The Best Evidence Rule: A Critical Appraisal Of The Law In California

I. INTRODUCTION

The California best evidence rule provides that "no evidence other then the writing itself is admissible to prove the content of a writing."[1] Upon timely objection[2] the rule operates to exclude any secondary evidence[3] of a writing's content, unless the absence of the original is attributable to circumstances provided for in one of the eight codified exceptions.[4] Secondary evidence which qualifies under a best-evidence-rule exception might still be excluded if it is shown to be inadmissible hearsay[5] or if proof of authenticity is inadequate.[6]

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[1] CAL. EVID. CODE § 1500 (West 1968) provides:

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

The term "best evidence" has caused considerable confusion and several commentators have suggested that the phrase "original document rule" be used instead. *See* 5 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 1002 [01] n.1 [hereinafter cited as WEINSTEIN]. But since section 1500 specifically identifies this section as the best evidence rule, and the phrase is widely used in opinions, it will be used in this article.

[2] When secondary evidence is offered, a timely and specific objection must be made by the adversary party or the trial court will consider the evidence as if it were primary evidence. Sublett v. Henry's Turk & Taylor Lunch, 21 Cal. 2d 273, 276, 131 P.2d 369, 370 (1942); People v. Evans, 34 Cal. App. 3d 175, 181, 109 Cal. Rptr. 719, 722 (2d Dist. 1973). *But see* Dugar v. Happy Tiger Records, Inc., 41 Cal. App. 3d 811, 817, 116 Cal. Rptr. 412, 416 (2d Dist. 1974) (summary judgment reversed on appeal although defendant failed to appear at the hearing to make best-evidence-rule objection).

[3] For the purpose of this article, "secondary evidence" is any evidence, testimonial or documentary, offered in lieu of an original writing.

[4] CAL. EVID. CODE §§ 1501-04, 1506, 1507, 1509, 1510 (West 1968).

[5] *See generally* B. WITKIN, CALIFORNIA EVIDENCE §§ 448 *et seq.* (2d ed. 1966) [hereinafter cited as WITKIN]; Comment, *Hearsay: The Threshold Question*, this volume.

[6] A separate but related California Evidence Code provision, section 1401(a) (West 1968), makes authentication of a writing a prerequisite to its introduction into evidence. Subsection (b) of this section requires authentication of a writing before secondary evidence of its content may be admitted under a statutory exception to the best evidence rule. Thus, when a copy of a writing is sought to be introduced to prove a writing's content, a preliminary showing of the authenticity of the copy and of the original is required. This section is a codification of California case law. Spottiswood v. Weir, 80 Cal. 448, 449, 22 P. 289, 290 (1889);

The best evidence rule developed in the eighteenth century when manually produced copies were routinely expected to contain errors.[7] Moreover the rudimentary pretrial disclosure procedures then in existence provided little opportunity to inspect original documents prior to trial for signs of forgery.[8] Under such circumstances the rule's insistence on production of the original helped to ensure that the most reliable evidence available was brought before the trier of fact.[9]

Today the possibility of inadvertent error is substantially reduced when copies are produced by modern methods. Also, the use of broad discovery and related procedures enable litigants to detect fraudulent tampering well in advance of trial.[10] Although the rule continues to serve a useful function in certain contexts,[11] its mechanical application can work to exclude reliable evidence at trial or provide technical grounds for reversal on appeal.

This article provides a critical appraisal of the best evidence rule. An analysis of the policy underlying the rule precedes a discussion of the operation of the California best evidence rule and its statutory exceptions. Throughout this discussion the best evidence rule contained in the new Federal Rules of Evidence[12] is compared with the California statute. Finally, the article presents possible legislative alternatives to the existing California rule.

II. RATIONALE FOR THE RULE

The principal rationale advanced for the best evidence rule is to insure that the trier of fact is presented with the exact words of a writing.[13] This function is particularly important when the litigation involves technical instruments such as deeds or wills in which a slight variation in wording may greatly affect the outcome of the litigation.[14] Modern reproduction techniques have greatly diminished the problem of inaccuracy, since the possibility of error is negligible with copies produced by these methods. Yet this rationale still justifies

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Forman v. Goldberg, 42 Cal. App. 2d 308, 316, 108 P.2d 983, 988 (3d Dist. 1941). *See generally* WITKIN, *supra* note 5, § § 672 *et seq.*

[7] E. CLEARY *et. al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 236 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)].

[8] Cleary and Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 IOWA L. REV. 825, 831-35 (1966) [hereinafter cited as Cleary and Strong].

[9] *Id.* at 834-35; Broun, *Authentication and Contents of Writings*, 1969 LAW AND SOC. ORDER 611, 616 [hereinafter cited as Broun] ("Surely the rule has occasionally prevented fraud and mistake, and in all probability, it has often prevented simple inaccuracy").

[10] 5 WEINSTEIN, *supra* note 1, ¶ 1002[02].

[11] *See* text accompanying notes 146-47 *infra.*

[12] The Federal Rules of Evidence are found in 28 U.S.C. FED. R. EVID. 101 *et seq.* (1975).

[13] MCCORMICK (2d ed.), *supra* note 7, § 231.

[14] *Id.*

the existence of the rule in certain circumstances. For example, the chance of error is substantial when a witness purports to recall from memory the terms of a writing.

The rule is also thought to help prevent fraud.[15] The California Supreme Court noted in an early decision that when a party "seeks to substitute inferior evidence . . . the presumption naturally arises, that the better evidence is withheld for fraudulent purposes which its production would expose and defeat."[16] This rationale is premised on the assumption that copies and oral testimony are more susceptible to fraudulent alteration than an original writing.[17] Modern copying techniques permit portions of documents to be altered or eliminated by cutting and pasting the original without disturbing signatures or leaving other detectable signs of fraudulent tampering.[18] It should be noted, however, that the rule does not provide an absolute protection against fraud. A litigant determined to introduce fraudulent secondary evidence might not be effectively deterred under the present rule, since it is relatively easy to manufacture an explanation sufficient to satisfy the foundation requirements of one of the rule's exceptions.[19]

The final rationale offered for the rule is that inspection of an original document could reveal valuable information not disclosed from viewing a copy.[20] A notation in the margin of a document can be easily blocked out so as not to appear on a photocopy. Staple holes in an original document, which are not reproduced on a photocopy, could indicate that related documents once attached to the original have been withheld. One could also envision circumstances in which the characteristics of the paper, typeset, or color of ink, detectable only by inspecting the original, would be of probative value.[21]

III. THE LAW IN CALIFORNIA

The best evidence rule was first expressed in early California decisions as a general rule of evidence requiring that "the best evidence of which the case is susceptible must be produced."[22] This notion was adopted from an early English case which held that the rule gov-

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[15] *Id.*

[16] Bagley v. McMickle, 9 Cal. 430, 446 (1858).

[17] Broun, *supra* note 9, at 616.

[18] 5 WEINSTEIN, *supra* note 1, ¶ 1002[02].

[19] Cleary and Strong, *supra* note 8, at 847.

[20] 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1179 (Chadbourn rev. 1972) [hereinafter cited as 4 WIGMORE].

[21] *Id.* For example, to prove that interlineations on a writing were made at different times, it would be helpful to determine if different color inks or pencils were used.

[22] McCann v. Beach, 2 Cal. 25, 30 (1852).

erned the proof of all factual issues.[23] The application of the rule to proof of issues not involving a writing's content has been rejected in England[24] and in most United States jurisdictions including California.[25] 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.[26]

A. SCOPE OF THE BEST EVIDENCE RULE

1. WRITINGS WITHIN THE RULE

The California Evidence Code broadly defines "writing" to include "any form of communication or representation, including letters, words, pictures, sounds or symbols."[27] This definition has expanded the scope of the best evidence rule to encompass tape recordings, videotapes, photographs, films, and computer records. These modern communication forms, like traditional writings, often contain critical details which may not be accurately reflected by reproductions or oral testimony. For example, in a recent California case[28] still photographs of the projected images and descriptions of those

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[23] Ford v. Hopkins, 91 Eng. Rep. 250 (K.B. 1700).

[24] 4 WIGMORE, *supra* note 20, § 1181 n.1.

[25] *Id.* Section 1500 limits the best evidence rule to proof of the content of a writing. In spite of the clear language of this section, vestiges of the old California rule might cause misunderstandings. *See* Hannah v. Canty, 175 Cal. 673, 770, 167 P. 373, 377 (1917) (declarations in quit claim deed not best evidence of facts recited; testimony of witness required); Lacrabere v. Wise, 141 Cal. 554, 556, 75 P. 185, 186 (1904) (affidavits not best evidence to prove that notice was given in unlawful detainer action; testimony of witness required); Ford v. Smith, 5 Cal. 314 (1855) (receipt executed by a third party acknowledging payment is not admissible; testimony of person making payment is better evidence of the transaction). In addition, CALIFORNIA JURISPRUDENCE, a secondary source on California law, incorrectly states that section 1500 "does not seem to affect what has long been held as a wider, general rule, that the best evidence which, by the nature of the case, can be produced must be produced," CAL. JUR. 2D *Evidence* § 316 (1969). Because this reference is widely available to attorneys, the statement has undoubtedly contributed to misunderstandings about the scope of the rule.

