



# **Evidence:**

## **Best Evidence Rule**

COLIN MILLER



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Evidence:

# Best Evidence Rule

Colin Miller

CALI eLangdell<sup>®</sup> Press 2012

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# Preface

The Best Evidence Rule, contained in Article X of the Federal Rules of Evidence (Rules 1001-1008) and state counterparts, is a Rule that requires a party seeking to prove the contents of a writing, recording, or photograph to produce the original (or a duplicate) or account for its nonproduction. Through a series of cases and hypotheticals drawn from actual cases, this chapter gives readers a roadmap for how to address any Best Evidence Rule issue in practice.



# Best Evidence Rule Chapter

## Introductory Note

In 2009, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States Courts decided to “restyle” the Federal Rules of Evidence. The goal in this project was to make the Rules more user friendly rather than to enact substantive changes. At the end of each section of this chapter, there is a side-by-side comparison between the prior language of each Rule in Article X and the language of each new “restyled” Rule. Because the changes were intended to be stylistic only, everything discussed in this chapter should continue to be good law after the “restyled” Rules take effect on December 1, 2011.

## I. Historical Origins of the Best Evidence Rule

Pre-Roman inhabitants of England, who were mostly illiterate, placed great importance on ceremony and “viewed written documents affecting property or contractual rights not as mere indicia of those rights, but as the rights themselves.” Cynthia A. DeSilva, *California’s Best Evidence Rule Repeal: Toward a Greater Appreciation for Secondary Evidence*, 30 MCGEORGE L. REV. 646, 648 (1999). While this mindset, dubbed the “medieval mind” by John Henry Wigmore<sup>1</sup> eventually dissipated before disappearing entirely in the early 1800s, it permeated evidence law, setting the stage for both the doctrine of *profert in curia*<sup>2</sup> and the Best Evidence Rule. In courts of law, the ancient pleading doctrine of *profert in curia* required a party seeking relief based upon a written instrument to allege that he could produce the original. If a party could not produce the original document when its contents were at issue, he literally lost the rights it allegedly created.

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<sup>1</sup> See *John Henry Wigmore*, WIKIPEDIA, [http://en.wikipedia.org/wiki/John\\_Henry\\_Wigmore](http://en.wikipedia.org/wiki/John_Henry_Wigmore) (last visited Jan. 13, 2012).

<sup>2</sup> See *Definition of Profert in Curia L*, BLACK’S LAW DICTIONARY, <http://blackslawdictionary.org/profert-in-curia-l/> (last visited Jan 13, 2012).

Closely related to the doctrine of *proferat in curia* is the Best Evidence Rule, also known as the Original Document Rule. Under the Best Evidence Rule, first enunciated in *Ford v. Hopkins*, (1700) 91 Eng. Rep. 250, 250-51 (K.B.), the proponent of evidence concerning the contents of a written document had to produce the original document or account for its nonproduction. See Solomon Salako, *Chapter 13: The Hearsay Rule*, INSITE LAW MAGAZINE, <http://www.insitelawmagazine.com/evidencech13.htm> (last visited Jan. 13, 2012). If the proponent could neither produce the original document nor provide a satisfactory reason for its nonproduction, he could not prove the contents of the document through secondary evidence such as witness testimony or a handwritten copy. Courts applied this Best Evidence Rule with an understanding of the central position that the written word occupies in the law and the knowledge that “a slight variation of words may mean a great difference in rights.” *Johnson v. Sourignamath*, 816 A.2d 631 (2003). The requirement that the proponent of a document produce an original or account for its nonproduction was thus an effort to ensure that a party's substantive rights were not affected by the possibility of fraud or errors of human transcription and memory attendant in handwritten copies and testimony.

The twentieth century witnessed the invention of new technologies, such as the process of xerography<sup>3</sup>, invented by attorney Chester Carlson<sup>4</sup> in 1937, which “revolutionize[d] the document reproduction industry” because originals could now be reproduced, ostensibly without the errors inherent in human transcription. *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1197 (2d Cir. 1981). In response to these new technologies, states began enacting exceptions to the Best Evidence Rule that allowed for the admission of “duplicates” or “duplicate originals” created without manual transcription even when proponents could not account for the nonproduction of originals.

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<sup>3</sup> See *Xerography*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Xerography> (last visited Jan. 13, 2012).

<sup>4</sup> See *Chester Carlson*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Chester\\_Carlson](http://en.wikipedia.org/wiki/Chester_Carlson) (last visited Jan. 13, 2012).

These changes paved the way for the eventual adoption of Article X, and specifically Rule 1003, of the Federal Rules of Evidence in 1975.

## **II. Article X: The Modern Best Evidence Rule**

Article X of the Federal Rules of Evidence, consisting of Rules 1001-1008, contains the current Best Evidence Rule; most states have modified their Best Evidence Rules to conform to the Federal Rules.

### **A. Rule 1002: The Rule's Scope**

Federal Rule of Evidence 1002 contains the Best Evidence Rule: "An original writing, recording, or photograph is required in order to prove its contents unless these rules or a federal statute provides otherwise." An example of a writing triggering a Best Evidence Rule analysis can be found in United States v. Rivera-Carrizosa, 35 F.3d 573 (9th Cir. 1994), in which the defendant was convicted of unlawful reentry or presence in the United States after deportation. At trial, an agent testified that he reviewed the defendant's birth certificate from his immigration file and that the certificate stated that the defendant was born in Mexico. *Id.* On the defendant's appeal, the Ninth Circuit reversed his conviction because the prosecution did not produce his birth certificate at trial, meaning that the agent's testimony violated the Best Evidence Rule. *Id.*

For an example of how the Best Evidence Rule applies to photographs, see United States v. Shores, 93 F. App'x. 868 (6th Cir. 2004), where the defendant was charged with being a felon in possession of a firearm and ammunition. Officers seized the firearm and ammunition during a search of the defendant's residence, during which they saw, but did not seize, a photograph of the defendant with a holstered revolver that appeared identical to the revolver that they recovered from the defendant's bedroom. *See id.* The officers testified regarding the photograph at trial, and the Sixth Circuit found that this testimony would have violated the Best Evidence Rule but for the fact that the defendant was placed on notice of the officers' testimony and had the photograph in his possession during trial, triggering Federal Rule of Evidence 1004(3), which will be discussed *infra*. *See id.*

An example involving a recording can be found in Dyer v. State, 26 So. 3d 700 (Fla. Dist. Ct. App. 2010), in which a defendant was convicted of stealing videos from an adult video store. The prosecution's main evidence against the defendant was the testimony of the store's manager who reviewed the surveillance video from the night of the robbery. *See id.* at 701. Because the prosecution did not produce the surveillance video at trial or satisfactorily account for its nonproduction, the appellate court reversed the defendant's conviction on appeal, concluding that the manager's testimony violated the Best Evidence Rule. *See id.* at 703.

