

*California Evidence Code—Federal Rules
of Evidence*

**VI. Authentication and the Best and
Secondary Evidence Rules**

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THIS ARTICLE EXAMINES three rules of evidence relating to the introduction of writings: (1) the requirement of authentication, (2) the Best and Secondary Evidence Rules, and (3) the completeness doctrine. The Article compares the approach of the California Evidence Code ("Code") with that of the Federal Rules of Evidence ("Rules") to objections based on these rules. Since the Uniform Rules of Evidence ("Uniform Rules") largely track the federal provisions relating to authentication, the Best Evidence Rule, and the completeness doctrine, this Article does not discuss the Uniform Rules.¹

Part I examines the concept of authentication in the Rules and the Code and recommends that the Code more closely mirror the Rules by explicitly referencing non-writings and providing an additional presumption of admissibility for commercial and mercantile brands.² Part II explores the similarities between the Federal Best Evidence Rule and the California Secondary Evidence Rule and concludes that California should retain the Secondary Evidence Rule, which recently replaced its version of the Best Evidence Rule. Part III discusses the completeness doctrine, a rule that also applies to the introductions of writings. The doctrine seeks to avoid the misimpressions that can be created when only a part of a declaration is offered in evidence. It requires the introduction of any other declaration, which in fairness ought to be considered with the part introduced. Part III recommends retaining the California provision. Unlike its federal counterpart, the California rule is not limited to writings but includes conversations as well.

This Article is the sixth paper of a study commissioned by the California Law Revision Commission ("Commission") to assess whether the California Evidence Code should be conformed to the Federal Rules of Evidence. The version prepared for the Commission was submitted to the Commission on October 30, 2005 and can be viewed on the Commission's website.³ The California Legislature cre-

1. *Compare* UNIFORM RULES OF EVIDENCE 901-1008, FEDERAL RULES OF EVIDENCE, *with* FEDERAL RULES OF EVIDENCE 106, 901-1008. Although their substance is largely the same, the language of the Uniform Rules and Federal Rules of Evidence is not identical.

2. FED. R. EVID. 902(7).

3. California Law Revision Commission, <http://www.clrc.ca.gov/H850.html> (last visited Aug. 2, 2006).

ated the Commission in 1953 as the permanent successor to the Code Commission.⁴ Its chief responsibility is to review California statutory and decisional law to discover defects and anachronisms and to recommend legislation to make needed reforms.⁵

The California and federal provisions were in effect as of December 2004. To assist the reader, the pertinent code sections and rules are reproduced as an appendix to the Article.

The opinions, conclusions, and recommendations contained in this article are those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Commission.

I. The Requirement of Authentication

A. Authentication Generally: The Role of the Judge and Jury

Whenever a proponent offers a writing in evidence, the proponent must also present enough evidence to permit the judge to find that the writing is what the proponent claims it to be.⁶ If, for example, the plaintiff offers a writing, which he claims is the contract that he and the defendant entered into, then the plaintiff must offer some evidence indicating that the writing is indeed that contract. In the words of the California Law Revision Commission, the plaintiff must show that the writing is “authentic,” i.e., the exact contract entered into between the parties.⁷ If the writing is not the contract, then the writing is irrelevant and inadmissible.

Because authentication is a form of relevance, it substantially limits the role of the judge when ruling on an authentication objection.⁸ If, viewing the evidence in the light most favorable to the plaintiff, the judge concludes that a reasonable jury could find the writing to be the contract, then the judge must let the issue of the contract’s authenticity go to the jury.⁹ The defendant may offer evidence disputing the writing’s authenticity. However, such evidence will not prevent the introduction of the writing so long as the plaintiff’s evidence is “sufficient to sustain a finding that it is the writing that the proponent of

4. California Law Revision Commission, <http://www.clrc.ca.gov/background.html> (last visited Aug. 24, 2006).

5. *Id.*

6. CAL. EVID. CODE § 1400 (West 1995).

7. *Id.* § 1400 (comment).

8. *Id.*

9. *Id.* §§ 403(a)(3), 1400.

the evidence claims it is.”¹⁰ It is up to the jury, not the judge, to decide from all of the evidence whether the writing is in fact the contract entered into by the parties.¹¹ If the writing is received in evidence, the defendant can require the judge to instruct the jurors to disregard the writing unless they first find that it is the contract.¹² The limiting instruction, combined with the sufficiency standard, assures that the jurors will have the last word on the contract’s authenticity.

Although authentication is usually associated with writings, the concept applies whenever any tangible object is offered in evidence.¹³ Whether the object is the knife the prosecution believes the accused used to kill the victim or the ladder the plaintiff claims was defective, the proponent must connect the object with the case. Showing that the object is relevant to the pending issues will require some evidence that the object is what the proponent claims it to be. For purposes of admissibility, the quantum of evidence, as in the case of writings, needs to satisfy only a sufficiency standard.¹⁴

Under the Code and the Rules, a trial judge may admit evidence on the condition that the proponent supply the evidence connecting the item with the case before the close of evidence.¹⁵ Thus, a judge may admit the purported contract, knife, or ladder, subject to a motion to strike if the proponent fails to furnish the connecting evidence.¹⁶

B. Authentication Under the California Evidence Code

The various Code provisions describing the manner in which the requirement of authentication can be satisfied assume that the object to be authenticated is a writing. The provisions are not exclusive, but

10. CAL. EVID. CODE § 1400 (West 1995).

11. *Id.* § 1400 (comment).

12. *Id.* § 403(c)(1)–(2).

13. *Id.* § 1400 (comment).

14. *Id.* § 403(a)(1).

15. *Id.* § 403(b).

16. California Evidence Code section 403(b) does not empower judges to admit the testimony of a witness on the condition that the proponent later demonstrate the witness’s personal knowledge of the subject matter of the testimony. Against a lack of personal knowledge objection, the proponent must show the witness’s personal knowledge before the witness can continue with the testimony. *Id.* § 702(a). Section 1401(a) provides that “[a]uthentication of a writing is required before it may be received in evidence.” *Id.* § 1401(a). But since section 1401(a) is not exempted by section 403(b), presumably the requirement is not violated if the writing is received only conditionally.

are illustrative only, and the proponent is free to use any otherwise admissible evidence to identify a writing.¹⁷

Anyone who sees a writing made or executed may authenticate the writing.¹⁸ Where the party against whom the writing is offered has admitted its authenticity or has treated the writing as authentic, courts may consider the writing authenticated.¹⁹ Evidence that the writing is a direct response by the person who the proponent of the evidence claims authored the writing may serve to authenticate a writing.²⁰ Likewise, evidence referring to or stating matters that are unlikely to be known to anyone other than the person the proponent claims as the maker of the writing may serve to authenticate a writing.²¹

Evidence that the writing is in the handwriting of the maker may authenticate a writing, or if signed, that the signature is the maker's.²² A lay witness who has personal knowledge of the maker's handwriting or signature can give an opinion on whether the handwriting or signature is the maker's.²³ The ways in which the witness acquires the personal knowledge include: seeing the purported maker write or sign,²⁴ seeing a writing purporting to be in the handwriting of the supposed maker and upon which the supposed maker has acted,²⁵ or receiving letters from the supposed maker in response to letters duly addressed and mailed by the witness to the supposed maker.²⁶

An expert can give an opinion as to the authenticity of a writing by comparing the writing with one that has been authenticated as having been prepared or signed by the purported maker.²⁷ This method applies to any form of writing, not just handwriting, since experts can now compare typewritten specimens and other forms of writing as accurately as they can compare handwritten specimens.²⁸

A proponent may also authenticate a handwritten document by providing the fact finder, whether judge or jury, with a specimen which the court finds was admitted or treated as authentic by the party

17. CAL. EVID. CODE § 1410 (West 1995).

18. *Id.* § 1413.

19. *Id.* § 1414.

20. *Id.* § 1420.

21. *Id.* § 1421.

22. *Id.* § 1415.

23. *Id.* § 1416.

24. *Id.* § 1416(a).

25. *Id.* § 1416(b).

26. *Id.* § 1416(c).

27. *Id.* § 1418.

