St. Mary's Law Journal

Volume 18 | Number 1 Article 2

1-1-1986

The Best Evidence Article of the Texas Rules of Evidence.

Olin Guy Wellborn III

THE "BEST EVIDENCE" ARTICLE OF THE TEXAS RULES OF EVIDENCE*

OLIN GUY WELLBORN III**

 The provisions of Article X (Contents of Writings, Records, and Photographs) of the Texas Rules of Evidence and of the Texas Rules of Criminal Evidence are identical. References in this article to the Texas Rules of Evidence are intended to refer to both civil and criminal rules. The text of Article X is reproduced as the Appendix to this article.

This article is third in a series. *See* Wellborn, *Article VIII: Hearsay*, 20 HOUS. L. REV. 477 (1983); Wellborn, *Authentication and Identification Under Article IX of the Texas Rules of Evidence*, 16 ST. MARY'S L.J. 371 (1985); Wellborn, *Article I of the Texas Rules of Evidence and Articles I and XI of the Texas Rules of Criminal Evidence: Applicability of the Rules, Procedural Matters, and Preserving Error*, 18 ST. MARY'S L.J. No. 4 (forthcoming) (1987); Wellborn, *Judicial Notice Under Article II of the Texas Rules of Evidence*, 19 ST. MARY'S L.J. No. 1 (1987) (forthcoming).

** William C. Liedtke, Sr. Professor of Law, The University of Texas. A.B. 1970, J.D. 1973, Harvard University. Reporter, Texas Rules of Evidence, 1981-83; Texas Rules of Criminal Evidence, 1983-85; State Bar of Texas Standing Committee on Administration of Rules of Evidence, 1983-88.

I. INTRODUCTION

There is no general doctrine, either at common law or in modern codifications such as the Texas Rules of Evidence, that requires a party to produce the "best" or most primary evidence in order to prove any fact. The common law doctrine, rather inappropriately called the "Best Evidence Rule," is actually a relatively narrow rule concerning writings. Dean McCormick and Professor Ray summarized the basic features of the Texas common law version of the Best Evidence Rule as follows:

> Where inquiry is being made as to the contents of a material document, the only competent evidence of such contents is the document itself, unless the document be first shown to be unavailable as being lost or destroyed or absent from the jurisdiction without fault on the part of the person offering the evidence, or as being in the adversary's possession where he has been notified to produce it, or as being a part of the public records, in all which cases other evidence may be resorted to.
>
> The rule is dispensed with in cases where the exact terms of a document are only "collaterally" involved in the litigation, and also where the admission of the adversary himself or his privies in interest, as to the terms of the document, are offered. Furthermore, this like other administrative rules of evidence must be promptly asserted by objection, or it is waived.[1]

Why has this special rule developed for writings, while no corresponding doctrine has developed which demands the production of "primary" evidence of other objects of proof? Dean McCormick's explanation of the basis of the Best Evidence Rule remains the most plausible:

Most modern commentators follow [Wigmore's] lead in asserting that

1. 2 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1562, at 256-57 (Texas Practice 3d ed. 1980).

> the basic premise justifying the rule is the central position which the written word occupies in the law. Because of this centrality, presenting to a court the exact words of a writing is of more than average importance, particularly in the case of operative or dispositive instruments such as deeds, wills or contracts, where a slight variation of words may mean a great difference in rights. In addition, it is to be considered (1) that there is substantial hazard of inaccuracy in many commonly utilized methods [of] making copies of writings, and (2) oral testimony purporting to give from memory the terms of a writing is probably subject to a greater risk of error than oral testimony concerning other situations generally. The danger of mistransmitting critical facts which accompanies the use of written copies or recollection, but which is largely avoided when an original writing is presented to prove its terms, justifies preference for original documents.[2]

Modern codifications of the law of evidence, including the Federal and Texas Rules of Evidence, reflect continued adherence to the basic policies that underlay the common law Best Evidence Rule. They also incorporate significant modifications of common law doctrines, primarily in response to scientific and social developments. For example, the development and widespread availability of machines that accurately reproduce writings, of many techniques for reproducing sounds and images as well as words, and of electronic data processing and storage, have all operated to contribute to provisions in Article X of the Rules of Evidence that have no counterparts in the original common law Best Evidence doctrines. To a great extent, these modern developments had already been reflected in statutes enacted long before the current codifications.[3]