On the other hand, the Best Evidence Rule is inapplicable when a party seeks to admit evidence or testimony that relates to a writing, recording, or photograph, but does not seek to prove its contents. For example, in State v. Clark, 377 S.E.2d 54 (N.C. 1989), the defendant allegedly murdered his wife, and the trial court permitted a witness to testify that she discovered a life insurance policy on the wife's life in the defendant's personal belongings although the prosecution did not produce the original policy. On the defendant's appeal, the Supreme Court of North Carolina affirmed the trial court's decision, concluding that the witness' testimony "was offered not to prove contents or terms, but simply to show defendant's knowledge that the policy existed." *Id.* at 60.

Furthermore, "[t]he best-evidence rule does not apply where a party seeks to prove a fact which has an existence independent of any writing, even though the fact might have been reduced to, or is evidenced by, a writing." JAG Consulting v. Eubanks, 72 S.W.3d 549, 555 (Ark. Ct. App. 2002). For instance, in Eubanks, an Arkansas appellate court found in a shop owner's lawsuit for conversion of his tools and equipment that the trial court properly permitted his wife to testify about his lost income resulting from the conversion because she had personal knowledge of the lost income. The fact that the wife later used this knowledge to prepare his tax returns did not make her testimony inadmissible pursuant to the Best Evidence Rule even though the plaintiff did not produce the tax returns at trial. *See id.* at 242.

Finally, when evidence qualifies as a writing and as chattel<sup>5</sup>, an item of tangible movable or immovable property, a court has discretion to treat it as chattel and beyond the scope of the Best Evidence Rule. Thus, in *United States v. Yamin*, 868 F.2d 130 (5th Cir. 1989), a prosecution for conspiracy and trafficking in counterfeit watches, the Fifth Circuit found no error with the admission of testimony by a witness that she purchased watches with counterfeit trademarks from the defendant even though the prosecution did not produce those watches at trial. *See id.* at 134-35. The Fifth Circuit found that the watches constituted both chattel and writings and that the dangers of inaccuracy and fraud that the Best Evidence Rule are designed to protect against were not implicated by the admission of the testimony because “[t]he viewing of a simple and recognized trademark is not likely to be inaccurately remembered.” *Id.* This was especially true because the prosecution did produce other counterfeit watches sold by the defendant and seized from the defendant’s store. *See id.* In *United States v. Buchanan*, 605 F.3d 518 (8th Cir. 2010), the Eighth Circuit reached the same conclusion with regard to testimony concerning an inscription in a safe. *See also* Colin Miller, “Safety in Numbers: Eight Circuit Finds Best Evidence Rule Not Triggered by Inscription on Safe.” EVIDENCEPROF BLOG, (May 6, 2010) <http://lawprofessors.typepad.com/evidenceprof/2010/05/1002-chattel--us-v-buchanan----f3d-----2010-wl-1753346ca8-iowa2010.html>

### **Hypothetical 1**

Chris Vagenos files an action pursuant to The Fair Debt Collection Practices Act against LDG Financial Services, LLC, alleging that the company engaged in deceptive practices in connection with the collection of a consumer debt. His claims are based upon a telephone message left on his cell phone by LDG. Vagenos claims, however, that the original message was destroyed when he switched his cellular telephone provider. If Vagenos wants to testify about the

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<sup>5</sup> For definition *see Chattel*, LEGAL INFORMATION INSTITUTE’S WEX, <http://www.law.cornell.edu/wex/chattel> (last visited Jan. 17, 2012).

contents of the telephone message, does his testimony trigger a Best Evidence Rule analysis? Cf. *Vagenos v. LDG Financial Services, LLC*, 2009 WL 5219021 (E.D.N.Y. 2009); Colin Miller, “Adverse (Dis)Possession: Eastern District Of New York Order Adverse Inference Instruction In Best Evidence Ruling.” EVIDENCEPROF BLOG, (Jan. 17, 2010), <http://lawprofessors.typepad.com/evidenceprof/2010/01/10041-adverse-inference-instructionvagenos-vldg-financial-services-llcslip-copy-2009-wl-5219021edny2009.html>.

### **Hypothetical 2**

Dennis is on trial for robbing a bank in Virginia on August 2, 2011 at 3:42 P.M. Dennis’ defense is that it was impossible for him to be robbing a bank in Virginia at that time because he was at a post office in North Carolina mailing a letter on August 2, 2011 at 3:45 P.M. At trial, as Dennis begins to testify about mailing the letter, the prosecutor objects that Dennis’ testimony will violate the Best Evidence Rule because he did not produce the letter at trial. Should the judge sustain the objection?

### **Hypothetical 3**

Joseph Churchill is charged with safecracking and related crimes after allegedly stealing money and checks from a lock-box type safe at Joseppi’s Pizza at 2:25 A.M. Later that morning, Detective Sergeant Dale Parrish viewed a surveillance camera videotape of the parking lot adjacent to the pizza parlor, which showed a van in the lot at 2:24 A.M. that then left approximately 4 minutes later. Parrish later arrested Churchill that same day while he was driving a van. At trial, the prosecution did not introduce the videotape into evidence, but Parrish testified that the vehicle in the video was “a van like the one Churchill was driving.” After he is convicted, Churchill appealed, claiming that this testimony violated the Best Evidence Rule. Is he right? See *State v. Churchill*, 2002 WL 598315 (Ohio Ct. App. 2002).