28. *Id.* § 1418 (comment).

against whom the handwritten document is offered.²⁹ In this case, it is the fact finder rather than the expert who makes the comparison. In all cases, however, it is the fact finder who determines whether the purported writing is in fact what the proponent claims it to be.

As to acknowledged writings, the California Civil Code provides for the "acknowledgment" of such instruments as conveyances.³⁰ An acknowledgment consists of a certificate in which a designated officer certifies that the person signing the instrument personally appeared before the officer and declared to the officer that he signed the instrument in his authorized capacity.³¹ If the certificate meets the requirements of the Civil Code, then the Evidence Code provides that courts may receive the certificate as prima facie evidence of the facts recited in the certificate.³² Courts may also treat the certificate as prima facie evidence of the authenticity of the signature of the person who purportedly has signed the instrument.³³ Since authenticity raises a sufficiency issue, the certificate should permit the proponent to get to the issue of whether the signature appearing in the instrument is that of the person who appeared before the officer to the jury.

The Code, however, does not include wills among acknowledged writings.³⁴ But the Code does include another presumption favoring the authentication of some documents, including wills, affecting property interests. Section 643 treats a deed, will, or other writing purporting to create, terminate, or affect an interest in real or personal property as authentic if the writing is at least thirty years old; is in such condition as to create no suspicion about its authenticity; was kept or, if found, was found in a place where one would likely encounter such a writing; and the writing has been generally acted upon as authentic by persons having an interest in the matter.³⁵ The presumption created by section 643 does not affect the persuasion burden regarding the authenticity of the writing. If the opponent introduces some evidence contesting the document's authenticity, the proponent will

29. *Id.* § 1417.

30. CAL. CIV. CODE §§ 1180–1207 (West 1982).

31. CAL. CIV. CODE § 1189 (West 1982 & Supp. 2006).

32. CAL. EVID. CODE § 1451 (West 1995).

33. *Id.*

34. *Id.*

35. *Id.* § 643.

have the burden of establishing its authenticity by the appropriate persuasion standard without the benefit of the presumption.³⁶

Seals designate the official status of some writings. Section 1452 provides that a seal is presumed to be genuine and its use authorized if it purports to be the seal of the United States, a public entity in the United States, a nation recognized by the United States, a public entity in a nation recognized by the United States, or a notary public within any state of the United States.³⁷ Accordingly, the presence of such a seal authenticates the writing as an official writing of the entity entitled to the use of the seal. The presumption created by section 1452 affects only the burden of producing evidence. If the party opposing the writing introduces evidence sufficient to sustain a finding that the seal is not genuine or its use is not authorized, then the fact finder will have to determine the authenticity of the writing, including the seal, without recourse to any presumption.³⁸ If, on the other hand, the opponent introduces no evidence challenging the genuineness of the seal or its use, then the fact finder will be required to find the writing authentic.³⁹

Signatures can serve the same function as seals in designating certain writings as official. Section 1453 creates the following presumption for signatures:

A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of: (a) A public employee of the United States. (b) A public employee of any public entity in the United States. (c) A notary public within any state of the United States.⁴⁰

Accordingly, the presence of such a signature will authenticate the writing as an official writing of the entity of the employee whose signature appears. The presumption created by section 1453 is the same as the presumption created by section 1452. If the party opposing the writing introduces evidence sufficient to sustain a finding that the signature is not genuine or not authorized, then the fact finder will have to determine the authenticity of the writing without recourse to the presumption.⁴¹ If the opponent fails to challenge the genuineness of

36. *Id.* § 630. For a discussion of the effects of different presumptions on the burden of persuasion, see MIGUEL A. MENDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES—A PROBLEM APPROACH §§ 18.04–18.06 (3d ed. 2004).

37. CAL. EVID. CODE § 1452 (West 1995).

38. *Id.* (comment); MENDEZ, *supra* note 36, §§ 18.04–18.06.

39. *Id.* (comment); MENDEZ, *supra* note 36, §§ 18.04–18.06.

40. *Id.* (comment); MENDEZ, *supra* note 36, §§ 18.04–18.06.

41. *Id.* § 1450 (comment); MENDEZ, *supra* note 36, §§ 18.04–18.06.

the signature or its use, then the fact finder must find that the document is authentic.⁴²

A purported copy of a writing in the custody of a public entity is prima facie evidence of the existence and content of such a writing if the copy purports to be published by the authority of the public entity in which the writing is kept.⁴³ A purported copy of a writing in the custody of a public entity is also prima facie evidence of the existence and content of such a writing if the office in which the writing is kept is within the United States and the copy is attested or certified as a correct copy of the writing by a public employee having legal custody of the writing.⁴⁴ Although the attestation or certification is an out-of-court statement asserting the copy's authenticity, the attestation or certification may be received for the truth as an exception to the hearsay rule.⁴⁵

The Code does not use self-authentication. Instead, it uses presumptions to favor the authentication of some writings. As has been noted, these presumptions favor the authentication of acknowledged documents,⁴⁶ some writings affecting interests in real or personal property,⁴⁷ documents bearing official seals,⁴⁸ and documents bearing official signatures.⁴⁹ In addition, under the Code, a book purporting to be printed or published by a public authority is presumed to have been so printed or published;⁵⁰ a book purporting to contain reports of cases adjudged in the tribunals of the state or nation where the book is published is presumed to contain correct reports of those cases;⁵¹ and printed materials purporting to be a particular newspaper or periodical are presumed to be that newspaper or periodical if regu-

42. CAL. EVID. CODE § 1450 (comment) (West 1995); MENDEZ, *supra* note 36, §§ 18.04–18.06.

43. CAL. EVID. CODE § 1530(a)(1).

44. *Id.* § 1530(a)(2). If the office in which the writing is kept is not within the United States, additional attestation requirements must be met. *See id.* § 1530(a)(3).

45. *Id.* § 1530 (comment). The hearsay exception is only for the attestation or certification. *See id.* § 1453. Whether or not the contents of the copy of the writing are admissible for the truth of the matters stated depends on the hearsay rule and its exceptions. Some courts still miss this point. *See, e.g., In re Kirk*, 88 Cal. Rptr. 2d 648, 654 (Cal. Ct. App. 1999) (mistakenly asserting that the hearsay exception for the certification created a hearsay exception for the contents of the writing).

46. *See supra* text accompanying notes 30–33.

47. *See supra* text accompanying note 35.

48. *See supra* text accompanying notes 37–39.

49. *See supra* text accompanying notes 40–42.

50. CAL. EVID. CODE § 644 (West 1995).

51. *Id.* § 645 (comment).

larly issued at average intervals not exceeding three months.⁵² These presumptions do not shift the burden of persuasion with regard to the existence of the presumed fact. If the opponent introduces some evidence contesting the authenticity of the book or periodical, the proponent must convince the fact finder of the document's authenticity by the appropriate persuasion standard without the aid of the presumption.⁵³

C. Authentication Under the Federal Rules

Under the Rules, as under the Code, authentication presents a sufficiency issue. It is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims."⁵⁴ The methods employed to authenticate are similar to those found in the Code.⁵⁵ The Rules, like the Code, provide that the methods enumerated are illustrative, not exclusive.⁵⁶ And like the Code, the Rules also allow the judge to admit an item of evidence subject to a motion to strike if the proponent fails to connect the item with the case before the close of the evidence.⁵⁷

The Rules differ from the Code in two important respects. First, the requirement of authentication is not limited to writings. The Rules make explicit what the Code implies—that the requirement of authentication applies to any tangible object that is offered in evidence.⁵⁸ Although the Rules contain no special provisions for authenticating chattel, the Rules do give special attention to voice identification and computer printouts. A voice can be identified by anyone who acquired the necessary knowledge by hearing the voice at any time under circumstances connecting the voice with the alleged speaker.⁵⁹ A computer printout can be authenticated by evidence describing the process or system used to produce the result and showing that the process or system produces an accurate result.⁶⁰

52. *Id.* § 645.1.

53. *Id.* § 630.

54. FED. R. EVID. 901(a).

55. *See id.* R. 901(b).

