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."