-1504

~~1505. If the proponent does not have in his possession or under his control a copy of a writing described in Section 1501, 1502, 1503, or 1504, other secondary evidence of the content of the writing is not made inadmissible by the best evidence rule. This section does not apply to a writing that is also described in Section 1506 or 1507.~~

Comment. Section 1505 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. Insofar as Section 1505 pertains to oral testimony of the content of a writing, it is continued without substantive change in Section 1523 (oral testimony of content of writing). See Comments to former Sections 1501-1504.

§ 1506 (repealed). Copy of public writing

~~1506. A copy of a writing is not made inadmissible by the best evidence rule if the writing is a record or other writing that is in the custody of a public entity.~~

Comment. Section 1506 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. As to oral testimony of the content of a writing in the custody of a public entity, the combined effect of former Sections 1506 and 1508 is continued without substantive change in Section 1523 (oral testimony of content of writing).

§ 1507 (repealed). Copy of recorded writing

~~1507. A copy of a writing is not made inadmissible by the best evidence rule if the writing has been recorded in the public records and the record or an attested or a certified copy thereof is made evidence of the writing by statute.~~

Comment. Section 1507 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. As to oral testimony of the content of a writing that has been recorded in the public records, the combined effect of former Sections 1507 and 1508 is continued without substantive change in Section 1523 (oral testimony of content of writing).

§ 1508 (repealed). Other secondary evidence of writings described in Sections 1506 and 1507

~~1508. If the proponent does not have in his possession a copy of a writing described in Section 1506 or 1507 and could not in the exercise of reasonable diligence have obtained a copy, other secondary evidence of the content of the writing is not made inadmissible by the best evidence rule.~~

Comment. Section 1508 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. Insofar as Section 1508 pertains to oral testimony of the content of a writing, it is continued without substantive change in Section 1523 (oral testimony of content of writing). See Comments to former Sections 1506, 1507.

§ 1509 (repealed). Voluminous writings

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

Comment. Section 1509 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. To the extent that Section 1509 provided a means of obtaining production of accounts or other writings for inspection, continuation of that aspect is unnecessary because other statutes afford sufficient opportunities for such inspection. *See, e.g.,* Code Civ. Proc. §§ 1985.3, 1987, 2020, 2031; Penal Code §§ 1054.1, 1054.3. Insofar as Section 1509 pertains to oral testimony of the content of voluminous writings, it is continued without substantive change in Section 1523 (oral testimony of content of writing).

§ 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 1521 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 1521 Comment. Exceptions to the Secondary Evidence Rule are modeled on the exceptions in former Section 1511. See Section 1521(a) & Comment.