

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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November 1996

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

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Administrative Adjudication by Quasi-Public Entities

October 1996

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

NOTE

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

Cite this report as *Administrative Adjudication by Quasi-Public Entities*, 26 Cal. L. Revision Comm'n Reports 277 (1996).

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
(415) 494-1335

ALLAN L. FINK, Chairperson
CHRISTINE W.S. BYRD, Vice Chairperson
ASSEMBLYMAN DICK ACKERMAN
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SENATOR QUENTIN L. KOPP
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EDWIN K. MARZEC
SANFORD M. SKAGGS
COLIN W. WIED

October 10, 1996

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

An adjudicative decision of a private entity, when affecting the public interest, is subject to common law fair procedure requirements. The exact scope of the fair procedure requirement is not clear, particularly as applied to a quasi-public entity — a private entity created by statute for the purpose of administering a state function. This recommendation would impose the administrative adjudication provisions of the state Administrative Procedure Act, including the administrative adjudication “bill of rights,” on any statutorily or constitutionally required evidentiary hearing of a quasi-public entity administering a state function for which there is no other administrative review with Administrative Procedure Act protections.

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

Respectfully submitted,

Allan L. Fink
Chairperson

ADMINISTRATIVE ADJUDICATION BY QUASI-PUBLIC ENTITIES

Comprehensive legislation enacted in 1995 requires state agency administrative adjudication to adhere to fundamental due process and public policy requirements.¹ Among the requirements the Administrative Procedure Act imposes on state agency administrative adjudication are:²

- The agency must give notice and an opportunity to be heard, including the right to present and rebut evidence.
- The agency must make available a copy of its hearing procedure.
- The hearing must be open to public observation.
- The presiding officer must be neutral, the adjudicative function being separated from the investigative, prosecutorial, and advocacy functions within the agency.
- The presiding officer must be free of bias, prejudice, and interest.
- The decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision. Credibility determinations made by the presiding officer are entitled to great weight on review. A penalty may not be based on an agency “guideline” unless the agency has adopted the guideline as a regulation.
- The decision may not be relied on as precedent unless the agency designates and indexes it as precedent.
- Ex parte communications to the presiding officer are prohibited.

1. Gov’t Code §§ 11400-11470.50, enacted by 1995 Cal. Stat. ch. 938, § 21. The legislation implements a recommendation of the California Law Revision Commission, and is operative July 1, 1997. See *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm’n Reports 55 (1995); *Report of the California Law Revision Commission on Chapter 938 of the Statutes of 1995 (Senate Bill 523)*, 25 Cal. L. Revision Comm’n Reports 711 (1995).

2. Gov’t Code § 11425.10 (administrative adjudication bill of rights).

- The agency must make available language assistance to the extent required by existing law.

The new legislation also encourages settlements,³ alternative dispute resolution,⁴ and informal proceedings.⁵

The coverage of the new provisions is limited to adjudication by state agencies made pursuant to constitutionally or statutorily required hearings.⁶ However, in many cases a statute delegates or authorizes delegation of a state function to a private entity, including delegation of adjudicative authority. Examples of such delegations to “quasi-public” entities include:

California Automobile Assigned Risk Plan (Ins. Code § 11623)

California Insurance Guarantee Association (Ins. Code §1063)

3. Gov’t Code § 11415.60 (settlement).

4. Gov’t Code §§ 11420.10-11420.30 (alternative dispute resolution).

5. Gov’t Code §§ 11445.10-11445.60 (informal hearing).

6. Gov’t Code § 11410.10. A number of state agency hearings are exempted from the coverage of the new provisions. Separation of powers principles exempt the Legislature, the Governor and Governor’s Office, and the courts and judicial branch. The California Constitution also exempts the University of California. See discussion in *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm’n Reports 55, 87-91 (1995).

Specified hearings of the following executive branch agencies are also exempted by statute:

State Bar of California

Alcoholic Beverage Control Appeals Board

Commission on State Mandates

Military Department

Department of Corrections (including Board of Prison Terms, Youth Authority, Youthful Offenders Parole Board, Narcotic Evaluation Authority)

Public Utilities Commission

State Board of Equalization

Public Employment Relations Board

Agricultural Labor Relations Board

Franchise Tax Board

Escrow Agents' Fidelity Corporation (Fin. Code § 17311)
 State Compensation Insurance Fund (Ins. Code § 11773)
 Various agricultural produce commissions (Food & Agric.
 Code § 67111 *et seq.*)⁷

Adjudicative proceedings conducted by quasi-public entities of this type are not subject to the administrative adjudication requirements of the Administrative Procedure Act.⁸

Adjudicative proceedings of private entities, when affecting the public interest, are subject to common law "fair procedure" requirements.⁹ For example, private hospitals in the admission or exclusion of physicians to staff privileges, and professional societies in the exclusion and expulsion of members, must provide fair procedures, particularly notice and an opportunity to be heard. These principles apply whether or not the activity amounts to "state action" for purposes of equal protection and due process of law.¹⁰

7. A typical example is the Winegrowers of California Commission, created by the Dills-Bronzan Winegrowers Joint Commission Act of 1986. The statute proclaims that "There is in state government, the Winegrowers of California Commission." Food & Agric. Code § 74061. However, the statute then proceeds to distance the Commission from the state, providing that it is a corporate body and the state is not liable for its acts. Food & Agric. Code §§ 74074, 74078. It is funded by producer assessments. Food & Agric. Code § 74104. The Commission must provide an informal hearing for individuals aggrieved by its acts; appeals from Commission decisions are made to the Director of Food and Agriculture; the Director's determinations are subject to judicial review. Food & Agric. Code § 74172.

8. See Gov't Code § 11410.20 (application to state); *cf.* Henry George School of Social Science v. San Diego Unified School Dist., 183 Cal. App. 2d 82, 85-86, 6 Cal. Rptr. 661 (1960) ("While it is true that in a limited sense school districts are state agencies, we are of the view that the chapters last above referred to were intended to apply only to those state agencies exercising under authority of statute certain statewide functions, or who exercised some statewide function locally under some statute specifically localizing that function.")

9. For discussion of the fair procedure principle, see California Administrative Hearing Practice §§ 1.35-1.36, at 32-24 (Cal. Cont. Ed. Bar 1984) & Supp. 1996).

10. See 1 G. Ogden, California Public Agency Practice § 2.03 (1996).

It is likely that adjudicative proceedings of quasi-public entities are subject to fair procedure requirements to the same or a greater extent than proceedings of purely private entities, but the law is not clear on this matter. It should be made clear. The Law Revision Commission recommends that a quasi-public entity administering a state function be subject to the administrative adjudication provisions of the Administrative Procedure Act in its conduct of a constitutionally or statutorily required adjudicative hearing. This would also clarify the precise standards that are applicable, in place of nebulous “fair procedure” requirements.

It is appropriate that an adjudicative proceeding of a quasi-public entity performing a state function be treated the same as an adjudicative proceeding of a state agency. A person’s right to fundamental due process and public policy protections should not depend on whether the adjudication is done by a state agency or by a quasi-public entity to which the agency’s authority is delegated. Application of the state procedural protections to quasi-public entity adjudication will also promote uniformity of administrative procedure, to the ultimate benefit of the regulated public.

A critical step in applying the administrative adjudication provisions of the Administrative Procedure Act to quasi-public entities is specification of precisely which entities are covered. Because many private entities perform functions that are arguably “public” in nature, a private entity needs to know with some assurance whether any of its proceedings is subject to the administrative adjudication provisions of the Administrative Procedure Act. For this reason, the Law Revision Commission recommends a narrowly drawn statute — a private entity’s adjudicative proceeding will be subject to the administrative adjudication provisions of the Administrative Procedure Act if each of the following requirements is satisfied:

- (1) The entity is a creature of statute.
- (2) The entity is administering a state function.
- (3) The entity is engaged in making an adjudicative decision that determines the legal rights or other legal interests of a particular individual or entity.
- (4) The entity is constitutionally or statutorily required to formulate its decision pursuant to an evidentiary hearing for determination of facts.
- (5) The entity's decision is not subject to administrative review in a proceeding to which the administrative adjudication protections of the Administrative Procedure Act apply.

Under this test, for example, proceedings of a “community action agency” would not be covered, since those quasi-public entities do not conduct evidentiary hearings.¹¹

11. See Gov't Code §§ 12750-12763.

PROPOSED LEGISLATION

Gov't Code § 11410.60 (added). Application to quasi-public entities

SECTION 1. Section 11410.60 is added to the Government Code, to read:

11410.60. (a) This chapter applies to a decision by a private entity if all of the following conditions are met:

(1) The entity is created by statute for the purpose of administration of a state function.

(2) Under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.

(b) Notwithstanding subdivision (a), this chapter does not apply to a decision by a private entity if the decision is subject to administrative review in an adjudicative proceeding to which this chapter applies.

(c) For the purpose of application of this chapter to a decision by a private entity that meets the conditions specified in subdivision (a), unless the provision or context requires otherwise, the following terms have the following meanings:

(1) "Agency," as defined in Section 11405.30, also includes the private entity.

(2) "Regulation" means a rule promulgated by the private entity.

(d) Article 8 (commencing with Section 11435.05), requiring language assistance in an adjudicative proceeding, applies to a private entity that meets the conditions specified in subdivision (a) to the same extent as a state agency under Section 11018.

Comment. Section 11410.60 applies this chapter to decisions of quasi-public entities. It is limited to decisions for which an evidentiary hearing by the quasi-public entity is statutorily or constitutionally required. *Cf.* Section 11405.50 ("decision" is action of specific application that determines legal right or other legal interest of particular person).

This section does not apply to a private entity unless the entity was created by statute for the purpose of administering a state function. Thus the statute governs hearings of a statutory entity such as the Winegrowers of California Commission (Food & Agric. Code § 74061) or the Escrow Agents' Fidelity Corporation (Fin. Code § 17311). But the statute does not govern hearings of a private entity such as a licensed health care provider (Health & Safety Code § 1200 *et seq.*) or a board of trustees established pursuant to statute under an interindemnity, reciprocal, or interinsurance contract between members of a cooperative corporation (Ins. Code § 1280.7).

This section does not apply to the State Bar, including proceedings of the State Bar Court. See Bus. & Prof. Code § 6001.

Although subdivision (b) makes this chapter inapplicable to a quasi-public entity decision if the decision is otherwise reviewable in a proceeding governed by this chapter, the quasi-public entity may voluntarily adopt the procedural protections provided in this chapter. *Cf.* Section 11410.40 (election to apply administrative adjudication provisions).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Marketable Title: Enforceability of Land Use Restrictions

October 1996

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

NOTE

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

Cite this report as *Marketable Title: Enforceability of Land Use Restrictions*, 26 Cal. L. Revision Comm'n Reports 289 (1996).

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October 10, 1996

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

This recommendation addresses two issues in enforcement of land use restrictions — it provides a mechanism for clearing land title records of an obsolete restriction, and it clarifies the applicable statute of limitations for enforcement of breach of a restriction. Under these proposals:

(1) A land use restriction expires of record 60 years after it was recorded, but may be preserved for another 60 years at a time by recording a statutory notice. The 60-year expiration period does not apply to a publicly-held or -imposed restriction, an environmental or conservation easement, or a common interest development equitable servitude.

(2) Breach of a restriction is enforceable for a period of five years, but a failure to bring an action within the five year period does not waive the underlying restriction or the right to bring an action for another breach of the restriction.

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

Respectfully submitted,

Allan L. Fink
Chairperson

MARKETABLE TITLE: ENFORCEABILITY OF LAND USE RESTRICTIONS

OBSOLETE RESTRICTIONS

Restrictions on land use take a number of forms, including covenants, conditions, equitable servitudes, and negative easements. These restrictions may serve useful purposes for a while, and eventually fall into disuse and become obsolete. A common example is a restriction of property to residential uses in an area that is now substantially commercial.¹ Unless action is taken to remove the obsolete restriction, it remains of record indefinitely and impairs the marketability of the property on which it is imposed.

A restriction in the form of a covenant, condition, or equitable servitude that has become obsolete is unenforceable.² Whether these rules apply equally to a negative easement is not clear.³ It is not possible to tell from the record whether a particular restriction has become obsolete and is unenforce-

1. See, e.g., *Key v. McCabe*, 54 Cal. 2d 736, 356 P.2d 169, 8 Cal. Rptr. 425 (1960); *Hirsch v. Hancock*, 173 Cal. App. 2d 745, 343 P.2d 959 (1959).

2. See, e.g., discussions in 4 B. Witkin, *Summary of California Law Real Property* §§ 502-07, at 681-84 (9th ed. 1987); 2 A. Bowman, *Ogden's Revised California Real Property Law* §§ 23.29-23.34, at 1157-61 (1975); 7 H. Miller & M. Starr, *Current Law of California Real Estate* § 22:19, at 577-82 (2d ed. 1990).

3. A negative easement is an easement that limits the use of the servient tenement as opposed to an affirmative easement, which permits acts to be done upon the servient tenement. See, e.g., discussions in 4 B. Witkin, *Summary of California Law Real Property* § 434, at 614-15 (9th ed. 1987); 5 H. Miller & M. Starr, *Current Law of California Real Estate* § 15:9, at 414-15 (2d ed. 1989). Easements of both types are subject to abandonment. See, e.g., discussions in 4 B. Witkin, *Summary of California Law Real Property* §§ 474-76, at 653-55 (9th ed. 1987); 1 A. Bowman, *Ogden's Revised California Real Property Law* §§ 13.49-13.50, at 575-77 (1974); 5 H. Miller & M. Starr, *Current Law of California Real Estate* §§ 15:77-15:78, at 590-96 (2d ed. 1989).

able; a court determination is necessary. The cases and statutes have applied various standards to this determination.⁴

Likewise, a racial covenant may burden property. Although a covenant of this type is illegal and unenforceable,⁵ it nonetheless remains of record and may cause substantial embarrassment to the current owner. Court action is necessary to clear the land title of this cloud.

The Marketable Record Title Act⁶ provides a mechanism for clearing land title records of obsolete interests by operation of law, without the need for court proceedings. Under this statute, various types of recorded interests in real property are extinguished after passage of a sufficiently long period of time. A person wishing to preserve the property interest may do so by recording a statutory form that extends the life of the interest.