[26] MCCORMICK (2d ed.), *supra* note 7, § 232.

[27] CAL. EVID. CODE § 250 (West 1968) provides:

> 'Writing' means 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 combination thereof.

Section 250 is made applicable to California Evidence Code Section 1500 by California Evidence Code Section 100 which provides "[u]nless the provision or context otherwise requires, these definitions govern the construction of this code."

[28] People v. Enskat, 20 Cal. App. 3d Supp. 1, 98 Cal. Rptr. 646 (App. Dept. Super. Ct., Los Angeles 1971), *appeal after remand*, 38 Cal. App. 3d 900, 109 Cal. Rptr. 433 (2d Dist. 1973).

images were used as evidence in a film obscenity prosecution. The appellate court reversed the conviction noting that "[t]he policy considerations upholding the rule for written documents apply with full force to movies as . . . it is better for the trier of fact to see a movie than have it described."[29] The federal rules also expand the scope of the best evidence rule to encompass modern developments in communications and reproduction systems.[30]

The liberalized definition of "writing" accommodates the advances in communication systems, but it also causes practical difficulties. For example, the California definition of "writing" includes words or symbols recorded "upon any tangible thing."[31] Technically an object such as a tombstone, billboard or traffic sign which beárs an inscription of words or other meaningful symbols is within the scope of the best evidence rule. In many cases, however, production of these objects would be impractical. Moreover, the application of the rule to all inscribed objects appears unnecessary, because frequently the inscription is not sufficiently complex to present a problem of inaccuracy.[32] The California best evidence rule should therefore be construed as giving the court discretion to dispense with application of the rule to inscribed objects if the need for the precise language is outweighed by the difficulty of producing the object.[33]

2. COMPUTER RECORDS

The use of computer records as evidence raises two distinct best-evidence-rule difficulties.[34] The first involves offering into evidence a computer printout containing information which was created by the computer as a result of analysis or computation. An opponent might object to the admission of the printout on the ground that the original is the magnetic tape or punch cards from which the printout was derived. Commentators agree that in such circumstances computer printouts should be treated as originals, since they are the first documentary evidence readable by the average trier of fact.[35] The federal rules resolve the question of admissibility of computer-created records by stating that "[i]f data are stored in a computer or

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[29] *Id.* at 3, 98 Cal. Rptr. at 647.
[30] FED. R. EVID. 1001 (1), (2).
[31] CAL. EVID. CODE § 250 (West 1968).
[32] MCCORMICK (2d ed.), *supra* note 7, § 232.
[33] *See* 4 WIGMORE, *supra* note 20, § 1182.
[34] *See generally* Freed, *Computer Print-outs as Evidence*, 16 AM. JUR., PROOF OF FACTS 273 [hereinafter cited as Freed]; Roberts, *A Practitioner's Primer on Computer Generated Evidence*, 41 U. CHI. L. REV. 254 (1974); Comment, *Recorded Hearsay—Past Recollection Recorded and Business Records*, this volume.
[35] *See* 5 WEINSTEIN, *supra* note 1, ¶ 1001(3)[04]; Freed, *supra* note 34, at 300. *See also* Transport Indem. Co. v. Seib, 178 Neb. 253, 132 N.W. 2d 971 (1965); Annot., 11 A.L.R.3d 1377 (1967).

similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original'."[36]

A best-evidence-rule objection may also be made to computer printouts which merely reproduce data taken from underlying documents such as purchase orders, invoices, or sales slips.[37] Computer printouts used in place of underlying documents would likely be considered secondary evidence in California. These printouts may be admissible under the exception for voluminous writings[38] or, since the original documents are rarely preserved, under the exception for documents intentionally destroyed with no fraudulent intent.[39] Under the federal rules, a computer printout used solely to reproduce an underlying document is classified as a duplicate and in most circumstances is admissible to the same extent as an original.[40]

Computer printouts used in place of underlying documents may also be admissible under the provisions of the Uniform Photographic Copies of Business and Public Records as Evidence Act.[41] This act permits a reproduction of a writing to be introduced in place of the original if the reproduction was made and preserved as part of the records of a business or government agency. The Uniform Act encompasses copies produced by "photographic, photostatic, microfilm . . . or other process which accurately reproduces . . . the original."[42] In contrast, the California version of the act omits the general "other process" category.[43] With the absence of this language, a Cali-

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[36] FED. R. EVID. 1001(3).

[37] 5 WEINSTEIN, *supra* note 1, ¶ 1001(4)[07].

[38] *See* Vanguard Recording Society Inc. v. Fantasy Records Inc., 24 Cal. App. 3d 410, 418, 100 Cal. Rptr. 826, 832 (1st Dist. 1972) (summary abstracted from invoices by data processing machines admissible to show sales). The exception for voluminous writings is codified in CAL. EVID. CODE § 1509 (West 1968); *see* text accompanying notes 123-28 *infra*.

[39] The exception for documents intentionally destroyed without fraudulent intent is found in CAL. EVID. CODE § 1501 (West 1968); *see* text accompanying notes 70-83 *infra*.

[40] *See* FED. R. EVID. 1001(4); *see* text accompanying notes 57-58 *infra*.

[41] UNIFORM PHOTOGRAPHIC COPIES OF BUSINESS AND PUBLIC RECORDS AS EVIDENCE ACT. § 1 (1949). This act has been adopted by a majority of the states. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM LAWS, UNIFORM LAWS ANNOTATED: CIVIL PROCEDURAL AND REMEDIAL LAWS 453 (1975).

[42] UNIFORM PHOTOGRAPHIC COPIES OF BUSINESS AND PUBLIC RECORDS AS EVIDENCE ACT § 1 (1949).

[43] CAL. EVID. CODE § 1550 (West 1968) provides:

> A photostatic, microfilm, microcard, miniature photographic or other photographic copy or reproduction, or an enlargement thereof, of a writing is as admissible as the writing itself if such copy or reproduction was made and preserved as a part of the records of a business (as defined by section 1270) in the regular course of such business. The introduction of such copy, reproduction, or enlargement does not preclude admission of the original writing if it is still in existence.

fornia court might find the statute inapplicable to computer printouts.

3. *EVIDENCE NOT OFFERED TO PROVE CONTENT OF A WRITING*

The best evidence rule applies when evidence is offered to prove the content of a writing, because only then does the danger of inaccuracy or fraud become important. Therefore the rule does not apply when a witness testifies about facts within his knowledge, even though the facts are also evidenced by a writing.[44] For example, a witness may testify to the substance of his conversation with another, even though that conversation is evidenced by a tape recording. The testimony in this instance is offered to prove the substance of the conversation and not to prove the content of the tapes.

The rule is also inapplicable when evidence is offered to prove only that a document was executed or is in existence.[45] The distinction between evidence offered to prove the content of a writing and evidence offered to prove the existence of such a writing is unclear in many instances. Two California appellate courts have reached opposite decisions on this point in nearly identical factual circumstances.[46] The cases were similar in that in each instance a police officer stopped the defendant for a traffic violation. It was learned

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[44] People v. Sweeney, 55 Cal. 2d 27, 37, 9 Cal. Rptr. 793, 798, 357 P.2d 1049, 1054 (1960) (police officer can testify to conversations with defendant even though recording was made); Ponce v. Marr, 47 Cal. 2d 159, 162, 301 P.2d 837, 840 (1956) (testimony that loan was repaid admissible even though cancelled note would show that fact); People v. Ramos, 3 Cal. 2d 269, 272, 44 P.2d 301, 302 (1935) (police officer can testify from memory as to statements made by defendant in his presence); Vickter v. Pan Pac. Sales Corp., 108 Cal. App. 2d 601, 603, 239 P.2d 463, 465 (2d Dist. 1952) (when witness made purchases for company, his testimony admissible even though business records would also show transactions); People v. Kulwin, 102 Cal. App. 2d 104, 108, 226 P.2d 672, 674 (2d Dist. 1951) (police officer can testify as to what he heard even though recording was made); Galbavy v. Clevelin Realty Corp., 58 Cal. App. 2d Supp. 903, 905, 136 P.2d 134, 135 (1943) (corporate minute book is not the only evidence to prove the passage of resolutions by its board of directors; testimony of director admissible).

