

GUIDE TO NEW YORK EVIDENCE
ARTICLE 10: BEST EVIDENCE RULE
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10.01. Best Evidence Rule; Definitions

The following definitions apply to this article:

(1) Writing. A “writing” consists of letters, words, numbers, or their equivalent set down in any form.

(2) Recording. A “recording” consists of letters, words, numbers, sounds, or their equivalent recorded in any manner.

(3) Photograph. A “photograph” consists of a photographic image or its equivalent stored in any form, electronic or otherwise, including still photographs, motion pictures, video or digital recordings, and diagnostic imaging.

(4) Original.

(a) The original of a writing or recording includes the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it.

(b) The original of electronically stored information includes any printout or other output that accurately reflects the information and is readable by sight.

(c) The original of a photograph includes any print or digital reproduction thereof or a negative.

Note

This rule sets forth definitions applicable to the best evidence rule and its exceptions, as set forth in this article.

Subdivision (1) broadly defines a “writing” that may be subject to the best evidence rule. This definition accords with New York law that recognizes that the best evidence rule applies to any form of communicating, memorializing, or

storing verbal or numeric evidence set down by handwriting or a mechanical process. Thus, all forms of documentary evidence, from a contract, deed, or business record to letters or memoranda, are subject to the best evidence rule (e.g. *Trombley v Seligman*, 191 NY 400, 403 [1908] [shipping bill]; *Taft v Little*, 178 NY 127, 133 [1904] [contract]; *Butler v Mail & Express Publ. Co.*, 171 NY 208, 211 [1902] [stipulation]; *Foot v Bentley*, 44 NY 166, 171 [1870] [letter]; *Shanmugam v SCI Eng'g, P.C.*, 122 AD3d 437, 438 [1st Dept 2014] [business records]; *Dhillon v Bryant Assoc.*, 26 AD3d 155, 157 [1st Dept 2006] [tax returns]; *Matter of Marks*, 33 AD2d 1029, 1029 [2d Dept 1970] [plot plan for real estate parcel]). The term “writing” also includes verbal or numeric information that is stored digitally and can be read on a screen or printed out (e.g. *Ed Guth Realty v Gingold*, 34 NY2d 440, 451-452 [1974] [computer printouts]).

Inscriptions on physical objects, so-called “inscribed chattels,” are not considered to be writings for purposes of the best evidence rule when they merely identify the object (*Carroll v Gimbel Bros., New York*, 195 App Div 444, 451 [1st Dept 1921] [testimony that merchandise allegedly shoplifted by plaintiff bore tags and marks of the defendant’s store erroneously excluded on best evidence grounds; court noted the best evidence rule applied only to “documentary evidence”]; see *United States v Duffy*, 454 F2d 809, 812 [5th Cir 1972] [witness could testify about three-letter “D-U-F” laundry mark on shirt collar without producing the shirt as “the shirt with a laundry mark would not, under ordinary understanding, be considered a writing” for purposes of the best evidence rule]).

Subdivision (2) parallels subdivision (1), likewise broadly defining a “recording” subject to the best evidence rule. That definition accords with New York law (see *People v Harding*, 44 AD2d 800, 801 [1st Dept 1974] [“The fact that the transcript made of the recorded telephone conversation was concededly correct fails to ameliorate the fact that the tape and not the transcript constitutes the best evidence of the nature of the conversation”]; *People v Graham*, 57 AD2d 478, 480 [4th Dept 1977], *affd* 44 NY2d 768 [1978]).

Subdivision (3) defines “photograph,” which New York courts have recognized may have multiple meanings in the application of the best evidence rule in the electronic age. For example, the best evidence rule may apply to still photographs (e.g. *People v Byrnes*, 33 NY2d 343, 347-348 [1974]; *People v Farbman*, 231 AD2d 588 [2d Dept 1996]); videotapes, including surveillance tapes (see e.g. *People v Cyrus*, 48 AD3d 150, 159 [1st Dept 2007]; *People v Fondal*, 154 AD2d 476, 477 [2d Dept 1989]); motion pictures (see Martin, Capra & Rossi, NY Evidence Handbook § 10.1.2 at 920 [2d ed]); and diagnostic imaging (see e.g. *Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 644-645 [1994] [X ray film]; *Wagman v Bradshaw*, 292 AD2d 84, 88 [2d Dept 2002] [MRI film]).