#### Hypothetical 4

Officer Angela Timmerman pulls over a car believed to be involved in a road rage incident. Officer Timmerman asks the driver of the car for his name, and he responds, “Michael Lee Johns.” Officer Timmerman then asks the driver for something to verify his identity, and he gives her a sales receipt for the vehicle, which contains the name “Carl Wiskow.” Officer Timmerman then takes the receipt to her cruiser to run a records check. Before Timmerman can arrest the driver, he starts his car and drives away at a high rate of speed, but Officer Timmerman eventually catches and arrests the driver, who turns out to be Carl Wiskow. Wiskow is charged with fleeing a police officer and giving a false name to the police. At trial, when Officer Timmerman is asked what led her to run the records’ check after she pulled over the driver, she starts to testify regarding the receipt. Defense counsel objects that the prosecution had not offered the receipt into evidence, meaning that the testimony violates the Best Evidence Rule. Should the judge sustain the objection? See *State v. Wiskow*, 2009 WL 3172156 (Minn. Ct. App. 2009); see also Colin Miller, “Can I Get a Receipt For That?: Court of Appeals of Minnesota Finds Best Evidence Rule Not Violated by Testimony Regarding Receipt Not Offered to Prove its Contents.” EVIDENCEPROF BLOG, (Oct. 7, 2009), <http://lawprofessors.typepad.com/evidenceprof/2009/10/best-evidence-receiptstate-of-minnesota-respondent-v-cain-lee-wiskow-appellant---nw2d-----2009-wl-3172156minnapp.html>.

#### Hypothetical 5

Store patrons who were arrested after an altercation with store employees at a Wal-Mart brought a Section 1983 claim against Wal-Mart, the city, the police department, and several individual police officers. In response, the defendants move for summary judgment. Wal-Mart has a surveillance video of the altercation, but it does not present it at the summary judgment hearing. Instead, it presents the affidavits of several

individuals who were present at the altercation and described what they saw. The patrons claim that these affidavits are inadmissible pursuant to the Best Evidence Rule because the surveillance video is the original, and the defendants have not accounted for its nonproduction. Are they right? *See Jackim v. Sam's East Inc.*, 2010 WL 2101962 (6th Cir. 2010).

**Prior Rules Language:**

**Rule 1002. Requirement of Original**

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

**Restyled Rules Language:**

**Rule 1002. Requirement of the Original**

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

**B. Rule 1001: Defining the Relevant Terms**

Federal Rule of Evidence 1001 defines the relevant terms contained in Rule 1002 and sets forth the definition of a “duplicate” as used in Rule 1003. According to Rule 1001(a)-(b), “[a] ‘writing’ consists of letters, words, numbers, or their equivalent set down in any form,” and “[a] recording’ consists of letters, words, numbers, or their equivalent recorded in any manner.” Under this definition, the Best Evidence Rule covers a wide range of evidence, such as title records (*See White Indus., Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049 (W.D. Mo. 1985)), claim forms (*See United States ex rel. El-Amin v. George Washington Univ.*, 522 F. Supp. 2d 135 (D.D.C. 2008)), bills (*See Oliver v. Sioux City Community School Dist.*, 389 NW 2d 665 (Iowa 1986)), deeds (*See Gleason v. Galvin*, 374 Mass. 574, 373 NE.2d 357, (Mass. 1978)), and sound recordings (*See Hall v. Texas*, 829 S.W.2d 407 (Tex. Ct. App. 1992)).

Moreover, courts have given the phrase “their equivalent” an expansive reading, capturing an even broader range of items under the purview of the Best Evidence Rule. For instance, in *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316 (9th Cir. 1986), the plaintiff, graphic

artist Lee Seiler, “claimed that creatures known as ‘Imperial Walkers’<sup>6</sup> which appeared in The Empire Strikes Back infringed Seiler's copyright on his own creatures called ‘Garthian Striders.’” Seiler, however, did not obtain his copyright until after the movie was released in 1980, but he alleged that he first published his “Garthian Striders” in 1976 and 1977. *Id.* at 1317-18. At trial, Seiler could not produce his original drawings and instead sought to prove his case through “reconstructions” he created for trial. *Id.* at 1318. Seiler alleged that the Best Evidence Rule did not apply to his drawings because they did not consist of letters, words, or numbers. *Id.* at 1318-19. The Ninth Circuit disagreed, finding that his drawings “consist[ed] not of letters, words, or numbers’ but of ‘their equivalents.’” *Id.* at 1318-19. It found that the drawings were “equivalents” because “[j]ust as a contract objectively manifests the subjective intent of the makers, so Seiler's drawings are objective manifestations of the creative mind.” *Id.* at 1320.

Federal Rule of Evidence 1001(c) more clearly defines the term “photograph.” According to the Rule, the term “‘photograph’ means a photographic image or its equivalent stored in any form.” Federal Rule of Evidence 1001(d) indicates that “[a]n ‘original’ of a photograph includes the negative or any print from it.” Furthermore, before Rule 1001(d) was restylized, it stated that “if data are stored on a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.” Therefore, if the proponent of the evidence creates data, such as work logs, not on paper, but on a computer, any printout from the computer is admissible as an original and the proponent does not have to introduce the computer or hard drive at trial. The “output readable by sight” portion of the prior Rule covers evidence such as computer-generated displays.

Rule 1001(d) also defines “[a]n ‘original’ of a writing or recording [as] the writing or recording itself or any counterpart intended to have the same effect by a person who executed or issued it.” Therefore, when

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<sup>6</sup> For image see *Walker (Star Wars)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Walker\\_%28Star\\_Wars%29](http://en.wikipedia.org/wiki/Walker_%28Star_Wars%29) (last visited Jan. 17, 2012).

a person executes a document such as a contract, will, or deed, the writing that he executed is clearly an original. Moreover, under the Rule there can be multiple originals. To wit, “[i]f each party to a contract, lease, sale or other transaction receives or retains a copy of the instrument that embodies or evidences the transaction, each copy is considered an original, regardless of the mechanism or the chronology of their creation.” Olin Guy Wellborn III, *The “Best Evidence” Article of the Texas Rules of Evidence*, 18 St. Mary’s L.J. 99, 105 (1986).