[45] Marriner v. Dennison, 78 Cal. 202, 213, 20 P. 386, 391 (1889) (testimony as to existence of a contract); Poole v. Gerrard, 9 Cal. 593, 594 (1858) (testimony admissible to show that agreement was formed); People v. Skeen, 93 Cal. App. 2d 489, 491, 209 P.2d 132, 134 (2d Dist. 1949) (in prosecution for embezzlement, testimony admissible to prove that power of attorney was executed); Crinella v. Northwestern Pac. R. Co., 85 Cal. App. 440, 445, 259 P. 774, 776 (1st Dist. 1927) (testimony admissible to show that claim was filed). *Contra*, Bickerdike v. State, 144 Cal. 698, 704, 78 P. 277, 279 (1904) (certificate of county clerk is best and only evidence of its issuance); Equitable Trust Co. v. Western Land & Power Co., 38 Cal. App. 535, 541, 176 P. 876, 878 (3d Dist. 1918) (proof of existence of mortgage bonds required production of bonds).

[46] *Compare* Hewitt v. Superior Court, 5 Cal. App. 3d 923, 85 Cal. Rptr. 493 (1st Dist. 1970) *with* People v. Wohlleben, 261 Cal. App. 2d 461, 67 Cal. Rptr. 826 (2d Dist. 1968).

by radio that there were outstanding warrants for the defendant's arrest. The officer discovered marijuana in the defendant's automobile during a search pursuant to the arrest on the outstanding warrants. In the subsequent prosecution the state offered the oral testimony of the arresting officer concerning the outstanding warrants. The defendant raised a best-evidence-rule objection which was overruled.

On review the Second District Court of Appeal reversed one conviction for failure to sustain the defendant's best-evidence-rule objection. The court held that the prosecution was seeking to prove the content of the warrants to determine whether the defendant was actually the person named therein.[47] In contrast, the First District Court of Appeal affirmed the other conviction. The court held that the best evidence rule was inapplicable in that the prosecution was not seeking to prove the content of the warrants, but only their existence.[48]

These cases raise some doubt as to the possibility of distinguishing between proof of a writing's content and proof of a writing's existence or execution. It is true that the government had no burden to prove the specific content of the warrants. The fact remains, however, that the warrants could not have been identified as such without reference to their content. The problem, as Wigmore notes, is that

> [t]he line between testifying to . . . contents and testifying to other facts is not only . . . difficult to draw in a given case, but . . . [t]here seems to be no way of invoking in its settlement any broad notion of policy definite enough to be useful in solving a given case.[49]

Although this distinction is intended to avoid needless application of the rule, in practice it has generated confusion. The best evidence rule could be simplified by abandoning this distinction and allowing the application of the rule to turn upon factors which identify those instances where the likelihood of inaccuracy or fraud is substantial.[50]

4. DUPLICATE ORIGINALS

Historically the best evidence rule proscribed admission of any copy to prove the content of a writing, unless one of the exceptions permitted such admission. With the advent of carbon paper it became

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[47] People v. Wohlleben, 261 Cal. App. 2d at 465, 67 Cal. Rptr. at 830.

[48] Hewitt v. Superior Court, 5 Cal. App. 3d at 929, 85 Cal. Rptr. at 497.

[49] 4 WIGMORE, *supra* note 20, § 1242.

[50] McCormick has suggested that the policy underlying the proof of content requirement could be incorporated into an expanded collateral writings exception. MCCORMICK (2d ed.), *supra* note 7, § 233. *See also* Comment, *The Best Evidence Rule—The Rule in Oregon*, 41 ORE. L. REV. 138, 142-43 (1962); Comment, *The Best Evidence Rule—A Rule Requiring the Production of a Writing to Prove the Writing's Contents*, 14 ARK. L. REV. 153, 156-58 (1960).

possible to produce more reliable copies than were produced by manual transcribing or letter press. Carbon copies are now classified by courts in most jurisdictions[51] including California[52] as duplicate originals. A duplicate original is considered an original writing and therefore can be admitted without qualifying under a best-evidence-rule exception. In contrast, courts in California treat photocopies, re-recordings, and other mechanically produced copies as secondary evidence.[53] These reproductions are no less reliable than carbon copies; there is an apparent concern, however, that mechanical reproductions are more susceptible to tampering.[54]

Copies are also admitted in evidence in California without qualifying under a best-evidence-rule exception under California's version of the Uniform Photographic Copies of Business and Public Records as Evidence Act. The act permits the introduction of copies made and preserved in the ordinary course of business activity.[55] Copies falling outside the scope of the act are often admitted by stipulation prior to trial.[56]

The federal rules classify as a duplicate original a copy produced by any method which insures accuracy.[57] A duplicate original is admitted as an original unless the authenticity of the original is challenged, or it appears that admitting the duplicate rather than the original would be unfair.[58]

5. *ADVERSARY ADMISSION*

A majority of the states permit proof of a writing's content by an

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[51] *See* MCCORMICK (2d ed.), *supra* note 7, § 236.

[52] People v. Lockhart, 200 Cal. App. 2d 862, 871, 19 Cal. Rptr. 719, 725 (2d Dist. 1962). *See also* Hughes v. Pac. Wharf Co., 188 Cal. 210, 219, 205 P. 105, 108 (1922); Edmunds v. Atchison Topeka and Santa Fe Ry. Co., 174 Cal. 246, 162 P. 1038 (1917); Pratt v. Phelps, 23 Cal. App. 755, 757, 139 P. 906, 907 (1st Dist. 1914).

[53] *In re* Connor, 16 Cal. 2d 701, 713, 108 P.2d 10, 17 (1940), *cert. denied*, 313 U.S. 542 (1941); Hopkins v. Hopkins, 157 Cal. App. 2d 313, 321, 320 P.2d 918, 923 (2d Dist. 1958); People v. Norwoods, 100 Cal. App. 2d 281, 283, 223 P.2d 490, 492 (1st Dist. 1950); People v. Thompson, 85 Cal. App. 2d 261, 264, 192 P.2d 802, 804 (3d Dist. 1948); Forman v. Goldberg, 42 Cal. App. 2d 308, 316, 108 P.2d 983, 988 (3d Dist. 1941). *Contra* People v. Stephens, 117 Cal. App. 2d 653, 660, 256 P.2d 1033, 1038 (2d Dist. 1953).

[54] *See* text accompanying notes 17-18 *supra;* Comment, 64 HARV. L. REV. 1369 (1951).

[55] CAL. EVID. CODE § 1550 (West 1968); UNIFORM PHOTOGRAPHIC COPIES OF BUSINESS AND PUBLIC RECORDS AS EVIDENCE ACT § 1 (1949).

[56] *See* A. VAN ALSTYNE AND H. GROSSMAN, CALIFORNIA CONTINUING EDUCATION OF THE BAR: CALIFORNIA PRETRIAL AND SETTLEMENT PROCEDURES 280 (1963).

[57] *See* FED. R. EVID. 1001(4).

[58] FED. R. EVID. 1003.

opponent's oral or written admission.[59] Production of the original writing is considered unnecessary since an opponent is unlikely to make a mistake against his interest in recalling the terms of a writing. The use of extra-judicial oral admissions has been criticized, however, because there is considerable danger of inaccurate reporting of the admission due to the witness's faulty perception or memory.[60] Noting this danger, one early California case held that an extra-judicial oral admission about the content of a document was inadmissible when the proponent failed to bring the admission within one of the best-evidence-rule exceptions.[61] The federal rules also bar the use of an adversary's extra-judicial oral admission to establish the content of a writing.[62]

No case in California has yet decided whether the best evidence rule applies to oral admissions made in the course of prior testimony or to written admissions whether in or out of court. In these circumstances the possibility of inaccuracy in recounting the admission is minimized, because the admission is a written statement or has been reduced to a writing in the court's transcript. Even if an error were made, little harm would be done since the admission is not dispositive. The opponent could present contrary evidence to prove the content as he knows it to be or produce the original if it is within his possession. The federal rules permit oral admissions made in the course of testimony and any written admissions to prove a writing's content.[63]

It should be kept in mind that an extra-judicial statement within the hearsay exception for admission of a party opponent,[64] may still be excluded by the best evidence rule. For example, an oral out-of-court admission of a party opponent about the disputed terms of a contract may be admitted under the hearsay exception. But the admission might not overcome a best-evidence-rule objection unless the proponent satisfactorily accounts for his failure to produce the original writing.

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[59] The rule was first enunciated in Slatterie v. Pooley, 151 Eng. Rep. 579 (Ex. 1840); 4 WIGMORE, *supra* note 20, § 1256.

[60] MCCORMICK (2d ed.), *supra* note 7, § 242. The danger of faulty memory has not been held sufficient to warrant exclusion of this type of hearsay evidence generally, which is admitted under the exception for an admission of a party opponent. But for testimony concerning an oral admission regarding the specific content of a document, it can be argued that the need for accuracy is more critical. The danger of faulty memory in this circumstance is sufficiently great to justify exclusion of the evidence.

[61] Grimes v. Fall, 15 Cal. 63, 65 (1860) (oral admissions made out of court inadmissible to show terms of contract).

[62] *See* FED. R. EVID. 1007.

[63] *Id.*

[64] *See* Comment, *Admissions of a Party Opponent: An Advocate's Guide*, this volume.