Subdivision (4) restates the separate definitions of an “original,” “writing or recording,” computer printout, and “photograph,” as provided in New York decisional law.

Subdivision (4) (a) sets forth what constitutes an “original” for purposes of the best evidence rule (*Sarasohn v Kamaiky*, 193 NY 203, 215 [1908]; *Hubbard v Russell*, 24 Barb 404, 408 [Sup Ct 1857]). Where the parties make two or more copies of a document and each party retaining one, both copies are considered an “original” if that is what the parties intended; and any one copy is admissible as the “original” without accounting for the absence of the other copy (*Sarasohn*, 193 NY at 215-216; *People v Sims*, 127 AD2d 712, 713 [2d Dept 1987]). A different rule, however, applies when multiple copies of a will are executed, as all copies must be accounted for before one is probated (*see Crossman v Crossman*, 95 NY 145 [1884]; *Matter of Robinson*, 257 App Div 405, 406-407 [4th Dept 1939]; *see also* SCPA 1407 [proof of lost or destroyed will]).

The Third Department has noted that carbon copies of written statements are originals for purposes of the best evidence rule (*see People v Chaplin*, 134 AD3d 1148, 1152 [3d Dept 2015]; *People v Kolp*, 49 AD2d 139, 141 [3d Dept 1975]). The First Department has taken a contrary position (*Rosenberg v People’s Sur. Co. of N.Y.*, 140 App Div 436, 437 [1st Dept 1910]). In *Foot v Bentley* (44 NY 166 [1870]), the Court of Appeals held the best evidence rule barred the admission of a “letter press” copy of a letter.

Subdivision (4) (b) sets forth New York law that treats any printout or other readable output of electronically stored information as the “original” of the stored data (*Ed Guth Realty*, 34 NY2d at 452).

Subdivision (4) (c) restates New York law recognizing that an original of a photograph includes any print or digital reproduction thereof or a negative (*Byrnes*, 33 NY2d at 348; *People v Fort*, 146 AD3d 1017, 1018 [3d Dept 2017] [still photographs from a surveillance video]; *see People v Fraser*, 96 NY2d 318, 327 [2001] [holding that the term “photograph” used in the definition of a crime (Penal Law § 263.00 [4]) included a digital computer image]).

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

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]).

10.07. Exception when Original Missing or Collateral

(1) Evidence, other than the original of a writing, recording, or photograph, may be admissible pursuant to subdivision two when:

(a) all originals are lost or destroyed unless the proponent caused or procured their loss or destruction in bad faith;

(b) an original cannot be obtained by any available judicial process; or

(c) the party against whom the original would be offered has control of the original and fails to produce it after having been notified by pleadings or otherwise that the original will be a subject of proof in the action or proceeding.

(2) Competent and reliable secondary evidence of the contents of an unproduced original is admissible when the court is satisfied that the proponent has, pursuant to subdivision one, sufficiently explained the unavailability of the original writing, recording, or photograph.

(3) Evidence, other than the original of a writing, recording, or photograph, may be admissible when the writing, recording, or photograph is not directly in issue.

Note

This rule restates New York law that establishes exceptions to the best evidence rule, excusing the nonproduction of the original of a writing, recording, or photograph; and, correspondingly, permits other evidence, referred to as secondary evidence, to prove the contents of a writing, recording, or photograph.

Subdivision (1) sets forth three judicially recognized exceptions to the best evidence rule under which production of the original writing, recording or photograph is excused.

Subdivision (1) (a) restates New York’s well-established “excuse of good faith loss or destruction” exception to the best evidence rule. As stated by the Court of Appeals in *Schozer v William Penn Life Ins. Co. of N.Y.*:

“Under a long-recognized exception to the best evidence rule, secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith” (84 NY2d 639, 644 [1994] [citations omitted]; *cf. Trombley v Seligman*, 191 NY 400, 403 [1908] [trial court erred in permitting testimony to establish the contents of shipping bills without any proper attempt to procure these bills on the trial and without any sufficient evidence of their loss or destruction]; *Butler v Mail & Express Publ. Co.*, 171 NY 208, 211 [1902] [trial court erred in permitting testimony to establish an alleged stipulation between the parties without satisfactorily explaining the absence of the stipulation entered into]).