56. *Id.*

57. FED. R. EVID. 104(b).

58. Whereas California Evidence Code section 1400 refers to the authentication of a "writing," Federal Rule of Evidence 901 refers to the authentication of "the matter in question."

59. FED. R. EVID. 901(b)(5). For the requirements for identifying telephone conversations, refer to R. 901(b)(6).

60. FED. R. EVID. 901(b)(9). For an extended discussion of the admissibility of computer printouts as an exception to the hearsay rule, see MENDEZ, *supra* note 36, § 10.05.

Second, unlike the Code, the Rules also provide for the “self-authentication” of certain writings.⁶¹ If a writing qualifies for self-authentication, no extrinsic evidence of authenticity is required as a condition of admissibility.⁶² These writings include domestic public documents under seal, certified copies of public records, acknowledged documents, official publications, newspapers and periodicals, trade inscriptions, and commercial paper.⁶³

D. The Code Should Adopt the Rules’ Explicit Language Regarding Non-Writings, Commercial, and Mercantile Brands

Substantial overlap characterizes the approach taken by both the Code and the Rules regarding authentication. Most differences appear to be the product of drafting choices and do not raise significant policy concerns. Accordingly, the Code’s provisions relating to authentication should generally be retained. Consideration, however, should be given to amending the Code’s definition of authentication to expressly include all tangible items offered in evidence, not just writings. The Rules achieve this goal by referring to the authentication of “the matter in question” and not just a “writing” as does the Code.⁶⁴

In addition, Code drafters should consider including the Rules’ provisions on the self-authentication of “trade inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.”⁶⁵ As the Advisory Committee points out, several factors justify dispensing with preliminary proof of the authenticity of commercial and mercantile brands. “The risk of forgery is minimal. Trademark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given to them.”⁶⁶ Moreover, the opponent is still free to offer evidence to show that the item offered is not authentic and to urge the fact finders to disregard the item unless they find by the appropriate persuasion standard from all of the evidence that the item is what the proponent claims it to be.⁶⁷ If the Code’s preference for presumptions instead of

61. FED. R. EVID. 902.

62. *Id.*

63. *Id.* R. 902(1), (4)–(9).

64. Compare FED. R. EVID. 901(a) with CAL. EVID. CODE § 1400 (West 1995).

65. FED. R. EVID. 902(7).

66. *Id.* (Advisory Committee’s note).

67. See *supra* text accompanying notes 10–12.

self-authentication is retained, a provision should be added making trade inscriptions and the like prima facie evidence of their identity.

II. The Best Evidence and Secondary Evidence Rules

A. Proof of Writings—Convergence and Divergence

1. Definitions

Unless certain exceptional circumstances exist, the Best Evidence Rule requires the use of the original of a writing to prove its content rather than testimony recounting its contents or a copy of the writing.⁶⁸ A major purpose of the rule is to minimize the possibility of misinterpretation that could occur if the production of the original writing were not required to prove its contents.⁶⁹

Both the Code and the Rules define an original as the writing itself or “any counterpart intended to have the same effect by a person executing or issuing it.”⁷⁰ Thus, if the parties to a contract intend for the pink copy to serve as the original, that is the original for purposes of the Best Evidence Rule. The “original” of a photograph includes the negative or any print of the negative.⁷¹ For information stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the information accurately, is an original.⁷²

Both the Code and the Rules also define writings broadly. Under the Code, for example, writings include “handwriting, typewriting, printing . . . photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation.”⁷³ Accordingly, testimony describing X-rays violates the Best Evidence Rule unless the X-rays have been received in evidence.⁷⁴

Since the concern “is with getting the words or other contents before the court with accuracy and precision, . . . a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness.”⁷⁵ Accordingly, the Rules allow a “duplicate” in lieu of the original, unless a genuine ques-

68. FED. R. EVID. 1002.

69. FED. R. EVID. 1001 (Advisory Committee’s note).

70. CAL. EVID. CODE § 255; *see also* FED. R. EVID. 1001(3).

71. CAL. EVID. CODE § 255; *see also* FED. R. EVID. 1001(3).

72. CAL. EVID. CODE § 255; *see also* FED. R. EVID. 1001(3).

73. CAL. EVID. CODE § 250. In addition, the Rules include writings produced by magnetic impulse or by mechanical or electronic recording. FED. R. EVID. 1001(1).

74. *Sirico v. Cotto*, 324 N.Y.S.2d 483 (N.Y. Civ. Ct. 1971).

75. FED. R. EVID. 1003 (Advisory Committee’s note).

tion is raised about the original's authenticity or under the circumstances it would be unfair to admit the duplicate.⁷⁶ Duplicates are admissible also in California but under a broader provision known as the Secondary Evidence Rule.⁷⁷ The Secondary Evidence Rule subsumes the duplicate-original doctrine of the Rules by permitting a party in the first instance to offer secondary evidence of the original.⁷⁸

The Code and the Rules define a duplicate as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original."⁷⁹ Thus, a photograph of a police artist's sketch of a suspect can be offered in place of the sketch.⁸⁰ But because of the possibility of error, manually produced copies, whether handwritten or typed, are not within the definition.⁸¹

2. Changing Times Call for an Expansion of the Best Evidence Rule: California's Secondary Evidence Rule Is a Step in the Right Direction

Although the Federal Rules of Evidence continue to apply the classic formulation of the Best Evidence Rule,⁸² in 1999, the California Legislature replaced the Best Evidence Rule with the Secondary Evidence Rule. A number of factors moved the California Legislature to give secondary evidence the same status as the original writing in proving the contents of a writing. Broad pretrial discovery gives civil litigants an opportunity to inspect the originals, thereby reducing the need to produce the originals in court to assure accuracy. Technological developments, especially the rise of facsimile transmission and electronic mail, pose unanticipated difficulties in ascertaining which document is the "original." Moreover, a party bent on creating fraudulent documents is not likely to be deterred by the rule, and insisting on the use of the original increases litigation costs unnecessarily.⁸³

76. FED. R. EVID. 1003.

77. CAL. EVID. CODE § 1521(d).

78. CAL. EVID. CODE § 1521.

79. CAL. EVID. CODE § 260; *see also* FED. R. EVID. 1001(4).

80. *People v. Garcia*, 247 Cal. Rptr. 94, 96-97 (Cal. Ct. App. 1988).

81. *See* FED. R. EVID. 1001(4) (Advisory Committee's note).

82. *Id.* R. 1002.

83. CAL. EVID. CODE § 1521 (Law Revision Commission's comment); *see also* 26 CAL. L. REV. COMM'N, REPORTS 369 (1996) (discussing the Best Evidence Rule) [hereinafter COMMISSION REPORTS].

Under the new rule, any secondary evidence of an original is as admissible as the original unless (1) a genuine dispute exists concerning the material terms of the writing and justice requires the exclusion, or (2) admission of the secondary evidence would be unfair.⁸⁴ The new rule, however, does not relax the requirements of authentication. Accordingly, a party offering a copy (as opposed to testimony) of the original must still produce evidence demonstrating that the copy is a true copy of a duly authenticated original.⁸⁵

In determining whether it would be unfair to admit a copy, California judges 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.⁸⁶

Because discovery is narrower in California criminal cases than in civil cases, secondary evidence in criminal cases must clear an additional hurdle before it can be admitted.⁸⁷ Even if no genuine dispute exists about the terms of the original, and even if it were fair to receive the secondary evidence, the trial judge nonetheless must exclude the evidence if the judge 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 the trial.⁸⁸ This limitation, however, does not apply if the proponent is offering a duplicate.⁸⁹

84. CAL. EVID. CODE § 1521(a).

85. *Id.* § 1521(c).

86. *Id.* § 1521 (comment).

87. *Id.* § 1522 (comment).