B. EXCEPTIONS TO THE RULE

The California Evidence Code provides eight exceptions to temper the exclusionary feature of the rule by permitting the introduction of copies.[65] The code also permits the introduction of secondary evidence other than copies, upon a showing that neither the original nor a copy is within the possession or control of the proponent.[66]

The eight exceptions can be divided into three categories. The first category encompasses circumstances in which the need for the evidence outweighs the possible unreliability of the copy. This category consists of three exceptions which make a copy of a writing admissible when the original is unavailable because (1) it has been lost or destroyed; (2) it is not reasonably procurable by the proponent; or (3) it is under the control of the opponent.[67] The second category encompasses a situation in which the court's interest in expediting the proceedings outweighs the need for the precise language of the document's content. This category consists of a single exception which permits the admission of a copy when a writing is not closely related to the controlling issues in the case, and it would be inexpedient to require production of the original.[68] The final category encompasses circumstances in which the reliability of the secondary evidence and the court's interest in expediting the proceeding outweighs the court's interest in production of the original writing at trial. This category consists of four exceptions which permit the admission of a copy when (1) the original is a record in the custody of a public entity; (2) the original is recorded as a public record; (3) the writing consists of numerous entries which could be examined in court only with a great loss of time; or (4) the original is made available at the proceeding for inspection by the opponent.[69]

It should be emphasized that these exceptions are only to the best evidence rule. If the original writing would be inadmissible either because it is hearsay or because it lacks proper authentication, the copy is inadmissible in spite of being within a best-evidence-rule exception.

1. ORIGINAL LOST OR DESTROYED

Section 1501 provides that a copy is admissible to prove the content of a writing when the original has been lost or destroyed.[70] This

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[65] CAL. EVID. CODE §§ 1501-04, 1506, 1507, 1509, and 1510 (West 1968).
[66] CAL. EVID. CODE §§ 1505, 1508 (West 1968).
[67] CAL. EVID. CODE §§ 1501-03 (West 1968).
[68] CAL. EVID. CODE § 1504 (West 1968).
[69] CAL. EVID. CODE §§ 1506, 1507, 1509, 1510 (West 1968).
[70] CAL. EVID. CODE § 1501 (West 1968) provides:

> 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.

section restates a prior statutory provision[71] and incorporates an additional common law requirement that the loss or destruction be shown to have occurred "without fraudulent intent on the part of the proponent of the evidence."[72]

Before the court admits the copy, the proponent must establish, either directly or circumstantially, the loss or destruction of the original.[73] If the proponent of the copy, or someone acting under his direction, intentionally destroyed the original writing, the proponent must show that the destruction was not motivated by fraudulent intent.[74] When the destruction is accidental, the proponent may be required to trace the document to its last known whereabouts and show that the event bringing about the destruction occurred at that location.[75]

Loss is shown by presenting evidence of an unsuccessful search for the document. No fixed rules govern the sufficiency of the search required to show loss. Most cases have held that the search must be "bona fide and diligent,"[76] sometimes requiring the testimony of the

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[71] Ch. 5, § 447, [1851] Cal. Stat. 122 (*repealed* 1967).

[72] CAL. EVID. CODE § 1501 (West 1968). For the development of the common law requirement *see* cases cited in note 74 *infra*.

[73] *See* Lewis v. Burns, 122 Cal. 358, 361, 55 P. 132, 136 (1898); Macy v. Goodwin, 6 Cal. 579, 581 (1855); People v. Peterson, 251 Cal. App. 2d 676, 680, 59 Cal. Rptr. 694, 696 (2d Dist. 1967); Cheek v. Whiston, 159 Cal. App. 2d 472, 477, 323 P.2d 1028, 1031 (4th Dist. 1958); Brown v. Gow, 128 Cal. App. 671, 18 P.2d 377 (4th Dist. 1933). *But see* Gibson v. McReynolds, 175 Cal. 263, 269, 165 P. 921, 923 (1917) (no error to admit secondary evidence when proof of loss of original was later shown).

[74] Wolf v. Donahue, 206 Cal. 213, 219, 273 P. 547, 550 (1929); Bagley v. McMickle, 9 Cal. 430, 446 (1858); People v. Peterson, 251 Cal. App. 2d 676, 679, 59 Cal. Rptr. 694, 696 (2d Dist. 1967); Guardianship of Levy, 137 Cal. App. 2d 237, 249, 290 P.2d 320, 328 (2d Dist. 1955); People v. Guasti, 110 Cal. App. 2d 456, 462, 243 P.2d 59, 63 (2d Dist. 1952). *Contra*, Smith v. Truebody, 2 Cal. 341, 344 (1852) (held error to admit secondary evidence when assignment contract intentionally destroyed, though without fraudulent intent). *But see* People v. King, 101 Cal. App. 2d 500, 507, 225 P.2d 950, 954 (2d Dist. 1950) (held nonprejudicial error to admit disc recordings when originals were intentionally, though innocently, destroyed).

[75] McCann v. Beach, 2 Cal. 25, 30 (1852). *See also* Folsom's Executors v. Scott, 6 Cal. 460, 461 (1856) (testimony that original document might have been among those destroyed by fire is insufficient, for paper in question might have been one of those saved from the fire).

[76] King v. Samuel, 7 Cal. App. 55, 67, 93 P. 391, 395 (3d Dist. 1907). *See also* Von Brimer v. Whirlpool Corp., 362 F. Supp. 1182, 1187 (N.D. Cal. 1973); Anthony v. Janssen, 183 Cal. 329, 332, 191 P. 538, 540 (1920) (testimony that document could have been found if searched for in company files precluded admission of secondary evidence); Kenniff v. Caulfield, 140 Cal. 34, 41, 73 P. 803, 805 (1903); Woods v. Jensen, 130 Cal. 200, 205, 62 P. 473, 474 (1900); Pierce v. Wallace, 18 Cal. 165, 170 (1861) (after diligent search made, mere suggestion by opponent that document might have been taken to another location does not necessitate that search be undertaken at that location); Folsom's Executors v. Scott, 6 Cal. 460, 461 (1856); Furman v. Craine, 18 Cal. App. 41, 48, 121 P.

last known custodian of the document.[77] The custodian in many instances will be the proponent himself, and his testimony may be enough to establish a sufficient search.[78] When no allegation of fraud has been made, testimony that the original document has been searched for and not discovered has been held adequate to establish that the document is lost.[79]

California decisions hold that the degree of proof required to show loss or destruction should be in direct proportion to the importance of the document at trial.[80] For example, when the precise language of a deed is dispositive of a central issue, a higher degree of proof will likely be required. In addition, the burden may be relaxed if a writing is very old or if sufficient time has elapsed since it was last seen.[81] The sufficiency of a showing of loss or destruction is within the discretion of the trial judge. His admission of a copy will be overturned for abuse of discretion only when the proof offered is manifestly insufficient to warrant such admission.[82]

The corresponding provision in the federal rules provides that

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1007, 1010 (2d Dist. 1912); Morison v. Weik, 19 Cal. App. 139, 140, 124 P. 869, 870 (2d Dist. 1912).

[77] *See* Kenniff v. Caulfield, 140 Cal. 34, 41, 73 P. 803, 805 (1903); Posten v. Rassette, 5 Cal. 467, 469 (1855). *See also* King v. Randlett, 33 Cal. 318, 320 (1867) (failure to call as witness party who was last known occupant of premises where deed was lost made search less than diligent); Patterson v. Keystone Mining Co., 30 Cal. 360, 365 (1866) (secondary evidence inadmissible when last known custodian of lost document not called as witness).

[78] *See* Kenniff v. Caulfield, 140 Cal. 34, 41, 73 P. 803, 805 (1903); Folsom's Executors v. Scott, 6 Cal. 460, 461 (1856); Grass Valley Quartz Mining Co. v. Stackhouse, 6 Cal. 413, 414 (1856); McCann v. Beach, 2 Cal. 25, 30 (1852).

[79] *See* Kenniff v. Caulfield, 140 Cal. 34, 41, 73 P. 803, 805 (1903); Eltzroth v. Ryan, 89 Cal. 135, 139, 26 P. 647, 648 (1891) (*dictum*); McCann v. Beach, 2 Cal. 25, 30 (1852) (proof of destruction held insufficient, though court said party could have established destruction through his own affadavit); Richards v. Oliver, 162 Cal. App. 2d 548, 567, 328 P.2d 544, 556 (2d Dist. 1958); Cotton v. Hudson, 42 Cal. App. 2d 812, 814, 110 P.2d 70, 71 (1st Dist. 1941); Larimer v. Smith, 130 Cal. App. 98, 103, 19 P.2d 825, 828 (3d Dist. 1933) (evidence that letter delivered to party opponent who denied he received it, sufficient to establish loss); Pratt v. Phelps, 23 Cal. App. 755, 759, 139 P. 906, 907 (1st Dist. 1914); Van Varkenburgh v. Oldham, 12 Cal. App. 572, 580, 108 P. 42, 45 (3d Dist. 1910) (testimony that party either never received original document or lost it sufficient foundation to permit admission of copy).