Loss may be established upon a showing of a diligent search where the document was last known to have been kept and through the testimony of the person who last had custody of the original (*Schozer*, 84 NY2d at 644; *see Kearney v Mayor of City of N.Y.*, 92 NY 617, 621 [1883] [“The general rule is that the party alleging the loss of a material paper, where such proof is necessary for the purpose of giving secondary evidence of its contents, must show that he has in good faith exhausted, to a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him”]; *Kliamovich v Kliamovich*, 85 AD3d 867, 869 [2d Dept 2011]).

As to destruction of an original, proof that the destruction was made in the ordinary course of business, or there was no reason for its continued preservation, will excuse the original’s non-production (*Steele v Lord*, 70 NY 280, 283-284 [1877]). On the other hand, the exception will not apply when the destruction was made in bad faith by a party against whom secondary evidence of content is sought (*People v Grasso*, 237 AD2d 741, 742 [3d Dept 1997]).

Subdivision (1) (b) restates New York law that excuses production of an original writing, recording, or photograph and allows secondary evidence to prove the original’s contents when the original is not obtainable by any available judicial process (*see e.g. People v Burgess*, 244 NY 472, 479 [1927] [“Secondary evidence of the contents of a written document may ordinarily be introduced where the original document is in the custody of a person without the jurisdiction of the courts, and its production has been refused and cannot be compelled. ‘The books being out of the State and beyond the jurisdiction of the court, secondary

evidence to prove their contents was admissible’ ” (citation omitted)). This exception recognizes that an unobtainable original is analogous to it being lost or destroyed, and no principled reason dictates treating the situations differently.

The unobtainability of an original for purposes of this exception can be shown by evidence that the original cannot be subpoenaed or the subpoena when properly served was not obeyed (*Burgess*, 244 NY at 479; *Chanler v Manocherian*, 151 AD2d 432, 435 [1st Dept 1989]).

Subdivision (1) (c) restates New York law that the production of the original of a writing, recording, or photograph is excused when the party in control of the original is on notice that the contents of the original will be the subject of proof and the party fails to produce it (*see e.g. People v Dolan*, 186 NY 4, 11 [1906]; *Glatter v Borten*, 233 AD2d 166, 168 [1st Dept 1996] [A recognized “excuse is that the original is in the possession of an adversary who, after due notice, has failed to produce it; evidence of such adverse possession is required”]; *Briar Hill Apts. Co. v Teperman*, 165 AD2d 519, 521-522 [1st Dept 1991]). In these circumstances, that party cannot complain that the party who requested the original is proving its contents by secondary evidence.

Proof of notice is a basic foundational element for invoking this exception. There is, however, no mandated form of notice. Any reasonable means of giving notice will suffice (*see Dolan*, 186 NY at 11-13; *Gardam & Son v Batterson*, 198 NY 175 [1910] [mail]; *Lawson v Bachman*, 81 NY 616, 618 [1880] [pleadings], *affd* 109 US 659 [1884]).

Subdivision (2) restates New York law that, once the failure to produce the original of a writing, recording, or photograph is excused, any admissible evidence, referred to as secondary evidence, can be used to prove the contents of the original (*see e.g. Schozer*, 84 NY2d at 645 [“(O)nce the absence of (the original) is excused, all competent secondary evidence is generally admissible to prove its contents”]; *Chanler v Manocherian*, 151 AD2d 432, 435 [1st Dept 1989] [“The contents of a document may be proved by secondary evidence if the absence of the original writing can be satisfactorily accounted for” (internal quotation marks and citations omitted)]). In short, “[n]o categorical limitations are placed on the types of secondary evidence that are admissible” (*Schozer*, 84 NY2d at 645).

