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Rule 1001: The "Original Document" Rule

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ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

RULE 1001: THE “ORIGINAL DOCUMENT” RULE

Federal Rule of Evidence 1001 states:

(1) Writings and recordings. “Writings” and “recordings” consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, Photostatting, 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.¹

Rule 1001 cannot be looked at in a vacuum. The terms that are defined within it must be considered in light of the other rules in this article which collectively make up the federal “original document rule”² and its exceptions.³ The definitions embodied in

1. FED. R. EVID. 1001.

2. FED. R. EVID. 1001 advisory committee’s note; GLEN WEISSENBERGER, WEISSENBERGER’S FEDERAL EVIDENCE § 1001.2, at 696 (2d ed.). See *Gordon v. United States*, 344 U.S. 414, 421 (1953) (“The elementary wisdom of the best evidence rule rests on the fact that the

the rule delineate the scope of the original document rule which has changed over time due to technological developments.⁴ Under the federal common law, the purpose of the best evidence rule was to guard against fraud and inaccuracies in documents by insisting upon the production of the original document.⁵ Although an original was “preferentially required,”⁶ the rule has been modified by the Federal Rules of Evidence.⁷

However, the phrase “best evidence rule” is misleading: the rule does not require production of the most probative evidence, as the name seems to suggest. Rather, it is a rule which generally prefers an original document over secondary evidence.⁸ Consequently, it is more appropriately referred to as the “original document rule.”⁹

document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone’s description”). See FED. R. EVID. 1002. Rule 1002 states: “[t]o 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.” *Id.*

3. See FED. R. EVID. 1003; FED. R. EVID. 1004.

4. FED. R. EVID. 1001 advisory committee’s note (“Traditionally, the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures . . . [C]onsiderations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments.”); WEISSENBERGER, *supra* note 2, § 1001.3, at 697 (“Rule 1001(1) is . . . sufficiently broad to include within its purview the setting down of any symbols that have a verbal or numerical translation.”).

5. FED. R. EVID. 1001 advisory committee’s note.

6. WEISSENBERGER, *supra* note 2, § 1001.1, at 694.

7. FED. R. EVID. 1003 (providing that a duplicate may be admissible as an original under certain circumstances); FED. R. EVID. 1004. Rule 1004 states in pertinent part: “The original is not required, and other evidence of the contents of a writing . . . is admissible if - (1) . . . [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith” *Id.*; see also WEISSENBERGER, *supra* note 2, § 1001.1, at 695.

8. WEISSENBERGER, *supra* note 2, § 1001.1, at 695.

9. *Id.* See also *Seiler v. Lucasfilm, Ltd.*, 797 F.2d 1504, 1506 (9th Cir. 1986) (“[T]he rule requires not, as its common name implies, the best evidence in every case but rather the production of an original document instead of a copy.”).

In the context of the Federal Rules, however, even the phrase “original document rule” may be misleading. Rule 1001 expands and redefines the word “original” to include not only the original document, but also “any counterpart intended to have the same effect.”¹⁰ This rule focuses on the intent of the parties; duplicate originals are those documents “where, by virtue of intent, there is more than one original.”¹¹ For example, “[a] carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer.”¹² This is wholly distinguishable from a duplicate under Rule 1001(4) which is an accurate reproduction of a document that is not intended to be an original by the parties.¹³ “It should be noted that what is an original for some purposes may be a duplicate for others.”¹⁴ The distinction turns upon the intent of the parties at the time the document was executed.¹⁵

In *United States v. Davis*, the United States Court of Appeals for the Seventh Circuit applied Rule 1001(3).¹⁶ The court affirmed the district court’s holding that “an ‘original’ is the document itself and anything else the parties intend to treat as such.”¹⁷ Furthermore, the court stated that “[p]hotocopies made contemporaneously with the completion of the ‘primary’ version

10. FED. R. EVID. 1001(3).

11. WEISSEBERGER, *supra* note 2, § 1001.10, at 703.

12. FED. R. EVID. 1001(3) advisory committee’s note.

13. FED. R. EVID. 1001(4).

14. FED. R. EVID. 1001(4) advisory committee’s note.

15. WEISSEBERGER, *supra* note 2, § 1001.10, at 703.

16. 1 F.3d 606 (1993), *cert. denied*, 114 S. Ct. 1216 (1994). The defendant in *Davis* was charged with obstruction of justice. *Id.* at 606. Specifically, he was accused of “conceal[ing] a document during the course of a grand jury investigation.” *Id.* Thereafter, the defendant sought to preclude the government from questioning the attorney who represented him during the grand jury investigation, contending that such communications were privileged. *Id.* at 607. The Seventh Circuit held that it was not essential that the document in question be an “original.” *Id.* at 610.