[80] *E.g.*, Cotton v. Hudson, 42 Cal. App. 2d 812, 814, 110 P.2d 70, 71 (1st Dist. 1941).

[81] King v. Samuel, 7 Cal. App. 55, 67, 93 P. 391, 395 (3d Dist. 1907) (when document of little value, or ancient, a lesser degree of diligence will be demanded, as it will be aided by a presumption of loss which these circumstances afford).

[82] Wolf v. Donahue, 206 Cal. 213, 219, 273 P. 547, 550 (1929); Robinson v. Thorton, 271 Cal. App. 2d 605, 611, 76 Cal. Rptr. 835, 839 (2d Dist. 1969); Hausen v. Goldman, 124 Cal. App. 2d 25, 30, 267 P.2d 852, 855 (4th Dist. 1954); White v. White, 39 Cal. App. 2d 57, 60, 102 P.2d 432, 433 (2d Dist. 1940); Ulm v. Prather, 49 Cal. App. 141, 146, 192 P. 878, 879 (3d Dist. 1920); Morison v. Weik, 19 Cal. App. 139, 141, 124 P. 869, 870 (2d Dist. 1912); California Nat. Bank v. Weldon, 14 Cal. App. 765, 773, 113 P. 334, 337 (3d Dist. 1910).

secondary evidence is admissible if "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith."[83]

2. ORIGINAL UNAVAILABLE

Section 1502 provides that a copy may be used to prove the content of a writing if the proponent of the evidence makes a sufficient showing that the original writing "was not reasonably procurable . . . by use of the court's process or by other available means."[84] Before the enactment of section 1502, the courts treated all documents shown to be outside the court's process as lost, thereby allowing the admission of secondary evidence under the exception for lost documents.[85] Section 1502 creates a narrower exception for unavailable documents. This section requires a showing that the original is outside of the court's process and that informal attempts to procure the original from the person in possession have failed. The exception for unavailable writings in the federal rules permits secondary evidence to be admitted if the original cannot be obtained "by any available judicial process or procedure."[86] The federal rules do not require the proponent to attempt to secure the original by informal means.

The requirements of the California exception for unavailable documents appear to call into question case law developed prior to the statute's enactment. An early California case lowered the standard for the admission of a copy if the original document was located within the court's process and was in the control of a non-party. In this case secondary evidence was admitted without an attempt to subpoena the document on a showing that the non-party was unwilling to give up the original.[87] There are no recent cases on this

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[83] FED. R. EVID. 1004(1).

[84] CAL. EVID. CODE § 1502 (West 1968) provides:

> 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.

[85] *In re* Baker's estate, 176 Cal. 430, 438, 168 P. 881, 884 (1917) (copies of documents on file in court in another state admissible to show content); Zellerbach v. Allenberg, 99 Cal. 57, 73, 33 P. 786, 791 (1893) (oral testimony of letter mailed out of country admissible to show content); Gordon v. Searing, 8 Cal. 49, 50 (1857) (certified copy of grant admissible when possession of original is traced to a party outside the state); Heinz v. Heinz, 73 Cal. App. 2d 61, 66, 165 P.2d 967, 970 (2d Dist. 1946) (oral testimony admissible to prove content of photographs located outside state); Koenig v. Steinbach, 119 Cal. App. 425, 428, 6 P.2d 525, 526 (2d Dist. 1931) (copy of agreement held lost when sent out of jurisdiction to another court for litigation purposes); Mackroth v. Sladky, 27 Cal. App. 112, 119, 148 P. 978, 980 (1st Dist. 1915) (copy of letter admissible when original is in private papers located outside the country).

[86] FED. R. EVID. 1004(2).

[87] Mahanay v. Lynde, 48 Cal. App. 2d 79, 119 P.2d 430 (2d Dist. 1941). *But see* Mutual Bldg. & Loan Ass'n v. Corum, 16 Cal. App. 2d 212, 214, 60 P.2d 316, 317 (1st Dist. 1936).

point, but the language of section 1502 would seem to require an attempt to subpoena the document in such circumstances. Another early California case suggested that when the person in custody of an original document could claim a privilege, which allows him to refuse to obey any subpoena ordering its production, a copy would be admissible without issuance of the subpoena.[88] Section 1502 could require an attempt to subpoena the document since the possibility exists that the party in possession will choose not to exercise the privilege.

3. ORIGINAL UNDER THE CONTROL OF THE OPPONENT

Section 1503 provides that a copy may be used to prove the content of a writing when (1) "the writing was under the control of the opponent," (2) "the opponent was expressly or impliedly notified, by pleadings or otherwise, that the writing would be needed at the hearing" and (3) "on request at the hearing the opponent has failed to produce the writing."[89]

Before a copy is admitted, the proponent must make a prima facie showing that the original is under the control of the opponent.[90] The document does not have to be in the personal custody of the opponent; it is enough if it is held by a third person subject to the opponent's control.[91] If the opponent denies possession, this may be a sufficient foundation to invoke the lost document exception.[92]

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[88] People v. Powell, 71 Cal. App. 500, 513, 236 P. 311, 317 (3d Dist. 1925) (oral testimony admissible to show the content of letters when originals traced to possession of co-conspirator).

[89] CAL. EVID. CODE § 1503 (West 1968) provides:

> (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.
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> (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.

[90] Sanborn v. Cunningham, 4 Cal. Unrep. 95, 100, 33 P. 894, 896 (Cal. 1893) (evidence that document was mailed to opponent sufficient to show that the document was in opponent's possession); Jones v. Jones, 38 Cal. 584, 586 (1869) (when paper drawn up for defendant, paper properly presumed to be in his possession); Burke v. Table Mountain Water Co., 12 Cal. 403, 407 (1859); People v. Chapman, 55 Cal. App. 192, 200, 203 P. 126, 130 (2d Dist. 1921).

[91] 4 WIGMORE, *supra* note 20, § 1200.

[92] Jones v. Jones, 38 Cal. 584, 586 (1869); Silveyra v. Harper, 82 Cal. App. 2d 761, 768, 187 P.2d 83, 87 (1st Dist. 1947); People v. Jackson, 24 Cal. App. 2d 182, 198, 74 P.2d 1085, 1094 (4th Dist. 1937); Pittler v. Bank of America N.T.S.A., 15 Cal. App. 2d 5, 10, 58 P.2d 981, 983 (1st Dist. 1936) (original vouchers mailed to opponent who stated that she did not preserve them); Lari-

Perhaps the most frequently litigated area under this code section is the notice to produce clause.[93] Notice is adequate if the writing is described with sufficient particularity[94] to permit the opponent to identify it, and if it allows sufficient time for the person in custody of the writing to present it in court.[95] Some California decisions have held that if the document is present in the courtroom an immediate demand for production will be held reasonable.[96] One California court indicated in dictum that the notice requirement would be satisfied if the defendant was expressly or impliedly notified of the existence of a criminal action involving the document in question.[97]

Notice to produce is not required if it would serve no useful purpose under the circumstances. For example, notice to produce is not required when the opponent has previously testified that the document is not in his possession.[98] Conversely, a determination that the party alleged to have been in possession would deny such possession, cures the defect resulting from failure to give proper notice.[99] A party may not object to lack of notice if at the time of the admission of the secondary evidence the party could have produced the original but failed to do so.[100] Notice to produce is also not required when the original document is itself a notice.[101] Wigmore suggests this exemption is justified with respect to a "notice to produce," since a requirement to give notice to produce the preceding notice could lead to an endless succession of notices.[102] The exemption makes

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mer v. Smith, 130 Cal. App. 98, 102, 19 P.2d 825, 828 (3d Dist. 1933); Bartholomae Oil Corp. v. Oregon Oil and Dev. Corp., 106 Cal. App. 57, 66, 288 P. 814, 818 (3d Dist. 1930).

[93] Grimes v. Fall, 15 Cal. 63, 65 (1860) (error to admit secondary evidence absent notice to produce); Poole v. Garrard, 9 Cal. 593, 594 (1858); Hopkins v. Hopkins, 157 Cal. App. 2d 313, 321, 320 P.2d 918, 923 (2d Dist. 1958); Womble v. Wilbur, 3 Cal. App. 527, 544, 86 P. 916, 920 (3d Dist. 1906).

[94] Burke v. Table Mountain Water Co., 12 Cal. 403, 407 (1859).

[95] Leese v. Clark, 29 Cal. 664, 668 (1866).

[96] Harloe v. Lambie, 132 Cal. 133, 136, 64 P. 88, 89 (1901); People v. Vasalo, 120 Cal. 168, 52 P. 305 (1898); Burke v. Table Mountain Water Co., 12 Cal. 403, 407 (1859).

[97] People v. Enskat, 20 Cal. App. 3d Supp. 1, 4, 98 Cal. Rptr. 646, 648 (App. Dept. Super. Ct., Los Angeles 1971), *appeal after remand*, 33 Cal. App. 3d 900, 109 Cal. Rtpr. 433 (2d Dist. 1973).