This simple mechanism has been applied to rid the land title records of such encumbrances as ancient mortgages and deeds of trust,⁷ dormant mineral rights,⁸ powers of termination,⁹ and unperformed contracts for sale of real property.¹⁰ The Law Revision Commission recommends that it be applied to land use restrictions as well.

Because a land use restriction may be intended to have enduring effect, a relatively long 60-year expiration period is appropriate. The restriction could be preserved by a person

4. Compare Civ. Code § 885.040(b)(1) (restriction “of no actual and substantial benefit to the holder”) with Civ. Code § 1354 (equitable servitude enforceable “unless unreasonable”). Decisions have also used abandonment standards, as well as waiver, estoppel, and laches concepts. See discussions cited *supra* note 2.

5. Civ. Code §§ 53, 782, 782.5; *Shelley v. Kraemer*, 334 U.S. 1 (1948).

6. Civ. Code §§ 880.020-887.090.

7. Civ. Code §§ 882.020-882.040.

8. Civ. Code §§ 883.210-883.270.

9. Civ. Code §§ 885.010-885.070.

10. Civ. Code §§ 886.010-886.050.

entitled to enforce the restriction for 60 years at a time by recording a notice of intent to preserve the interest.

Some restrictions, supported by public policy, are intended to be permanent and should not be subject to an automatic expiration period at all. These include (1) restrictions imposed or enforceable by a public entity,¹¹ e.g., to provide public access to the coast; (2) environmental restrictions,¹² which protect against release of hazardous materials; and (3) conservation easements¹³ to preserve land in its natural condition.

Equitable servitudes in common interest developments also should be exempt from the 60-year expiration period. Restrictions of this type do not ordinarily become obsolete because they are continually overseen and amended as appropriate by their governing bodies. They remain enforceable unless unreasonable.¹⁴

STATUTE OF LIMITATIONS

The statute of limitations applicable to violation of a restriction on land use is likewise not clear. Although it is assumed that the general five-year statute applicable to real property actions applies,¹⁵ there is authority to the contrary.¹⁶ In theory, at least, a covenant could be governed by the four-year

11. This is a specific application of the general marketable title rule. See Civ. Code § 880.240(c).

12. Civ. Code § 1471.

13. See, e.g., Civ. Code § 815 (conservation easements); Gov't Code §§ 51070 (Open-Space Easement Act of 1974), 51200 (California Land Conservation Act of 1965). This is a specific application of the general marketable title rule. See Civ. Code § 880.240(d).

14. Civ. Code § 1354.

15. See, e.g., 2 A. Bowman, *Ogden's Revised California Real Property Law* § 23.25, at 1155, § 23.32, at 1159 (1975).

16. See, e.g., *Lincoln v. Narom Development Co.*, 10 Cal. App. 3d 619, 89 Cal. Rptr. 128 (1970) (statute of limitations not applicable to breach of condition).

statute applicable to a contract founded upon a written instrument,¹⁷ a condition could be governed by the five-year statute applicable to real property actions,¹⁸ a negative easement could be governed by the three-year statute applicable to abatement of a nuisance,¹⁹ and an equitable servitude could be subject to both equitable doctrines as waiver, estoppel, and laches,²⁰ and to the general four-year statute of limitations.²¹

Just as these various forms of land use restrictions that serve the same functions should be uniformly subject to a 60-year expiration period, so should violation of the restrictions be uniformly subject to a clear single statutory limitation period.

The general five-year limitation period for an action to recover real property²² is appropriate in an action for violation of a land use restriction; its application should be made clear by statute.

Failure of a person to enforce a restriction within five years after violation should preclude further action on that violation, but should not in itself be deemed a waiver or abandonment of the underlying restriction. Non-enforcement of a restriction for a particular violation may be considered as part of a pattern or constellation of circumstances that indicate waiver or abandonment.²³ However, to imply waiver or abandonment of the underlying restriction from a failure to act on a particular violation would undesirably precipitate enforcement actions

17. Code Civ. Proc. § 337(1).

18. Code Civ. Proc. § 319.

19. Code Civ. Proc. § 338(b). See 5 H. Miller & M. Starr, *Current Law of California Real Estate* § 15:71, at 580-81 (2d ed. 1989).

20. See, e.g., 7 H. Miller & M. Starr, *Current Law of California Real Estate* § 22:23, at 585 (2d ed. 1990).

21. Code Civ. Proc. § 343. See 3 B. Witkin, *California Procedure Actions* §§ 320-21, at 351-52 (3d ed. 1985).

22. Code Civ. Proc. § 319.

23. See, e.g., *Bryant v. Whitney*, 178 Cal. 640, 174 P. 32 (1918) (waiver).

in cases where the holder of the restriction is otherwise inclined to be lenient.

PROPOSED LEGISLATION

RESTRICTION DEFINED

Civ. Code § 784 (added). “Restriction”

SECTION 1. Section 784 is added to the Civil Code, to read:

784. “Restriction,” when used in a statute that incorporates this section by reference, means a limitation on the use of real property in a deed, declaration, or other instrument, whether in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction.

Comment. Section 784 provides a definition of “restriction” for application in Chapter 8 (commencing with Section 888.010) (obsolete restrictions) of Title 5 and in Code of Civil Procedure Section 336 (statute of limitations). The reference to “declaration” includes a declaration of restrictions in a common interest development intended to be enforceable as equitable servitudes. See Section 1353(a).

MARKETABLE RECORD TITLE ACT

Civ. Code §§ 888.010-888.090 (added)

SEC. 2. Chapter 8 (commencing with Section 888.010) is added to Title 5 of Part 2 of Division 2 of the Civil Code, to read:

CHAPTER 8. OBSOLETE RESTRICTIONS

§ 888.010. “Restriction” defined

888.010. As used in this chapter, “restriction” has the meaning provided in Section 784.

Comment. Section 888.010 implements application of this chapter to private land use restrictions of all types. See Section 784 (“restriction” means limitation on use of real property in deed or other instrument, whether in form of covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction). *Cf.* Section 815.1

(“conservation easement” defined). However, this chapter does not apply to a number of specified restrictions. See Sections 880.240 (interests excepted from title), 888.020 (restrictions excepted). This chapter applies to negative easements; affirmative easements are governed by Chapter 7 (commencing with Section 887.010) (abandoned easements). For additional provisions applicable to conditions subsequent, see Chapter 5 (commencing with Section 885.010) (powers of termination).

§ 888.020. Restrictions excepted

888.020. This chapter does not apply to any of the following:

(a) A restriction that is an enforceable equitable servitude under Section 1354.

(b) An environmental restriction under Section 1471 or other restriction that serves substantially the same function.

(c) A restriction enforceable by a public entity or recorded in fulfillment of a requirement of a public entity, provided that fact appears on the record.

(d) A conservation easement under Chapter 4 (commencing with Section 815) of Title 2, or a negative easement or other restriction that serves substantially the same function, including an open space easement under the Open-Space Easement Act of 1974 (Chapter 6.6 (commencing with Section 51070) of Part 1 of Division 1 of Title 5 of the Government Code) and a restriction under the California Land Conservation Act of 1965 (Chapter 7 (commencing with Section 51200) of Part 1 of Division 1 of Title 5 of the Government Code), regardless whether the easement or other restriction is given voluntarily and whether or not it is perpetual in duration.

Comment. Section 888.020 supplements the general exceptions from this title provided in Section 880.240. Nothing in this section precludes the parties to an excepted restriction from providing by agreement that this chapter applies to the restriction.

Subdivision (a) excepts equitable servitudes in common interest developments from expiration by operation of law under this chapter.

Enforceability of those restrictions is governed by Section 1354 (restriction enforceable “unless unreasonable”).

Subdivision (b) applies to a restriction intended to protect present or future human health or safety or the environment as a result of the presence of hazardous materials (Health and Safety Code Section 25260), whether in the form of a covenant or in another form. Compare Section 1471 (covenant) with Sections 784, 888.010 (“restriction” defined).

Subdivision (c) is a specific application of Section 880.240(c). A public land use restriction is an interest in property that is excepted from the operation of the Marketable Record Title Act. Restrictions imposed by state and regional land use agencies, such as the California Coastal Commission, the San Francisco Bay Conservation and Development Commission, the Tahoe Regional Planning Agency, and the California Tahoe Conservancy, as well as restrictions imposed by federal agencies, are included within the coverage of subdivision (c).

Subdivision (d) broadens the exception provided in Section 880.240(d). A “conservation easement” within the meaning of Section 815 must be conveyed voluntarily and is perpetual in duration. Subdivision (d) excepts a negative easement or other restriction that serves substantially the same function as a conservation easement even though it may have been conveyed in fulfillment of a requirement of a public entity and even though it may not be perpetual in duration. An open space easement under the Open-Space Easement Act of 1974, for example, or a restriction under the Williamson Act, may be limited in duration. See Gov’t Code §§ 51075(d) (open space easement), 51244-51244.5 (contract to limit use of agricultural land).

§ 888.030. Expiration of restriction

888.030. (a) A restriction of record expires at the last of the following times:

(1) Sixty years after the date the instrument creating or otherwise evidencing the restriction is recorded.

(2) Sixty years after the date a notice of intent to preserve the restriction is recorded, if the notice is recorded within the time prescribed in paragraph (1).

(3) Sixty years after the date an instrument creating or otherwise evidencing the restriction or a notice of intent to preserve the restriction is recorded, if the instrument or notice is recorded within 60 years after the date such an instrument or notice was last recorded.

(b) This section applies notwithstanding any provision to the contrary in the instrument creating or otherwise evidencing the restriction or in another recorded document unless the instrument or other recorded document provides an earlier expiration date.

Comment. Section 888.030 provides for expiration of a restriction after 60 years, notwithstanding a longer or indefinite period or automatic renewal provided in the instrument creating the restriction. The expiration period runs from the date of recording rather than the date of creation of the restriction because the primary purpose of this section is to clear record title.

The expiration period can be extended for up to 60 years at a time by recordation of a notice of intent to preserve the restriction. See Section 880.310 (notice of intent to preserve interest). The form of a notice of intent to preserve the restriction is prescribed in Section 880.340. For persons entitled to record a notice of intent to preserve the restriction, see Section 880.320. Recordation of a notice of intent to preserve the restriction does not enable enforcement of a restriction that is unenforceable because it has been abandoned or become obsolete due to changed conditions or otherwise. See Sections 880.310 (notice of intent to preserve interest), 888.070 (chapter does not revive unenforceable restriction), & Comments.

For the effect of expiration of a restriction pursuant to this section, see Section 888.080 (effect of expiration). This section does not affect restrictions excepted by statute from its operation. See Sections 880.240 (interests excepted from title), 888.020 (restrictions excepted).

§ 888.040. Notice of intent to preserve restriction

888.040. (a) Recordation of a notice of intent to preserve a restriction within the time prescribed in Section 888.030 preserves the restriction described in the notice for the benefit of the claimant or claimants named in the notice against the real property described in the notice.

(b) Recordation of a notice of intent to preserve a restriction is constructive notice to the owner of the real property described in the notice, notwithstanding the indexing of the notice under the name of the claimant pursuant to Section 880.350.

Comment. Subdivision (a) of Section 888.040 is a specific application of the general principles set out in Sections 880.310-880.330. Under these provisions, a person may preserve a restriction by recording a notice of intent to preserve the restriction. Section 880.310 (notice of intent to preserve interest). A person may record a notice on the person's own behalf or on behalf of another claimant if the person is authorized to act on behalf of the other claimant. Section 880.320 (who may record notice). The notice must identify each claimant for which the notice is recorded, the specific restriction or restrictions being preserved, and the property against which the restriction is claimed. Section 880.330 (contents of notice); see also Section 880.340 (form of notice).

Subdivision (b) emphasizes the point that even though recordation of a notice of intent to preserve an interest is indexed under the name of the interest claimant and not under the name of the property owner, the property owner is on inquiry notice of its recordation. A chain of title search for a notice of intent to preserve an interest will therefore require a search from creation of the restriction down the line of persons entitled to enforce the restriction rather than down the line of owners of the property burdened by the restriction.

§ 888.050. Mutuality of preservation of restriction

888.050. Recordation of a notice of intent to preserve a restriction that is enforceable as a mutual equitable servitude preserves the restriction (1) for the benefit of the claimant or claimants named in the notice against the real property described in the notice and (2) for the benefit of the real property described in the notice against the claimant or claimants.

Comment. Section 888.050 makes clear that one party's recordation of a notice of intent to preserve a mutual equitable servitude does not destroy the mutuality of the equitable servitude — its benefits and burdens are preserved both for the party recording the notice and the party against whom it is recorded.

§ 888.060. Preservation of restriction as to entire tract or subdivision

888.060. In lieu of the legal description of the real property in which the interest is claimed as otherwise required by paragraph (3) of subdivision (b) of Section 880.330 and notwithstanding the provisions of Section 880.340, Section

888.040, or any other provision in this title, a notice of intent to preserve a restriction that is enforceable as a mutual equitable servitude may refer generally and without specificity to all property located within a tract or subdivision, and preserves the restriction for the benefit of all property located within the tract or subdivision, if the tract or subdivision is identified in the restriction as composed of parcels subject to the restriction pursuant to a general plan of restrictions common to all the parcels and designed for their mutual benefit.

Comment. Section 888.060 allows recordation of a single notice of intent to preserve a restriction enforceable as a mutual equitable servitude as to an entire subdivision if the subdivision is identified in the restriction. If the subdivision is not identified in the restriction, the restriction may be preserved as to the entire subdivision by identifying all parcels that are subject to the restriction.

§ 888.070. Chapter does not revive unenforceable restriction

888.070. Nothing in this chapter shall be construed to revive or make enforceable a restriction that is otherwise unenforceable before expiration of the times provided in Section 888.030, whether because the restriction is abandoned, obsolete, unlawful, or for any other reason.

Comment. Section 888.070 supplements Sections 880.250(b) (title does not revive or extend period of enforceability under statute of limitations) and 880.310(b) (recordation of notice of intent to preserve interest does not preclude court determination of unenforceability). A restriction that is obsolete is unenforceable. See, e.g., discussion in 4 B. Witkin, *Summary of California Law Real Property* §§ 502-07, at 681-84 (9th ed. 1987). A discriminatory restriction is void and unenforceable. See, e.g., Section 53 (restriction on sex, race, color, religion, ancestry, national origin, or disability).