II. THE TEXAS RULES AND THE FEDERAL RULES

Article X of the Texas Rules of Evidence is nearly identical to its model, Article X of the Federal Rules of Evidence. The sole substantive difference is the addition of paragraph (3) in Texas Rule 1004,[4] and the consequent renumbering of Federal Rules 1004(3) and (4) as

---

2. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 231, at 704 (3d ed. 1984) (footnote omitted); *see also* E. MORGAN, BASIC PROBLEMS OF EVIDENCE 385 (4th ed. 1962) (discussion of purpose of Best Evidence Rule); 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1180 (Chadbourn rev. ed. 1972) (illustrating reasons for Best Evidence Rule).

3. *See, e.g.*, TEX. REV. CIV. STAT. ANN. arts. 3731b, 3731c (Vernon Supp. 1986) (repealed as to civil actions, effective Sept. 1, 1983; repealed as to criminal cases, effective Sept. 1, 1986). *See infra* text accompanying notes 38-41.

4. *See* TEX. R. EVID. 1004(3) (original outside state).

Texas Rules 1004(4) and (5).[5] While the adoption of Article X effects a few changes in Texas law as to matters of detail, there are no major changes. For the most part, Article X is a restatement and reorganization of preexisting principles.

III. PROVISION-BY-PROVISION ANALYSIS OF ARTICLE X

A. *Rule 1001: Definitions*

Rule 1001, Definitions, must be read in conjunction with other rules which employ the defined terms and thereby give them legal significance. For example, Rule 1002 states the basic Best Evidence Rule, that ordinarily the "original" (defined in Rule 1001(3)) of a "writing" (defined in Rule 1001(1)) is required in order to prove its content. Rule 1001(4) defines "duplicate"; but the legal significance of the concept is contained in Rule 1003, which tells us that most of the time a "duplicate" is as good as an "original."[6]

B. *Rule 1001(1): Writings and Recordings*

The breadth of the definition of writings and recordings found in Rule 1001(1) is a logical extension of the basic goal of the Best Evidence Rule, which is to guard against inaccuracy of transmission of matters that are especially sensitive to slight variation.[7] It simply expands the common law concept of "writing" to include functionally equivalent creations of modern technology.

It is important to note that Rule 1001(1) is merely a definition. Simply because an item exists that is related to the case and that fits the definition, does not mean that its production will be required. Under Rule 1002, the original writing is only demanded, as at common law, when a party seeks "to prove the content" of it.[8] Many times a writing may exist, bearing some connection with the case, and yet its production may never be required by the Best Evidence Rule because no party ever seeks to prove its content.[9]

It will seldom be difficult to apply this definition. One type of case,

---

5. *Compare* FED. R. EVID. 1004(3) (original in possession of opponent) *and id.* 1004(4) (collateral matters) *with* TEX. R. EVID. 1004(4) (original in possession of opponent) *and id* 1004(5) (collateral matters).

6. *See* TEX. R. EVID. 1003.

7. *See supra* text accompanying note 3.

8. *See* TEX. R. EVID. 1002.

9. *See infra* text accompanying notes 63-76.

however, will present problems: when secondary evidence is offered to prove the content of an inscription upon an object that is not a mere sheet of paper, "such as a policeman's badge, a flag, or a tombstone."[10] Although the cases have not been consistent, most have not applied the Best Evidence Rule to require production of the original of such "inscribed chattels."[11] Instead, most courts have implicitly or explicitly adopted the suggestions of Wigmore[12] and McCormick[13] that the trial judge should have discretion to apply the Rule or not, "in light of such factors as the need for precise information as to the exact inscription, the ease or difficulty of production, and the simplicity or complexity of the inscription."[14] In *Keeney v. Odom*,[15] for example, oral testimony was permitted to prove the contents of a metal plate attached to a truck which stated the truck's gross weight.[16] In that decision the Texas Court of Civil Appeals cited *United States v. Duffy*,[17] a decision of the United States Court of Appeals for the Fifth Circuit which adopted the Wigmore-McCormick approach, in upholding the admission of oral testimony concerning a laundry mark on a shirt.[18]

The Federal and Texas Rules of Evidence do not specifically address the "inscribed chattel" issue, nor is it mentioned in the Advisory Committee's Notes to the Federal Rules. One could read Rule 1001(1) woodenly to permit no discretion and to include all inscriptions within the definition. However, none of the leading commentators on the Federal Rules have urged such a reading; instead, all have favored a continuation of the traditional flexibility.[19] While the new

---

10. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 232, at 705 (3d ed. 1984).