88. *Id.* § 1522. This requirement is subject to a number of exceptions. The requirement does not apply to duplicate originals, writings that are not closely related to the controlling issues in the action, or a copy of a writing that is in the custody of a public entity or that is recorded in the public records. *Id.*

89. *Id.*

3. Applying the Best and Secondary Evidence Rules: More Similarities than Differences

The Federal Best Evidence Rule and the California Secondary Evidence Rule apply only when the proponent seeks to prove the contents of a writing. They do not apply simply because the proponent seeks to prove conversations that may have also been recorded or reduced to writing.⁹⁰ For example, in *Meyers v. United States*,⁹¹ the prosecution sought to prove the testimony that a witness gave to a congressional committee.⁹² The prosecution did so by calling the lawyer who examined the witness before the committee.⁹³ The accused claimed that the lawyer's testimony violated the Best Evidence Rule because the witness's congressional testimony had been taken down by a stenographer.⁹⁴ The reviewing court rejected the accused's claim.⁹⁵ The prosecution was seeking to prove not the contents of the stenographic record but the lawyer's recollection of what the witness had said before the committee.⁹⁶ Had the prosecution sought to prove the contents of the stenographic record, then the accused's objection would have been well taken.⁹⁷

The distinction drawn in *Meyers* applies to any stenographic record. For example, so long as the proponent is not attempting to prove the contents of a deposition or of the record formed at a preliminary hearing, the proponent may elicit testimony about what the deponent or the witness said without violating the Best or Secondary Evidence Rules. The distinction applies to other records as well: payment may be proved without producing a written receipt, and earnings may be proved without producing the books of account, as long as the proponent is not seeking to prove the contents of the written record.⁹⁸

Whether the Best Evidence and Secondary Evidence Rules should encompass chattel has been controversial. Over objection, should testimony be received that a shirt found in a stolen car had a laundry tag with the defendant's initials? Since such inscriptions are within the

90. *People v. Johnson*, 114 Cal. Rptr. 545, 554 (Cal. Ct. App. 1974) (noting a police officer may relate the accused's confession in court even though it was recorded).

91. 171 F.2d 800 (D.C. Cir. 1948).

92. *Id.* at 802-803, 812.

93. *Id.* at 802-803.

94. *Id.* at 812.

95. *Id.*

96. *Id.*

97. *Id.* at 812-813.

98. FED. R. EVID. 1002 (Advisory Committee's note).

broad definition of a writing, compliance, unless excused, would require the production of the shirt. In *People v. Mastin*,⁹⁹ the court rejected such a strict reading of California's old Best Evidence Rule. Instead, the court opted for the federal practice of leaving the application of the rule to the discretion of the trial judge. The court stated that in exercising discretion, the judge should consider the following:

The importance of examining the original and the difficulties involved in its production—the more complex the inscription, the less reliable the secondary evidence. The more critical the fact to be proved by the inscription, and the lesser the quantity and quality of other evidence to prove that fact, the greater is the importance of the inscribed chattel's production. The more difficult the production or the more inconvenience to the owner by temporary loss of the chattel, the greater must be the importance of examining the original before production is required.¹⁰⁰

As a practical matter, since photographic duplicates can generally be offered in lieu of the original in federal and California courts, the availability of photographs of inscribed chattel has dampened the debate.¹⁰¹ In California, photographs of graffiti are expressly admissible in vandalism actions to prove that the accused was the author.¹⁰²

The Advisory Committee takes the position that under the Rules, testimony that a writing does not contain any reference to designated matter does not implicate the Best Evidence Rule.¹⁰³ But since such testimony proves the contents of a writing indirectly, in California the argument can be made that the testimony violates the Secondary Evidence Rule.¹⁰⁴

B. Exceptions to the Best Evidence Rule

The Federal Best Evidence Rule does not require use of the original if it has been lost or destroyed, unless the proponent lost or destroyed the original in bad faith.¹⁰⁵ The Federal Rule does not require using the original where it cannot be obtained by available judicial process or procedure.¹⁰⁶ Nor does the Rule require the original if at

99. 171 Cal. Rptr. 780 (Cal. Ct. App. 1981).

100. *Id.* at 783.

101. In California, resort to the duplicate-original doctrine is no longer necessary. As a general rule, secondary evidence is admissible as the original. CAL. EVID. CODE § 1521 (West 1995) (For example, a photograph of a shirt is admissible as the shirt). This is so even in a criminal case such as *Mastin*. See CAL. EVID. CODE § 1522(a)(1).

102. CAL. EVID. CODE § 1410.5.

103. FED. R. EVID. 1002 (Advisory Committee's note).

104. See CAL. EVID. CODE § 1521.

105. FED. R. EVID. 1004(1).

106. *Id.* R. 1004(2).

the time when the original was under the control of the opponent, the opponent was put on notice by the pleadings (or otherwise) that the contents would be a subject of proof at the hearing, and the opponent does not produce the original at the hearing.¹⁰⁷ Furthermore, the Federal Best Evidence Rule does not demand the original if it is not closely related to the controlling issues.¹⁰⁸ As noted earlier, an original also is not required if the proponent offers a duplicate of the original.¹⁰⁹

The Rules also provide that testimony or deposition of the adverse party or that party's written admission may be used to prove the contents of a writing without accounting for the nonproduction of the original.¹¹⁰

The Rules do not express a preference for a copy of a private writing that is unavailable. They allow the proponent to prove the contents of the original by a copy or by testimony if production of the original writing is excused.

Under the Rules, the contents of an official record or of a document authorized to be recorded or filed and actually recorded or filed do not have to be proved by the original record or document.¹¹¹ In this instance, however, testimony is inadmissible and the proponent must offer a copy certified or testified to be correct, unless a copy cannot be obtained by the exercise of reasonable diligence.¹¹²

By adopting the Secondary Evidence Rule the California Legislature eliminated the numerous exceptions to the state's version of the Best Evidence Rule.¹¹³ The Secondary Evidence Rule, however, retains the Code's preference for hard copies as opposed to testimony except (1) where "the proponent does not have possession or control of a copy and the original is lost or has been destroyed without fraudulent intent on the part of the proponent,"¹¹⁴ and (2) "where the proponent does not have possession or control of the original or a copy"¹¹⁵

107. *Id.* R. 1004(3).

108. CAL. EVID. CODE § 1504 (repealed); FED. R. EVID. 1004(4).

109. *See supra* text accompanying note 76.

110. FED. R. EVID. 1007. The Code does not have an equivalent provision. Presumably, proof of the contents of the original by these methods could satisfy the requirements of the Secondary Evidence Rule. *See* CAL. EVID. CODE §§ 1521, 1523.

111. FED. R. EVID. 1005.

112. *Id.*

113. Indeed, the amendment repeals the Best Evidence Rule. *See* CAL. EVID. CODE § 1521 (comment). The name is retained here for ease of analysis and comparison to the Federal Rules.

114. *Id.* § 1523(b).

115. *Id.* § 1523(c).

and (a) "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,"¹¹⁶ or (b) the original "is not closely related to the controlling issues and it would be inexpedient to require its production."¹¹⁷ Since copies of official records and documents authorized to be recorded or filed are generally available, copies, rather than testimony, must be offered to prove the contents of the originals.

C. The Exceptions Swallow the Rule

The Best Evidence Rule has evolved from a strict rule requiring production of the original to prove the contents of a writing in most instances to one in which production of the original may now be the exception. As the Federal Rules illustrate, exceptions have multiplied as the rules of evidence have become codified. Public records may be proved by copies¹¹⁸ as may writings that are not closely related to controlling issues.¹¹⁹ In addition, the contents of a writing may be proved by the testimony of the party opponent.¹²⁰ Perhaps the greatest relaxation of the rule occurred with the adoption of the duplicate-original doctrine. As has been noted, this doctrine permits the admission of a duplicate to the same extent as the original unless "(1) a genuine question is raised about the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate."¹²¹

Viewed from this perspective, California took the next logical step when it replaced the Best Evidence Rule with the Secondary Evidence Rule. California parties may now dispense with the original and use secondary evidence to prove the contents of a writing unless the judge finds that it would be unfair to admit the secondary evidence or that production of the original is necessary to resolve a genuine dispute concerning the material terms of the original writing.¹²² Published opinions do not disclose any substantial difficulties for courts or parties under the new rule. California should retain its novel, liberalized approach to the admissibility of secondary evidence to prove the contents of writings.

116. *Id.*

117. *Id.*

118. FED. R. EVID. 1005.

119. *Id.* R. 1004(4).

120. *Id.* R. 1007.

121. *Id.* R. 1003.