§ 888.080. Effect of expiration of restriction

888.080. Expiration of a restriction pursuant to this chapter makes the restriction unenforceable and is equivalent for all purposes to a termination of the restriction of record.

Comment. Section 888.080 provides for the clearing of record title to real property by operation of law after a restriction has expired under Section 888.030 (expiration of restriction). Title can be cleared by judicial decree prior to the time prescribed in Section 888.030 in case of an otherwise unenforceable restriction. See Section 888.070 & Comment.

§ 888.090. Operative date

888.090. (a) This chapter is operative January 1, 1998.

(b) Subject to Section 880.370, this chapter applies on the operative date to all restrictions, whether executed or recorded before, on, or after the operative date.

Comment. Section 888.090 makes clear the legislative intent to apply this chapter immediately to existing restrictions. Section 880.370 provides a five-year grace period for recording a notice of intent to preserve a restriction that expires by operation of this chapter before, on, or within five years after the operative date of this chapter.

STATUTE OF LIMITATIONS

Code Civ. Proc. § 336 (amended). Five year statute of limitations

SEC. 3. Section 336 of the Code of Civil Procedure is amended to read:

336. Within five years:

(a) An action for mesne profits of real property.

(b) *An action for violation of a restriction, as defined in Section 784 of the Civil Code. The period prescribed in this subdivision runs from the time the person seeking to enforce the restriction discovered or, through the exercise of reasonable diligence, should have discovered the violation. A failure to commence an action for violation of a restriction within the period prescribed in this subdivision does not waive the right to commence an action for any other violation of the restriction and does not, in itself, create an implication that the restriction is abandoned, obsolete, or otherwise unenforceable. This subdivision shall not bar commencement of an action for violation of a restriction before January 1,*

2000, and until January 1, 2000, any other applicable statutory or common law limitation shall continue to apply to such an action.

Comment. Subdivision (b) is added to Section 336 to make clear that the statutory limitation period applicable to enforcement of a restriction is five years, consistent with the general statutes governing recovery of real property. *Cf.* Section 319 (five years). This ensures a uniform limitation period regardless whether the restriction is in the form of a covenant, condition, negative easement, or equitable servitude. See Civ. Code § 784 (“restriction” defined); *cf.* 2 A Bowman, Ogden’s Revised California Real Property Law §§ 23.25, at 1155; 23.32, at 1159 (1975) (five years). It should be noted that, while equitable servitudes in common interest developments are covered by this section, they are not subject to expiration under the obsolete restriction provisions of the Marketable Record Title Act. See Civ. Code § 888.020(a) (common interest development equitable servitudes excepted).

For purposes of subdivision (b), the time when a homeowners’ association is deemed to have knowledge of a violation of a restriction would be determined under general principles of imputed knowledge. See, e.g., Civ. Code § 2332. Thus an incorporated or unincorporated homeowner’s association is deemed to have knowledge of a violation of a restriction when an appropriate officer or agent of the association has knowledge of the violation.

Under subdivision (b), a failure to enforce a violation within the limitation period should not alone be grounds to imply a waiver or abandonment of the restriction. However, such a failure may, combined with other circumstances, be grounds for waiver or estoppel or evidence of abandonment or obsolescence. See, e.g., *Bryant v. Whitney*, 178 Cal. 640, 174 P. 32 (1918) (waiver). It should be noted that a restriction may become unenforceable due to passage of time or for other reasons. *Cf.* Civ. Code §§ 888.030 (expiration of restriction), 888.070 (chapter does not revive unenforceable restriction), & Comments.

Subdivision (b) provides a two-year grace period to enable action on a violation that would become unenforceable upon enactment of this chapter and a shorter grace period for action on a violation that would become unenforceable within two years after enactment of this chapter. The two-year grace period does not operate to extend the time to act on a violation that would become unenforceable by operation of law apart from this chapter, either pursuant to case law limitations or applicable statutes of limitation.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Attachment by Undersecured Creditors

November 1996

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

NOTE

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

Cite this report as *Attachment by Undersecured Creditors*, 26 Cal. L. Revision Comm'n Reports 307 (1996).

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
(415) 494-1335

ALLAN L. FINK, Chairperson
CHRISTINE W.S. BYRD, Vice Chairperson
ASSEMBLYMAN DICK ACKERMAN
ROBERT E. COOPER
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SENATOR QUENTIN L. KOPP
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EDWIN K. MARZEC
SANFORD M. SKAGGS
COLIN W. WIED

November 14, 1996

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

The Commission recommends continuation of the 1990 amendments permitting attachment by undersecured creditors, specifically, creditors whose claims are partially secured by personal property security. This recommendation would be implemented by repealing the sunset clauses applicable to the 1990 amendments. The Commission has not found any evidence that the 1990 rules have caused any problems nor has the Commission found any grounds for modifying the policy of the existing rules. The Commission also recommends a number of technical revisions.

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

Respectfully submitted,

Allan L. Fink
Chairperson

ATTACHMENT BY UNDERSECURED CREDITORS

This recommendation proposes repealing the sunset clauses applicable to 1990 amendments to the Attachment Law that relaxed the rules concerning issuance of attachment where the plaintiff's claim is partially secured by personal property.¹ The effect of this recommendation would be to make the 1990 changes permanent. In addition, this recommendation proposes a number of technical revisions in the Attachment Law.

1. See 1990 Cal. Stat. ch. 943 (SB 2170), amending Code of Civil Procedure Sections 483.010 and 483.015. (Hereinafter, all code citations are to the Code of Civil Procedure, unless otherwise noted.) In an uncodified provision of this 1990 legislation, the Commission was directed to

study the impacts of the changes in Sections 483.010 and 483.015 of the Code of Civil Procedure made by ... this act during the period from January 1, 1991, to and including December 31, 1993, and shall report the results of its study, together with recommendations concerning continuance or modification of these changes, to the Legislature on or before December 31, 1994.

1990 Cal. Stat. ch. 943, § 3.

The Commission submitted its report as part of a recommendation on *Debtor-Creditor Relations*, 25 Cal. L. Revision Comm'n Reports 1 (1995). See *id.* at 7-11, 25-40. The Commission recommended continuation of the 1990 attachment provisions based on experience under the modified law and implementing amendments were included in Senate Bill 832 (Kopp) in the 1995 legislative session. However, the attachment provisions were removed from the bill in the Senate Judiciary Committee, apparently because the Committee wanted the Commission to evaluate the policy underlying the 1990 amendments. See Senate Committee on Judiciary. Consultant's Analysis of AB 1689, as amended July 3, 1995 (1995-96 Regular Session). Consequently, the attachment sunset provisions were extended for two years "in order for the Law Revision Commission ... to study the fairness of the proposals to expand creditor's remedies." *Id.* The sunset extension was enacted as 1995 Cal. Stat. ch. 591, §§ 1-4 (amending Code Civ. Proc. §§ 483.010-483.015).

Background

The Attachment Law² was enacted in 1974 on recommendation of the Commission and has been amended on Commission recommendation several times since then.³ In 1990, a bill sponsored by the California State Bar amended the Attachment Law to permit attachment where the plaintiff's claim is secured by personal property or fixtures.⁴ The amendments eliminated the former rule limiting attachment in claims secured by personal property to cases where the plaintiff could show that the security had decreased in value or become valueless without fault of the plaintiff. Under the 1990 rule, the existence of personal property security is irrelevant to the right to attach, but the amount of the attachment is reduced by the present value of the security plus the amount of any decrease in value caused by the plaintiff or prior holders of the security interest. The 1990 amendments were designed to give an *undersecured* creditor the same attachment remedy as an *unsecured* creditor, to the extent that the debt is not secured.⁵

The 1990 rule will expire on January 1, 1998, by operation of statutory sunset clauses, unless the Legislature takes action before that date. If there is no legislative action to preserve the 1990 amendments, the former rule will come back into force.⁶

2. Section 481.010 *et seq.*; see *Recommendation Relating to Prejudgment Attachment*, 11 Cal. L. Revision Comm'n Reports 701 (1973).

3. See recommendations cited in *1982 Creditors' Remedies Legislation*, 16 Cal. L. Revision Comm'n Reports 1001, 1608 (1982).

4. See 1990 Cal. Stat. ch. 943.

5. For background on the 1990 legislation, see Senate Committee on Judiciary, Consultant's Analysis of SB 2170, as amended May 1, 1990 (1989-90 Regular Session) (attached to Memorandum 94-16, on file with California Law Revision Commission); letter from Brian L. Holman (June 22, 1994) (attached to Memorandum 94-41, on file with California Law Revision Commission).

6. See Sections 483.010 (as added by 1990 Cal. Stat. ch. 943, § 1.5), 483.015 (as added by 1990 Cal. Stat. ch. 943, § 2.5). Although these sections

Experience Under 1990 Amendments

The Commission was directed to study the impact of the 1990 amendments on the attachment process during 1991-1993 and to report to the Legislature any recommendations concerning continuation or modification of the 1990 changes.⁷

The Commission solicited comments on the experience under the new rule from superior courts in ten of the most populous counties. In addition, letters were sent to all persons on the Commission's mailing list who have expressed an interest in debtor-creditor relations and to about 30 other potentially interested organizations that maintain registered lobbyists. The State Bar liaisons were notified of the study and the opinions of relevant State Bar sections were requested.

The Commission received comments from four superior courts, the Debtor/Creditor Relations and Bankruptcy Committee of the Business Law Section of the State Bar, and the Commercial Law League.⁸ Opinion was nearly unanimous in support of continuing the 1990 amendments:

appear to be new enactments operative in the future, they are actually prior law as it existed on December 31, 1990, before the new rule became operative. It has been reported to the Commission that the appearance of two sets of two sections with the same numbers in the code has caused practitioners some confusion. See letter from Commissioner Arnold Levin to Stan Ulrich (March 31, 1994) (attached to Memorandum 94-16, on file with California Law Revision Commission).

7. See note 1 *supra*.

8. See letters attached to Memorandum 94-16 (on file with California Law Revision Commission); letter from Leo G. O'Bieunas, Jr., on behalf of the Creditor Rights Section of the Commercial Law League of America, to Stan Ulrich (Sept. 22, 1994) (on file with California Law Revision Commission). The Commission also received comments from Brian L. Holman and Alan M. Mirman, who were instrumental in sponsoring the 1990 amendments. Mr. Holman and Mr. Mirman believe respectively that the amendments are "serving their purpose" and that the amendments have created "no problems, concerns, or drawbacks." See letter and background materials from Brian L. Holman to the Commission (June 22, 1994) and letter from Alan M. Mirman to the Commis-

- Judge Joe S. Gray of the Sacramento County Superior Court reported that he and Judge Morrison, who handle almost all attachments in that county, have not perceived any difficulties with or any effect from the new rule.
- Judge Ronald L. Bauer of the Orange County Superior Court reported no observable impact of the 1990 amendments in over 700 cases considered since enactment of the new rule.
- Judge Arthur W. Jones of the San Diego County Superior Court reported that the new rule appears to be working well and that it has had no unusual or adverse affect on the number or dollar amount of attachments. Judge Jones concluded that evaluation of security is generally an easy task and saw no reason not to extend the new rule.
- The Debtor/Creditor Relations and Bankruptcy Committee of the Business Law Section of the State Bar wrote that, based on anecdotal history available to the members of the committee, the new rule “works effectively and should remain in operation.”
- The Commercial Law League of America believes that the attachment provisions “should be allowed to remain in effect.”

The dissenting note came from Commissioner Arnold Levin of the Los Angeles County Superior Court, who reported that the number of attachments has increased under the amended statute and concluded with the suggestion that the law be restored to its earlier form.⁹

sion (Sept. 7, 1994) (attached to Memorandum 94-41, on file with California Law Revision Commission).

9. Commissioner Levin expresses the concern that an attachment can be issued even though the amount of the claim is fully secured. See letter from Commissioner Arnold Levin to Stan Ulrich (March 31, 1994) (attached to Memorandum 94-16, on file with California Law Revision Commission). This is theoretically possible, but the amount of the attachment would be \$0, since Section 483.015(b)(4) requires the deduction of the value of the security. This points to an inconsistency between Section 483.015(b) (amount to be secured by attachment) and Section 484.050(c) (notice of attachment, which omits the reduction required by the 1990 amendment to Section 483.015(b)(4)). The Commission

Policy Issues

The arguments in favor of permitting limited attachment by undersecured creditors may be summarized as follows:

(1) Permitting attachment by creditors who do not have security for the full amount of the debt assists business borrowers in obtaining financing on less than full security. This benefits credit-worthy borrowers who otherwise might not be able to obtain financing.

(2) In commercial transactions, it makes sense generally to permit attachment for any amount that can be enforced after judgment. Since the plaintiff must show probable validity of the claim to obtain a right to attach order, the defendant is protected from overreaching. To permit the debtor to avoid or delay a prejudgment remedy just because the debt is partially secured is arbitrary and inefficient.

(3) Permitting attachment of the unsecured part of the debt avoids the practical problems and artificialities inherent in proving that the value of the security has declined or become valueless without fault of the plaintiff. Determining whether the security has decreased in value requires the court to determine its original value and then determine its present value, before permitting attachment for the difference. Only the present value of the security need be determined under the 1990 amendments.

(4) Experience under the law has not shown any problems, as far as the Commission's study and survey in 1994 were able to determine, nor have any problems come to light since the survey was conducted. If the 1990 amendments resulted in significant unfairness, the Commission would have expected to receive some report from practitioners, courts, or interest

recommends that this inconsistency be resolved and that the Attachment Law be amended to make clear that the application for a right to attach order and writ of attachment should be dismissed if the value of the security exceeds the plaintiff's claim.

groups that have been contacted in the course of the Commission's study.

The arguments in opposition to continuing the 1990 amendments may be summarized as follows:

(1) Historically, attachment was not available in California for secured debts unless the security had become valueless without the act of the plaintiff. This rule recognizes the coercive effect attachment can have on a going business and should be preserved.

(2) If the debt is secured, the parties may be presumed to have entered into the contract with the expectation that the creditor should resort to the security. The terms of the loan, for example, may take into account the additional risk exposure due to the undersecured status of the lender.

(3) If a creditor can fall back on attachment, then there is less of an incentive to make sure that the security is not impaired.