11. *See id.* at 705 (citing cases allowing secondary evidence of inscribed chattels); *see also* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 550, at 287-90 (1981); 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 1001(1)[01] (1983).

12. *See* 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1182, at 421-22 (Chadbourn rev. ed. 1972).

13. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 232, at 705-06 (3d ed. 1984).

14. *Id.* § 232, at 705-06.

15. 534 S.W.2d 409 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.).

16. *See id.* at 412.

17. 454 F.2d 809 (5th Cir. 1972).

18. *See id.* at 811-12.

19. *See, e.g.*, M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 1001.0, at 989-90 (1981); 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 550, at 288-90 (1981); 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 1001(1)[01] (1983).

Rules do not expressly provide for this discretion, neither do they follow the pattern of the old Uniform Rules, which explicitly extended the Best Evidence Rule to writings "upon any tangible thing."[20] It seems fair to conclude that the Texas courts can and will continue to use discretion in applying the Rule to inscribed chattels. Accordingly, the Rule should not apply to signs, buildings, vehicles, and tombstones, but it should apply, for example, to a profusely inscribed carton where the terms are material to the case, such as in a product liability case based upon inadequacy of warnings or instructions.

C. *Rule 1001(2): Photographs*

Although the Best Evidence Rule in this codification extends to photographs—here defined as inclusively as possible—seldom will practical consequences result from this extension. For one reason, Rule 1001(3) gives "the negative or any print therefrom" equal status as an original.[21] More importantly, under Rule 1002, the requirement of an original arises only when a party seeks to prove the content of a photograph. As explained hereafter,[22] instances in which this occurs are rare. The most common situation in which oral testimony might be offered to prove the content of a photograph would be where medical x-rays are described by a testifying physician but not actually produced and introduced as exhibits.[23] Prior Texas cases have been inconsistent in this situation.[24] Under the new Rules, an expert witness' oral testimony based upon his examination of the x-rays normally should not be excluded on Best Evidence grounds, despite Rule 1002. This is because, as explained in the Federal Advisory Commit-

---

20. *See* UNIF. R. EVID. 1(13) (1953).

21. *See* TEX. R. EVID. 1001(3).

22. *See infra* text accompanying notes 72-76.

23. *See, e.g.*, Avila v. United States Fidelity & Guaranty Co., 551 S.W.2d 453, 455-57 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.) (discussing past cases dealing with x-rays and Best Evidence Rule); Community Chapel Funeral Home v. Allen, 499 S.W.2d 215, 216 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.) (requiring presence of x-rays); Drake v. Walls, 348 S.W.2d 62, 69 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.) (x-rays were required by court).

24. *Compare* Avila v. United States Fidelity & Guaranty Co., 551 S.W.2d 453, 455-56 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.) (fairness requires presence of x-rays) *with* Maryland Casualty Co. v. Dicken, 80 S.W.2d 800, 804 (Tex. Civ. App.—Dallas 1935, writ dism'd) (x-rays are not subject to Best Evidence Rule); *see also* 2 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1562 (Texas Practice 3d ed. 1980). *See generally* Hippard, *Article X: Contents of Writings, Recordings and Photographs*, 20 HOUS. L. REV. 595, 608-09 (1983) (general discussion of Best Evidence Rule and x-rays).

tee's Note to that Rule, "Rule 703 . . . allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application."[25] On the other hand, a leading commentator on the Federal Rules has argued that "where an x-ray is central to the diagnosis, and where a genuine controversy arises as to its true meaning and proper interpretation, the trial judge may reasonably invoke the Best Evidence Doctrine to require its production."[26] This latter view seems fair, and is supported by pre-Rules authority in Texas.[27]

D. *Rule 1001(3): Original*

With regard to writings or recordings, Rule 1001(3) accords "original" status to "the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it."[28] Prior case law in Texas recognized that there can be more than one "original" of some writings, and employed the terms "duplicate originals"[29] and "counterparts"[30] to describe such writings. Instances of the creation of multiple originals are commonplace. If 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.