Finally, Federal Rule of Evidence 1001(e) defines a “duplicate” as “a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.” Rule 1001(e) thus refers to four kinds of duplicates: “same impression (such as carbon or so-called ‘carbonless’ or ‘formpack’ copies), same matrix (such as offset printing, often called ‘multilith’; stencil duplication or ‘mimeograph’; or hectograph or ‘ditto’), photography (such as micrography or microfiche), and chemical reproduction (such as electrostatic or xerographic ‘photocopies’).” Courts have used the “other equivalent techniques” language of Rule 1001(e) to qualify, *inter alia*, facsimiles as duplicates. Essentially, then, “any mechanically created reproduction is a duplicate; a manually created production, because of the risk of human error, is not.” *Wellborn, supra* at 107.

### **Hypothetical 6**

James Kodadeck claims that he made numerous drawings of two cartoon characters called “Beavis and Butthead” in 1991. He alleges that he gave one of the drawings to a man who identified himself as Mike Judge. In 1993, MTV aired a TV show entitled “MTV’s Beavis and Butthead,” with creative credit going to Mike Judge. Kodadeck brings a claim sounding in copyright infringement and unfair competition against Judge. Kodadeck does not produce his 1991 drawings in response to the defendant’s motion for summary judgments, but he does produce illustrations that he drew after the premiere of MTV’s show that allegedly closely approximate his 1991 drawings. Can the illustrations be

admitted, or would their admission violate the Best Evidence Rule? Cf. Kodadeck v. MTV Networks, Inc., 152 F.3d 1209 (9th Cir. 1998).

### **Hypothetical 7**

Vincent Bennett is charged with possession with intent to distribute and importation of marijuana. At trial, the prosecution wants to have U.S. Customs Officer Malcolm Chandler testify that he discovered a global positioning system (“GPS”) while searching Bennett's boat and that the GPS revealed that Bennett's boat had traveled from Mexican waters to the San Diego Bay. Is Chandler's testimony admissible in the absence of the GPS? See United States v. Bennett, 363 F.3d 947 (9th Cir. 2004).

### **Hypothetical 8**

The Canyon County Prosecuting Attorney files a Petition under the Child Protective Act requesting that the court take jurisdiction over the children of John and Jane Doe. At trial, the prosecution seeks to present several photographs of injuries to the children produced from data downloaded from a camera to a computer system and printed out at the police station. An expert witness testifies that the colors of the prints were not "neutrally balanced" and reflected color biases toward red and yellow hues. Are these prints originals for Best Evidence Rule purposes? See Idaho Dept. of Health and Welfare v. Doe, 2010 WL 4342147 (Idaho Ct. App. 2010); Colin Miller, “Color Me Surprised: Court of Appeals of Idaho Finds No Problem with Color Biased Photos Under Best Evidence Rule.” EVIDENCEPROF BLOG, (Nov. 10, 2010) <http://lawprofessors.typepad.com/evidenceprof/2010/11/best-evidence-idaho-dept-of-health-and-welfare-v-doe-p3d-2010-wl-4342147idaho-app2010.html>.

## **Prior Rules Language:**

### **Rule 1001. Definitions**

For purposes of this article the following definitions are applicable:

#### **(1) Writings and recordings.**

“Writings” and “recordings” consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

**(2) Photographs.** “Photographs” include still photographs, X-ray films, video tapes, and motion pictures.

**(3) Original.** An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original”.

**(4) Duplicate.** A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

## **Restyled Rules Language:**

### **Rule 1001. Definitions That Apply to This Article**

In this article:

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

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

**(c)** A “photograph” means a photographic image or its equivalent stored in any form.

**(d)** An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, “original” means any printout — or other output readable by sight — if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it.

**(e)** A “duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

### C. Rule 1003: The Duplicate Exception

Federal Rule of Evidence 1003 is consistent with the emerging state trend finding mechanically produced duplicates admissible even when proponents could not account for the nonproduction of originals. It states that “[a] duplicate is admissible to the same extent as the original unless a genuine question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate.” Under Rule 1003, duplicates are thus admissible as long as they can meet the liberal authentication test laid out in Rule 901(a), unless one of the exceptions applies. Every state has either adopted a counterpart to Rule 1003 or some version of the similar Uniform Photographic Copies of Business and Public Records as Evidence Act. 28 USC § 1732.

The exception contained in Federal Rule of Evidence 1003 applies when there are questions about whether the original ever really existed, whether a signature on the original was actually the signature of a party or a forgery, or whether the original was altered before it was copied, such as through photoshopping or the use of white out. *See, e.g., Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 362, 371 (2nd Cir. 2003) (“Bodylines contends that Opals ‘whited out’ the note below Sautter’s signature...Accordingly, Bodylines has raised a genuine question as to the authenticity of the original.”)

For instance, in *Boswell v. Jaspersen*, 266 F. Supp. 2d 1314 (D. Utah 2003), in 1974, Marsden and Melva Larsen sold land, including a feed yard, to Garth Boswell. Garth later obtained loans on the property from the Zions First National Bank and the Farmers Home Administration. *Id.* at 1316. In 1983, Garth filed a bankruptcy petition, which listed the feed yard as part of his real estate property holdings, and his son, William P. Boswell, sought to establish that he had an ownership interest in the feed yard. *Id.* As support for his claim, William introduced an alleged copy of the original deed from the Larsens to his father, which he claimed was altered with the consent of all parties “to substitute his name, William P. Boswell and his d/b/a Rafter ‘B’ Ranch, as grantees.” *Id.* William admitted, however, that the loan holders were never notified of this alleged alteration. *Id.* Meanwhile, Garth contradicted himself, alternatively

contending that the original deed was and was not altered. *Id.* at 1316-17. Although the court failed to set forth a test for determining whether there was a genuine question raised as to the original's authenticity, it concluded that "there [wa]s a genuine question as to the authenticity of the proffered altered deed." *Id.* at 1321.