17. *Id.* at 610.

of the document would readily satisfy this definition . . . [and are] consistent with Federal Rule of Evidence 1001(3)”¹⁸

Similarly, in *United States v. Leight*,¹⁹ the Seventh Circuit held that an X-ray may be admissible pursuant to Rule 1001(3).²⁰ In reaching this conclusion, the court recognized that an X-ray is a photograph “for evidentiary purposes” within the meaning of Rule 1001(2).²¹ The court then applied Rule 1001(3) and explicitly recognized that “an ‘original’ of a photograph includes the negative and any print therefrom.”²² Moreover, the court stated that even if the X-ray was considered to be a duplicate under Rule 1001(4), it would still be admissible pursuant to Rule 1003²³ because there was no “genuine question of authenticity of the original” nor was its admission unfair under the circumstances.²⁴ Applying this same rationale, the court in *United States v. Carrasco*²⁵ held that duplicate tape recordings of phone conversations also fell within the definition of duplicate and, therefore, concluded that the recordings were admissible.²⁶

The position taken by the Seventh Circuit when applying the definition of “original” and “duplicate” illustrates the expansive approach that is embodied within Rule 1001. However, the permissive nature of the Rule 1001 definitions is not without limitations. In *Seiler v. Lucasfilm, Ltd.*,²⁷ the Ninth Circuit was

18. *Id.*

19. 818 F.2d 1297 (7th Cir.), *cert. denied*, 484 U.S. 958 (1987).

20. *Id.* at 1300.

21. *Id.* at 1305

22. *Id.* (quoting FED. R. EVID. 1001(3)).

23. FED. R. EVID. 1003. Rule 1003 provides that “[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.” *Id.*

24. *Leight*, 818 F.2d at 1305. *See* FED. R. EVID. 1003.

25. 887 F.2d 794 (7th Cir. 1989).

26. *Id.* at 802-03.

27. 797 F.2d 1504 (9th Cir. 1986). This was a copyright action brought by plaintiff Seiler, a graphic artist specializing in science fiction drawings, against Lucasfilm, Ltd. *Id.* at 1506. Seiler alleged that the defendant had unlawfully copied Seiler’s creations, known as “Garthian Striders,” and used them as “Imperial Walkers” in the movie “The Empire Strikes Back.” *Id.*

not prepared to read Rule 1001(4) in such an expansive tone as to allow manual reconstructions of plaintiff's drawings to be introduced as duplicates.²⁸ The court ruled that where the claim depends on the "content of the originals,"²⁹ a reconstruction will not substitute for the original.³⁰ This is wholly consistent with the Advisory Committee's Note to Rule 1001(4) which states that "[c]opies subsequently produced manually, whether handwritten or typed, are not within the definition [of a duplicate]."³¹

Despite the fact that *Seiler* did not find Rule 1001 to be so expansive as to allow manual reconstructions to be included within the definition of duplicate, *Seiler* is illustrative of the expansive definition of the words "writings and recordings" as they are now defined in Rule 1001(1). Considering that the rule was traditionally concerned with "accumulations of data and expressions affecting legal relations set forth in words and figures,"³² Rule 1001 broadened this term to include "letters, words, or numbers, or their equivalent . . ."³³ In *Seiler*, the court held that the drawings fell within the purview of Rule 1001(1) because drawings are the "equivalent" to "letter, words or numbers."³⁴ The court compared the plaintiff's drawings with a written contract stating that "[j]ust as a contract objectively manifests the subjective intent of the makers, so *Seiler*'s drawings are objective manifestations of the creative mind."³⁵

Unlike federal common law, the original meaning of the best evidence rule in New York required that the proponent introduce

28. *Id.* at 1508. The court held that plaintiff could not prove that originals once existed nor could he demonstrate that they were unavailable through no fault of plaintiff's own. *Id.*

29. *Id.*

30. *Id.* The court stated that "[s]ince the contents are material and must be proved, *Seiler* must either produce the original or show that it is unavailable through no fault of his own The facts of this case implicate the very concerns that justify the best evidence rule." *Id.*

31. FED. R. EVID. 1001 advisory committee's note.

32. *Id.*

33. FED. R. EVID. 1001(1).

34. *Seiler*, 797 F.2d at 1507.