The phrase "the writing . . . itself" means the writing of which the content is sought to be proved in the case. As the Advisory Committee's Note to Rule 1001(3) states, "In most instances, what is an original will be self-evident,"[31] but confusion can occur in some situations because of ambiguity in our usage of terms like "copy" and "original" in common parlance. What is considered an original in the sense of this Rule does not depend upon, for instance, chronology of creation

---

25. FED. R. EVID. 1002 advisory committee note.

26. 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 553, at 303 (1981).

27. *See* Avila v. United States Fidelity & Guaranty Co., 551 S.W.2d 453, 455-57 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.) (requiring production of x-rays).

28. *See* TEX. R. EVID. 1001(3).

29. *See* Cross v. Everybodys, 357 S.W.2d 156, 159 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.) (photostat of contract to terminate partnership was "duplicate original"); Hughey v. Donovan, 135 S.W.2d 265, 266 (Tex. Civ. App.—Galveston 1939, no writ) (copy of contract was "duplicate original").

30. *See* Killingsworth v. General Motors Acceptance Corp., 37 S.W.2d 823, 824-25 (Tex. Civ. App.—Waco 1931, no writ) (triplicate automobile sales contract, "counterparts").

31. FED. R. EVID. 1001(3) advisory committee note.

in relation to other like documents. The "original" may be younger than another writing having similar contents. The Advisory Committee's Note to Rule 1001(4) (Duplicate) suggests this illustration:

> It should be noted that what is an original for some purposes may be a duplicate for others. Thus a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents are in controversy is a duplicate.[32]

To illustrate further: suppose D dictates a letter, defamatory of P, to a stenographer, S, who takes the letter down in shorthand, then types it, and, after it is signed by D, sends it to a newspaper which prints it. In a libel suit against D for the publication to the newspaper, the typed letter is the original. In a libel suit against the newspaper, any copy of the printed version is an original. If S showed the shorthand version to others, then in a libel suit against S for that "publication," the shorthand notes would be the original. In *United States v. Rangel*[33] the defendant, a federal employee, had submitted travel expense vouchers accompanied by photocopies of altered charge card receipts.[34] The court held that the photocopies were "originals" in this context, since they were the writings actually submitted by Rangel for reimbursement.[35] In general, the substantive law determines which of a series of writings is of primary legal significance in a given context. The Best Evidence Rule then operates to prefer that writing as proof of its contents, and it is called the "original," regardless of whether it is in lay language a "copy" of some antecedent writing, or whether in a different legal context it would be regarded as a duplicate or copy of some other original.

The definitions in Rule 1001(3) of "original" as applied to photographs and to computer-stored data are admittedly artificial, but they are amply justified by the Advisory Committee's pleas of "practicality and common usage."[36]

E. *Rule 1001(4): Duplicate*

This provision creates a category of copies, not originals, which nevertheless are ordinarily admissible to prove the contents of the

---

32. *Id.* 1001(4) advisory committee note.
33. 585 F.2d 344 (8th Cir. 1978).
34. *See id.* at 346.
35. *See id.*
36. *See* FED. R. EVID. 1001(3) advisory committee note.

original under Rule 1003. Basically, any mechanically created reproduction is a duplicate; a manually created reproduction, because of the risk of human error, is not.[37]

Prior Texas law did not use the term "duplicate" in exactly the same sense as do present Rules 1001(4) and 1003, but the effect of two previous statutes was practically identical to the effect of these Rules. One previous statute, article 3731b,[38] provided that if public records or private business records were "copied or reproduced by any photographic, photostatic, microfilm or other process which accurately reproduces or forms a durable medium for reproducing the original," the reproduction was admissible in any instance in which the original would be admissible.[39] The other statute, article 3731c,[40] provided that any similarly described copy or reproduction of any "writing or written instrument" was admissible "where the party using the same, at the time of its offer in evidence either produces the original or reasonably accounts for its absence, or where there is no bona fide dispute as to its being an accurate reproduction of the original."[41]

Due to the breadth of the definition of "original" in Rule 1001(3) as to photographs and computer-stored data, the concept of "duplicate" is of little importance where such items are concerned. That is, since any photographic print made from the original negative is considered an original, use of a duplicate of a photograph is highly unlikely.[42] Similarly, since any sight-readable output of electronic data is defined to be an original, the only respect in which the duplicate concept is likely to be employed as to such data is to permit the use of a photocopy of a paper printout.[43]

Copies of paper writings may result from a variety of technical processes. The Rule refers to four kinds: 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 mi-

37. *See id.* 1001(4) advisory committee note.