(4) Mixing secured debt enforcement and attachment gives the creditor too much power, since typically the creditor may sell the security under UCC provisions through private enforcement, albeit in a "commercially reasonable manner." Permitting attachment for the unsecured portion of the liability could further depress the price the creditor bids or accepts at a private sale.

(5) Permitting attachment by undersecured creditors gives them an unfair advantage over unsecured creditors who must rely on attachment to secure a debt. The secured creditor is already favored to the extent of the security (which cannot be profitably subjected to attachment by other creditors) and should not also have the opportunity to lock up other property ahead of competing unsecured creditors.

Commission Recommendation

Having reviewed the reports received on experience under the new rule and considered the policy arguments for and against permitting attachment by undersecured creditors, the Commission concludes that the substance of the 1990 amendments should be made permanent. There is no evidence that the 1990 rules have caused any problems nor has the Commission found any grounds for modifying the policy of the 1990 amendments. While individuals may evaluate the policy arguments differently, on balance there is no clear need to revise rules that appear to be operating as designed and without any reports of negative consequences. The Commission recommends removal of the sunset clauses and the final repeal of the earlier rules.¹⁰

Technical Issues

The Commission also recommends a number of technical revisions to improve the coordination of the 1990 amendments with other provisions in the Attachment Law.¹¹ For example, the rules relating to attachment in unlawful detainer actions were not adjusted for conformity with the 1990 amendments,¹² and obsolete language qualifying the former limitation applicable to claims secured by personal property still remains in the code.¹³

10. For the implementation of this recommendation, see *infra*, Sections 483.010 (amended), 483.010 (repealed), 483.015 (amended), 483.015 (repealed).

11. For the implementation of this technical revision, see *infra*, Sections 483.020, 484.050, 484.090, 485.220, 492.030.

12. Section 483.020, read literally, appears to require that the amount of any security for rent be deducted twice from the amount of the attachment, once under subdivision (d) and once under subdivision (e) (incorporating Section 483.015(b)(4)).

13. E.g., the reference to claims secured by nonconsensual possessory liens in Section 483.010(b).

PROPOSED LEGISLATION

Code Civ. Proc. § 483.010 (amended). Cases in which attachment authorized

SECTION 1. Section 483.010 of the Code of Civil Procedure, as amended by Section 1 of Chapter 591 of the Statutes of 1995, is amended to read:

483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees.

(b) An attachment may not be issued on a claim which is secured by any interest in real property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust of realty and any statutory, common law, or equitable lien on real property, but excluding any security interest in fixtures subject to Division 9 (commencing with Section 9101) of the Commercial Code). However, an attachment may be issued ~~(1)~~ where the claim was originally so secured but, without any act of the plaintiff or the person to whom the security was given, the security has become valueless or has decreased in value to less than the amount then owing on the claim, in which event the amount to be secured by the attachment shall not exceed the lesser of the amount of the decrease or the difference between the value of the security and the amount then owing on the claim, ~~or (2) where the claim was secured by a nonconsensual possessory lien but the lien has been relinquished by the surrender of the possession of the property.~~

(c) If the action is against a defendant who is a natural person, an attachment may be issued only on a claim which

arises out of the conduct by the defendant of a trade, business, or profession. An attachment may not be issued on a claim against a defendant who is a natural person if the claim is based on the sale or lease of property, a license to use property, the furnishing of services, or the loan of money where the property sold or leased, or licensed for use, the services furnished, or the money loaned was used by the defendant primarily for personal, family, or household purposes.

(d) An attachment may be issued pursuant to this section whether or not other forms of relief are demanded.

~~(e) This section shall remain in effect only until January 1, 1998, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1998, deletes or extends that date.~~

Comment. The last clause of subdivision (b) of Section 483.010 is omitted as obsolete. This exception was applicable to personal property formerly covered by the general rule against attachment on a claim secured by personal property.

Subdivision (e) is deleted to remove the sunset provision that was enacted in 1990 and extended in 1995. See 1990 Cal. Stat. ch. 943, § 1; 1995 Cal. Stat. ch. 591, § 1.

Background Comment (1974-90 revised). Section 483.010 is based on subdivision (a) of former Section 537.1. Subdivision (a) of former Section 537.1 was designed to limit attachment to cases arising out of commercial transactions. (The title to the 1972 enactment provides that it is one “relating to attachment in commercial actions.”) Section 483.010 continues this purpose. Subdivision (a) limits the claims on which an attachment may be issued to those based on a contract, express or implied, where the total amount claimed is \$500 or more, exclusive of costs, interest, and attorney’s fees. Subdivision (c) further carries out this purpose by providing that, if the defendant is an individual, an attachment may be issued only if the contract claim “arises out of the conduct by the individual of a trade, business, or profession” and only if the goods, services, or money furnished were not used primarily for the defendant’s personal, family, or household purposes. *Cf.* *Advance Transformer Co. v. Superior Court*, 44 Cal. App. 3d 127, 142, 118 Cal. Rptr. 350, 360 (1974) (construing former Sections 537.1 and 537.2 as “limiting the attachment to situations in which the claim arises out of

defendant's conduct of his business"). Compare Civil Code Section 1802.1 (retail sales). However, Section 483.010 is intended to encompass each of the situations described in paragraphs (1) through (4) of subdivision (a) of former Section 537.1. In this respect, it should be noted that the term "contract" used in subdivision (a) includes a lease of either real or personal property. See *Stanford Hotel Co. v. M. Schwind Co.*, 180 Cal. 348, 181 P. 780 (1919) (realty); *Walker v. Phillips*, 205 Cal. App. 2d 26, 22 Cal. Rptr. 727 (1962) (personalty). In addition, unlike former Section 537.2, Section 483.010 permits attachment on such claims against corporations and partnerships and other unincorporated associations which are not organized for profit or engaged in an activity for profit. Under Section 483.010, the court is not faced with the potentially difficult and complex problem of determining whether a corporation, partnership, or association is engaged in a trade, business, or profession.

Claims may be aggregated, but the total amount claimed in the action must be not less than \$500. Generally an expeditious remedy will be available for lesser amounts under the small claims procedure. See Section 116.110 *et seq.* The claim must be for a "fixed or readily ascertainable" amount. This provision continues former law. E.g., *Lewis v. Steifel*, 98 Cal. App. 2d 648, 220 P.2d 769 (1950).

The introductory clause of Section 483.010 recognizes the authority to attach granted by other miscellaneous statutory provisions. See, e.g., Civ. Code §§ 3065a, 3152; Fin. Code § 3144; Food & Agric. Code § 281; Harb. & Nav. Code § 495.1; Health & Safety Code § 11501; Lab. Code § 5600; Rev. & Tax. Code §§ 6713, 7864, 8972, 11472, 12680, 18833, 26251, 30302, 32352. See also Section 492.010 (nonresident attachment).

The attachment remedy is not available where the plaintiff's claim is secured by real property unless, without act of the plaintiff, the security has become valueless or has decreased in value to less than the amount then owing on the claim. See subdivision (b). Moreover, the security cannot simply be waived. As to a claim secured by personal property, see Section 483.015(b)(4). Special rules also apply in unlawful detainer cases. See Section 483.020.

Code Civ. Proc. § 483.010 (repealed). Cases in which attachment authorized

SEC. 2. Section 483.010 of the Code of Civil Procedure, as amended by Section 2 of Chapter 591 of the Statutes of 1995, is repealed.

483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees.

(b) An attachment may not be issued on a claim which is secured by any interest in real or personal property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust of realty, any security interest subject to Division 9 (commencing with Section 9101) of the Commercial Code, and any statutory, common law, or equitable lien). However, an attachment may be issued (1) where the claim was originally so secured but, without any act of the plaintiff or the person to whom the security was given, the security has become valueless or has decreased in value to less than the amount then owing on the claim, in which event the amount for which the attachment may issue shall not exceed the lesser of the amount of the decrease or the difference between the value of the security and the amount then owing on the claim, or (2) where the claim was secured by a nonconsensual possessory lien but the lien has been relinquished by the surrender of the possession of the property.

(c) If the action is against a defendant who is a natural person, an attachment may be issued only on a claim which arises out of the conduct by the defendant of a trade, business, or profession. An attachment may not be issued on a claim against a defendant who is a natural person if the claim is based on the sale or lease of property, a license to use property, the furnishing of services, or the loan of money where the property sold or leased, or licensed for use, the services furnished, or the money loaned was used by the

~~defendant primarily for personal, family, or household purposes.~~

~~(d) An attachment may be issued pursuant to this section whether or not other forms of relief are demanded.~~

~~(e) This section shall become operative on January 1, 1998.~~

Comment. Former Section 483.010 (as amended by 1995 Cal. Stat. ch. 591, § 2) is repealed in light of continuation of the alternative rule in Section 483.010, as amended to delete the sunset provision.

Code Civ. Proc. § 483.015 (amended). Amount to be secured by attachment

SEC. 3. Section 483.015 of the Code of Civil Procedure, as amended by Section 3 of Chapter 591 of the Statutes of 1995, is amended to read:

483.015. (a) Subject to subdivision (b) and to Section 483.020, the amount to be secured by an attachment is the sum of the following:

(1) The amount of the defendant's indebtedness claimed by the plaintiff.

(2) Any additional amount included by the court under Section 482.110.

(b) The amount described in subdivision (a) shall be reduced by the sum of the following:

(1) The amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable.

(2) The amount of any indebtedness of the plaintiff that the defendant has claimed in a cross-complaint filed in the action if the defendant's claim is one upon which an attachment could be issued.

(3) The amount of any claim of the defendant asserted as a defense in the answer pursuant to Section 431.70 if the defendant's claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations.

(4) The value of any security interest in the property of the defendant held by the plaintiff to secure the defendant's indebtedness claimed by the plaintiff, together with the amount by which the value of the security interest has decreased due to the act of the plaintiff or ~~any person to whom a prior holder of the security interest was transferred.~~

~~(c) This section shall remain in effect only until January 1, 1998, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1998, deletes or extends that date.~~

Comment. Subdivision (c) of Section 483.015 is deleted to remove the sunset provision that was enacted in 1990 and amended in 1995. See 1990 Cal. Stat. ch. 943, § 2; 1995 Cal. Stat. ch. 591, § 3. For a special limitation on the reduction factor in subdivision (b)(4), see Section 483.020(e) (unlawful detainer). Subdivision (b)(4) is amended for clarity. This is a technical, nonsubstantive change.

Background Comment (1982-83 revised). Section 483.015 governs the amount for which an attachment may issue. Subdivision (b) clarifies the nature of claims that will reduce the amount to be secured by attachment. This subdivision makes clear, for example, that the amount to be secured by the attachment is not reduced by a tort claim that has not been reduced to judgment. The defendant may seek to have the amount secured by the attachment reduced as provided in Sections 484.060 and 485.240. Under subdivision (b), if a claim may be offset only if it is "one upon which an attachment could be issued," the claim must meet the requirements of Section 483.010 as to amount and nature of the claim.

Code Civ. Proc. § 483.015 (repealed). Amount to be secured by attachment

SEC. 4. Section 483.015 of the Code of Civil Procedure, as amended by Section 4 of Chapter 591 of the Statutes of 1995, is repealed.

~~483.015. (a) Subject to subdivision (b) and to Section 483.020, the amount to be secured by an attachment is the sum of the following:~~

~~(1) The amount of the defendant's indebtedness claimed by the plaintiff.~~

~~(2) Any additional amount included by the court under Section 482.110.~~

~~(b) The amount described in subdivision (a) shall be reduced by the sum of the following:~~

~~(1) The amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable.~~

~~(2) The amount of any indebtedness of the plaintiff that the defendant has claimed in a cross-complaint filed in the action if the defendant's claim is one upon which an attachment could be issued.~~

~~(3) The amount of any claim of the defendant asserted as a defense in the answer pursuant to Section 431.70 if the defendant's claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations.~~

~~(c) This section shall become operative on January 1, 1998.~~

Comment. Former Section 483.015 (as amended by 1995 Cal. Stat. ch. 591, § 4) is repealed in light of continuation of the alternative rule in Section 483.015, as amended to delete the sunset provision.

Code Civ. Proc. § 483.020 (technical amendment). Amount secured by attachment in unlawful detainer proceeding

SEC. 5. Section 483.020 of the Code of Civil Procedure is amended to read:

483.020. (a) Subject to subdivisions (d) and (e), the amount to be secured by the attachment in an unlawful detainer proceeding is the sum of the following:

(1) The amount of the rent due and unpaid as of the date of filing the complaint in the unlawful detainer proceeding.

(2) Any additional amount included by the court under subdivision (c).

(3) Any additional amount included by the court under Section 482.110.

(b) In an unlawful detainer proceeding, the plaintiff's application for a right to attach order and a writ of attachment pursuant to this title may include (in addition to the rent due and unpaid as of the date of the filing of the complaint and any additional estimated amount authorized by Section 482.110) an amount equal to the rent for the period from the date the complaint is filed until the estimated date of judgment or such earlier estimated date as possession has been or is likely to be delivered to the plaintiff, such amount to be computed at the rate provided in the lease.

(c) The amount to be secured by the attachment in the unlawful detainer proceeding may, in the discretion of the court, include an additional amount equal to the amount of rent for the period from the date the complaint is filed until the estimated date of judgment or such earlier estimated date as possession has been or is likely to be delivered to the plaintiff, such amount to be computed at the rate provided in the lease.

~~(d) Notwithstanding subdivision (b) of Section 483.010, an attachment may be issued in an unlawful detainer proceeding where *Except as provided in subdivision (e), the amount to be secured by the attachment as otherwise determined under this section shall be reduced by the amounts described in subdivision (b) of Section 483.015.*~~

~~(e) Where the plaintiff has received a payment or holds a deposit to secure the payment of rent or the performance of other obligations under the lease. If the payment or deposit secures only the payment of rent, the amount of the payment or deposit shall be subtracted in determining the amount to be secured by the attachment. If the payment or deposit secures (1) the payment of rent and the performance of other obligations under the lease or secures (2) only the performance of other obligations under the lease, the amount~~

of the payment or deposit shall not be subtracted in determining the amount to be secured by the attachment.

