

AMENDMENT TO RESOLUTION 11-01-05

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Evidence Code section 250 to read as follows:

1 § 250
2 “Writing” means handwriting, typewriting, printing, photostating, photographing,
3 photocopying, ~~mechanical or electronic recording,~~ transmitting by electronic mail or facsimile, and
4 every other means of recording ~~upon any tangible thing and/or storing that is retrievable by any~~
5 means, communication or representation, including letters, words, pictures, sounds, or symbols, or
6 combinations thereof, and any record thereby created, regardless of the manner or location in which
7 the record has been stored. It is intended that the term “writing” be given the broadest possible
8 interpretation.

(Proposed new language underlined; language to be deleted stricken.)

RESOLUTION 11-01-05

DIGEST

Evidence: "Writing" Defined

Amends Evidence Code section 250 to broaden the term "writing" to clarify that it includes electronic media such as web pages.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Similar to Resolution 03-02-05.

Reasons:

This resolution amends Evidence Code section 250 to broaden the term "writing" to clarify that it includes electronic media such as web pages. This resolution should be disapproved because it is unnecessary.

The proponent suggests that the inclusion of e-mail and facsimiles in the definition of "writing" implies the exclusion of other electronic records such as web pages and intranets. Yet there is no basis on which to believe that the broad interpretation of "writing" has somehow been limited by the inclusion of e-mail and facsimiles to the non-exclusive list in the statute. Therefore, the resolution is unnecessary. Moreover, the addition of the language "that is retrievable by any means" is vague and could lead to inadvertent violations of discovery orders.

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6 combinations thereof, and any record thereby created, regardless of the manner or location in which
7 the record has been stored.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS:

Existing Law: Requires that a writing be recorded upon a tangible thing in order to fall within the statutory definition of "writing."

This Resolution: Amends Evidence Code section 250 to delete the requirement that a writing be recorded upon a "tangible thing" and adds that "writing" includes anything that is stored and retrievable, irrespective of whether the location in which it is stored is, or is not, tangible.

The Problem: The section was last amended by Stats 2002 ch 945 (AB 1962), s. 1, eff.1/1/2003, and at the same time amended the identical language in Government Code section 6252. The most recent amendment by the legislature added the words "transmitting by electronic mail or facsimile," implying the section might not have been interpreted to include "transmitting by electronic mail or facsimile" as a

recording upon a “tangible thing.”

The statute as it presently exists is not clear as to the meaning of recording upon “any tangible thing.” If electronic mail and facsimiles might not have come within the definition of “writings” as formerly defined by the section, as not being a recording upon a tangible thing, then all web pages, contents of computer dominions, content contained in intranets and portals, might not be perceived as recorded upon a “tangible thing.” Accordingly “mechanical or electronic recording” should be included in the definition of a “writing” as set forth in the section.

This amendment would also be consistent with rule 1001 of the Federal Rules of Evidence (28 U.S.C.), effective July 31, 1993, which defines writings as: “(1) Writings and recordings. – ‘Writings’ and ‘recordings’ consist of letters, words, or numbers, or their equivalent set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. (2) Photographs. – ‘Photographs’ include still photographs, Xray films, video tapes, and motion pictures.”

IMPACT STATEMENT

This resolution does not affect any other laws.

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