

## **10.05. Exception for Certain Reproductions and Copies**

**(1) When an original writing, recording, or photograph is required, a reproduction or copy is not admissible to prove its contents, except as provided in subdivisions two, three, and four, and rule 10.07 (Exception when Original Missing or Collateral).**

**(2) If any business, institution, or member of a profession or calling, in the regular course of business or activity has made, kept or recorded any writing, entry, print or representation and in the regular course of business has recorded, copied, or reproduced it by any process, including reproduction, which accurately reproduces or forms a durable medium for reproducing the original, such reproduction, when satisfactorily identified, is as admissible in evidence as the original, whether the original is in existence or not, and an enlargement or facsimile of such reproduction is admissible in evidence if the original reproduction is in existence and available for inspection under direction of the court. The introduction of a reproduction does not preclude admission of the original.**

**(3) A reproduction created by any process which stores an image of any writing, entry, print or representation and which does not permit additions, deletions, or changes without leaving a record of such additions, deletions, or changes, when authenticated by competent testimony or affidavit which shall include the manner or method by which tampering or degradation of the reproduction is prevented, shall be as admissible in evidence as the original.**

**(4) A reproduction or copy of a record or report is admissible to prove its contents when specifically permitted by statute.**

**Note**

This rule addresses the circumstances when a reproduction or copy of a writing, recording, or photograph is admissible to prove the contents of the original.

**Subdivision (1)** restates New York law that provides the contents of a writing, recording, or photograph cannot be proved by a copy except when permitted by a statute or decisional law (*e.g. Richardson v Tanner*, 140 App Div 372, 377 [1st Dept 1910]; *Guilfoyle v Pierce*, 125 App Div 504, 507 [1st Dept 1908], *affd* 196 NY 499 [1909]; *Dhillon v Bryant Assoc.*, 26 AD3d 155, 157 [1st Dept 2006]; *People v Hamilton*, 3 AD3d 405, 405 [1st Dept 2004], *mod on other grounds* 4 NY3d 654 [2005]; *see* Prince, *Richardson on Evidence* § 10-110 [Farrell 11th ed]).

**Subdivision (2)** restates verbatim CPLR 4539 (a). This statutory provision creates an exception to the best evidence rule set forth in Guide to New York Evidence rule 10.03 for a copy of any “writing, entry, print or representation” made by any “business, institution, or member of a profession or calling” by an accurate reproduction process, provided the copy was made in the regular course of business (*e.g. Grand Manor Health Related Facility, Inc. v Hamilton Equities, Inc.*, 122 AD3d 481, 482 [1st Dept 2014] [copy of assignment document was properly admitted: “The testimony of a witness for plaintiff that he retrieved the document from the company’s files, where it was plaintiff’s practice to keep photocopies of outgoing correspondence, satisfies CPLR 4539 (a)”]; *People v May*, 162 AD2d 977, 978 [4th Dept 1990] [two photocopies and fax copy of documents properly admitted when they were made in the regular course of business]). This exception is based on the legislative recognition that the “modern business practice is to make photographic reproductions in the regular course of business and also of the fact that photographic reproductions so made are sufficiently trustworthy to be treated as originals for the purpose of the best evidence rule” (*People v Flores*, 138 AD2d 512, 513 [2d Dept 1988]).

This exception does not encompass copies of documents not made in the regular course of business, even if made by an accurate reproduction process (*see Toho Bussan Kaisha, Ltd. v American President Lines, Ltd.*, 265 F2d 418, 423 [2d Cir 1959] [applying predecessor to CPLR 4539: “The provisions of those acts permitting use of photostats refer only to situations where photostats, microfilms, or the like, have been made in the ordinary course of business and not in preparation for trial”]; *Dipace v Hertz Corp.*, 30 AD2d 515, 516 [1st Dept 1968] [citing *Toho Bussan Kaisha, Ltd.*]). The legislature has not enacted a statute similar to Federal Rules of Evidence rule 1003 which provides that copies are generally admissible in all cases except where there is a genuine question of the authenticity of the original or where admission of the duplicate instead of the original would be unfair.

As noted by the Appellate Division: “[CPLR 4539 (a)] makes it unnecessary to establish that the exhibit was compared to the original and found to be an accurate copy. It is enough that the document is identified as a photocopy of the original or the product of some similarly accurate copying process” (*May*, 162 AD2d at 978).

CPLR 4539 (a) permits the introduction of the reproduced copy even if the original of the document exists. It also permits an enlargement of the reproduced copy to be admitted if the original document still exists and is available for inspection.

**Subdivision (3)** restates verbatim CPLR 4539 (b). It, too, creates an exception to the best evidence rule set forth in rule 10.03 for any “writing, entry, print or representation” produced by electronic data imaging, e.g., optically scanned images that are stored on a computer disc (*e.g. People v Gunther*, 172 AD3d 1403, 1404 [2d Dept 2019] [computer reproduction of scanned original withdrawal slips properly admitted]). The underlying legislative intent is to “expressly provide for the admissibility in evidence of business records produced by new technologies, including electronic data imaging, to remove the legal uncertainties that currently require businesses and governments that adopt such technologies to maintain dual record systems” (Senate Introducer’s Mem in Support, Bill Jacket, L 1996, ch 27 at 7).

Two conditions are imposed: the imaging process utilized does not allow “additions, deletions, or changes without leaving a record” of such alterations; and a description as to how “tampering or degradation of the reproduction is prevented” is presented by testimony or affidavit.

Of note, unlike CPLR 4539 (a), CPLR 4539 (b) is not limited to reproductions made in the regular course of business. Thus, CPLR 4539 (b) encompasses scanned documents that were converted to electronic form as part of a wholesale conversion of documents maintained in storage.

In *People v Kangas* (28 NY3d 984 [2016]), the Court of Appeals held that CPLR 4539 (b) does not apply to documents that were originally created in electronic form. Rather, it “applies only when a document that originally existed in hard copy form is scanned to store a digital ‘image’ of the hard copy document” (*id.* at 985). The Court expressly noted that an electronic business record offered into evidence as a true and accurate tangible exhibit under CPLR 4518 (a) can be admitted without the additional foundation elements of CPLR 4539 (b) (*id.* at 986).

**Subdivision (4)** refers to many statutes, other than CPLR 4539, that authorize the admission in evidence of reproductions or copies of specific types of records and reports in lieu of the original. They encompass both public and private records and reports. These statutes address specific types of writings (*see*

*e.g.* Banking Law § 11 [2] [b] [banking reports required to be kept by superintendent]; Banking Law § 256 [records of savings bank relating to accounts of depositors and relating to its business operations]; CPLR 3122-a [certification of copies of business records]; CPLR 4518 [c] [certified copies of hospital and medical records of a municipal corporation and the state; and records of a library, municipal corporation and the state]; CPLR 4525 [certified copies of statements made pursuant to UCC 9-523]; CPLR 4540 [copies of an official publication, official record of a court or government office of the United States and any state]; CPLR 4542 [a] [certified copies of foreign records and documents]; County Law § 208 [certified copies or transcripts of county records]; Education Law § 106 [copies of records made by the regents of a university and commissioner of education under their seal]; Public Service Law § 17 [certified copies of records filed or deposited in office of Public Service Commission]; Real Property Law § 399 [certified certificate of title]; Transportation Law § 69 [copies of records of Utica Transit Authority]; Transportation Law § 88 [certified copies of records filed or deposited in Transportation Department]).