~~(e) The amount to be secured by the attachment as otherwise determined under this section shall be reduced by the amounts described in subdivision (b) of Section 483.015.~~

Comment. Section 483.020 is amended to conform this section to Sections 483.010 and 483.015, as amended in 1990. The “notwithstanding” clause formerly in subdivision (d) is unnecessary, since Section 483.010 has been amended to eliminate the categorical restriction on attachment where a claim is secured by personal property. See 1990 Cal. Stat. ch. 943, § 1. Former subdivision (e) is deleted as surplus, since the appropriate reduction in the amount of the attachment is covered by subdivision (d), which incorporates the reduction factors in Section 483.015. See 1990 Cal. Stat. ch. 943, § 2, which added paragraph (4) to Section 483.015(b).

As revised, this section is consistent with the rule that an attachment is available where a claim is partially secured by personal property (Section 483.010(b)), with the amount of the attachment reduced by the value of any security interest (Section 483.015(b)(4)) that is applicable exclusively to the rental obligation. If the security may be applied to any obligation other than rent, subdivision (e) makes clear that the amount of the attachment is not reduced by the amount of the security.

Background Comment (1978 revised). Section 483.020 makes clear that, on the plaintiff’s application, the “amount to be secured by the attachment” in an unlawful detainer proceeding may include, in the court’s discretion, an amount for the use and occupation of the premises by the defendant during the period from the time the complaint is filed until either the time of judgment or such earlier time as possession has been or is likely to be delivered to the plaintiff. One factor the court should consider in deciding whether to allow the additional amount is the likelihood that the unlawful detainer proceeding will be contested. There may be a considerable delay in bringing the unlawful detainer proceeding to trial if it is contested. In this case, there may be a greater need for attachment to include an additional amount to cover rent accruing after the complaint is filed. It should be noted that, in the case of a defendant who is a natural person, attachment is permitted only where the premises were leased for trade, business, or professional purposes. See Section 483.010.

The amount authorized under subdivision (c) is in addition to (1) the amount in which the attachment would otherwise issue (unpaid rent due and owing at the time of the filing of the complaint) and (2) the

additional amount for costs and attorney's fees that the court may authorize under Section 482.110.

Subdivision (d) makes clear that the amount of a deposit (such as a deposit described in Civil Code Section 1950.7) held by the plaintiff solely to secure the payment of rent is to be subtracted in determining the amount to be secured by the attachment. However, the amount of the deposit is not subtracted in determining the amount to be secured by the attachment where, for example, the deposit is to secure both the payment of rent and the repair and cleaning of the premises on termination of the tenancy. Under former law, it was held that a deposit in connection with a lease of real property was not "security" such as to preclude an attachment under former Section 537(4), superseded by Section 483.010(b). See *Garfinkle v. Montgomery*, 113 Cal. App. 2d 149, 155-57, 248 P.2d 52, 56-57 (1952).

Code Civ. Proc. § 484.050 (technical amendment). Contents of notice of application and hearing

SEC. 6. Section 484.050 of the Code of Civil Procedure is amended to read:

484.050. The notice of application and hearing shall inform the defendant of all of the following:

(a) A hearing will be held at a place and at a time, to be specified in the notice, on plaintiff's application for a right to attach order and a writ of attachment.

(b) The order will be issued if the court finds that the plaintiff's claim is probably valid and the other requirements for issuing the order are established. The hearing is not for the purpose of determining whether the claim is actually valid. The determination of the actual validity of the claim will be made in subsequent proceedings in the action and will not be affected by the decisions at the hearing on the application for the order.

(c) ~~The amount to be secured by the attachment is the amount of the defendant's indebtedness claimed by the plaintiff over and above the sum of (1) the amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable, (2) the amount of any indebtedness of the plaintiff claimed by the~~

~~defendant in a cross-complaint filed in the action if the defendant's claim is one upon which an attachment could be issued, and (3) the amount of any claim of the defendant asserted as a defense in the answer pursuant to Section 431.70 if the defendant's claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations determined pursuant to Sections 482.110, 483.010, 483.015, and 483.020, which statutes shall be summarized in the notice.~~

(d) If the right to attach order is issued, a writ of attachment will be issued to attach the property described in the plaintiff's application unless the court determines that such *the* property is exempt from attachment or that its value clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment. However, additional writs of attachment may be issued to attach other nonexempt property of the defendant on the basis of the right to attach order.

(e) If the defendant desires to oppose the issuance of the order, the defendant shall file with the court and serve on the plaintiff a notice of opposition and supporting affidavit as required by Section 484.060 not later than five court days prior to the date set for hearing.

(f) If the defendant claims that the personal property described in the application, or a portion thereof, is exempt from attachment, the defendant shall include that claim in the notice of opposition filed and served pursuant to Section 484.060 or file and serve a separate claim of exemption with respect to the property as provided in Section 484.070. If the defendant does not do so, the claim of exemption will be barred in the absence of a showing of a change in circumstances occurring after the expiration of the time for claiming exemptions.

(g) The defendant may obtain a determination at the hearing whether real or personal property not described in the

application or real property described in the application is exempt from attachment by including the claim in the notice of opposition filed and served pursuant to Section 484.060 or by filing and serving a separate claim of exemption with respect to the property as provided in Section 484.070, but the failure to so claim that the property is exempt from attachment will not preclude the defendant from making a claim of exemption with respect to the property at a later time.

(h) Either the defendant or the defendant's attorney or both of them may be present at the hearing.

(i) The notice shall contain the following statement: "You may seek the advice of an attorney as to any matter connected with the plaintiff's application. The attorney should be consulted promptly so that the attorney may assist you before the time set for hearing."

Comment. Subdivision (c) of Section 484.050 is amended for conformity with the substantive rules governing the amount of an attachment. The notice is required to set out the substance of the rules in Sections 482.110, 483.010, 483.015, and 483.020. See Section 482.030(b) (Judicial Council to prescribe form of notices).

Code Civ. Proc. § 484.090 (amended). Issuance of order and writ on notice

SEC. 7. Section 484.090 of the Code of Civil Procedure is amended to read:

484.090. (a) At the hearing, the court shall consider the showing made by the parties appearing and shall issue a right to attach order, which shall state the amount to be secured by the attachment determined by the court in accordance with Section 483.015 or 483.020, if it finds all of the following:

(1) The claim upon which the attachment is based is one upon which an attachment may be issued.

(2) The plaintiff has established the probable validity of the claim upon which the attachment is based.

(3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

(4) *The amount to be secured by the attachment is greater than zero.*

(b) If, in addition to the findings required by subdivision (a), the court finds that the defendant has failed to prove that all the property sought to be attached is exempt from attachment, it shall order a writ of attachment to be issued upon the filing of an undertaking as provided by Sections 489.210 and 489.220.

(c) If the court determines that property of the defendant is exempt from attachment, in whole or in part, the right to attach order shall describe the exempt property and prohibit attachment of the property.

(d) The court's determinations shall be made upon the basis of the pleadings and other papers in the record; but, upon good cause shown, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of the additional evidence or points and authorities.

Comment. Paragraph (4) is added to subdivision (a) of Section 484.090 to make clear that the court is not to issue a right to attach order and writ of attachment if there is no amount to be secured by the attachment. This amendment establishes the principle that a right to attach order cannot be issued if there is no amount for which a writ of attachment can be issued and avoids the theoretical possibility of the court's making a right to attach order with no amount to be secured by the attachment. Prior to the 1990 amendments to Section 483.015, this was not likely to occur even in theory, but with the change in the rules concerning issuance of attachment where the plaintiff's claim is secured by personal property, the statutes read literally would permit issuance of a right to attach order under Section 484.090 even though the value of the security exceeded the amount of the claim. See Section 483.015(b)(4); see also Section 485.240 (application to set aside right to attach order).

Code Civ. Proc. § 485.220 (technical amendment). Issuance of ex parte order and writ

SEC. 8. Section 485.220 of the Code of Civil Procedure is amended to read:

485.220. (a) The court shall examine the application and supporting affidavit and, except as provided in Section 486.030, shall issue a right to attach order, which shall state the amount to be secured by the attachment, and order a writ of attachment to be issued upon the filing of an undertaking as provided by Sections 489.210 and 489.220, if it finds all of the following:

(1) The claim upon which the attachment is based is one upon which an attachment may be issued.

(2) The plaintiff has established the probable validity of the claim upon which the attachment is based.

(3) The attachment is not sought for a purpose other than the recovery upon the claim upon which the attachment is based.

(4) The affidavit accompanying the application shows that the property sought to be attached, or the portion thereof to be specified in the writ, is not exempt from attachment.

(5) The plaintiff will suffer great or irreparable injury (within the meaning of Section 485.010) if issuance of the order is delayed until the matter can be heard on notice.

(6) *The amount to be secured by the attachment is greater than zero.*

(b) If the court finds that the application and supporting affidavit do not satisfy the requirements of Section 485.010, it shall so state and deny the order. If denial is solely on the ground that Section 485.010 is not satisfied, the court shall so state and such denial does not preclude the plaintiff from applying for a right to attach order and writ of attachment under Chapter 4 (commencing with Section 484.010) with the same affidavits and supporting papers.

Comment. Paragraph (6) is added to subdivision (a) of Section 485.220 to make clear that the court is not to issue a right to attach order and writ of attachment if there is no amount to be secured by the attachment. This amendment is consistent with Section 484.090. See Section 484.090 Comment.

Code Civ. Proc. § 492.030 (technical amendment). Issuance of foreign attachment order

SEC. 9. Section 492.030 of the Code of Civil Procedure is amended to read:

492.030. (a) The court shall examine the application and supporting affidavit and shall issue a right to attach order, which shall state the amount to be secured by the attachment, and order a writ of attachment to be issued upon the filing of an undertaking as provided by Sections 489.210 and 489.220, if it finds all of the following:

(1) The claim upon which the attachment is based is one upon which an attachment may be issued.

(2) The plaintiff has established the probable validity of the claim upon which the attachment is based.

(3) The defendant is one described in Section 492.010.

(4) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

(5) The affidavit accompanying the application shows that the property sought to be attached, or the portion thereof to be specified in the writ, is subject to attachment pursuant to Section 492.040.

(6) The amount to be secured by the attachment is greater than zero.

(b) If the court finds that the application and supporting affidavit do not satisfy the requirements of this chapter, it shall so state and deny the order. If denial is solely on the ground that the defendant is not one described in Section 492.010, the judicial officer shall so state and such denial does not preclude the plaintiff from applying for a right to attach order and writ of attachment under Chapter 4

(commencing with Section 484.010) with the same affidavits and supporting papers.

Comment. Paragraph (6) is added to subdivision (a) of Section 492.030 to make clear that the court is not to issue a right to attach order and writ of attachment if there is no amount to be secured by the attachment. This amendment is consistent with Section 484.090. See Section 484.090 Comment.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Ethical Standards for Administrative Law Judges

November 1996

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

NOTE

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

Cite this report as *Ethical Standards for Administrative Law Judges*, 26 Cal. L. Revision Comm'n Reports 335 (1996).

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
(415) 494-1335

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November 15, 1996

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

This recommendation proposes to adapt the California Code of Judicial Ethics (1996) to govern the hearing and nonhearing conduct of state administrative law judges. The ethical standards would apply in all proceedings conducted by state administrative law judges, including state adjudicative proceedings that are otherwise exempt from the Administrative Procedure Act. State hearing officers other than administrative law judges would not generally be covered by the new ethical standards, but general statutes governing conduct of state employees would continue to apply to them. A violation of the new ethical standards would be grounds for disciplinary action against the administrative law judge.

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

Respectfully submitted,

Allan L. Fink
Chairperson

ETHICAL STANDARDS FOR ADMINISTRATIVE LAW JUDGES

California has led the nation in developing a corps of professional administrative law judges to conduct state administrative adjudication proceedings. California's landmark 1945 Administrative Procedure Act included a central panel of hearing officers, designed to provide competent, professional hearing services for a variety of state agencies.¹ In addition, major state agencies that conduct their own administrative hearings have developed in-house divisions of administrative law judges devoted to the adjudication function.²

It is important for the integrity of the state's administrative adjudication system that its administrative law judges adhere to high ethical standards of conduct. Administrative law judges, like all other state employees, are currently subject to disciplinary action on such grounds as:³

- Incompetency
- Inexcusable neglect of duty
- Dishonesty
- Discourteous treatment of the public or other employees

1. For a description of the California central panel system and its history, see *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55, 93-98 (1995).

2. The Law Revision Commission estimates that at least 95% of the state's administrative law judges and hearing officers are employed by the adjudicating agencies rather than the Office of Administrative Hearings. Each of the following major adjudicative agencies employs a greater number of administrative law judges or hearing officers than the total number employed by the Office of Administrative Hearings: Board of Prison Terms, Department of Industrial Relations, Department of Social Services, Public Utilities Commission, Unemployment Insurance Appeals Board, Workers' Compensation Appeals Board.

3. Gov't Code § 19572.

- Engaging in an employment, activity, or enterprise that is inconsistent, incompatible, or in conflict with the duties of the employee
- Unlawful discrimination
- Other failure of good behavior

However, these grounds for disciplinary action are not well-adapted to the circumstances of adjudicative proceedings and administrative law judges.

At least one body of California hearing officers is expressly subject to an adjudicative code of ethics. Workers' compensation referees must subscribe to the California Code of Judicial Conduct and may not otherwise, directly or indirectly, engage in conduct contrary to that code.⁴ The canons of the California Code of Judicial Conduct admonish a judge to uphold the integrity and independence of the judiciary, to avoid impropriety and the appearance of impropriety in all of the judge's activities, to perform the duties of judicial office impartially and diligently, to conduct the judge's quasi-judicial and other extra-judicial activities to minimize the risk of conflict with judicial obligations, and to refrain from inappropriate political activity.⁵

Some of the provisions of the Code of Judicial Conduct are not suited to the circumstances of administrative adjudication. Efforts have been made at the national level to adapt judicial codes to govern the conduct of administrative law judges and provide guidance to them in establishing and maintaining high standards of judicial and personal conduct. These include the American Bar Association's Model Codes of Judicial Conduct for Federal Administrative Law Judges and State Administrative Law Judges, the National Association of Administrative Law Judges' Model Code of Judicial Conduct

4. Lab. Code § 123.6.

5. California Judges Association, California Code of Judicial Conduct, Canons 1-5 (1992).

for State Administrative Law Judges, and the Model Code of Judicial Conduct for State Central Panel Administrative Law Judges.