That said, it is the rare case in which a court has found that an opposing party has successfully raised a genuine question concerning the authenticity of an original. *See* Wellborn, *supra* at 114. For example, in *Alderson v. Bonner*, 132 P.3d 1261, 1264-66, the Idaho Appellate Court found no problem with the prosecution's introduction of a 35-minute copy of a videotape despite the fact that the officer who made the copy previously reported that the original video was 45 minutes long. In *Amin v. Flagston Hospitality Mgmt.*, 2005 WL 3054599 (D. Minn. 2005), the court found no problem with the admission of a copy of a declaration that a witness denied signing despite the fact that the last page of the copy had printing across the top indicative of a fax while the rest of the document did not.

The second exception contained in Rule 1003 applies where only part of an original document or recording is reproduced in a duplicate, and the remainder is needed for some purpose cross-examination. Courts have consistently found that the second exception contained in Rule 1003 applies when duplicates fail to fully reproduce important or critical parts of an original document or recording. Such was the case in *Amoco Production Co. v. United States*, 619 F.2d 1383 (10th Cir. 1980), in which the Tenth Circuit found that the district court properly excluded the photocopy of a deed that did not reproduce the reservation clause.

### **Hypothetical 9**

E.G. Lewis purchases a car and reaches an oral agreement with Edward Smith, under which Smith and his wife will pay Lewis \$222 in exchange for use of the car. Lewis claims that this oral agreement was later reduced to a written contract under which the Smiths would continue paying him \$222 a month until his car loan was paid off. Smith claims that he never signed such an agreement and that he only agreed to



make the monthly payment as long as he needed the car. Lewis sues Smith for breach of contract and produces a photocopy of the alleged written contract at trial. His handwriting expert compared the signature on the photocopy with other documents signed by Smith and testified that the signature on the photocopy was “probably” by Smith but he could not be sure without examining the original. The expert testified that it is possible to scan a signature on to a document but that he found no evidence of tampering. But he also found that the signature on the photocopy was not an exact match with any of Smith’s other signatures that he examined. Is the photocopy admissible? See *Lewis v. Smith*, 2003 WL 578619 (Ohio Ct. App. 2003).

#### **Hypothetical 10**

John Galvan, a USPS employee, is injured on February 11, 2004, after a chair and table apparatus he was seated in collapsed. Galvan brings a negligence and strict liability action against Krueger International Inc., the manufacturer of the chair and table apparatus. Krueger brings a motion for summary judgment dismissing the complaint, claiming that Illinois product liability statute of repose, which prevents a plaintiff from bringing a strict product liability claim ten years after the date that the product was sold, expired on December 3, 2003. In support, Krueger presents photocopies of invoices and shipping manifests indicating that Krueger’s chair table apparatus was scheduled to arrive at Galvan’s USPS office in December 3, 1993. Galvan counters that these photocopies violate the Best Evidence Rule because they only reproduce the fronts of these invoices and shipping manifests and not the backs, which contain terms and conditions. Galvan claims that these backs could alter the court’s decision. Is Galvan correct? See *Galvan v. Krueger International Inc.*, 2011 WL 111576 (N.D. Ill. 2011).

**Prior Rules Language:**

**Rule 1003. Admissibility of Duplicates**

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

**Restyled Rules Language:**

**Rule 1003. Admissibility of Duplicates**

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

**D. Rule 1004: Excusing Nonproduction of Originals**

Federal Rule of Evidence 1004 states that there are four circumstances under which the proponent of evidence concerning the contents of a writing, recording, or photograph is not required to produce the original and instead can prove its contents through secondary evidence. Secondary evidence includes any type of evidence besides the original, "ranging from photographs and handwritten copies to oral testimony of a witness whose credibility is suspect." *United States v. Gerhart*, 538 F.2d 807 (8<sup>th</sup> Cir. 1976). Indeed, courts have even held that when the opponent of a duplicate has made a successful challenge to it under Rule 1003, the proponent can still introduce the "duplicate" if he establishes one of the Rule 1004 circumstances. Furthermore, courts have relied upon the Advisory Committee's Note to Rule 1004 in concluding that there are no "degrees" of secondary evidence. Accordingly, once the proponent meets his burden of proof in establishing one of the Rule 1004 circumstances, he is free to submit any type of secondary evidence; there is no requirement, for instance, that a "copy be introduced in preference to...oral testimony" on the ground that the former is 'better' evidence. Unfortunately, while most courts have placed the burden of proof on proponents to establish one of the Rule 1004 circumstances, they have consistently failed to flesh out the nature of that burden.

The first circumstance is triggered under Rule 1004(a) when “[a]ll originals are lost or have been destroyed, and not by the proponent acting in bad faith.” An example of this circumstance can be found in United States v. McMahon, 938 F.2d 1501 (1st Cir. 1991), where the First Circuit found that the district court properly allowed testimony about the contents of a note allegedly written by the defendant. The court came to this conclusion under Rule 1004(a) because the defendant did “not suggest that the government lost or destroyed the document in bad faith.” It is a difficult task for the opponent of secondary evidence to prove that the proponent of secondary evidence lost or destroyed the original in bad faith. Courts have determined that the proponents of secondary evidence satisfied Rule 1004(a) even when they acknowledged negligently destroying documents (See Estate of Gryder v. CIR, 705 F.2d 336 (8th Cir. 1983)), using a process to copy a tape which they knew would destroy the original (See United States v. Balzano, 687 F.2d 6 (1st Cir. 1982)), and erasing tapes in the ordinary course of business (See United States v. Workinger, 90 F.3d 1409 (9th Cir. 1996)).

Furthermore, a couple of recent court decisions have heightened the hurdle the opponents of secondary evidence must leap in opposing the admission of secondary evidence pursuant to Rule 1004(a). As noted, courts typically require the proponent of secondary evidence to establish one of the Rule 1004 circumstances such as proving that the original was lost or destroyed without bad faith. In two 2007 decisions, however, the District Court for the Eastern District of Michigan indicated that the opponent of secondary evidence “has the burden of establishing bad faith” under Rule 1004(a), shifting the burden from the proponent to the opponent. See United States v. Culberson, 2007 WL 1452902 (E.D. Mich. 2007); United States v. Culberson, 2007 WL 1266131 (E.D. Mich. 2007).