38. TEX. REV. CIV. STAT. ANN. art. 3731b (Vernon Supp. 1986) (repealed as to civil actions, effective Sept. 1, 1983; repealed as to criminal cases, effective Sept. 1, 1986).

39. *See id.*

40. *Id.* art. 3731c (Vernon Supp. 1986) (repealed as to civil actions, effective Sept. 1, 1983; repealed as to criminal cases, effective Sept. 1, 1986).

41. *See id.*

42. *See* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 562, at 360 (1981).

43. *See id.* § 564, at 387-88.

crography or microfiche), and chemical reproduction (such as electrostatic or xerigraphic "photocopies").[44] Although this list of categories is probably comprehensive of existing technology,[45] the Rule also embraces any "other equivalent technique which accurately reproduces the original."[46]

Obviously, the best method of qualifying a particular copy of a particular original as a duplicate is by stipulation, as part of a stipulation that also covers its authentication. For example, the parties may prepare and execute a stipulation in the following form:

> The documents attached hereto as Exhibits A-Z are duplicates of original documents, each of which is authentic. Each such Exhibit may be offered in evidence during the trial of this case as if it were the authenticated original, any objection for want of authentication or for want of production of the original being waived. No stipulation is made as to the admissibility of all or any part of any Exhibit over objection on any other ground.[47]

In the absence of stipulation, a proper foundation that a writing is a duplicate of another consists of testimony by a person with personal knowledge of the contents of the original that the offered writing is an accurate reproduction of the original, produced by some identified process "which accurately reproduces the original."[48]

Rule 1001(4) also refers to "mechanical or electronic re-recording," recognizing that the contents of a sound recording may be proven by a duplicate. In criminal cases, the use of duplicate re-recordings is quite common, because "it is often possible to re-record the original by means of audio equipment which reduces or cuts out background noise or amplifies conversational tones, with the result of enhancing the critical content of the tape."[49] Such a re-recording is clearly admissible as a duplicate upon a proper foundation,[50] such as the following:

---

44. *See* TEX. R. EVID. 1001(4).

45. *See* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 561, at 356-60 (1981) (description of existing technology for reproduction of paper writings).

46. *See* TEX. R. EVID. 1001(4).

47. R. KEETON, TRIAL TACTICS AND METHODS § 2.25, at 64 (2d ed. 1973).

48. *See* TEX. R. EVID. 1001(4).

49. *See* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 563, at 361 (1981).

50. *See id.*; *see also* United States v. DiMatteo, 716 F.2d 1361, 1368 (11th Cir. 1983) (recording admitted in conspiracy to import marijuana case), *cert. denied*, — U.S. —, 106 S. Ct. 172, 88 L. Ed. 2d 143 (1985); United States v. Gordon, 688 F.2d 42, 43-44 (8th Cir. 1982) (filtered recordings of defendant's conversation with informant held admissible); United States

> The original recording should first be offered into evidence, together with testimony which clearly identifies it as the original. The technician who made the re-recording should then explain how he produced the re-recording. His testimony should include a statement that he made no additions or deletions and did not alter the original in any way except to improve its audibility or clarity. If the defendant wishes to challenge the admissibility of the re-recording, he should be given an opportunity, out of the hearing of the jury, to compare it to the original for accuracy and completeness. If the court concludes that the re-recording is an accurate reproduction of the original, the re-recording is then admitted into evidence and played at trial.[51]

Many cases involve the use of a transcript made from a recording of an oral statement or conversation.[52] A transcript offered in lieu of an available recording would be objectionable on Best Evidence grounds, being neither the original nor a duplicate of the recording.[53] However, when offered in conjunction with the original or a duplicate recording, a properly authenticated transcript is admissible to assist the trier in understanding the recording.[54] A proper foundation for such a transcript must establish that it is accurate. Normally the transcriber's testimony will be offered for this purpose,[55] although another person who can swear to the accuracy of the transcript from personal knowledge of the conversation or statement may also be competent to supply the foundation.[56]

---

v. Balzano, 687 F.2d 6, 7-8 (1st Cir. 1982) (court admitted tape of conversation with undercover agent).

