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]).