[98] *In re* Claussenius Estate, 96 Cal. App. 2d 600, 609, 216 P.2d 485, 492 (2d Dist. 1950); Smith v. Bert M. Morris Co., 131 Cal. App. 2d Supp. 871, 873, 280 P.2d 553, 555 (App. Dept. Super. Ct., Los Angeles 1955).

[99] Boyd v. Warden, 163 Cal. 155, 158, 124 P. 841, 843 (1912) (no notice to produce; harmless error when opponent later testified under oath that he had never received the mailed letter).

[100] Nicholson v. Tarpey, 70 Cal. 608, 610, 12 P. 778, 779 (1886).

[101] Gethin v. Walker, 59 Cal. 502, 506 (1881) (notice of rescission of a contract). *Contra*, Lombardo v. Ferguson, 15 Cal. 372, 373 (1860) (mining-claim notice posted by plaintiff; defendant in offering copy required to give notice to produce or otherwise account for it).

[102] 4 WIGMORE, *supra* note 20, § 1207.

little sense, however, as applied to notices generally and should be limited accordingly.

After the control and notice requirements are satisfied, the proponent must make a request at the hearing that the opponent produce the original writing.[103] If production is not made, the proponent may introduce a copy. Section 1503 expressly provides that a demand for production in a criminal case may not be made in the presence of the jury.[104] Although the federal rules do not include a parallel provision,[105] federal decisions have held that the privilege against self-incrimination is violated by such a demand.[106]

4. WRITINGS NOT CLOSELY RELATED TO THE CONTROLLING ISSUES

Section 1504 provides that a copy may be admitted to prove the content of a writing "if the writing is not closely related to the controlling issues and it would be inexpedient to require its production."[107] This exception did not exist in California prior to its enactment in the Evidence Code.[108]

The exception is intended to provide flexibility in the application of the best evidence rule by permitting the admission of a copy when a writing does not influence any important issue in the case.[109] Commentators agree that whether a writing is closely related to a controlling issue must be determined in light of the factual circumstances of each case.[110] Specific application of the exception must therefore be left to the discretion of the trial court.

In addition to the condition that the writing be collateral to the issues, the California exception requires that production of the origi-

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[103] Harloe v. Lambie, 132 Cal. 133, 136, 64 P. 88, 89 (1901); Grant v. Dreyfus, 5 Cal. Unrep. 970, 973, 52 P. 1074, 1076 (Cal. 1898); Jones v. Jones, 38 Cal. 584, 586 (1869); Gardner v. Rich Mfg. Co., 68 Cal. App. 2d 725, 737, 158 P.2d 23, 29 (2d Dist. 1945).

[104] CAL EVID. CODE § 1503 (West 1968).

[105] *See* FED. R. EVID. 1004 (3).

[106] *E.g.*, McKnight v. United States, 115 F. 972, 981 (6th Cir. 1902). *See also* United States v. O'Connor, 273 F.2d 358, 361 (2d Cir. 1959); Annot., 110 A.L.R. 101 (1937).

[107] CAL. EVID. CODE § 1504 (West 1968) provides:

> 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.

[108] The court rejected this exception in Poole v. Gerrard, 9 Cal. 593, 594 (1858) (*dictum*). The court later generated some confusion by declaring that "the question comes collaterally in issue," in a case holding the rule inapplicable when only the existence of a writing is sought to be proven. Marriner v. Dennison, 78 Cal. 202, 213, 20 P. 386, 391 (1889).

[109] *See* CAL. EVID. CODE § 1504, Law Rev. Comm'n Comment (West 1968).

[110] *See* 5 WEINSTEIN, *supra* note 1, ¶ 1004(4)[01].

nal be inexpedient.[111] This requirement seems to be an unwarranted limitation on the exception, for when a writing does not influence any controlling issues, its precise language is not of sufficient importance to delay the trial by requiring production of the original. The trial judge in such circumstances should be permitted to admit secondary evidence even if the original is available. The federal rules have enacted this exception without the "inexpediency" requirement.[112]

5. *PUBLIC RECORDS AND RECORDED PRIVATE WRITINGS*

Section 1506 provides that "[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."[113] Since "public entity" is broadly defined to include "a nation, state, county, city . . . or any other political subdivision"[114] the exception has been held applicable to a wide variety of public records.[115]

Section 1507 provides a similar exception for recorded private writings. It states that "[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."[116] Thus the contents of a deed may be proven by a certified copy of the record without

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[111] *See* CAL. EVID. CODE § 1504 (West 1968).

[112] *See* FED. R. EVID. 1004 (4).

[113] CAL. EVID. CODE § 1506 (West 1968) provides:

> 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.

[114] CAL. EVID. CODE § 200 (West 1968).

[115] People v. Crosby, 58 Cal. 2d 713, 726, 25 Cal. Rptr. 847, 855, 375 P.2d 839, 847 (1962) (entries on New York City register of voters); *In re* Connor, 16 Cal. 2d 701, 713, 108 P.2d 10, 17 (1940) (photostatic copy of letter in the hands of the District Attorney admissible); Hewitt v. Superior Court, 5 Cal. App. 3d 923, 929, 85 Cal. Rptr. 493, 497 (1st Dist. 1970) (abstract of arrest warrant); Estate of Dwyer, 168 Cal. App. 2d 264, 268, 335 P.2d 718, 722 (4th Dist. 1959) (copy of accounts of taxpayer as reflected by public records of United States Bureau of Internal Revenue); Whitson v. La Pay, 153 Cal. App. 2d 584, 589, 315 P.2d 45, 49 (2d Dist. 1957) (copy of act by municipality); Hollander v. Denton, 69 Cal. App. 2d 348, 350, 159 P.2d 86, 88 (4th Dist. 1945) (copy of ordinance establishing street grade); People v. Santos, 36 Cal. App. 2d 599, 97 P.2d 1050 (3d Dist. 1940) (copies of prison records to show fact of incarceration); People v. Sanders, 28 Cal. App. 2d 746, 747, 83 P.2d 720, 721 (4th Dist. 1938) (certified copy of motor vehicle records admissible to show suspended driver's license). license).

[116] CAL. EVID. CODE § 1507 (West 1968) provides:

> 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.

producing the original.[117]

The use of a copy in lieu of an original public record is well accepted because the removal of a public record for production in court would (1) make it impossible for others to use the record in the interim; (2) pose a risk of loss; and (3) cause additional wear and tear on the document.[118]

Sections 1506 and 1507 do not eliminate the code requirement that an agency representative appear in court to authenticate the copy.[119] In contrast, California Evidence Code Section 1530 provides that a certified copy of a writing in the custody of a public entity is prima facie evidence of both authentication and content.[120] Section 1530 is more widely used than sections 1506 or 1507 because in addition to being an exception to the best evidence rule it eliminates the burden on public agencies of dispatching an authenticating witness.[121] The federal rules contain a similar exception allowing the admission of copies of documents which are official records and documents that have been either filed or recorded.[122]

6. VOLUMINOUS WRITINGS

Section 1509 provides that a summary of a writing is admissible if (1) "the writing consists of numerous accounts or other writings" which (2) "cannot be examined in court without great loss of time" and (3) the evidence concerns only "the general result of the whole."[123] The court is also given the discretion to have the writings

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[117]Marriner v. Dennison, 78 Cal. 202, 213, 20 P. 386, 391 (1889) (copy of deed); Gethin v. Walker, 59 Cal. 502, 506 (1881) (copy of deed); Canfield v. Thompson, 49 Cal. 210, 212, (1874) (copy of deed); Spect v. Gregg, 51 Cal. 198, 200 (1875) (copy of powers of attorney); Jones v. Marks, 47 Cal. 242, 248 (1874) (copy of powers of attorney).

[118]4 WIGMORE, *supra* note 20, § 1215.

[119]See note 6 supra.

[120]CAL. EVID. CODE § 1530(a) (West 1968). The relevant part of the statute provides:

> A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing or entry if: (1) the copy purports to be published by the authority of the nation or state, or public entity therein, in which the writing is kept . . . .

[121]*See* cases cited in note 115 *supra*.

[122]FED. R. EVID. 1005.

[123]CAL. EVID. CODE § 1509 (West 1968) provides:

> 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.

A majority of states have adopted a similar provision. *See* Annot., 66 A.L.R. 1206 (1930).

"produced for inspection by the adverse party."[124]

The exception for voluminous writings is dictated by practicality. Some facts can be ascertained only from inspection of a multitude of documents. It would be unduly time consuming and disruptive for this inspection process to be undertaken in court. Moreover the introduction of summaries often brings better evidence before the court, since neither the judge nor the jury can effectively synthesize or analyze voluminous writings during the course of the trial. As a result, the exception has been used frequently in civil[125] and criminal[126] cases.