To help maintain the competence and integrity of California's system of administrative adjudication, the Law Revision Commission recommends that California adopt ethical standards for administrative law judges. Although national model codes are available, the Commission recommends that the California standards be based on the new California Code of Judicial Ethics, promulgated by the California Supreme Court effective January 15, 1996, as revised effective April 15, 1996.⁶

The California Code of Judicial Ethics is sanctioned by Article VI, Section 18(m) of the California Constitution. It replaces the California Code of Judicial Conduct, and has the force of law. By adapting the judicial code to the circumstances of administrative adjudication, we can ensure that the same ethical standards will apply throughout state adjudication, both judicial and administrative. Moreover, uniform judicial and administrative ethical standards will enable each system to benefit from the other's experience under it.

The California Code of Judicial Ethics should generally apply to state administrative law judges. However, the following provisions of the Code, which may be appropriate for judges, are inappropriate as applied to administrative law judges:

- Canon 3B(7) provides rules for *ex parte* communications; the Administrative Procedure Act already covers the matter in some detail.⁷

6. A copy of the California Code of Judicial Ethics is attached to this recommendation as an Appendix. See *infra* pp. 351-67.

7. Gov't Code §§ 11430.10-11430.70 (operative July 1, 1997), 11513.5 (operative until July 1, 1997).

- Canon 3B(10) relates to juries, which are not used in administrative adjudication.
- Canon 4C limits the right to engage in governmental, civic, and charitable activities; however, administrative law judges are executive branch rather than judicial branch employees, and the range of issues that may come before them is narrowly circumscribed.
- Canons 4E(1), 4F, and 4G prohibit fiduciary, activities, private employment in alternative dispute resolution or the practice of law; these matters are the subject of each employing agency's incompatible activity rules adopted pursuant to Government Code Section 19990.
- Canons 5A-5D contain specific restrictions on political activities of judges that have limited relevance to administrative law judges; Canon 5's general injunction to "avoid political activity that may create the appearance of political bias or impropriety" is sufficient.
- Canon 6 concerns enforcement of and compliance with the code of ethics; adaptation to executive branch as opposed to judicial branch implementation and enforcement is required.

Violation of the ethical standards should be grounds for disciplinary action against an offending administrative law judge. This is consistent with existing law, which provides that "failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment" is grounds for discipline of a state employee.⁸ The proposed Administrative Adjudication Code of Ethics would in effect define "failure of good behavior" for administrative law judges.

The Law Revision Commission would not apply the ethical standards to a presiding officer other than an administrative law judge, at present. Application of the standards to other hearing personnel is problematic since the presiding officer may be part-time or a lay hearing officer, or even the agency

8. Gov't Code § 19572(t).

head.⁹ However, general principles of appropriate conduct would still apply to non-administrative law judge hearing personnel.¹⁰ In addition, an agency could by regulation make the Administrative Adjudication Code of Ethics applicable to its presiding officers.¹¹

The administrative adjudication provisions of the Administrative Procedure Act do not govern certain state agency hearings.¹² Nonetheless, the proposed Administrative Adjudication Code of Ethics should apply to administrative law judges who preside in these hearings. The ethical integrity of a state administrative law judge is independent of the details of the particular hearing procedure the judge follows.

9. *Cf.* Gov't Code § 11405.80 ("presiding officer" defined), operative July 1, 1997.

10. See *supra* text accompanying note 3.

11. See Gov't Code § 11410.40 (election to apply administrative adjudication provisions), operative July 1, 1997.

12. See, e.g., Gov't Code § 15609.5 (State Board of Equalization), operative July 1, 1997; Pub. Util. Code § 1701 (Public Utilities Commission), operative July 1, 1997.

PROPOSED LEGISLATION

Gov't Code §§ 11475.10-11475.70 (added). Administrative Adjudication Code of Ethics

SECTION 1. Article 16 (commencing with Section 11475.10) is added to Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, to read:

Article 16. Administrative Adjudication Code of Ethics

§ 11475.10. Application of article

11475.10. (a) This article applies to all of the following persons:

(1) An administrative law judge. As used in this subdivision, "administrative law judge" means an incumbent of that position as defined by the State Personnel Board for each class specification for Administrative Law Judge.

(2) A presiding officer to which this article is made applicable by statute or regulation.

(b) This article applies notwithstanding a general provision that this chapter does not apply to some or all of a state agency's adjudicative proceedings.

Comment. Section 11475.10 limits application of the Administrative Adjudication Code of Ethics to specified classes of hearing officers. See Section 11475.20 (application of Code of Judicial Ethics).

Subdivision (a)(1) includes not only an administrative law judge who presides at a hearing but also a supervisory or management level administrative law judge or chief administrative law judge, whose function may relate directly or indirectly to the adjudicative process.

This article does not apply to an agency head or hearing officer who presides in an administrative adjudication but who is not an administrative law judge, absent a special statute or regulation. See subdivision (a)(2). However, other ethical considerations apply to the hearing and nonhearing conduct of state agency presiding officers. See, e.g., Section 19572 (cause for discipline).

The Administrative Adjudication Code of Ethics is made applicable by statute to workers' compensation referees. Lab. Code § 123.6. An agency may make the Administrative Adjudication Code of Ethics applicable to its non-administrative law judge presiding officers by regulation where this article would not otherwise apply. See Section 11410.40 (election to apply administrative adjudication provisions); see also Section 11405.80 ("presiding officer" defined).

Under subdivision (b), the Administrative Adjudication Code of Ethics applies to an administrative law judge even though the proceedings in which the administrative law judge presides might otherwise be statutorily exempt from this chapter. See, e.g., Section 15609.5 (State Board of Equalization); Pub. Util. Code § 1701 (Public Utilities Commission).

§ 11475.20. Application of Code of Judicial Ethics

11475.20. Except as otherwise provided in this article, the Code of Judicial Ethics adopted by the Supreme Court pursuant to subdivision (m) of Section 18 of Article VI of the Constitution for the conduct of judges governs the hearing and nonhearing conduct of an administrative law judge or other presiding officer to which this article applies.

Comment. Section 11475.20 applies the Code of Judicial Ethics in administrative adjudication. For the persons to which this article applies, see Section 11475.10 (application of article).

The Code of Judicial Ethics adopted by the Supreme Court is effective January 15, 1996. The incorporation by reference includes subsequent amendments and additions to the Code. Section 9.

It is intended that interpretations of the Code of Judicial Ethics in its application to the judicial system, whether made by court rule or decision, should also be applied in administrative adjudication, to the extent relevant to the circumstances of administrative adjudication. *Cf.* Section 11475.40 (provisions of Code excepted from application).

The Code of Judicial Ethics supplements other standards applicable to conduct of an administrative law judge, including disqualification for bias (Section 11425.40) and disciplinary action for failure of good behavior (Section 19572). See also Section 11475.50 & Comment (enforcement).

§ 11475.30. Terminology

11475.30. For the purpose of this article, the following terms used in the Code of Judicial Ethics have the meanings provided in this section:

(a) “Appeal” means administrative review.

(b) “Court” means the agency conducting an adjudicative proceeding.

(c) “Judge” means administrative law judge or other presiding officer to which this article applies; related terms, including “judicial,” “judiciary,” and “justice,” mean comparable concepts in administrative adjudication.

(d) “Law” includes regulation and precedent decision.

Comment. Section 11475.30 provides a general guide to conversion of terminology in the Code of Judicial Ethics for application to administrative adjudication. It is intended to be applied in a manner to effectuate that general purpose without requiring strict or grammatically precise rigidity in the conversion. Likewise, terms not specified in this section should be converted in an appropriate manner to effectuate the general intent of this statute to apply the Code of Judicial Ethics to the circumstances of administrative adjudication.

§ 11475.40. Provisions of Code excepted from application

11475.40. The following provisions of the Code of Judicial Ethics do not apply under this article:

(a) Canon 3B(7), to the extent it relates to ex parte communications.

(b) Canon 3B(10).

(c) Canon 4C.

(d) Canons 4E(1), 4F, and 4G.

(e) Canons 5A-5D. The introductory portion of Canon 5 applies under this article notwithstanding Chapter 9.5 (commencing with Section 3201) of Division 4 of Title 1, relating to political activities of public employees.

(f) Canon 6.

Comment. Section 11475.40 adapts the Code of Judicial Ethics for application to administrative law judges. Some provisions of the Code of

Judicial Ethics, although not excepted by this section, may be minimally relevant to an administrative law judge. See, e.g., Canon 3C(4) (administrative responsibilities).

Subdivision (a) of Section 11475.40 excepts the portion of Canon 3B(7) relating to ex parte communications. It reflects the fact that special provisions, and not the Code of Judicial Ethics, govern ex parte communications in administrative adjudication. See, e.g., Article 7 (commencing with Section 11430.10).

Subdivision (b) excepts Canon 3B(10), relating to juries. It reflects the fact that juries are not used in administrative adjudication.

Subdivision (c) excepts Canon 4C, relating to governmental, civic, or charitable activities. An administrative law judge is not precluded from engaging in activities of this type, except to the extent the activities may conflict with general limitations on the administrative law judge's conduct. See, e.g., Canon 4A (extrajudicial activities in general).

Subdivision (d) excepts Canons 4E(1), 4F, and 4G, relating to fiduciary activities, private employment in alternative dispute resolution, and the practice of law. These matters are the subject of the employing agency's incompatible activity statement pursuant to Section 19990.

Subdivision (e) applies the introductory portion of Canon 5 to an administrative law judge or other presiding officer, but not Canons 5A-5D. Under this provision an administrative law judge or other presiding officer must avoid political activity that may create the appearance of political bias or impropriety. This would preclude participation in political activity related to an issue that may come before the administrative law judge or other presiding officer.

Subdivision (e) limits the political activities of administrative law judges even though other public employees might be able to participate in those activities under the *Hatch Act* (Sections 3201-3209). This subdivision is not intended to preclude an administrative law judge or other presiding officer to which this article applies from appearing at a public hearing or officially consulting with an executive or legislative body or public official in matters concerning the judge's private economic or personal interests, or to otherwise engage in political activities relating to salary, benefits, and working conditions. *Cf.* Section 11475.70 (collective bargaining rights not affected).

Subdivision (f) excepts Canon 6, which is superseded by Sections 11475.50 (enforcement) and 11475.60 (compliance).

§ 11475.50. Enforcement

11475.50. (a) An administrative law judge or other presiding officer to which this article applies shall comply with the applicable provisions of the Code of Judicial Ethics.

(b) A violation of an applicable provision of the Code of Judicial Ethics by an administrative law judge or other presiding officer to which this article applies is cause for discipline by the employing agency pursuant to Section 19572.

Comment. Section 11475.50 supersedes Canon 6A of the Code of Judicial Ethics. The compliance requirement is not precatory in administrative adjudication, but is mandatory.

Appropriate discipline under subdivision (b) is the responsibility of the agency that employs the administrative law judge. Thus if an administrative law judge employed by the Office of Administrative Hearings violates the code of ethics in a hearing conducted for another agency, the Office of Administrative Hearings is the disciplining entity, and not the other agency. An agency may apply appropriate disciplinary procedures. See, e.g., 8 Cal. Code Regs. §§ 9720.1-9723 (1996) (enforcement of ethical standards of workers' compensation referees). It should be noted that a person may also institute disciplinary proceedings directly before the State Personnel Board with the consent of the board. Gov't Code § 19583.5; 2 Cal. Code Regs. § 51.9 (1996).

A violation of the code of ethics by the administrative law judge is not per se grounds for disqualification, or reversal of a decision, of the administrative law judge. But the violation may be indicative of the administrative law judge's violation of other procedural requirements. See, e.g., Section 11425.40 (disqualification of presiding officer for bias, prejudice, or interest).

§ 11475.60. Compliance

11475.60. (a) Except as provided in subdivision (b), a person to whom this article becomes applicable shall comply immediately with all applicable provisions of the Code of Judicial Ethics.

(b) A person to whom this article becomes applicable shall comply with Canon 4D(2) of the Code of Judicial Ethics as soon as reasonably possible and shall do so in any event

within a period of one year after the article becomes applicable.

Comment. Section 11475.60 supersedes Canon 6F of the Code of Judicial Ethics.

§ 11475.70. Collective bargaining rights not affected

11475.70. Nothing in this article shall be construed or is intended to limit or affect the rights of an administrative law judge or other presiding officer under the Ralph C. Dills Act, Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of the Government Code.

Comment. Section 11475.70 makes clear that the Administrative Adjudication Code of Ethics is not intended to interfere with collective bargaining rights guaranteed state employees under the Ralph C. Dills Act. These include the right to form, join, and participate in activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations, to refuse to join or participate in the activities of employee organizations, or to represent themselves individually in their employment relations with the state. See Section 3515.

Lab. Code § 123.6 (amended). Workers' compensation referees

SEC. 2. Section 123.6 of the Labor Code is amended to read:

123.6. (a) All workers' compensation referees and settlement—conference—referees employed by the administrative director shall subscribe to the ~~California Code of Judicial Conduct adopted by the Conference of California Judges~~ *Administrative Adjudication Code of Ethics, Article 16 (commencing with Section 11475.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code*, and shall not otherwise, directly or indirectly, engage in conduct contrary to that code.

The administrative director shall adopt regulations to enforce this section. To the extent possible, the rules shall be consistent with the procedures established by the Commission on Judicial Performance for regulating the activities of state

judges, and, to the extent possible, with the gift, honoraria, and travel restrictions on legislators contained in the Political Reform Act of 1974.

(b) Honoraria or travel allowed by the administrative director or otherwise not prohibited by this section in connection with any public or private conference, convention, meeting, social event, or like gathering, the cost of which is significantly paid for by attorneys who practice before the board, may not be accepted unless the administrative director has provided prior approval in writing to the workers' compensation referee allowing him or her to accept those payments.

Comment. Section 123.6 is amended to reflect the fact that the California Code of Judicial Conduct adopted by the Conference of California Judges is superseded by the Code of Judicial Ethics adopted by the Supreme Court pursuant to subdivision (m) of Section 18 of Article VI of the Constitution. The Code of Judicial Ethics is adapted for administrative law judges by Government Code Sections 11475.10-11475.70 (administrative adjudication code of ethics).

