

10.09. Exception for Admission of Contents

The contents of a writing, recording, or photograph may be proved by the testimony, deposition, or admission of the party against whom offered, without accounting for the production of the original of the writing, recording, or photograph.

Note

This rule restates well established New York law that permits, as an exception to the best evidence rule, the contents of a writing, recording, or photograph to be proved by the testimony, deposition, or admission of the party against whom the contents are offered without the need for producing the original, regardless of its availability (*see e.g. Thomson v Rubenstein*, 31 AD3d 434, 436 [2d Dept 2006] [“plaintiff’s inability to produce the original note (does not) raise a triable issue of fact under the best evidence rule, since the appellants do not dispute the contents of the original note, which was drafted by their attorney”]; *Chamberlain v Amato*, 259 AD2d 1048, 1048-1049 [4th Dept 1999] [“Defendant admitted the existence and essential terms of the note in his pleadings and testimony, and he and another witness identified defendant’s writing and signature on the copy of the note. Under the circumstances, the best evidence rule does not apply”]; *Matter of La Rue v Crandall*, 254 AD2d 633, 635 [3d Dept 1998] [“(I)t appears from the record that during cross-examination petitioner was shown the photocopy of the letter, admitted that he wrote it to respondent and acknowledged making the statements contained therein. Under these circumstances, we find no violation of the best evidence rule”]; *Haas v Storer*, 21 Misc 661, 662-663 [App Term, 5th Jud Dist 1897] [“(T)he paper admitted was a letter-press copy of an agreement signed by the defendant, and the defendant herself while upon the stand admitted that it was a true copy of the original paper which she had signed. This certainly bound the defendant as an admission against interest, and made the evidence primary in its nature”]; *but see* SCPA 1407 [proof of lost or destroyed will]).

The rationale for this rule is that production of an original is unnecessary and the opposing party cannot complain about its absence where the party has admitted its contents (*see Haas*, 21 Misc at 662-663). The party’s admission in these circumstances is viewed as reliable evidence of the contents (*id.* at 662; *see* Guide to NY Evid rule 8.03 [1]).

The rule encompasses an admission by a party while testifying at a hearing or trial in the action or proceeding or at a deposition (*Matter of La Rue*, 254 AD2d at 635). The rule also encompasses written admissions made during pendency of the action or proceeding, or before (*Chamberlain*, 259 AD2d at 1048-1049).

Federal Rules of Evidence rule 1007, the federal equivalent of this rule, does not authorize the admission of an “oral, out-of-court admission,” without accounting for the original writing, recording, or photograph. No New York decision has expressly adopted that view; to the contrary, in accord with New York’s exception to hearsay for admissions, the Appellate Division, Second Department, in an alternative holding, appeared to accept an oral out-of-court admission without accounting for the original (*see Falcone v EDO Corp.*, 141 AD2d 498, 499 [2d Dept 1988]).