51. C. FISHMAN, WIRETAPPING AND EAVESDROPPING § 296 (1978).

52. *See, e.g.*, United States v. Reed, 647 F.2d 678, 688 (6th Cir.) (court's use of transcripts of tapes was not error), *cert. denied*, 454 U.S. 837 (1981); United States v. Vinson, 606 F.2d 149, 155 (6th Cir. 1979) (if transcripts are proven accurate, admission is proper), *cert. denied*, 444 U.S. 1074 (1980); United States v. Rochan, 563 F.2d 1246, 1251 (5th Cir. 1977) (transcript of tapes held admissible).

53. *See* FED. R. EVID. 1001(4) advisory committee note. *See generally* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 563, at 365 (1981).

54. *See, e.g.*, United States v. Slade, 627 F.2d 293, 299, 302-03 (D.C. Cir.) (transcript held admissible), *cert. denied*, 449 U.S. 1034 (1980); United States v. Vinson, 606 F.2d 149, 155 (6th Cir. 1979) (admission of transcript proper if accuracy shown), *cert. denied*, 444 U.S. 1074 (1980); United States v. Rinn, 586 F.2d 113, 118 (9th Cir. 1978) (transcript admissible as aid to jury). *See generally* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 563 (1981) (discussion of admissibility of transcript of recording).

55. *See* United States v. Slade, 627 F.2d 293, 299, 302-03 (D.C. Cir.) (transcriber testified that transcript was accurate), *cert. denied*, 449 U.S. 1034 (1980); United States v. Onori, 535 F.2d 938, 946 (5th Cir. 1976) (transcriber's testimony proved accuracy of transcript).

56. *See* United States v. Rochan, 563 F.2d 1246, 1251-52 (5th Cir. 1977).

A number of federal cases have addressed the issue of dispute between the parties as to the accuracy of the transcript.[57] If a stipulated transcript cannot be produced by the parties, the court should hold a hearing to attempt to resolve as many issues as possible.[58] If there are portions of the statement or conversation as to which there is reasonable disagreement concerning the content or attribution, the parties may be permitted to present alternative transcripts at the trial.[59]

When a transcript is used in conjunction with a recording, the transcript is not "substantive evidence," and, if the party-opponent so requests, the judge should instruct the jury accordingly.[60] Moreover, the transcript should not be taken into the jury room, since its status is that of illustrative, and not real, evidence.[61]

With the two limitations set out in the preceding paragraph, the Texas Court of Criminal Appeals upheld the use of a transcript in conjunction with a recording in the case of *Garratt v. State*,[62] which was decided before the adoption of the Rules.

F. *Rule 1002: Requirement of Originals*

Rule 1002 states the Best Evidence Rule. The key to its application is in the phrase "[t]o prove the content." The Rule only applies, and requires production of the original, when a party seeks to prove the content of the original. The Rule does not come into operation every time a writing (or recording or photograph) exists containing a matter which a party seeks to prove. This is so even if a writing may be the "best" evidence of the matter, in the sense that it is most convincing. The Rule only operates when either (1) a writing is itself the object of proof, or (2) a party seeks to prove a matter by using a writing as evidence of it.

Examples of the first category are written contracts, deeds, wills,

---

57. *See* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 563 (1981) (collection of cases dealing with accuracy of transcript).

58. *See* United States v. Watson, 594 F.2d 1330, 1336 (10th Cir. 1979), *cert. denied*, 444 U.S. 840 (1980); United States v. Onori, 535 F.2d 938, 946 (5th Cir. 1976).

59. *See* United States v. Slade, 627 F.2d 293, 299, 302-03 (D.C. Cir.), *cert. denied*, 449 U.S. 1034 (1980); United States v. Wilson, 578 F.2d 67, 69-70 (5th Cir. 1978).