35. *Id.* at 1508.

the strongest evidence which the nature of the case would allow.³⁶ Over time, however, the rule has changed, making it more of an “original document rule” than a “best evidence rule”: “At its genesis, the [best evidence] 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.’”³⁷

In *Schozer v. William Penn Life Insurance Co.*,³⁸ the court of appeals restated the current New York rule: “The . . . best evidence rule simply requires the production of an original writing where its contents are in dispute and sought to be proven.”³⁹ Duplicate originals will also be admitted “[w]here several copies of a writing are produced by the same mechanical operation.”⁴⁰

As a general rule, copies of documents are inadmissible absent a proper foundation.⁴¹ Before copies may be admitted, the unavailability of the original document must be sufficiently established.⁴² “Loss may be established upon a showing of a diligent search in the location where the document was last known to have been kept and through testimony of the person who had custody of the original.”⁴³ However, when the lost document is essential to the resolution of the ultimate issue in the

36. JEROME PRINCE, RICHARDSON ON EVIDENCE § 568, at 578 (10th ed.).

37. *Schozer v. William Penn Life Ins. Co. of New York*, 84 N.Y.2d 639, 643-44, 644 N.E.2d 1353, 1355, 620 N.Y.S.2d 797, 799 (1994) (citations omitted).

38. *Id.*

39. *Id.*

40. PRINCE, *supra* note 37, § 576 at 584.

41. PRINCE, *supra* note 37, § 577 at 585.

42. *Schozer*, 84 N.Y.2d at 644, 644 N.E.2d at 1355, 620 N.Y.S.2d at 799.

43. *Id.*

case, the evidentiary showing of proof of loss becomes much greater.⁴⁴

As a matter of policy, the New York State Legislature has decided that there should be a special exception regarding business documents.⁴⁵ Section 4539 of the New York Civil Practice Law and Rules has been recognized as an exception “carve[d] out” of the best evidence rule.⁴⁶ When documents belong to a business, and the copy was made “during the regular course of business . . . [t]he proponent is thus exempt from the requirement of producing the original or explaining its absence.”⁴⁷

Both Rule 1001 and the New York best evidence rule agree that the term “original” is somewhat broader than what the word itself seems to imply. However, New York courts will allow duplicates to be admitted into evidence if the document is a business record that has been reproduced “in the regular course of business.”⁴⁸ In *Toho Bussan Kaisha, Ltd. v. American*

44. *Id.* (“[T]he court should give careful consideration to the possible motivation for the nonproduction of the original in determining whether the foundational proof of loss is sufficient.”).

45. N.Y. CIV. PRAC. L. & R. 4539 (McKinney 1992). Section 4539 provides:

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 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.

46. *People v. May*, 162 A.D.2d 977, 978, 557 N.Y.S.2d 203, 204 (4th Dep’t 1990).

47. N.Y. CIV. PRAC. L. & R. 4539 practice commentary.

48. N.Y. CIV. PRAC. L. & R. 4539 (McKinney 1992). In New York however, duplicates may be admitted into evidence only upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently

President Lines, Ltd.,⁴⁹ the Second Circuit was called upon to determine an original document dispute which was governed by New York law. The court found that under New York law, photocopies which were not made in the regular course of business, but rather were prepared for the specific purposes of being presented at litigation, did not fall within the exception to the best evidence rule and were thus inadmissible:⁵⁰ “Photostats made at some later time are not duplicate originals . . . How could there be any guarantee that they are accurate reproductions of all that may be relevant?”⁵¹

Despite the confusing nomenclature, Rule 1001 and the New York rule manifest themselves as an “original document rule” rather than a “best evidence rule.” Both rules come into play only when the contents of a writing are at issue. While the federal rule explicitly provides for situations when a duplicate may be admitted as an original, i.e., “any counterpart intended to have the . . . effect [of an original],”⁵² the New York rule narrowly defines the term “original,” making a limited exception to include copies of business records made in the ordinary course of business.⁵³

explained the unavailability of the primary evidence.” *Schozer v. William Penn Life Ins. Co. of New York*, 84 N.Y.2d 639, 644, 644 N.E.2d 1353, 1355, 620 N.Y.S.2d 797, 799 (1994)

49. 265 F.2d 418 (2d Cir. 1959).

50. *Id.* at 423.

51. *Id.* at 424. The court noted however, that photostats are commonly admitted into evidence on the consent of all the parties. *Id.* “[T]hat is quite another matter from receiving them, over objection, where the original is in Japan and no reason is given for not producing it.” *Id.*

52. FED. R. EVID. 1001(3).

53. *See supra* notes 49-52 and accompanying text.