The second circumstance applies under Rule 1004(b) when “an original cannot be obtained by any available judicial process.” For instance, in Allegra v. Bowen, 670 F. Supp. 465 (E.D.N.Y. 1987), the plaintiff applied for disability insurance because she allegedly suffered from muscular dystrophy since early childhood. The plaintiff claimed that her childhood physician in Italy diagnosed her with this

condition and attempted to prove this diagnosis through a sworn physician's letter rather than the original clinical documents in which the diagnosis was made. *Id.* at 468. An Administrative Law Judge denied the plaintiff's application, finding that the letter was inadmissible under the Best Evidence Rule, but the District Court for the Eastern District of New York reversed, concluding that the original clinical documents were unobtainable "by available process or procedure" under Rule 1004(b) because they were Italy, allowing the plaintiff to prove their contents through secondary evidence such as the letter. *Id.* at 468-69. Courts have made clear that the proponents of secondary evidence need not take Herculean efforts to try to obtain the original for Rule 1004(b) to apply. When, however, proponents of duplicates fail to engage in "diligent" efforts to establish that originals are lost, destroyed, or unobtainable, courts will find that they cannot introduce secondary evidence pursuant to Rule 1004(a) or 1004(b).

The third circumstance applies under Rule 1004(c) when "the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing." The District Court for the Eastern District of California found this portion of the Rule applied in *United States v. Cuesta*, 2997 WL 2729853 (E.D. Cal. 2007), where the defendant appealed his conviction for being a minor knowingly driving a vehicle containing alcohol. At the defendant's trial, the prosecution requested that the defendant produce his driver's license to prove his age, but he refused; thereafter, the magistrate judge allowed the prosecution to call the ranger who arrested the defendant to testify as to the defendant's date of birth on his driver's license. *Id.* at \*20. The court rejected the defendant's argument that this testimony violated the Best Evidence Rule, finding pursuant to Rule 1004(c) that the driver's license was in the defendant's possession and that he failed to produce it at his trial. *Id.*

Finally, under the "collateral matters" circumstance enunciated in Rule 1004(d), secondary evidence is admissible when "[t]he writing, recording, or photograph is not closely related to a controlling issue."

In *Jackson v. Crews*, 873 F.2d 1105 (8th Cir. 1989), a movie theater patron who was arrested for public intoxication and resisting arrest brought a Section 1983 action against the municipality and his arresting officer for excessive force. On appeal, after the district court awarded damages to the plaintiff, the arresting officer alleged that the district court erred by allowing Jackson to question a witness about the contents of a flyer describing the arrest and “asking any witnesses to contact the person named on the flyer.” *Id.* at 1109-10. The Eighth Circuit determined that the Best Evidence Rule did not preclude the testimony despite the nonproduction of the flyer because, *inter alia*, the contents of the flyer were “collateral to the principal issue in the trial.” *Id.* at 1110.

### **Hypothetical 11**

Keith Lanzon is charged with attempting to persuade, entice, or coerce a minor to engage in sexual activity after he allegedly sent instant messages to an undercover officer posing as a 14 year-old girl. The government produced transcripts of these messages before they were deleted after the agent logged out of the instant message program. At trial, when the prosecution seeks to admit the transcripts at trial, Lanzon objects that their admission would violate the Best Evidence Rule. Should his objection be sustained? See *United States v. Lanzon*, 639 F.3d 1293 (11th Cir. 2011); Colin Miller, “Word Perfect?: 11<sup>th</sup> Circuit Finds Prosecution Properly Authenticated IMs Cut-and-Pasted Into Word Document,” EVIDENCEPROF BLOG, (May 7, 2011), <http://lawprofessors.typepad.com/evidenceprof/2011/05/text-message-word-authenticate-us-v-lanzon-f3d-2011-wl-1662901ca11-fla2011.html>.

### **Hypothetical 12**

Kevin Murray met with Police Chief Vincent Carlone to arrange a controlled purchase of cocaine from John Grullon. The police supplied Murray with a \$100 bill to purchase the cocaine. At a meeting at Grullon’s condominium, Grullon agreed to sell Murray a small amount of cocaine for \$60,

which Grullon retrieved from the hemline of a curtain covering a sliding glass door. Murray paid Grullon with the \$100 bill and received \$40 in change plus a bag of cocaine. Grullon is charged with possession with intent to distribute cocaine. At trial, the prosecution claims that by the time the police obtained a search warrant, Grullon had already used the \$100 bill, so it was in general circulation and could not be recovered. The prosecution seeks to admit a photocopy of the front side of the \$100 bill under Rule 1003, but the court deems it inadmissible under Rule 1003(2) because the photocopy fails to completely reproduce the original. Can the prosecution still get the photocopy admitted? See State v. Grullon, 984 A.2d 46 (R.I. 2009); Colin Miller, “Better Evidence or Best Evidence?: Supreme Court of Rhode Island Engages in Detailed Analysis of Best Evidence Rule.” EVIDENCEPROF BLOG, (Jan. 10, 2010), <http://lawprofessors.typepad.com/evidenceprof/2010/01/ri-state-v-grullon---a2d-----2009-wl-4722264ri2009.html>.

### **Hypothetical 13**

Tim Cooper reached an agreement with Publishing Group, pursuant to which Publishing Group would print an advertisement for Cooper’s financial planning business in one of its magazines. A Publishing Group employee mailed a copy of the agreement to Cooper, who signed it and faxed it back to Publishing Group. Cooper retained possession of the original agreement. Publishing Group printed the advertisement in the November/December issue of the magazine, and when Cooper failed to pay for the advertisement, Publishing Group sued Cooper for breach of contract. Cooper’s defense was that the agreement he signed provided that if he did not pay for the advertisement by October 2nd, Publishing Group would not print it and both parties would be relieved from their obligation to perform under the agreement. Publishing Group does not produce the agreement at trial but does have several of its employees testify concerning the terms of the agreement. Cooper claims

that this testimony violated the Best Evidence Rule. Is he right? See *Publishing Group, Ltd. v. Cooper*, 2011 Ohio 2872 (Ohio Ct. App. 2011).