60. *See* United States v. Slade, 627 F.2d 293, 302 (D.C. Cir.), *cert. denied*, 449 U.S. 1034 (1980); United States v. Vinson, 606 F.2d 149, 155 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980).

61. *See* United States v. Vinson, 606 F.2d 149, 155 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980).

62. 658 S.W.2d 592, 594 (Tex. Crim. App. 1983).

libels, and materials claimed to be obscene.[63] The substantive law in these instances accords ultimate legal significance to the writing, by operation of the Statute of Frauds, Parol Evidence Rule, etc. Therefore, in these instances the transaction can only be proven by the writing, and a party seeking to prove it necessarily must prove the content of the writing and, therefore, must comply with the Best Evidence Rule.

The second category includes all instances in which, although the ultimate fact to be determined is not a written transaction, a party chooses a writing as evidence of that ultimate fact. For example, suppose that in a negligence case P offers to establish D's negligence by D's statement in a letter admitting a negligent act. The Rule applies to the letter.

To be distinguished are the many situations in which the Rule does not require production of a writing that happens to contain matter that a party can prove without it. For example, a party may prove that he paid a debt by so testifying, even if he received a written receipt for the payment.[64] Any objection to the oral testimony on the ground that the receipt is the "best evidence" should be overruled. Similarly, the fact that persons were married may be shown by testimony, without producing the marriage certificate.[65] A person may testify to the earnings and expenses of his business, of which he has personal knowledge, without producing the books and records.[66] On the other hand, if the witness lacks independent knowledge, but instead derives his knowledge from the written records, the witness' testimony in lieu of the records would violate the Rule.[67]

By weight of authority, the Rule does not apply to testimony to the

---

63. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 233, at 707 (3d ed. 1984).

64. *See* Jackman v. Jackman, 533 S.W.2d 361, 362 (Tex. Civ. App.—San Antonio 1976, no writ).

65. *See* Lopez v. Missouri, K. & T. Ry., 222 S.W. 695, 697 (Tex. Civ. App.—San Antonio 1920, writ dism'd).

66. *See* Cummings v. Van Valin, 363 S.W.2d 385, 387 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.).

67. *See* Panhandle & S.F. Ry. v. McDonald, 227 S.W.2d 601, 603 (Tex. Civ. App.—Eastland 1950, writ ref'd). In *Panhandle*, the court held that testimony as to the weight of cotton was improper where the witness "did not weigh the cotton, neither was he present when it was weighed," and the book upon which he admittedly based his testimony was not introduced. *See id.* at 603; *see also* Stinnett v. Paramount-Famous Lasky Corp., 37 S.W.2d 145, 148 (Tex. Comm'n App. 1931, holding approved) (error to admit testimony by part owner as to earnings where testimony based upon records not introduced).

effect that written records have been examined and found not to contain a certain matter.[68] Considerable authority also holds that the Rule does not apply to evidence that a writing exists,[69] or to evidence of some other fact about the writing, such as its date,[70] as distinguished from evidence of its terms. Obviously, as noted by Wigmore, "[t]estimony about a document cannot go very far without referring to its terms."[71]

Application of the rule to photographs merits special mention, and, in fact, the Advisory Committee's Note to the Federal Rule discusses the matter at some length.[72] Several points are explained in the Note. First, the Rule seldom arises with photographs, for two reasons: (1) in most instances, the party wishes to introduce the photograph; rarely would he instead offer testimony about it; and (2) the usual device of using a photograph to illustrate a witness' oral testimony does not constitute proof of its contents, and, thus, the Rule is inapplicable.[73] On the other hand, there are situations where the contents of a photograph are sought to be proved, and in these situations the Rule applies. Examples include obscenity and other cases where the contents are an ultimate issue,[74] and instances where a photograph is used as substantive evidence rather than merely to illustrate a witness' testimony, such as a surveillance photograph.[75] X-rays logically fall into the latter category. With respect to x-rays, however, the Advisory Committee noted that Rule 703 permits expert testimony based upon matters not in evidence, and Rule 803(6) would permit medical records containing a radiologist's interpretation of a x-ray without the

---

68. *See* FED. R. EVID. 1002 advisory committee note; *see also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 233, at 708 (3d ed. 1984); 2 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1566, at 271 (Texas Practice 3d ed. 1980).