122. CAL. EVID. CODE § 1521(a).

D. Functions of the Judge and Jury Under the Best and Secondary Evidence Rules

1. Federal Rules

Federal judges enjoy greater power in excluding writings when the opponent objects on Best Evidence Rule grounds than when the opponent objects on grounds of lack of authentication. As has been discussed, when ruling on an authentication objection, the judges may exclude a writing only if in the judge's estimation the proponent's evidence fails to meet the low *prima facie* standard.¹²³ But in ruling on Best Evidence Rule objections, federal judges may exclude copies of writings whenever the proponent fails to persuade the judge by a preponderance of the evidence that non-production of the original writing is excused.¹²⁴ For example, if the opponent objects to the introduction of a copy, the proponent must convince the judge by a preponderance of the evidence (including the credibility of the witnesses called on the issues) that the original has been lost or destroyed.¹²⁵ The persuasion burden is placed on the proponent because the Best Evidence Rule embodies a public policy favoring the use of original writings to prove their contents.¹²⁶

The Rules, however, recognize that in some instances the power given to judges to exclude secondary evidence of originals can impinge on the role traditionally assigned to jurors in American trials.¹²⁷ Take a contract dispute in which the opponent contests the proponent's claim that the original has been lost and objects to the introduction of a copy on the ground that no original contract ever existed. If the judge overrules the objection and admits the copy, the traditional role of the jurors is preserved—upon request the judge would instruct the jurors not to consider the copy unless they first found that the parties entered into the contract and that the copy was a faithful reproduction of the original contract. But if the judge sustains the opponent's objection and excludes the copy, the ruling would result in a directed verdict for the opponent. To ensure that the jurors determine whether the original contract existed, the Rules reserve that question for them.¹²⁸ Similarly, the Rules reserve for the jurors two additional questions: whether the exhibit offered by the

123. See *supra* text accompanying notes 9.

124. See FED. R. EVID. 1001.

125. FED. R. EVID. 1008.

126. *Id.* R. 1004 (Advisory Committee's note).

127. *Id.* R. 1008 (Advisory Committee's note).

128. *Id.* R. 1008.

proponent is the original of the writing, and whether the exhibit correctly reflects the contents of the writing.¹²⁹

Federal judges, however, are given greater power to withhold duplicates from jurors. Federal Rule of Evidence 1003 generally allows a party to offer a duplicate in lieu of the original writing.¹³⁰ Since a duplicate is a counterpart produced by the same impression as the original,¹³¹ a counterpart should serve as well as the original in getting the words or other contents before the fact finder with accuracy and precision.¹³² But a federal judge may exclude a duplicate where “(1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”¹³³

Since jurors are generally charged with resolving questions of authenticity, the two exceptions to the use of duplicates warrant discussion. With regard to the first exception, it should be noted that the objection is not that the duplicate is an unfaithful reproduction. Rather, the objection is that the duplicate cannot be a reproduction of the writing the proponent seeks to prove because no such writing, for example, ever existed. Since production of the original, if there was one, would facilitate the resolution of this issue, the judge, by excluding the duplicate, can force the proponent to offer the original.¹³⁴ More than a bare objection is required, however. The opponent must provide the judge with reasons why production of the original is justified. *United States v. Haddock*¹³⁵ is illustrative. In this bank fraud prosecution, the reviewing court upheld the trial judge’s discretionary exclusion of bank record duplicates offered by the defendant. In objecting to the introduction of the duplicates, the government offered the following evidence:

With regard to each of these photocopies, evidence presented at trial indicates that only Haddock could recall ever seeing either the original or a copy of these documents. Except for Haddock, no one—including in some cases persons who allegedly typed the document and persons to whom the original allegedly was sent—was familiar with the contents of the photocopies. In addition, witnesses testified that several of the documents bore markings and

129. *Id.*

130. *See supra* text accompanying note 76.

131. FED. R. EVID. 1001(4).

132. *Id.* (Advisory Committee’s note).

133. *Id.* R.1003.

134. 4 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 1003.1 (6th ed., 2006).

135. 956 F.2d 1534 (10th Cir. 1992) (abrogated on a different matter in *United States v. Wells*, 519 U.S. 482 (1997)).

included statements that did not comport with similar documents prepared in the ordinary course of business at the Bank of White City and at the Bank of Herington.¹³⁶

Federal Rule of Evidence 1003(2) also empowers judges to exclude duplicates if "in the circumstances it would be unfair to admit the duplicate in lieu of the original."¹³⁷ The Advisory Committee describes one set of circumstances when it would be unfair to admit a duplicate: "Other reasons for requiring the original may be present when [the duplicate reproduces only a part of the original] and the remainder [of the original] is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party."¹³⁸

Professors Mueller and Kirkpatrick provide other examples of circumstances requiring the exclusion of duplicates.¹³⁹ Judges may exclude duplicates because of their poor quality, because of questions about the accuracy of the process used to reproduce them, or because the proponent has destroyed the originals in bad faith.¹⁴⁰ Their concern is with the authenticity of the duplicates—whether they are faithful reproductions of the original writings—as well as with the authenticity of the original writings—whether the proponent destroyed the originals in bad faith to prevent their use in proving their contents.¹⁴¹ Although whether a copy is a faithful reproduction of the original is generally a question for the jury, the Federal Rules empower the judge to withhold a duplicate from jurors whenever in the judge's estimation it would be "unfair" to the opponent to receive the duplicate.¹⁴² In this instance, however, sharp practices (e.g., destroying the originals to prevent their use in court) may not be the only reason for giving the judge the power to exclude duplicates. Their poor quality, as Professors Mueller and Kirkpatrick point out, might suffice.¹⁴³

136. *Id.* at 1545–1546.

137. FED. R. EVID. 1003(2).

138. *Id.* (Advisory Committee's note); *see also* United States v. Alexander, 326 F.2d 736 (4th Cir. 1964).

139. 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 574 (2d ed. 1999).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

2. California Code

Prior to its replacement by the Secondary Evidence Rule, California's Best Evidence Rule was in most ways identical to its federal counterpart. Like the Federal Rules, California's preference for an original to prove the contents of a writing was relaxed when the proponent offered a duplicate.¹⁴⁴ California used the federal definition of a duplicate¹⁴⁵ and allowed the use of duplicates to the same extent as the Rules.¹⁴⁶ Former section 1511 provided that a duplicate was "admissible to the same extent as an original unless (a) a genuine question [was] raised as to the authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original."¹⁴⁷

The Secondary Evidence Rule repealed section 1511 and allows proof of the contents of a writing by an otherwise admissible original or secondary evidence.¹⁴⁸ The judge, however, must exclude secondary evidence if the court determines one of the following: (1) "[a] genuine dispute exists concerning material terms of the writing and justice requires the exclusion,"¹⁴⁹ or (2) "[a]dmission of the secondary evidence would be unfair."¹⁵⁰ As the California Law Revision Commission acknowledged in its Comment, the exceptions were modeled on the exceptions to former section 1511 and Federal Rule 1003.¹⁵¹

As in the case of Rule 1003(2), the second exception empowers the judge to withhold secondary evidence from jurors whenever the judge is convinced that the proponent has engaged in unscrupulous practices.¹⁵² As the Commission notes, "[a] classic circumstance for exclusion pursuant to subdivision (a) (2) is [where] the proponent destroyed the original with fraudulent intent"¹⁵³ Also, like Rule 1003(2), the second exception encompasses the authenticity of the secondary evidence.¹⁵⁴ As an example, the Commission cites *Amoco*

144. CAL. EVID. CODE § 1521 (West 1995); FED. R. EVID. 1003.

145. CAL. EVID. CODE § 260 (West 1995); FED. R. EVID. 1001(4).

146. CAL. EVID. CODE § 1511(repealed by section 1521); see *id.* §§ 1500–1511.

147. CAL. EVID. CODE § 1511 (repealed 1998).

148. *Id.* §§ 1520–1521.

149. *Id.* § 1521(a)(1).

150. *Id.* § 1521(a)(2).

151. *Id.* (comment); FED. R. EVID. 1003 (Commission Reports).