#### **Hypothetical 14**

David Winn is charged with aggravated burglary and related crimes based upon a burglary at the house of Treva Hummons. Winn admits to committing the burglary but claims that he committed it under duress. At trial, several witnesses testify that Winn was friends with Hummons' grandson. The prosecution also introduces into evidence a crime scene photograph of Hummons' living room. In the photograph, there is a barely visible photograph on top of Hummons' television. The girlfriend of Hummons' grandson testifies that the photograph is a photograph of Winn and Hummons' grandson. Winn objects that this testimony violates the Best Evidence Rule because the prosecution did not produce this second photograph at trial. Should the court sustain his objection? See *State v. Winn*, 877 N.E.2d 1020 (Ohio Ct. App. 2007).

**Prior Rules Language:**

**Rule 1004. Admissibility of Other Evidence of Contents**

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

**(1) Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

**(2) Original not obtainable.** No original can be obtained by any available judicial process or procedure; or

**(3) Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

**(4) Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue.

**Restyled Rules Language:**

**Rule 1004. Admissibility of Other Evidence of Content**

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

**(a)** all the originals are lost or destroyed, and not by the proponent acting in bad faith;

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

**(c)** the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

**(d)** the writing, recording, or photograph is not closely related to a controlling issue.

**E. Rule 1005: Public Records**

Federal Rule of Evidence 1005 covers public records and indicates that “[t]he proponent may use a copy to prove the content of an official record – or of a document that was recorded or filed in a public office as authorized by law – if these conditions are met: the record or document is otherwise admissible; and the copy is certified



as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original.” Rule 1005 also provides that “[i]f no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.” In other words, the proponent can introduce a properly certified copy of a public record without accounting for the original, and, if a public record is lost or destroyed without bad faith or is not available through any judicial process, the proponent may prove its contents through secondary evidence, similar to the way that secondary evidence can be offered pursuant to Rule 1004(a) and (b).

### **Hypothetical 15**

James Phillips, a partner at a law firm, is charged with willingly making a false statement to a federal agent and immigration fraud. According to the prosecution, Phillips forged signatures on forms called “Applications for Alien Employment Certifications” or “ETA-750s,” the means by which foreign workers initiate the process to obtain an employment-based visa from the United States Department of Labor. At trial, the prosecution seeks to introduce handwritten copies of these ETA-750s, claiming that the United States Citizenship and Immigration Office in Nebraska had such a high backlog of ETA-750 applications following the Legal Immigration Family Equity Act deadline that it was forced to ship many ETA-750s, including those coming from Phillips’ firm, to the Dallas office. The prosecution claims that these forms were not recoverable from the Dallas office before trial. Are the handwritten copies admissible? See United States v. Phillips, 543 F.3d 1197 (10th Cir. 2008).

**Prior Rules Language:**

**Rule 1005. Public Records**

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

**Restyled Rules Language:**

**Rule 1005. Copies of Public Records to Prove Content**

The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

**F. Rule 1006: Summaries**

Federal Rule of Evidence 1006 states that “[t]he proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court.” For this rule to apply, however, the proponent must make the originals or duplicates “available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.” Rule 1006 is thus not an exception to the rule that proponents must produce originals or duplicates pursuant to Rules 1002 and 1003; instead, it merely states that proponents who have already made lengthy originals or duplicates available for examination, copying, or both can later prove their contents through charts, summaries, or calculations. Finally, it is important to note that courts have found that under Rule 1006, proponents merely must make the originals or duplicates available for examination and/or copying; no such obligation applies with regard to the charts, summaries, or

calculations admitted under the Rule. *See, e.g., Colon-Fontanez v. Municipality of San Juan*, 2011 WL 4823189 at \*8 (1st Cir. 2011) (“Regarding Colón's first argument, Rule 1006 provides that only the underlying documents, not the summaries themselves, must be produced to the opposing party.”)

### **Hypothetical 16**

Mark Isaacs is charged with fraudulently using unauthorized access devices. 15 months before trial, the prosecution provides defense counsel with CDs containing underlying data connecting Isaacs with the crime charged. Three days before trial, the prosecution provides defense counsel with a new set of CDs containing the same underlying data. The prosecution produced this new set of CDs before trial because the earlier set of CDs contained extraneous and inadmissible information, and one set of data lists was difficult to read. The new CDs contained 25,000 pages of underlying data. At trial, the prosecution sought to introduce summary exhibits created from the new sets of CD's. Defense counsel objects that the prosecution failed to comply with Rule 1006. Is he correct? *See United States v. Isaacs*, 2010 WL 252278 (7th Cir. 2010); Colin Miller, “Reasonable Doubt: Seventh Circuit Finds That Data Disclosure Was Reasonable for Rule 1006 Purposes.” EVIDENCEPROF BLOG, (Feb. 2, 2010) <http://lawprofessors.typepad.com/evidenceprof/2010/02/1006us-v-isaacs----f3d-----2010-wl-252278ca7-ill2010.html>.

**Prior Rules Language:**

**Rule 1006. Summaries**

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

**Restyled Rules Language:**

**Rule 1006. Summaries to Prove Content**

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

**G. Rule 1007: Admissions**

Federal Rule of Evidence 1007 allows for proof of the contents of a writing, recording, or photograph “by the testimony, deposition, or written statement of the party against whom the evidence is offered.” As an example, in *Vigil v. Division of Child and Family Services*, 107 P.3d 716 (Utah Ct. App. 2005), an issue at the trial of David R. Vigil was whether he possessed material harmful to a child in his home. At trial, a detective gave testimony and introduced into evidence a report concerning the contents of pornographic magazines and photographs seized from Vigil’s house pursuant to a search warrant. *Id.* at 719. On appeal, Vigil claimed that the testimony and report violated the Best Evidence Rule because the magazines and photographs were not produced. *Id.* The Court of Appeals of Utah rejected this argument, noting that Vigil “testified at trial that he had Playboy magazines and some videotapes that could be considered pornographic in [his] house.” *Id.* Because Playboy magazine met the definition of material considered harmful to a child pursuant to the Division of Child and Family Services Manual, the court found that Vigil had admitted the contents of the seized items pursuant to Rule 1007, precluding any Best Evidence objection. *Id.*