Thus, the contents of an original can be proved: (1) by testimony (*see Schozer*, 84 NY2d at 645-646 [“(W)hen oral testimony is received to establish the contents of an unavailable writing, the proponent of that proof must establish that the witness is able to recount or recite, from personal knowledge, ‘substantially and with reasonable accuracy’ all of its contents”]); (2) by documentary evidence (*Kliamovich v Kliamovich*, 85 AD3d 867 [2d Dept 2011]; *cf. Lipschitz v Stein*, 10 AD3d 634, 637 [2d Dept 2004]); (3) by copies of the original (*see People v Hamilton*, 3 AD3d 405, 405 [1st Dept 2004], *mod on other grounds* 4 NY3d 654

[2005]; *People v Sims*, 257 AD2d 582, 582 [2d Dept 1999]; *People v McCargo*, 144 AD2d 496 [2d Dept 1988]); or (4) by oral admissions (*Mandeville v Reynolds*, 68 NY 528, 536 [1877]; *Dependable Lists v Malek*, 98 AD2d 679, 680 [1st Dept 1983]; *Cociancich v Vazzoler*, 48 App Div 462, 467 [2d Dept 1900]).

In *Schozer*, the Court of Appeals explained the procedure to be followed to admit “secondary evidence.”

“[T]he proponent of such [secondary] proof has the heavy burden of establishing, preliminarily to the court’s satisfaction, that it is a reliable and accurate portrayal of the original. Thus, as a threshold matter, the trial court must be satisfied that the proffered evidence is authentic and correctly reflects the contents of the original before ruling on its admissibility. For example, when oral testimony is received to establish the contents of an unavailable writing, the proponent of that proof must establish that the witness is able to recount or recite, from personal knowledge, substantially and with reasonable accuracy all of its contents. Once a sufficient foundation for admission is presented, the secondary evidence is subject to an attack by the opposing party not as to admissibility but to the weight to be given the evidence, with [the] final determination left to the trier of fact” (84 NY2d at 645-646 [internal quotation marks and citations omitted]; see *Kearney v Mayor of City of N.Y.*, 92 NY 617, 620 [1883] [issue of whether proponent had lost writing and diligently tried to find it “presented a question to be determined by (the court) as matter of fact”]; *Mason v Libbey*, 90 NY 683, 685 [1882] [issue of whether the letters had been destroyed in bad faith and the “sufficiency of the explanation presented a question of fact for the trial judge”]).

The Court further noted in *Schozer* that “the more important the document to the resolution of the ultimate issue in the case, the stricter becomes the requirement of the evidentiary foundation [establishing loss] for the admission of secondary evidence” (84 NY2d at 644 [internal quotation marks and citations omitted]).

“Placement of this heavy foundational burden on the proponent of secondary evidence to prove its accuracy as a derivative source of proof,” the Court has observed, “serves to reduce the dangers of fraud and prejudice” (*Schozer*, 84 NY2d at 646).

In a criminal proceeding, where photographs viewed in an identification procedure are not produced at a *Wade* hearing, the secondary evidence must rebut a presumption of suggestiveness that arose from the nonproduction of the photographs (see *People v Holley*, 26 NY3d 514, 521-522 [2015] [the failure of the People to preserve and thus produce a record of photographs viewed in an

identification procedure gives rise to a rebuttable presumption that the array was suggestive]; *People v Castello*, 176 AD3d 730, 732 [2d Dept 2019] [“The presumption of suggestiveness may be overcome by presenting sufficient evidence of nonsuggestiveness, such as by reconstructing the photo array from related materials or through the testimony of a police witness detailing the manner in which the photo manager system was utilized to arrive at the identification. If the People meet their burden . . . the burden shifts to the defendant to persuade the hearing court that the procedure was improper” (internal quotation marks and citations omitted)].

Subdivision (3) restates New York’s “collateral matters” exception to the best evidence rule. This exception excuses the production of an original writing, recording, or photograph where its contents are not directly in issue but are only incidental or collateral to a controlling issue in the action or proceeding, i.e., the contents are of minor significance to the issue so that no useful purpose would be served in requiring the original’s production (*e.g. People v Jones*, 106 NY 523, 526 [1887]; *Grover v Morris*, 73 NY 473, 480 [1878]; *Clover Crest Stock Farm, Inc. v New York Cent. Mut. Fire Ins. Co.*, 189 App Div 548, 555 [4th Dept 1919]). While the exception is well established, the cases do not provide meaningful guidance about when the contents are considered “collateral.”