152. See CAL. EVID. CODE § 1521.

153. *Id.* (comment).

154. *Id.*

*Production Co. v. United States*¹⁵⁵ for the proposition that it would be unfair to admit a copy that lacked a critical part included in the original.¹⁵⁶

As has been noted, a federal judge may also exclude a duplicate when the judge finds that the opponent has raised a genuine question about the authenticity of the original.¹⁵⁷ But more than a bare objection is required for exclusion. The opponent must provide the judge with reasons why the original must be produced.¹⁵⁸

Similarly, the language of the first exception to the Secondary Evidence Rule appears to embrace serious questions about the authenticity of the original.¹⁵⁹ It empowers a California judge to exclude secondary evidence whenever the opponent convinces the judge that a genuine dispute exists concerning material terms of the writing and justice requires its exclusion.¹⁶⁰ Why the Commission chose this language instead of the language of former section 1511 is unclear from the Comment. It may be that the Commission wanted to make sure that California judges had the power to exclude secondary evidence when the parties disagreed about material terms of the original, not just about the existence of the original, and production of the original was necessary to resolve the dispute.

The three federal cases and one California case cited by the Commission involve the authenticity of the secondary evidence, not of the original.¹⁶¹ That may be unimportant, however, since what matters is that the Commission appears to have intended to follow Federal Rule of Evidence 1003 and former section 1511; although authenticity is normally a matter for jury resolution, California judges should have the authority to exclude secondary evidence when serious questions about the authenticity of either the secondary evidence or the original are raised by the opponent.

As a matter of policy, the Best Evidence Rule expresses a preference for the use of originals to prove the contents of a writing, unless an exception applies.¹⁶² The Rules's duplicate original doctrine and the California Secondary Evidence Rule turn that policy on its head by allowing the use of duplicates in federal courts and of secondary evi-

155. 619 F.2d 1383 (10th Cir. 1980).

156. CAL. EVID. CODE § 1521 (comment).

157. FED. R. EVID. 1003(1).

158. *Id.*

159. *See* CAL. EVID. CODE § 1521(a)(1).

160. *See id.*

161. *Id.* (comment).

162. FED. R. EVID. 1002.

dence (including duplicates) in California courts to prove the contents of a writing without accounting for the original.¹⁶³ But the generous treatment accorded duplicates in federal courts and secondary evidence in California courts is not unconditional. If the opponent raises serious questions about the authenticity of either the original or the secondary evidence, the judge may exclude the secondary evidence and require the use of the original.¹⁶⁴ The Commission's Comment includes a useful non-exclusive list of factors judges should consider in determining whether to exclude the secondary evidence offered.¹⁶⁵ It would be helpful, however, if section 1521 or its Comment made clear that judges should normally allow jurors to determine disputes concerning the authenticity of the secondary evidence or of the original unless the evidence offered by the opponent raises the dispute to the level contemplated by section 1521.

E. The Relationship of the Best and Secondary Evidence Rules to the Requirement of Authentication

Under the traditional Best Evidence Rule, a party must offer the original of a writing unless production of the original is excused.¹⁶⁶ In addition, the demands of authentication will force the party to offer evidence that the writing is what the party claims it to be.¹⁶⁷ For example, if in a contract action the plaintiff offers the original of the contract he claims the defendant breached, he must authenticate the contract as the contract entered into between the parties. If the party is permitted to offer a copy of the original, then the party must also authenticate the copy.¹⁶⁸ This means that the party must offer evidence showing that the copy is a faithful reproduction of the original contract between the parties.

The replacement in California of the Best Evidence Rule with the Secondary Evidence Rule does not relax the requirement of authentication. If a party, for example, offers a copy in lieu of the original contract, over objection the party must offer some evidence that the copy is a faithful reproduction of the contract between the parties.¹⁶⁹

163. CAL. EVID. CODE § 1521 (West 1995); FED. R. EVID. 1003.

164. See CAL. EVID. CODE § 1521.

165. See *supra* text accompanying note 86.

166. See *supra* text accompanying notes 67, 75, and 76.

167. See *supra* text accompanying note 5.

168. CAL. EVID. CODE § 1401(b).

169. *Id.* § 1521(d); see also *id.* § 1521(d) (comment).

F. Other Provisions Relating to the Proof of Writings or Copies of Writings in Official Custody

In the case of some public records, the Code provides for the simultaneous satisfaction of the requirements of authentication and the Secondary Evidence Rule. Section 1530(a)(1) provides that if a copy of a writing in the custody of a public entity "purports to be published by the authority of the nation or state, or public entity therein in which the writing is kept . . . [then the copy shall be] prima facie evidence of the existence and content of [the original]."¹⁷⁰ In addition, section 1530(a)(2) provides that if the office that houses the original is within the United States and the office certifies that a copy is a correct copy of the original, then the copy shall also be prima facie evidence of the existence and content of the original.¹⁷¹ To facilitate the admission of these records, the certification of authenticity may be received for the truth of the matters stated.¹⁷²

The presumptions created by section 1530 affect only the burden of producing evidence.¹⁷³ If the opponent introduces some evidence indicating that the copy is not a faithful reproduction, the fact finder will have to determine the correctness of the copy without regard to the presumptions.¹⁷⁴

Section 1532 allows the use of the official record of a writing that is recorded as prima facie of the existence and content of the recorded writing.¹⁷⁵ The presumption created by section 1532, like the one created by section 1530, affects only the burden of producing evidence.¹⁷⁶

While admission of summaries of the contents of voluminous books, records, and other documents by definition violates the Best Evidence Rule, summaries may be the only practical way of making their contents available to the fact finder.¹⁷⁷ Both the Code and the Rules permit the use of summaries, whether written or oral.¹⁷⁸ A fed-

170. *Id.* § 1530(a)(1).

171. *Id.* The certifying office may also be located in enumerated United States possessions. *Id.* Section 1530 also provides for the authentication by attestation of copies of writings kept in offices outside of the United States and its possessions. *See id.* § 1530(a)(3).

172. *Id.* (comment).

173. *Id.* § 1530(b).

174. *Id.* § 1530(b); *id.* (comment).

175. *Id.* § 1532.

176. *Id.* § 1532(b).

177. FED. R. EVID. 1006 (Advisory Committee's note).

178. *See* CAL. EVID. CODE § 1523(d) (West 1995); *see also* FED. R. EVID. 1006. Under section 1521, a written summary of written documents is secondary evidence of the documents. In the absence of the concerns enumerated in section 1521, the written summary is

eral judge, however, may order the production of the originals for inspection by the opposing party.¹⁷⁹ Presumably, a California judge would have the same power if the opponent claims that it would be unfair for the court to admit the summaries.¹⁸⁰ To remove any uncertainties about this matter, consideration should be given to amending the Code to give this authority to California judges.

With regard to business records, section 1550 provides that a photographic copy can be offered in lieu of the original if the copy was made and preserved as part of the records of a business in the regular course of such business.¹⁸¹ This section is designed to continue the provisions of the Uniform Photographic Copies of Business and Public Records as Evidence Act.¹⁸² In light of the generous treatment afforded duly authenticated copies of originals, the value of section 1550 as an exception to the Secondary Evidence Rule has diminished.

Of greater importance is section 1560. It permits the custodian of business records to supply copies of the originals in response to a subpoena duces tecum.¹⁸³ The copies may be offered in evidence in lieu of the original records.¹⁸⁴ In the affidavit accompanying the copies, the custodian must authenticate the originals as well as the copies.¹⁸⁵ The affidavit may be received for the truth of the matters stated.¹⁸⁶

As writings, computer printouts are subject to the Secondary Evidence Rule in California.¹⁸⁷ The fact that a printout may be the output of diverse data fed into a computer can raise questions about whether a particular printout is the "original." To eliminate these con-

as admissible as the documents. For additional discussion, see MENDEZ, *supra* note 32, § 1307.

179. FED. R. EVID. 1006. The authority to use summaries, however, does not in any way relax other conditions of admissibility. If the originals are inadmissible over a hearsay objection, for example, then the summaries are likewise inadmissible for the same reason.