The courts are particularly disposed to allow a summary statement by one who has examined business records that a specific entry is absent from those records.[127] Direct proof of such a fact would re-

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[124] CAL. EVID. CODE § 1509 (West 1968). For the common law development of this requirement *see* People v. Doble, 203 Cal. 510, 515, 265 P. 184, 187 (1928) (writings need not actually be introduced into evidence so long as they are available for inspection by the opposing counsel); Mayer v. Hazzard, 10 Cal. App. 2d 1, 4, 51 P.2d 189, 191 (2d Dist. 1935) (defendant had full opportunity to examine the original documents); People v. Roth, 137 Cal. App. 592, 609, 31 P.2d 813, 820 (2d Dist. 1934) (originals introduced into evidence); McPherson v. Great Western Milling Co., 44 Cal. App. 491, 495, 186 P. 803, 805 (1st Dist. 1919) (originals in possession of opposing party).

[125] Purer v. Aktiebolaget Addo, 410 F.2d 871, 874 (9th Cir. 1969) (summary of advertising expenditures and other records admissible when prepared by accounting department); *In re* Cathey, 55 Cal. 2d 679, 692, 12 Cal. Rptr. 762, 768, 361 P.2d 426, 432 (1961) (summary of hospital records by physician admissible); Johnstone v. Morris, 210 Cal. 580, 588, 292 P. 970, 973 (1930) (accountant's summary of corporate books admissible); Vanguard Recording Society, Inc. v. Fantasy Records, Inc., 24 Cal. App. 3d 410, 418, 100 Cal. Rptr. 826, 832 (1st Dist. 1973) (summary abstracted from invoices by data processing machines admissible to show sales); Exclusive Florists, Inc., v. Kahn, 17 Cal. App. 3d 711, 715, 95 Cal. Rptr. 325, 327 (4th Dist. 1971) (in contract action, summary of business records admissible to show purchases made); Kirby v. Alcoholic Beverage Control Appeals Bd., 8 Cal. App. 3d 1009, 1017, 87 Cal. Rptr. 908, 914 (1st Dist. 1970) (summaries of extensive and detailed circulation lists admissible).

[126] People v. Doble, 203 Cal. 510, 515, 265 P. 184, 187 (1928) (in prosecution for violation of corporate securities act, summary of books held not admissible when books themselves are not shown to be admissible); People v. Dole, 122 Cal. 486, 496, 55 P. 581, 585 (1898) (in forgery prosecution, testimony of bank teller who examined records admissible to show that defendant had no account); People v. Burman, 138 Cal. App. 2d 216, 222, 291 P.2d 49, 52 (2d Dist. 1955) (in embezzlement prosecution, testimony of accountant who has examined corporate books admissible as to results of examination); People v. Wheeler, 109 Cal. App. 2d 714, 716, 241 P.2d 276, 278 (2d Dist. 1952) (in prosecution for bad checks, testimony of witness who searched records admissible to show that defendant had made no arrangements for credit).

[127] For example, in a prosecution for passing bad checks, testimony of a bank official that he had searched the bank record books and found no account in defendant's name would be sufficient. *See* Pacific Paving Co. v. Gallett, 137 Cal. 174, 176, 69 P. 985, 986 (1902) (no record of company resolution); People v. Dole, 122 Cal. 486, 496, 55 P. 581, 585 (1898) (no record of account); People v. Wheeler, 109 Cal. App. 2d 714, 716, 241 P.2d 276, 278 (2d Dist. 1952) (no record of arrangements for credit); People v. Gormley, 64 Cal. App.

quire an in-court examination of every entry in the relevant records. In addition, testimony concerning the nonexistence of an entry, unlike that alleging the existence of an entry, is less susceptible to distortion or interpretation.

The federal rules provide a similar exception, but require that the original records be made available for examination or copying by other parties.[128] California makes access to the original writings discretionary with the trial courts, but in no instance has a trial court denied a party opponent access to the originals.

7. ORIGINAL PRODUCED AT HEARING

Section 1510 provides that "if the writing has been produced at the hearing and made available for inspection by the adverse party," the best evidence rule will not bar the admission of a copy.[129] This exception was intended to prevent business records which are needed by the owner on a day-to-day basis from being tied up in court during extended trials.[130]

Most copies of business records are admitted under California's version of the Uniform Photographic Copies of Business and Public Records as Evidence Act.[131] Thus, to a large extent, section 1510 is an unnecessary duplication. The exception has been invoked, however, to permit prosecutors in criminal trials to introduce amplified re-recordings of taped interviews, by producing the original recording at trial for verification of accuracy.[132] The federal rules accomplish the purpose of this exception by permitting all duplicates to be introduced, unless a genuine question is raised as to the authenticity of the original or unless it would be unfair to admit the duplicate instead of the original.[133]

2d 336, 338, 148 P.2d 687, 688 (2d Dist. 1944) (no record of bank account; People v. Weaver, 96 Cal. App. 1, 9, 274 P. 361, 364 (3d Dist. 1928) (no funds in account); People v. Kawano, 38 Cal. App. 612, 614, 177 P. 174, 175 (2d Dist. 1918) (no record of bank account).

[128] FED. R. EVID. 1006.

[129] CAL. EVID. CODE § 1510 (West 1968) provides:

> 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.

[130] CAL. EVID. CODE § 1510, Law Rev. Comm'n Comment (West 1968).

[131] UNIFORM PHOTOGRAPHIC COPIES OF BUSINESS AND PUBLIC RECORDS AS EVIDENCE ACT § 1 (1949) *codified in* CAL. EVID. CODE § 1550 (West 1968).

[132] People v. Marcus, 31 Cal. App. 3d 367, 370, 107 Cal. Rptr. 264, 266 (2d Dist. 1973) (prosecutor in criminal trial permitted to re-record taped conversation with defendant to make conversation audible and then introduce the duplicate at trial while producing the original recording for verification of its accuracy); People v. Kageler, 32 Cal. App. 3d 738, 743, 108 Cal. Rptr. 235, 239 (2d Dist. 1973) (re-recording of taped conversation played for jury).

[133] FED. R. EVID. 1003.

C. SECONDARY EVIDENCE RULE

The "secondary evidence rule" provides that if neither the original writing nor a copy is available, oral testimony may be used to prove the content of an original writing.[134] Section 1505 sets out the California secondary evidence rule as it applies to private writings.[135] It provides that if a proponent does not have within his possession or control "a copy of a writing described in Section 1501, 1502, 1503 or 1504 . . . " other secondary evidence of the content is admissible.[136] Section 1508 provides a similar rule with respect to secondary evidence of public records, but imposes the additional requirement that "reasonable diligence" to obtain a copy of the writing be shown as a foundation for the admission of other secondary evidence.[137] Considering the relative ease of obtaining a copy of a writing in public custody, this requirement eliminates the use of other secondary evidence in all but extraordinary circumstances.[138]

The federal rules eliminate preferences among classes of secondary evidence with respect to private writings.[139] A hierarchy of preference is considered unnecessary in light of the normal motivation of the parties to bring the most convincing evidence before the trier of fact.[140] If better evidence is available and not offered, the jury will consider this fact in determining the reliability of the evidence. An extended scheme of preferences would unnecessarily increase the number of evidentiary objections causing delay in the trial.

The federal provision applicable to public records retains a secondary evidence rule. It requires that the content of a public record be proven by a certified copy, and allows other secondary evidence only if a copy "cannot be obtained by the exercise of reasonable diligence."[141] A system of preferences for public records is justified on

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[134] Murphy v. Nielsen, 132 Cal. App. 2d 396, 400, 282 P.2d 126, 129 (3d Dist. 1955). *See also* Ford v. Cunningham, 87 Cal. 209, 25 P. 403 (1890).

[135] CAL. EVID. CODE § 1505 (West 1968) provides:

> 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.

[136] *Id.*

[137] CAL. EVID. CODE § 1508 (West 1968) provides:

> 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.

[138] *See* CAL. EVID. CODE § 1505, Law Rev. Comm'n Comment (West 1968).

[139] *See* FED. R. EVID. 1005.

[140] *See* WEINSTEIN, *supra* note 1, ¶ 1004[01].

[141] FED. R. EVID. 1005.

two grounds.[142] Often a public record will be a technical instrument such as a deed in which a slight variation in wording will greatly affect the outcome of the litigation. Additionally, because a copy is usually easy to obtain, this requirement ensures the reliability of secondary evidence without imposing an unreasonable burden on the proponent of the evidence.

IV. REVISION OF THE CALIFORNIA RULE

The best evidence rule is often a technical obstacle to the admission of reliable evidence at trial. Wigmore has pointed out that because of its mechanical nature the best evidence rule

> 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.[143]

Needless application of the best evidence rule not only results in the exclusion of reliable evidence, but also creates technical grounds for reversal on appeal.[144]

With the development of modern California discovery procedures, the need for the rule has been substantially reduced. The use of comprehensive interrogatories enables a litigant to ascertain the existence, as well as the location, of all relevant documentary evidence. Once documents are located, an order for production affords the litigant an opportunity to inspect the originals for signs of fraud or inaccuracy.[145]

Discovery procedures accomplish the purposes of the best evidence rule in most litigation contexts.[146] There are certain situations, however, in which discovery is unavailable or unused. A best evidence rule in these circumstances continues to serve a valid function. Un-

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[142] *See* WEINSTEIN, *supra* note 1, ¶ 1004[01].