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 Storner*, 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]).

10.11. Exception for Summary of Voluminous Material

The content of voluminous writings, recordings, or photographs may be proved by the use of a summary, chart, or calculation of the contents, provided the writings, recordings, or photographs are accurate, otherwise admissible, and cannot be conveniently examined in court. The party offering such evidence must make the originals available for examination, copying, or both, by other parties at a reasonable time and place. The party against whom the item is being offered must be given an opportunity to challenge its admission. And, the court may order the offering party to produce the underlying originals in court.

Note

This rule restates New York's "voluminous writings" exception to the best evidence rule by permitting the contents of a large number of writings, recordings, or photographs to be admitted in the form of a chart, summary, or calculation of their contents (e.g. *Ed Guth Realty v Gingold*, 34 NY2d 440, 451-452 [1974]; *Von Sachs v Kretz*, 72 NY 548, 552 [1878]). As stated by the First Department in *Public Operating Corp. v Weingart* (257 App Div 379, 382 [1st Dept 1939]):

"When documents introduced in evidence at a trial are voluminous and of such a character as to render it difficult for the jury to comprehend material facts without schedules containing abstracts thereof, it is within the discretion of the judge to admit such schedules provided they are based on facts in evidence, verified by the testimony of the person by whom they were prepared, and provided that the adverse party is permitted to examine them to test their correctness and to cross-examine upon them before the case is submitted to the jury."

The rule has four requirements before it can be invoked:

First, the original writings, recordings, or photographs must be too voluminous for convenient examination in court, a determination committed to the sound discretion of the court (see *Von Sachs*, 72 NY at 552 ["It would not have been error for the referee to have allowed a witness, with the books before him, to give a summary of their contents; but this was a question of convenience simply, and a matter within his discretion"]; *People v Potter*, 255 AD2d 763, 767 [3d Dept 1998]; *People v Weinberg*, 183 AD2d 932, 934 [2d Dept 1992]). In exercising that discretion, the court can consider the number of originals involved

and their complexity (*Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 228 [1st Dept 1996]; see *Fagiola v National Gypsum Co. AC & S., Inc.*, 906 F2d 53, 57-59 [2d Cir 1990]).

Second, the rule requires that the originals on which the chart, summary, or calculation is based be admissible (*Matter of Thomma*, 232 AD2d 422, 422-423 [2d Dept 1996]; *Weinberg*, 183 AD2d at 934; *Matter of Dunn Garden Apts. v Commissioner of Assessment & Taxation of City of Troy*, 11 AD2d 879, 880 [3d Dept 1960]).

Third, the proponent of the chart, summary or calculation must establish that the summary is an accurate representation of the originals (see *Public Operating Corp.*, 257 App Div at 382).

Fourth, the party against whom the chart, summary, or calculation is being offered must be given an opportunity to challenge its accuracy (*People v Case*, 114 AD3d 1308, 1309 [4th Dept 2014] [summary exhibits were improperly admitted under the voluminous writings exception to the best evidence rule inasmuch as defendant was not provided with the data underlying those exhibits before trial]; *Weinberg*, 183 AD2d at 934; *Public Operating Corp.*, 257 App Div at 383). In this connection, the court may also order the originals to be produced in court.

Where the chart, summary or calculation is used only for demonstrative purposes, this rule does not apply (see *Sager Spuck Statewide Supply Co. v Meyer*, 298 AD2d 794, 795 [3d Dept 2002] [summary of plaintiff's sales while not admissible as business record was properly admitted for the limited purpose of aiding the jury in understanding the voluminous data already admitted]; *Lauro v Bradley*, 265 AD2d 875, 875 [4th Dept 1999] ["A witness testifying concerning hundreds of items may use a list of those items, and after the witness has testified the list may be admitted in evidence, 'not as proving anything of itself, but as a detailed statement of the items testified to by the witness' "]; *Potter*, 255 AD2d at 767 ["visual aids"]).