180. See CAL. EVID. CODE § 1523(d) (West 1995). Under section 1521, a written summary of written documents is secondary evidence of the documents. In the absence of the concerns enumerated in section 1521, the written summary is as admissible as the documents. For additional discussion, see MENDEZ, *supra* note 32, § 1307.

181. CAL. EVID. CODE § 1550 (West 1995 & Supp. 2006). A photographic copy can include a "nonerasable optical image reproduction provided that additions, deletions, or changes to the original document are not permitted by the technology" *Id.* The proviso would appear to exclude the use of copies generated by printers connected to computers, since the original in the computer's memory can be changed. See *id.*

182. CAL. EVID. CODE § 1550 cmt. (West 1995 & Supp. 2006); see also CAL. CIV. PROC. CODE § 1550 (West 1998).

183. CAL. EVID. CODE § 1560 (West 1995 & Supp. 2006).

184. *Id.* § 1562.

185. *Id.* § 1561(a).

186. *Id.* § 1562.

187. See *id.* § 1552.

cerns, section 1552 provides that 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."¹⁸⁸ Combined with section 255, which defines computer printouts as originals,¹⁸⁹ these provisions satisfy the requirements of the Secondary Evidence Rule and replace the requirements of authentication.¹⁹⁰ The presumption created by section 1552 affects only the burden of producing evidence.¹⁹¹ If the objecting party introduces evidence that a printed representation is inaccurate or unreliable, the offering party must convince the judge by a preponderance of the evidence that the printed representation is an accurate representation of the existence and content of the computer information or computer program it purports to represent.¹⁹²

Similarly, 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.¹⁹³ As in the case of printed representations of computer information or a computer program, this provision, together with section 255, satisfies the Secondary Evidence Rule and replaces the requirements of authentication.¹⁹⁴ As in the case of section 1552, the presumption created by this section affects only the burden of production and imposes upon the offering party the same persuasion burden if a party to the action introduces evidence that the printed representation of the images is inaccurate or unreliable.¹⁹⁵

All of these provisions are a response to California's needs and should be retained. Other provisions that should also be retained are sections 1600 through 1605 regarding the admissibility of official writings affecting property, including Spanish and Mexican land title records.¹⁹⁶

III. The Completeness Doctrine

The completeness doctrine, like the requirement of authentication and the Best and Secondary Evidence rules, also applies to the

188. *Id.*

189. CAL. EVID. CODE § 255 (West 1995).

190. CAL. EVID. CODE § 1552 (West 1995 & Supp. 2006).

191. *Id.*

192. *Id.*

193. CAL. EVID. CODE § 1553 (West 1995 & Supp. 2006).

194. *Id.*

195. CAL. EVID. CODE §§ 1600–1605 (West 1995).

196. *Id.*

introduction of writings.¹⁹⁷ The doctrine seeks to avoid the misleading impressions that can be created when matters are taken out of context.¹⁹⁸ To diminish this risk, Evidence Code section 356 provides:

[When] part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.¹⁹⁹

The Federal Rules contain a similar provision, but it is limited to writings and recorded statements and does not apply to conversations.²⁰⁰

*Rosenberg v. Wittenborn*²⁰¹ illustrates section 356's application. The plaintiffs sued the defendant to recover for injuries they allegedly suffered when the defendant ran a light and struck their car.²⁰² To prove that the defendant ran the light, the plaintiffs called the officer who investigated the accident.²⁰³ He testified that at the time he investigated the accident the defendant admitted he had run the red light.²⁰⁴ Over the plaintiffs' objection, the officer was allowed on cross to testify that the defendant also told him that he ran the light because his brakes, which had just been repaired, failed unexpectedly.²⁰⁵ The appellate court upheld the use of the officer's cross-examination testimony:

Plaintiffs' attorney was trying to leave the jury with the impression that defendant by way of admission had told the officer . . . that he entered the intersection against the red light,—that he said this and no more. These statements were in fact so qualified when made to the officer that they carried no implication (such as plaintiffs would have the jury draw) that defendant ran the light because he was going too fast to stop within the distance he had available Considerations of fair play demanded that the portion of the conversation placed in evidence by plaintiffs be supplemented by the qualifying and enlightening portions of the conversation

197. CAL. EVID. CODE § 356 (West 1995).

198. *See id.*

199. *Id.*

200. FED. R. EVID. 1006 (Advisory Committee's note). The rule does not extend to conversations for "practical reasons." *See id.*

201. 3 Cal. Rptr. 459 (Cal. Ct. App. 1960). *Rosenberg* construed the predecessor to section 356, California Code of Civil Procedure section 1854. *Id.* at 464. Former section 1854 was identical to section 256. *Id.*

202. *Id.* at 460.

203. *Id.* at 461–462.

204. *Id.* at 462.

205. *Id.*

which gave a very different complexion than that which plaintiffs' segregated passages bore.²⁰⁶

Rosenberg is instructive in another respect. The fact that the statements offered by the defendant through the officer were hearsay, beyond the exception for party admissions, was immaterial. Since the statement offered by the plaintiffs was received for the truth of the matter asserted, the balance could also be received for that purpose. Under these circumstances, the hearsay rule does not bar the use of such statements.²⁰⁷ *Rosenberg* also underscores the importance of including conversations under the doctrine. Under the federal rule, the balance of the defendant's conversation could not have been offered under the completeness doctrine.²⁰⁸ The California rule should be retained.

IV. Recommendations

Part I compared authentication under the Rules and the Code, and recommends that the Code more closely mirror the Rules by explicitly referencing non-writings and providing an additional presumption of admissibility for commercial and mercantile brands. Part II explored the differences between the Federal Best Evidence and the California Secondary Evidence Rules and concludes that California should retain the Secondary Evidence Rule, which recently replaced the Best Evidence Rule. Part II also recommended giving California judges the express authority to exclude summaries of voluminous writings when it would be unfair to the opponent to receive the summaries. Part III discussed the completeness doctrine, which seeks to avoid the misimpressions that can be created when only part of a declaration is offered in evidence. This part also recommended retaining the California provision. Unlike its federal counterpart, it is not limited to writings but includes conversations as well.

206. *Rosenberg*, 3 Cal. Rptr. at 463.

207. *See id.* at 462; *see also* *People v. Williams*, 531 P.2d 778, 781-82 (Cal. 1975).

208. FED. R. EVID. 1006.

V. Appendix

A. Selected Provisions of the California Evidence Code

§ 250. Writing

“Writing” means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, 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, and any record thereby created, regardless of the manner in which the record has been stored.

§ 255. Original

“Original” means the writing itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original.”

§ 260. Duplicate

A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

§ 356. Entire act, declaration, conversation, or writing to elucidate part offered

Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

§ 643. Authenticity of ancient document

A deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic if it:

- (a) Is at least 30 years old;
- (b) Is in such condition as to create no suspicion concerning its authenticity;
- (c) Was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and

(d) Has been generally acted upon as authentic by persons having an interest in the matter.

§ 644. Book purporting to be published by public authority

A book, purporting to be printed or published by public authority, is presumed to have been so printed or published.

§ 645. Book purporting to contain reports of cases

A book, purporting to contain reports of cases adjudged in the tribunals of the state or nation where the book is published, is presumed to contain correct reports of such cases.

§ 645.1. Printed materials purporting to be particular newspaper or periodical

Printed materials, purporting to be a particular newspaper or periodical, are presumed to be that newspaper or periodical if regularly issued at average intervals not exceeding three months.

§ 1400. Authentication

Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.

§ 1401. Authentication required

(a) Authentication of a writing is required before it may be received in evidence.

(b) Authentication of a writing is required before secondary evidence of its content may be received in evidence.

§ 1402. Authentication of altered writings

The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the alteration or appearance thereof. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he does that, he may give the writing in evidence, but not otherwise.

§ 1410. Article not exclusive

Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved.

§ 1410.5. Graffiti constitutes a writing; admissibility

(a) For purposes of this chapter, a writing shall include any graffiti consisting of written words, insignia, symbols, or any other markings which convey a particular meaning.

(b) Any writing described in subdivision (a), or any photograph thereof, may be admitted into evidence in an action for vandalism, for the purpose of proving that the writing was made by the defendant.