The reference in subdivision (a) to settlement conference referees is deleted as obsolete; statutory authority for this classification no longer exists.

APPENDIX TO CALIFORNIA RULES OF COURT

DIVISION II

CALIFORNIA CODE OF JUDICIAL ETHICS

Amended by the Supreme Court of California
effective April 15, 1996

PREFACE

Formal standards of judicial conduct have existed for more than 50 years. The original Canons of Judicial Ethics promulgated by the American Bar Association were modified and adopted in 1949 for application in California by the Conference of California Judges (now the California Judges Association).

In 1969, the American Bar Association determined that current needs and problems warranted revision of the Canons. In the revision process, a special American Bar Association committee, headed by former California Chief Justice Roger Traynor, sought and considered the views of the bench and bar and other interested persons. The American Bar Association Code of Judicial Conduct was adopted by the House of Delegates of the American Bar Association August 16, 1972.

Effective January 5, 1975, the California Judges Association adopted a new California Code of Judicial Conduct adapted from the American Bar Association 1972 Model Code. The California code was recast in gender-neutral form in 1986.

In 1990, the American Bar Association Model Code was further revised after a lengthy study. The California Judges Association again reviewed the model code and adopted a revised California Code of Judicial Conduct on October 5, 1992.

Proposition 190 (amending Cal. Const., art. VI, § 18(m), effective March 1, 1995) created a new constitutional provision that states, "The Supreme Court shall make rules for the conduct of judges, both on and off the bench, and for judicial candidates [*] in the conduct of their campaigns. These rules shall be referred to as the Code of Judicial Ethics."

The Supreme Court formally adopted the 1992 Code of Judicial Conduct in March 1995, as a transitional measure pending further review.

The Supreme Court formally adopted the Code of Judicial Ethics effective January 15, 1996.

The Supreme Court formally adopted amendments to the Code of Judicial Ethics effective April 15, 1996. The *Advisory Committee Commentary* is published by the Supreme Court Advisory Committee on Judicial Ethics.¹

PREAMBLE

Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible member of government under the rule of law.

The Code of Judicial Ethics (“Code”) establishes standards for ethical conduct of judges on and off the bench and for candidates for judicial office. The Code consists of broad declarations called Canons, with subparts, and a Terminology section. Following each Canon is a Commentary section prepared by the Supreme Court Advisory Committee on Judicial Ethics. The Commentary, by explanation and example, provides guidance as to the purpose and meaning of the Canons. The Commentary does not constitute additional rules and should not be so construed. All members of the judiciary must comply with the Code. Compliance is required to preserve the integrity of the bench and to ensure the confidence of the public.

The Canons should be read together as a whole, and each provision should be construed in context and consistent with every

1. Law Revision Commission note: The Advisory Committee Commentary is not included in this Appendix. For additional guidance, reference should be made to the full text of the Code of Judicial Ethics with Advisory Committee Commentary.

other provision. They are to be applied in conformance with constitutional requirements, statutes, other court rules, and decisional law. Nothing in the Code shall either impair the essential independence of judges in making judicial decisions or provide a separate basis for civil liability or criminal prosecution.

The Code governs the conduct of judges and judicial candidates* and is binding upon them. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, requires a reasoned application of the text and consideration of such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.

TERMINOLOGY

Terms explained below are noted with an asterisk (*) in the Canons where they appear. In addition, the Canons in which terms appear are cited after the explanation of each term below.

“Appropriate authority” denotes the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported. See Commentary to Canon 3D.

“Candidate.” A candidate is a person seeking election for or retention of judicial office by election. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support. The term “candidate” has the same meaning when applied to a judge seeking election to nonjudicial office, unless on leave of absence. See Preamble and Canons 2B(3), the preliminary paragraph of 5, 5A, 5B, 5C, and 6E.

“Court personnel” does not include the lawyers in a proceeding before a judge. See Canons 3B(4), 3B(7)(b), 3B(9), and 3C(2).

“Fiduciary” includes such relationships as executor, administrator, trustee, and guardian. See Canons 4E, 6B, and 6F (*Commentary*).

“Law” denotes court rules as well as statutes, constitutional provisions, and decisional law. See Canons 1 (*Commentary*), 2A, 2C (*Commentary*), 3A, 3B(2), 3B(7), 3E, 4B (*Commentary*), 4C, 4D(46)(a)-(b), 4F, 4H, and 5D.

“Member of the judge’s family” denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Canons 2B(2), 4D(1) (*Commentary*), 4D(2), 4E, 4G (*Commentary*), and 5A.

“Member of the judge’s family residing in the judge’s household” denotes a spouse and those persons who reside in the judge’s household who are relatives of the judge including relatives by marriage, or persons with whom the judge maintains a close familial relationship. See Canons 4D(5) and 4D(6).

“Nonprofit youth organization” is any nonprofit corporation or association, not organized for the private gain of any person, whose purposes are irrevocably dedicated to benefiting and serving the interests of minors and which maintains its nonprofit status in accordance with applicable state and federal tax laws. See Canon 2C.

“Nonpublic information” denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to information that is sealed by statute or court order, impounded, or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports. See Canon 3B(11).

“Political organization” denotes a political party, political action committee, or other group, the principal purpose of which is to further the election or appointment of candidates to nonjudicial office. See Canon 5A.

“Temporary Judge.” A temporary judge is an active or inactive member of the bar who serves or expects to serve as a judge once, sporadically, or regularly on a part-time basis under a separate court appointment for each period of service or for each case heard. See Canons 4C(3)(d)(i), 6A, and 6D.

“Require.” Any Canon prescribing that a judge “require” certain conduct of others means that a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge’s direction and control. See Canons 3B(3), 3B(4), 3B(6), 3B(8) (*Commentary*), 3B(9), and 3C(2).

CANON 1

A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective. A judicial decision or administrative act later determined to be incorrect legally is not itself a violation of this Code.

CANON 2

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES

A. Promoting Public Confidence

A judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. Use of the Prestige of Judicial Office

(1) A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge.

(2) A judge shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others; nor shall a judge testify voluntarily as a character witness. A judge shall not initiate communications with a sentencing judge or a probation or corrections officer, but may provide them with information for the record in response to an official request. A judge may initiate communications with a probation or corrections officer concerning a member of the judge's family,* provided the judge is not identified as a judge in the communication.

(3) A judge may respond to judicial selection inquiries, provide recommendations (including a general character reference, relating

to the evaluation of persons being considered for a judgeship) and otherwise participate in the process of judicial selection.

(4) A judge shall not use the judicial title in any written communication intended to advance the personal or pecuniary interest of the judge. A judge may serve as a reference or provide a letter of recommendation only if based on the judge's personal knowledge of the individual. These written communications may include the judge's title and be written on stationery that uses the judicial title.

C. Membership in Organizations

A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation.

This Canon does not apply to membership in a religious organization or an official military organization of the United States. So long as membership does not violate Canon 4A, this Canon does not bar membership in a nonprofit youth organization.*

CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General

All of the judicial duties prescribed by law* shall take precedence over all other activities of every judge. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities

(1) A judge shall hear and decide all matters assigned to the judge except those in which he or she is disqualified.

(2) A judge shall be faithful to the law* regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law.*

(3) A judge shall require* order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require* similar conduct of

lawyers and of all court staff and personnel* under the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status against parties, witnesses, counsel, or others. This Canon does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law.* A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

(a) A judge may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(b) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(c) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(d) A judge may initiate ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(e) A judge may initiate or consider any ex parte communication when expressly authorized by law* to do so.

(8) A judge shall dispose of all judicial matters fairly, promptly, and efficiently.

(9) A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require* similar abstention on the part of court personnel* subject to the judge's direction and control. This Canon does not prohibit judges from making statements in the course of their official duties or from explaining for public information the procedures of the court, and does not apply to proceedings in which the judge is a litigant in a personal capacity. Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials, cases and issues pending in appellate courts. This education exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information* acquired in a judicial capacity.

C. Administrative Responsibilities

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require* staff and court personnel* under the judge's direction and control to observe appropriate standards of conduct and to refrain from manifesting bias or prejudice based

upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to ensure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary court appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees above the reasonable value of services rendered.

D. Disciplinary Responsibilities

(1) Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, the judge shall take or initiate appropriate corrective action, which may include reporting the violation to the appropriate authority.*

(2) Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action.

E. Disqualification

A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.* In all trial court proceedings, a judge shall disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification.

CANON 4

A JUDGE SHALL SO CONDUCT THE JUDGE'S QUASI-JUDICIAL AND EXTRAJUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS

A. Extrajudicial Activities in General

A judge shall conduct all of the judge's extrajudicial activities so that they do not

- (1) cast reasonable doubt on the judge's capacity to act impartially;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

B. Quasi-judicial and Avocational Activities

A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this Code.

C. Governmental, Civic, or Charitable Activities

(1) A judge shall not appear at a public hearing or officially consult with an executive or legislative body or public official except on matters concerning the law,* the legal system, or the administration of justice or in matters involving the judge's private economic or personal interests.

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law,* the legal system, or the administration of justice. A judge may, however, serve in the military reserve or represent a national, state, or local government on ceremonial occasions or in connection with historical, educational, or cultural activities.

(3) Subject to the following limitations and the other requirements of this Code,

(a) a judge may serve as an officer, director, trustee, or nonlegal advisor of an organization or governmental agency devoted to the improvement of the law,* the legal system, or the administration of justice provided that such position does not constitute a public office within the meaning of the California Constitution, article VI, section 17;

(b) a judge may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for profit;

(c) a judge shall not serve as an officer, director, trustee, or nonlegal advisor if it is likely that the organization

(i) will be engaged in judicial proceedings that would ordinarily come before the judge, or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member;

(d) a judge as an officer, director, trustee, or nonlegal advisor, or as a member or otherwise

(i) may assist such an organization in planning fund raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may privately solicit funds for such an organization from other judges (excluding court commissioners, referees, retired judges, and temporary judges*);

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law,* the legal system, or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or if the membership solicitation is essentially a fund-raising mechanism, except as permitted in Canon 4C(3)(d)(i);

(iv) shall not permit the use of the prestige of his or her judicial office for fund raising or membership solicitation but may be a speaker, guest of honor, or recipient of an award for public or charitable service provided the judge does not personally solicit funds and complies with Canon 4A(1), (2), and (3).

D. Financial Activities

(1) A judge shall not engage in financial and business dealings that

(a) may reasonably be perceived to exploit the judge's judicial position, or

(b) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to appear before the court on which the judge serves.

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family,* including real estate, and engage in other remunerative activities. A judge shall not participate in, nor permit the judge's name to be used in connection with, any business venture or com-

mercial advertising that indicates the judge's title or affiliation with the judiciary or otherwise lend the power or prestige of his or her office to promote a business or any commercial venture.

(3) A judge shall not serve as an officer, director, manager, or employee of a business affected with a public interest, including, without limitation, a financial institution, insurance company, or public utility.

(4) A judge shall manage personal investments and financial activities so as to minimize the necessity for disqualification. As soon as reasonably possible, a judge shall divest himself or herself of investments and other financial interests that would require frequent disqualification.

(5) Under no circumstance shall a judge accept a gift, bequest or favor if the donor is a party whose interests have come or are reasonably likely to come before the judge. A judge shall discourage members of the judge's family residing in the judge's household* from accepting similar benefits from parties who have come or are reasonably likely to come before the judge.

(6) A judge shall not accept and shall discourage members of the judge's family residing in the judge's household* from accepting a gift, bequest, favor, or loan from anyone except as hereinafter provided:

(a) any gift incidental to a public testimonial, books, tapes, and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law,* the legal system, or the administration of justice;

(b) advances or reimbursement for the reasonable cost of travel, transportation, lodging, and subsistence which is directly related to participation in any judicial, educational, civic, or governmental program, or bar-related function or activity, devoted to the improvement of the law,* the legal system, or the administration of justice;

(c) a gift, award, or benefit incident to the business, profession, or other separate activity of a spouse or other member of the judge's family residing in the judge's household,* including gifts, awards, and benefits for the use of both the spouse or other family member and the judge, provided the gift, award, or benefit could

not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(d) ordinary social hospitality;

(e) a gift for a special occasion from a relative or friend, if the gift is fairly commensurate with the occasion and the relationship;

(f) a gift, bequest, favor, or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Canon 3E;

(g) a loan in the regular course of business on the same terms generally available to persons who are not judges;

(h) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants.

E. Fiduciary Activities

(1) A judge shall not serve as executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other fiduciary,* except for the estate, trust, or person of a member of the judge's family,* and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary* if it is likely that the judge as a fiduciary* will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or minor or conservatee becomes engaged in contested proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary* capacity.

F. Service as Arbitrator or Mediator

A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.*

G. Practice of Law

A judge shall not practice law.

H. Compensation and Reimbursement

A judge may receive compensation and reimbursement of expenses as provided by law* for the extrajudicial activities permitted by this Code, if the source of such payments does not give

the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(1) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(2) Expense reimbursement shall be limited to the actual cost of travel, food, lodging, and other costs reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

CANON 5

A JUDGE OR JUDICIAL CANDIDATE* SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY

Judges are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They shall, however, avoid political activity that may create the appearance of political bias or impropriety. Judicial independence and impartiality should dictate the conduct of judges and candidates* for judicial office.

A. Political Organizations

Judges and candidates* for judicial office shall not

- (1) act as leaders or hold any office in a political organization;*
- (2) make speeches for a political organization* or candidate* for nonjudicial office or publicly endorse or publicly oppose a candidate for nonjudicial office;
- (3) personally solicit funds for a political organization* or nonjudicial candidate;* or make contributions to a political party or political organization* or to a nonjudicial candidate in excess of five hundred dollars in any calendar year per political party or political organization* or candidate,* or in excess of an aggregate of one thousand dollars in any calendar year for all political parties or political organizations* or nonjudicial candidates.*

B. Conduct During Judicial Campaigns

A candidate* for election or appointment to judicial office shall not (1) make statements to the electorate or the appointing author-

ity that commit or appear to commit the candidate* with respect to cases, controversies, or issues that could come before the courts, or (2) knowingly misrepresent the identity, qualifications, present position, or any other fact concerning the candidate* or his or her opponent.