### Hypothetical 17:

Joseph Koncel is on trial for first-degree murder and first-degree kidnapping. After Koncel was arrested in connection with these crimes, officers interrogated Koncel, who made several incriminatory statements. The interrogation was recorded, but the prosecution only introduced a written transcription of the audiotape of the interrogation at trial, rather than the audiotape itself. After he was convicted, Koncel appealed, claiming that he received the ineffective assistance of counsel because the transcript was inadmissible under the Best Evidence Rule, yet his attorney failed to object to its admission. Koncel's attorney responds that, at the time that the transcript was admitted, Koncel planned to testify, and the attorney believed that the substance of the statements in the transcript would be admitted through Koncel's own testimony. Will Koncel be successful? See *Koncel v. State*, 2009 WL 4842502 (Iowa Ct. App. 2009); Colin Miller, The Price of Admission: Court of Appeals of Iowa's Best Evidence Ruling Depends Upon Rule 1007 but Doesn't Cite it, EVIDENCEPROF BLOG, (Jan. 6, 2010) <http://lawprofessors.typepad.com/evidenceprof/2010/01/best-evidencekoncel-v-stateslip-copy-2009-wl-4842502-tableiowa-app2009.html>.

**Prior Rules Language:**

**Rule 1007. Testimony or Written Admission of Party**

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

**Restyled Rules Language:**

**Rule 1007. Testimony or Statement of a Party to Prove Content**

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

**H. Rule 1008: Functions of the Court and Jury**

Federal Rule of Evidence 1008 sets forth the respective functions of the judge and the jury in applying the Best Evidence Rule. Rule 1008 indicates that the judge must resolve preliminary issues of fact in accordance with Federal Rule of Evidence 104 while it is for the jury to determine whether “(a) an asserted writing, recording, or photograph ever existed, or (b) another one produced at the trial or hearing is the original; or (c) other evidence of content accurately reflects the content.” The Advisory Committee specifically noted that “the question whether the loss of the originals has been established, or of the fulfillment of other conditions specified in Rule 1004, *supra*, is for the judge” to resolve as a preliminary issue of fact. Commentators and judges have determined that the issue of whether the party opposing the admission of a duplicate has raised a genuine question as to the authenticity of the original under 1003 is also a preliminary issue of fact to be resolved by the judge.

**Hypothetical 18**

A former tenant sues Andrew Klopman, his former landlord, for personal injuries connected to exposure to lead paint at the property the tenant rented from Klopman. Klopman brings a declaratory judgment action against Zurich American Insurance Company of Illinois, seeking a declaration that the insurance company is obligated to defend and indemnify him

in the lead paint lawsuit pursuant to his insurance policy. The insurance company claims that it never issued such an insurance policy to him, and Klopman claims that the insurance policy was destroyed in a basement flood, meaning that he can testify about the contents of the policy pursuant to Rule 1004(a). The action proceeds to a jury trial. Who decides whether the insurance company issued a policy to Klopman, the judge or the jury? Cf. Klopman v. Zurich American Ins. Co. of Illinois, 233 Fed. App'x. 256 (4th Cir. 2007).

### **Hypothetical 19**

Gary Hermsdorf is charged with Medicaid fraud based upon billing the New Hampshire Division of Health and Human Services as if brand-name drugs had been dispensed when he in fact dispensed generic drugs to customers. Undercover members of the New Hampshire Attorney General's Medicaid Fraud Control Unit bought drugs from Hermsdorf, and an investigator with the Unit took notes regarding whether the labels on those drugs classify the drugs as brand name or generic and compares those notes with the bills submitted by Hermsdorf. At Hermsdorf's jury trial, the prosecution seeks to admit the notes under Rule 1004(a), claiming that it lost the original labels in good faith. Hermsdorf counters that the labels were lost in bad faith. Who decides the question of whether the notes are admissible, the judge or the jury? See State v. Hermsdorf, 605 A.2d 1045 (N.H. 1992).

**Prior Rules Language:****Rule 1008. Functions of Court and Jury**

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

**Restyled Rules Language:****Rule 1008. Functions of the Court and Jury**

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:

- (a) an asserted writing, recording, or photograph ever existed;
- (b) another one produced at the trial or hearing is the original; or
- (c) other evidence of content accurately reflects the content.

**I. The Best Evidence Framework**

Article X, consisting of Rules 1001-1008, thus sets up the following framework for how a party can prove the contents of a writing, recording, or photograph. First, if the party produces the original at trial, it can introduce it consistent with Federal Rule of Evidence 1002. Second, if the party does not have the original, it can introduce a “duplicate” that satisfies Federal Rule of Evidence 1003, even if it cannot account for its nonproduction of the original; alternatively, if the original is a public record, the party can introduce a certified copy in compliance with Rule 1005. Third, if the party cannot produce the original or a “duplicate,” but it can account for the nonproduction of the original under Rule 1004(a), (b), or (c), it can prove its contents through any type of secondary evidence; moreover, if the party can prove that the original is not closely related to a controlling issue, it



can do the same under Rule 1004(d). Furthermore, if the original is a public record, and the party cannot obtain a certified copy of it, the party can prove its contents through secondary evidence pursuant to Rule 1005. Fourth, if the party does not produce the original or a “duplicate” and cannot account for the original’s nonproduction, it may still be able to prove its contents through admissions by the opposing party under Rule 1007.

### **J. Best Evidence Pleadings**

Some concise examples of motions connected to evidence sought to be admitted or excluded under the Best Evidence Rule can be found at:

- *Autochina Limited v. Huang*, 2009 WL 5566956 (S.D. Fla. 2009) (*motion in limine*);
- *Autochina Limited v. Huang*, 2009 WL 5566960 (S.D. Fla. 2009) (response to *motion in limine*); and
- *Autochina Limited v. Huang*, 2009 WL 5566949 (S.D. Fla. 2009) (reply to response to *motion in limine*).