(c) The admissibility of any fact offered to prove that the writing was made by the defendant shall, upon motion of the defendant, be ruled upon outside the presence of the jury, and is subject to the requirements of Sections 1416, 1417, and 1418.

§ 1411. Subscribing witness' testimony unnecessary

Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing.

§ 1412. Use of other evidence when subscribing witness' testimony required

If the testimony of a subscribing witness is required by statute to authenticate a writing and the subscribing witness denies or does not recollect the execution of the writing, the writing may be authenticated by other evidence.

§ 1413. Witness to the execution of a writing

A writing may be authenticated by anyone who saw the writing made or executed, including a subscribing witness.

§ 1414. Admission of authenticity; acting upon writing as authentic

A writing may be authenticated by evidence that:

(a) The party against whom it is offered has at any time admitted its authenticity; or

(b) The writing has been acted upon as authentic by the party against whom it is offered.

§ 1415. Authentication by handwriting evidence

A writing may be authenticated by evidence of the genuineness of the handwriting of the maker.

§ 1416. Proof of handwriting by person familiar therewith

A witness who is not otherwise qualified to testify as an expert may state his opinion whether a writing is in the handwriting of a supposed writer if the court finds that he has personal knowledge of

the handwriting of the supposed writer. Such personal knowledge may be acquired from:

- (a) Having seen the supposed writer write;
- (b) Having seen a writing purporting to be in the handwriting of the supposed writer and upon which the supposed writer has acted or been charged;
- (c) Having received letters in the due course of mail purporting to be from the supposed writer in response to letters duly addressed and mailed by him to the supposed writer; or
- (d) Any other means of obtaining personal knowledge of the handwriting of the supposed writer.

§ 1417. Comparison of handwriting by trier of fact

The genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting

- (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or
- (b) otherwise proved to be genuine to the satisfaction of the court.

§ 1418. Comparison of writing by expert witness

The genuineness of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court.

§ 1419. Exemplars when writing is more than 30 years old

Where a writing whose genuineness is sought to be proved is more than 30 years old, the comparison under Section 1417 or 1418 may be made with writing purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing whether it is genuine.

§ 1420. Authentication by evidence of reply

A writing may be authenticated by evidence that the writing was received in response to a communication sent to the person who is claimed by the proponent of the evidence to be the author of the writing.

§ 1421. Authentication by content

A writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing.

§ 1450. Classification of presumptions in article

The presumptions established by this article [regarding acknowledged and official writings] are presumptions affecting the burden of producing evidence.

§ 1451. Acknowledged writings

A certificate of the acknowledgment of a writing other than a will, or a certificate of the proof of such a writing, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed if the certificate meets the requirements of Article 3 (commencing with Section 1180) of Chapter 4, Title 4, Part 4, Division 2 of the Civil Code.

§ 1452. Official seals

A seal is presumed to be genuine and its use authorized if it purports to be the seal of:

- (a) The United States or a department, agency, or public employee of the United States.
- (b) A public entity in the United States or a department, agency, or public employee of such public entity.
- (c) A nation recognized by the executive power of the United States or a department, agency, or officer of such nation.
- (d) A public entity in a nation recognized by the executive power of the United States or a department, agency, or officer of such public entity.
- (e) A court of admiralty or maritime jurisdiction.
- (f) A notary public within any state of the United States.

§ 1453. Domestic official signatures

A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of:

- (a) A public employee of the United States.
- (b) A public employee of any public entity in the United States.
- (c) A notary public within any state of the United States.

§ 1454. Foreign official signatures

A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of an officer, or deputy of an officer, of a nation or public entity in a nation recognized by the executive power of the United States and the writing to which the signature is affixed is accompanied by a final statement certifying the genuineness of the signature and the official position of (a) the person who executed the writing or (b) any foreign official who has certified either the genuineness of the signature and official position of the person executing the writing

or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person executing the writing. The final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation, authenticated by the seal of his office.

§ 1520. Content of writing; proof

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

§ 1521. Secondary evidence rule

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

- (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.
- (2) Admission of the secondary evidence would be unfair.

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

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

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

§ 1522. Additional grounds for exclusion of secondary evidence

(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 any other law, shall not be made in the presence of the jury.

§ 1523. Oral testimony of the content of a writing; admissibility

(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.

§ 1530. Copy of writing in official custody

(a) 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;

(2) The office in which the writing is kept is within the United States or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, and the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing; or

(3) The office in which the writing is kept is not within the United States or any other place described in paragraph (2) and the copy is attested as a correct copy of the writing or entry by a person having authority to make attestation. The attestation must be accompanied by a final statement certifying the genuineness of the signature and the official position of (i) the person who attested the copy as a correct copy or (ii) any foreign official who has certified either the genuineness of the signature and official position of the person attesting the copy or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the per-

son attesting the copy. Except as provided in the next sentence, the final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. Prior to January 1, 1971, the final statement may also be made by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation in which the writing is kept, authenticated by the seal of his office. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without the final statement or (ii) permit the writing or entry in foreign custody to be evidenced by an attested summary with or without a final statement.

(b) The presumptions established by this section are presumptions affecting the burden of producing evidence.

§ 1531. Certification of copy for evidence

For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be.

§ 1532. Official record of recorded writing

(a) The official record of a writing is prima facie evidence of the existence and content of the original recorded writing if:

- (1) The record is in fact a record of an office of a public entity; and
- (2) A statute authorized such a writing to be recorded in that office.

(b) The presumption established by this section is a presumption affecting the burden of producing evidence.

§ 1550. Types of evidence as writing admissible as the writing itself

(a) If made and preserved as part of the records of a business, as defined in Section 1270, in the regular course of that business, the following types of evidence of a writing are as admissible as the writing itself:

- (1) A nonerasable optical image reproduction or any other reproduction of a public record by a trusted system, as defined in Section 12168.7 of the Government Code, if additions, deletions, or changes to the original document are not permitted by the technology.
- (2) A photostatic copy or reproduction.
- (3) A microfilm, microcard, or miniature photographic copy, reprint, or enlargement.

- (4) Any other photographic copy or reproduction, or an enlargement thereof.
- (b) The introduction of evidence of a writing pursuant to subdivision (a) does not preclude admission of the original writing if it is still in existence. A court may require the introduction of hard copy printout of the document.

§ 1551. Photographic copies where original destroyed or lost

A print, whether enlarged or not, from a photographic film (including a photographic plate, microphotographic film, photostatic negative, or similar reproduction) of an original writing destroyed or lost after such film was taken or a reproduction from an electronic recording of video images on magnetic surfaces is admissible as the original writing itself if, at the time of the taking of such film or electronic recording, the person under whose direction and control it was taken attached thereto, or to the sealed container in which it was placed and has been kept, or incorporated in the film or electronic recording, a certification complying with the provisions of Section 1531 and stating the date on which, and the fact that, it was so taken under his direction and control.

§ 1552. Printed representation of computer information or computer programs

- (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 the 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.

§ 1553. Printed representation of images stored on a video or digital medium

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 the evidence, that the

printed representation is an accurate representation of the existence and content of the images that it purports to represent.

B. Selected Provisions of the Federal Rules of Evidence

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Rule 901. Requirement of Authentication or Identification

(a) **General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of Witness with Knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert Opinion on Handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by Trier or Expert Witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice Identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone Conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public Records or Reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement,

or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient Documents or Data Compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) *Process or System.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods Provided by Statute or Rule.* Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic Public Documents Under Seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic Public Documents Not Under Seal.** A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) **Foreign Public Documents.** A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be

evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official Publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and Periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade Inscriptions and the Like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions Under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) Certified Domestic Records of Regularly Conducted Activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified Foreign Records of Regularly Conducted Activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible

under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) **Writings and Recordings.** "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) **Photographs.** "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1003. Admissibility of Duplicates

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

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(1) **Originals Lost or Destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) **Original Not Obtainable.** No original can be obtained by any available judicial process or procedure; or

(3) **Original in Possession of Opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) **Collateral Matters.** The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 1006. Summaries

The contents of voluminous writings, records, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the non-production of the original.