[143] 4 WIGMORE, *supra* note 20, § 1191. It should be remembered that Wigmore's reaction to the rule pre-dates the development of modern discovery procedures. The inspection of documents prior to trial has reduced the number of best-evidence-rule objections and as a result there are fewer reversals attributable to the best evidence rule.

[144] *See* Dugar v. Happy Tiger Records, Inc., 41 Cal. App. 3d 811, 816, 116 Cal. Rptr. 412, 415 (2d Dist. 1974) (plaintiff granted judgment based upon affidavits, accompanied by photostatic copies of original invoices; defendant did not appear at the hearing to make a best-evidence rule objection; court reversed summary judgment on best-evidence rule grounds; even in the absence of a best-evidence-rule objection at the hearing); People v. King, 101 Cal. App. 2d 500, 507, 225 P.2d 950, 954 (2d Dist. 1950) (taped recording of admissions obtained by means of a microphone concealed in prison cell of criminal defendants; pursuant to normal procedure, content was recorded onto a disc to make audible, and the original tape was erased; court held admission of discs violated best evidence rule, despite reliability of re-recording procedure and absence of implications of fraud).

[145] *See generally* D. LOUISELL AND B. WALLY, MODERN CALIFORNIA DISCOVERY (2d ed. 1972).

[146] *See generally* Clearly and Strong, *supra* note 8, at 835-48.

anticipated documents occasionally emerge at trial when discovery has been incomplete or when the significance or existence of a document is ascertained after the time for discovery has passed. Also, when the expected amount of the judgment does not justify extensive discovery, a provision which can be invoked at trial provides an inexpensive way to inspect original documents. This reasoning also applies to documents located outside the jurisdiction, when discovery requires a substantial outlay of time and money. Finally, the rule continues to be useful in criminal litigation in which discovery procedures available to the prosecution are substantially limited.[147]

Because the California best evidence rule serves a valid function in these limited areas, it seems ill-advised to abandon the rule as has been suggested by some commentators.[148] Instead, it should be revised so that it does not mechanically operate each time secondary evidence is offered to prove a writing's content. The following discussion presents two alternative proposals which would minimize needless application of the rule. The first proposal represents the position taken by the federal rules and would require only a minor departure from existing California law. The second proposal provides a more thorough remedy, but would require more substantial legislative revision.

A. THE FEDERAL SOLUTION

One solution to the problem of mechanical application of the California best evidence rule would be to adopt the changes found in the new Federal Rules of Evidence. The federal rules expand the term "duplicate" to include a copy produced by any method or reproduction which ensures accuracy.[149] A duplicate is admissible to the same extent as an original unless the trial judge finds as a preliminary fact that a genuine question is raised as to the authenticity of the original or that under the circumstances it would be unfair to admit the duplicate in lieu of the original.[150] These limitations recognize that in spite of the accuracy of modern reproduction methods there are still reasons to inspect the original. For example, if the circumstances

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[147] *Id.*

[148] *See e.g.*, Taylor, *The Case for Secondary Evidence*, 81 CASE AND COMMENT 46, 48 (1976). One commentator has suggested that the present rule be replaced by a simple provision giving the court discretion to require a party to produce the original or state his reasons for not producing it. *See* Broun, *supra* note 9, at 616-17. Although this solution undoubtedly forecloses the possibility of rigid application of the rule, it may be too broad in that the exclusionary feature of the rule is all but eliminated. Secondary evidence of a writing's content is often as reliable as the original, but that is not true in every instance. For a more extensive discussion of the Broun proposal *see* 5 WEINSTEIN, *supra* note 1, ¶ 1002[02].

[149] *See* FED. R. EVID. 1001(4).

[150] *See* FED. R. EVID. 1003.

suggest a possibility of fraud or if only part of the original is copied so that the duplicate appears out of context, the trial judge would be authorized to insist on production of the original.[151]

The primary effect of this change in California would be to permit photocopies and re-recordings to be introduced in most circumstances without accounting for the original. Such copies have been excluded in California in the past when they failed to qualify under one of the best-evidence-rule exceptions.[152] The change would save time and expense by dispensing with the production of the original writing when an equally reliable copy is available.

In spite of the significant revision with respect to copies, the federal best evidence rule may still exclude oral evidence of a writing's content even though its reliability is unchallenged. A case decided prior to the adoption of the federal rules provides an illustration.[153] The defendant was charged with receiving and concealing a stolen car. An F.B.I. agent testified that a car driven by the defendant was parked in front of the house allegedly connected with the crime. The agent also stated that a book published by the Department of Motor Vehicles listed the license plate on that car as having been issued to the defendant. The agent testified on cross examination that the book was available in his office, located in the same building in which the trial was taking place. In reversing the conviction, the appellate court held that the admission of the agent's testimony in lieu of production of the book was a violation of the best evidence rule and was prejudicial error.[154]

As the dissent pointed out, the policy of the best evidence rule was fully satisfied in this case, because there was no genuine dispute about the accuracy of the agent's testimony.[155] Furthermore, if the testimony had been inaccurate, the defendant could have impeached the witness by producing the book which was readily available. The government's failure to offer the book in evidence was merely an oversight in trial preparation.

The result in this case would probably remain unchanged under the new federal rules.[156] The oral testimony was not within the broad definition of "duplicate" nor did it qualify under a federal best-evidence-rule exception. Oral testimony in many instances is less reliable than mechanically produced copies, but it should not be excluded for technical noncompliance with the best evidence rule if no genuine dispute exists as to the content of the original writing.

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[151] *See* text accompanying notes 13-21 *supra.*

[152] *See* cases cited note 144 *supra. But see* text accompanying notes 55-56 *supra.*

[153] United States v. Rohalla, 369 F.2d 220 (7th Cir. 1966).

[154] *Id.* at 224.

[155] *Id.*

[156] Broun, *supra* note 9, at 622.

B. AN ALTERNATIVE PROPOSAL

A more uniform and conceptually simpler approach to the revision of the California best evidence rule would be to make secondary evidence of a writing's content admissible unless the trial judge finds, as a preliminary fact, that (1) a genuine dispute exists concerning the material terms of the writing or (2) it would be unfair to admit the secondary evidence in lieu of the original writing. The admissibility of all evidence, whether documentary or oral, when offered to prove the content of a writing would thus be determined by a single procedure. Such a procedure would make all evidence of a writing's content admissible unless the opponent stated a bona fide reason for its exclusion. If the judge determined that the opponent had raised doubt about the reliability of the evidence,[157] the proponent would have to produce the original or qualify the evidence under one of the rule's exceptions. The trial judge would be guided by the existing case law in determining the admissibility of the challenged secondary evidence. The evidence would be admitted if it qualified under one of the exceptions. Therefore no evidence admissible under the existing law would be excluded under this proposal.

The proposed revision is also conceptually simpler than the existing rule. The present rule makes all secondary evidence inadmissible with the exceptions carving out a substantial area of admissibility. Under the proposed revision, all secondary evidence would be admissible with the existing rule invoked to create a small area of inadmissibility. Evidence would be excluded only in those instances in which the reliability of the secondary evidence is genuinely challenged, and the evidence cannot be admitted under one of the statutory exceptions.

A potential criticism of this proposal is that it grants the trial judge discretion to admit oral testimony which would not qualify under one of the best-evidence-rule exceptions. In exercising his discretion, a trial judge could mistakenly admit oral testimony which is unreliable. The decision of the trial court would only be reversed on appeal if the opponent of the evidence sustains the substantial burden of showing that the decision constituted an abuse of discretion. The harmful effect of the admission of possibly unreliable oral testimony is not great, however, in light of the normal motivation of the litigants to bring the most convincing evidence before the trier of fact.[158] If better evidence is available and not offered, the jury will likely discount the probative value of the evidence.

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[157] This would be a preliminary fact determination under CAL. EVID. CODE § 405 (West 1968).

[158] Cleary and Strong, *supra* note 8, at 846.

V. CONCLUSION

The best evidence rule is of diminished importance in light of modern discovery procedures which enable litigants to detect inaccurate or fraudulent documentary evidence prior to trial. Although the rule serves a valid function in limited contexts, its mechanical application can cause valuable evidence to be excluded at trial. A revision of the California best evidence rule is overdue. At a minimum, the changes found in the new Federal Rules of Evidence should be adopted in California. An alternative solution would be to condition the application of the rule on the preliminary finding of either (1) a genuine dispute concerning the terms of the writing or (2) prejudice to the opponent resulting from the admission of the secondary evidence. The mechanical operation of the rule would thereby be eliminated without sacrificing the assurance that the trier of fact is presented with the most accurate evidence available in those situations where informed legal judgment has concluded that precision is essential.

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