

### 10.03. Best Evidence Rule

**When a party seeks to prove the contents of a writing, recording, or photograph that is in dispute, the writing, recording, or photograph must be proved by production of the original, except when the production is excused as provided in this article.**

#### Note

This rule restates New York’s long-standing best evidence rule, which provides that, when a party is seeking to prove the disputed contents of a writing, recording, or photograph, as defined in rule 10.01 of the Guide to New York Evidence, the party must produce the original, as also defined in rule 10.01, unless nonproduction is excused for reasons allowed by decisional law or by statute (*e.g. People v Haggerty*, 23 NY3d 871, 876 [2014] [“The best evidence rule requires the production of an original writing where its contents are in dispute and sought to be proven” (internal quotation marks omitted)]; *Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643 [1994] [“(B)est evidence rule simply requires the production of an original writing where its contents are in dispute and sought to be proven”]; *Foot v Bentley*, 44 NY 166, 171 [1870] [Rule violated when trial court admitted letter-press copies of letters as the copies did not “obviate the necessity of producing the originals” of the letters]).

As to the rule’s underlying rationale, the Court of Appeals explained in *Schozer*: “At its genesis, the rule was primarily designed to guard against ‘mistakes in copying or transcribing the original writing.’ Given the technological advancements in copying, in modern day practice the rule serves mainly to protect against fraud, perjury and ‘inaccuracies . . . which derive from faulty memory’ ” (84 NY2d at 643-644 [citations omitted]; *see also People v Haggerty*, 23 NY3d 871, 876 [2014] [“The rule protects against fraud, perjury, and inaccurate recollection by allowing the jury to judge a document by its own literal terms”]).

The rule does not apply, however, when a party seeks to prove a fact that is memorialized in a writing, recording, or photograph if that fact has an existence independent of a writing, recording, or photograph (*McRorie v Monroe*, 203 NY 426, 429-430 [1911] [oral testimony may be proved without reference to the stenographer’s minutes]; *Steele v Lord*, 70 NY 280, 283-284 [1877] [payment may be proved without producing the written receipt provided]; *Grieshaber v City of Albany*, 279 AD2d 232, 235 [3d Dept 2001] [“Where, as here, a party seeks to prove the content of a conversation, which is a fact existing independently of an available recording of that conversation, an individual who heard the conversation may testify as to its content despite the existence of the tape recording”]; *Universal Grain Corp. v Lamport & Holt Line*, 54 NYS2d 53, 53-54 [App Term, 1st Dept 1945] [“The best evidence rule has no application to the instant case.

When a party seeks to prove a fact which has an existence independently of any writing, he may do so by parol, even though the fact has been reduced to, or is evidenced by, a writing. Here plaintiff relied on the positive and direct testimony of witnesses having independent knowledge” (citation omitted)). Similarly, it is not necessary to use certificates to prove such facts as marriage, birth, age, and death (*see Commonwealth v Dill*, 156 Mass 226, 227, 30 NE 1016, 1017 [1892, Holmes, J.] [“(T)he record of a marriage . . . is a mere memorandum or declaration of the fact which effected the result, not itself the fact, nor that which has been constituted the only evidence of the fact. There is no reason why the oath of the person who did the act should be deemed inferior evidence to a written statement by him or another” (citation omitted)]). In these instances, the proof is directed to the occurrence of an event and not to the contents of the writing or recording.

The core element of the best evidence rule is “proof of content.” The rule requires the production of the original of a writing, recording, or photograph only when a party is seeking to prove the contents of the writing, recording, or photograph (*e.g. Flynn v Manhattan & Bronx Surface Tr. Operating Auth.*, 61 NY2d 769, 771 [1984]; *Clarke v New York City Tr. Auth.*, 174 AD2d 268, 273 [1st Dept 1992]). Thus, the rule will apply when under the governing substantive law a fact required to be proved is a written transaction, *e.g.*, a deed, will, or written contract (*see Mahaney v Carr*, 175 NY 454, 461-462 [1903]; *Curran v Newport Assoc.*, 57 AD2d 882, 883 [2d Dept 1977]; *Matter of Hamilton*, 182 App Div 908, 908-909 [4th Dept 1918]), and a party chooses to prove a relevant fact by evidence of a writing or recording even though the substantive law does not require the writing or recording to be proved (*see Barker & Alexander*, Evidence in New York State and Federal Courts § 10.1 [2d ed]; Martin, Capra & Rossi, New York Evidence Handbook § 10.1.3 [2d ed]).

There are exceptions to the best evidence rule, however, as set forth in the ensuing rules:

- 10.05 Exception for Certain Reproductions and Copies
- 10.07 Exception when Original Missing or Collateral
- 10.09 Exception for Admission of Contents
- 10.11 Exception for Summary of Voluminous Material