C. Speaking at Political Gatherings

Candidates* for judicial office may speak to political gatherings only on their own behalf or on behalf of another candidate for judicial office.

D. Measures to Improve the Law

Except as otherwise permitted in this Code, judges shall not engage in any political activity, other than in relation to measures concerning the improvement of the law,* the legal system, or the administration of justice.

CANON 6

COMPLIANCE WITH THE CODE OF JUDICIAL ETHICS

A. Judges

Anyone who is an officer of the state judicial system and who performs judicial functions, including, but not limited to, a magistrate, court commissioner, referee, court-appointed arbitrator, judge of the State Bar Court, temporary judge,* or special master, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.

B. Retired Judge Serving in the Assigned Judges Program

A retired judge who has filed an application to serve on assignment, meets the eligibility requirements set by the Chief Justice for service, and has received an acknowledgment of participation in the assigned judges program shall comply with all provisions of this Code, except for the following:

- 4C(2) — Appointment to governmental positions
- 4D(2) — Participation in business entities and managing investments
- 4E — Fiduciary* activities

C. Retired Judge as Arbitrator or Mediator

A retired judge serving in the assigned judges program is not required to comply with Canon 4F of this Code relating to serving as an arbitrator or mediator, or performing judicial functions in a private capacity, except as otherwise provided in the Standards and Guidelines for Judges Serving on Assignment promulgated by the Chief Justice.

D. Temporary Judge,* Referee, or Court-appointed Arbitrator

A temporary judge,* a person serving as a referee pursuant to Code of Civil Procedure section 638 or 639, or a court-appointed arbitrator while actually serving in any of these capacities shall comply with the following provisions of this Code:

- 1 — Integrity and independence of the judiciary
- 2A, B, C — Public confidence, impartiality of the judiciary, and membership in organizations
- 3A, B — Judicial duties in general
Adjudicative responsibilities
- 3C(1), (2), (4) — Administrative responsibilities
- 3D, E — Disciplinary responsibilities
Disqualification
- 4A, B — Extrajudicial activities in general
- 4C(3)(c)(i) — Service as an officer, director, trustee, or nonlegal advisor
- 4C(1) — Appearance at public hearings
- 4C(3)(d)(iii), (iv) — Use of judicial office for fundraising by officer, director, trustee, or nonlegal advisor
- 4D(1)(a) — Financial and business dealings that exploit the judicial position
- 4D(5) — Gifts from those who have come or are reasonably likely to come before the judge
- 5B, C — Statements by candidates for judicial office
Speeches at political gatherings by candidates for judicial office

A person who has been a temporary judge,* referee, or court-appointed arbitrator shall not act as a lawyer in a proceeding in

which he or she has served as a judge or in any other proceeding related thereto except as otherwise permitted by Rule 3-310 of the Rules of Professional Conduct.

E. Judicial Candidate

A candidate* for judicial office shall comply with the provisions of Canon 5.

F. Time for Compliance

A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Canons 4D(2) and 4F and shall comply with these Canons as soon as reasonably possible and shall do so in any event within a period of one year.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Best Evidence Rule

November 1996

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

NOTE

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

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

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
(415) 494-1335

ALLAN L. FINK, Chairperson
CHRISTINE W.S. BYRD, Vice Chairperson
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November 15, 1996

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

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

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

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

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

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

Respectfully submitted,

Allan L. Fink
Chairperson

BEST EVIDENCE RULE

INTRODUCTION

The Best Evidence Rule requires that the content of a writing be proven by introducing the original. The rule developed in the eighteenth century, when pretrial discovery was practically nonexistent and manual copying was the only means of reproducing documents.¹ Commentators questioned the rule and its many exceptions in the 1960s when the California Law Revision Commission developed the Evidence Code, but there were still persuasive justifications for the rule and it was codified in California as Evidence Code Section 1500 and in the Federal Rules of Evidence as Rule 1002.

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

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

THE BEST EVIDENCE RULE AND ITS EXCEPTIONS

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

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

The rule pertains only to proof of the content of a “writing,” which is defined broadly to include “handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.”²

There are many statutory exceptions to the rule’s requirement that the proponent introduce the original of the writing.³ In particular, duplicates are admissible to the same extent as the original unless “(a) a genuine question is raised as to the authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”⁴ Moreover, the Best Evidence Rule does not exclude the following types of evidence:

2. Evid. Code § 250. With respect to other types of proof, there is no “best evidence” requirement. “To subject all evidence to the scrutiny of the judge for determination of whether it is the best evidence would unnecessarily disrupt court proceedings and would unduly encumber the party having the burden of proof.” Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, *supra* note 1, at 260; *see also* C. McCormick, Evidence 409, 413-14 (4th ed. 1992).

3. See Evid. Code §§ 1500.5-1566; Penal Code § 872.5. All further statutory references are to the Evidence Code, unless otherwise indicated.

4. Section 1511. For the definition of “duplicate,” see Section 260. For the definition of “original,” see Section 255.

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

5. Section 1500.5.

6. Section 1500.6.

7. Sections 1501, 1505.

8. Sections 1502, 1505.

9. Sections 1503(a), 1505.

10. Sections 1504, 1505.

11. Sections 1506, 1508.

12. Sections 1507, 1508.

13. Section 1509.

14. Section 1510.

15. Sections 1530-1532.

- Photographic copies made as business records.¹⁶
- Photographic copies of documents lost or destroyed, if properly certified.¹⁷
- Copies of business records produced in compliance with Sections 1560-1561.¹⁸

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

AN ALTERNATIVE: THE SECONDARY EVIDENCE RULE

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

16. Section 1550.

17. Section 1551.

18. Sections 1562, 1564, 1566.

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

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

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

presumptively inadmissible to prove the content of a writing, this rule would make such evidence generally admissible. The court would, however, be required to exclude secondary evidence if it determines that either (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion, or (2) admission of the secondary evidence would be unfair.

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

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

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

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

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

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

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

RATIONALE FOR THE BEST EVIDENCE RULE

Section 1500 and most of its exceptions were enacted in 1965 as part of the Evidence Code drafted by the Law Revision Commission.²³ Since then, there has been rapid technological change, including a sharp rise in use of photocopies and electronic communications. There have also been expansions in pretrial discovery. These developments prompted the Commission to review the continued utility of the Best Evidence Rule.

There are two main arguments for the rule: preventing fraud and guarding against misinterpretation of writings.

Fraud Deterrence

Some courts and commentators maintain that the Best Evidence Rule guards against incomplete or fraudulent proof.²⁴ The underlying assumption is that an original writing is less susceptible to fraudulent manipulation than a copy of the

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

23. 1965 Cal. Stat. ch. 299, § 2. For the Commission’s recommendation proposing the Evidence Code, see *Recommendation Proposing an Evidence Code*, 7 Cal. L. Revision Comm’n Reports 1 (1965).

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

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

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

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

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

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

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

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

As Wigmore and others have pointed out, the fraud rationale is also inconsistent with the scope of the Best Evidence Rule.²⁷ There are situations in which the rule applies yet ought not to apply if the goal is fraud deterrence, such as where the honesty of the proponent is not in question.²⁸

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

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

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

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

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

[P]ossession of the document by a disinterested third person would relieve the proponent from the suspicion of fraudulent suppression, yet the rule applies equally to that case; and the possession by the opponent himself with the right not to produce it will also serve to dismiss the suspicion, yet the rule applies equally to that case.

Finally, if the above reason were the correct one, the rule would equally apply to objects other than writings; yet it is generally conceded that it does not.

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

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

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

Minimizing Misinterpretation of Writings

The rationale given in the Comment to Evidence Code Section 1500 is that the Best Evidence Rule is “designed to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available.” Underlying this rationale are several concepts:

- In litigation, the exact words of a writing are often especially important, particularly with regard to contracts, wills, and other such instruments. The exact words of a document may be easier to discern from an original than from secondary evidence.
- An original document may provide clues to interpretation not present on copies or other secondary evidence, such as the presence of staple holes or the color of ink.
- Secondary evidence of the contents of a document, such as copies and oral testimony, may not faithfully reflect the original. Copying techniques are imperfect and memories are fallible.³¹

Preventing misinterpretation of writings is an important goal. Yet modern expansion of the breadth of discovery undermines this as a justification for the Best Evidence Rule. Because litigants are able to examine original documents in discovery, they can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the Best Evidence Rule in the midst of trial.³²

Professors Cleary and Strong, leading proponents of the Best Evidence Rule, acknowledged in 1966 that increases in the breadth of discovery diminished the rule’s significance.³³

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

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

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

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

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

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

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

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

34. *Id.* at 847.

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

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

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

Documents outside the jurisdiction. Some authorities claim that the Best Evidence Rule is useful with regard to documents beyond the court's jurisdiction.³⁷ Professors Cleary and Strong observed, however, that the rule is largely ineffective in obtaining production of original writings in the control of persons beyond the court's jurisdiction.³⁸ Instead, courts commonly rule that such evidence falls within one or more of the rule's exceptions.³⁹ For example, Section 1502 specifically directs that a copy "is not made inadmissible by the best evidence rule if the writing was not reasonably procurable by the proponent by use of the court's process or by other available means." In light of this exception, there may not be any cases, much less a significant number of such cases, in which the rule excludes secondary evidence of the contents of documents outside the jurisdiction.⁴⁰ Any such instances could also be addressed by the unfairness exception to the Secondary Evidence Rule.

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

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

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

39. *Id.*

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

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

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

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

OTHER SAFEGUARDS AGAINST FRAUD AND MISINTERPRETATION

The Best Evidence Rule is not the only protection against fraud and misinterpretation of writings, nor is it the only incentive for litigants to use original documents. There is also the normal motivation of the parties to present the most convincing evidence in support of their cases. If a litigant inexplicably proffers secondary evidence instead of an original, the trier of fact is likely to discount the probative value of the evidence, particularly if opposing counsel draws attention to the point in cross-examination or closing argument.⁴⁴ Indeed, Section 412 specifically directs: "If weaker and less satisfactory evidence is offered when it was within the power of the

42. See Penal Code §§ 1054.1, 1054.3; *Izazaga v. Superior Court*, 54 Cal. 3d 356, 372, 377, 815 P.2d 304, 285 Cal. Rptr. 231 (1991); *People v. Jackson*, 15 Cal. App. 4th 1197, 1201, 19 Cal. Rptr. 2d 80 (1993).

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

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

party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.”

Additionally, Section 352 gives the court discretion to exclude evidence “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” In some cases, Section 352 may serve as a basis for excluding unreliable secondary evidence.⁴⁵

COSTS OF THE BEST EVIDENCE RULE

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

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

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

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

even though that party could himself have introduced the original if he had any question as to either its genuineness or the accuracy of the secondary evidence introduced by his opponent.⁴⁷

Similarly, Wigmore commented that the Best Evidence Rule

sound at core as it is, tends to become encased in a stiff bark of rigidity. Thousands of times it is enforced needlessly. Hundreds of appeals are made upon nice points of its detailed application which bear no relation at all to the truth of the case at bar. For this reason the whole rule is in an unhealthy state. The most repugnant features of technicalism ... are illustrated in this part of the law of evidence.⁴⁸

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

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

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

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

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

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

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

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

For additional discussion along these lines, see Letter from Gerald H. Genard to California Law Revision Commission (May 4, 1994) (attached to Memorandum 95-34, on file with California Law Revision Commission) (expressing uncertainty regarding application of the best evidence doctrine to faxes and digital signatures). See also Section 1500.6 (1996 Cal. Stat. ch. 345), which is a new exception to the Best Evidence Rule for images stored on video or digital media.

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

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

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

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

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

COMMISSION RECOMMENDATION

The Best Evidence Rule is an anachronism. In yesterday's world of manual copying and limited pretrial discovery, it served as a safeguard against misleading use of secondary evidence. Under contemporary circumstances, in which high quality photocopies are standard and litigants have broad opportunities for pretrial inspection of original documents, the Best Evidence Rule is no longer necessary to protect against unreliable secondary evidence. Because the rule's costs now outweigh its benefits, the Law Revision Commission recommends that it be repealed.

In general, normal motivations to present convincing evidence deter use of unreliable secondary evidence. To further protect against misinterpretation of writings, the Best Evidence Rule and its numerous exceptions should be replaced with the comparatively simple Secondary Evidence Rule.⁵³ Rather than making secondary evidence presumptively inadmissible to prove the content of a writing, the new rule makes such evidence admissible, but requires the court to exclude secondary evidence if it determines either that (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion, or that (2) admission of the secondary evidence would be unfair.

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

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

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

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

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

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

PROPOSED LEGISLATION

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

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

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

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

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

Article 1. Proof of the Content of a Writing

§ 1520. Proof of content of writing by original

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

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

§ 1521. Proof of content of writing by secondary evidence (Secondary Evidence Rule)

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

(1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.

(2) Admission of the secondary evidence would be unfair.

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

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

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

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

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

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

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

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

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

§ 1522. Exclusion of secondary evidence in criminal action

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

- (1) A duplicate as defined in Section 260.
- (2) A writing that is not closely related to the controlling issues in the action.
- (3) A copy of a writing in the custody of a public entity.
- (4) A copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

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

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

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

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

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

§ 1523. Oral testimony of content of writing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Evid. Code § 1552 (added). Computer printout

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Uncodified (added). Operative date

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

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

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

COMMENTS TO REPEALED SECTIONS

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

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

Article 1. Best Evidence Rule

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

§ 1500 (repealed). Best Evidence Rule

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 1502 (repealed). Copy of unavailable writing

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

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

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

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

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

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

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

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

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

§ 1504 (repealed). Copy of collateral writing

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

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

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

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

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

§ 1506 (repealed). Copy of public writing

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

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

§ 1507 (repealed). Copy of recorded writing

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

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

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

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

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

§ 1509 (repealed). Voluminous writings

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

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

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

~~1510. A copy of a writing is not made inadmissible by the best evidence rule if the writing has been produced at the~~

~~hearing and made available for inspection by the adverse party.~~

Comment. Section 1510 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment.

§ 1511 (repealed). Duplicate of writing

~~1511. A duplicate is admissible to the same extent as an original unless (a) a genuine question is raised as to the authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original.~~

Comment. Section 1511 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. Exceptions to the Secondary Evidence Rule are modeled on the exceptions in former Section 1511. See Section 1521(a) & Comment.