69. *See* Reyna v. State, 477 S.W.2d 564, 566 (Tex. Crim. App. 1972) (testimony that beer license had been issued); Villiers v. Republic Financial Services, Inc., 602 S.W.2d 566, 569 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.) (testimony that claim had been assigned).

70. *See* Cage v. State, 167 Tex. Crim. 355, 361, 320 S.W.2d 364, 369 (1958) (testimony that permit was back-dated did not violate Best Evidence Rule), *cert. denied*, 360 U.S. 917 (1959).

71. 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1242 (Chadbourn rev. ed. 1972).

72. *See* FED. R. EVID. 1002 advisory committee note.

73. *See id.*

74. *See* United States v. Levine, 546 F.2d 658, 667-68 (5th Cir. 1977) (Rule 1002 applied to film in obscenity case).

75. *See* People v. Doggett, 188 P.2d 792, 794-95 (Cal. Ct. App. 1948).

x-ray itself.[76]

G. *Rule 1003: Admissibility of Duplicates*

The effect of Rule 1003 is to render admissible, under normal circumstances, a preferred category of secondary evidence: duplicates, as defined in Rule 1001(4). This would represent a large variation from the common law; however, a similar reform had already been effected in Texas by statutes enacted in 1959.[77]

When the Federal rules were under consideration by the Congress, some concern was expressed that Rule 1003 unduly "constricts" the Best Evidence Rule, and that a party who had not had an opportunity to see the original could not, as a practical matter, challenge the accuracy of a duplicate.[78] Professor Cleary, the Chief Reporter, responded to these concerns:

> With regard to proposed Rule 1003, you state that some concern was expressed that the rule constricts the best evidence rule. If by 'constricts' it is meant that the rule relaxes the common law insistence that the original in the strict sense be either produced or accounted for, then I agree that the rule has that effect. In fact, that was the end in view in the drafting of the rule. The purpose of the best evidence rule has always been to secure the most reliable information in disputes over the contents of writings. In pre-discovery and pre-xerox days the means used to attain that objective was a strong preference for the 'original.' With the advent of discovery and of xerography, the objective remains the same but the means of achieving it must be reexamined in the light of procedural and technological inventions. In my opinion the rule as drafted, taken in the light of present procedure and technology, is well designed to accomplish the purpose of the best evidence rule without wasting a lot of time over 'originals' which no one really needs. . . . The party complaining of lack of opportunity to see the original would, in my opinion, find in the exceptions of Rule 1003 any protection which the circumstances justified. One relevant circumstance might well be the source of the document. Thus an offer of duplicates of records of a disinterested third party, e.g., a bank, would be less likely to raise a question of genuineness or unfairness than would an offer of duplicates

---

76. *See* FED. R. EVID. 1002 advisory committee note.

77. *See supra* text accompanying notes 38-41.

78. *See* Hearings on Proposed Rules of Evidence Before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary, 93d Cong., 1st Sess. 82-83 (1973) (Letter of May 11, 1973, from Herbert E. Hoffman, Esq., to Professor Edward W. Cleary).

> of a party's own records. The nature of the documents themselves and their apparent completeness or lack of it might also be factors. Other circumstances might in addition call for consideration.[79]

Apparently, the House Committee's concerns were not altogether assuaged by Professor Cleary's letter. In their report, the Committee noted that they approved Rule 1003 without textual change "with the expectation that the courts would be liberal in deciding that a 'genuine question is raised as to the authenticity of the original.' "[80]

Whether the federal courts in applying Rule 1003 have been "liberal" in this sense cannot be ascertained from reported cases. Almost all of the reported cases which address complaints that a duplicate was admitted over an objection asserting the existence of a genuine question of authenticity reject the claim.[81] Perhaps, however, even a "liberal" construction of "genuine question" would not have extended to the objections raised in those cases.

Among the leading commentators on the Federal Rules, there is significant disagreement as to the definition of "genuine question" in this situation. Louisell and Mueller represent a rather extreme point of view.[82] They argue that, despite the "apparent meaning" of the phrase "genuine question," "the mere fact that his adversary adduces counterproof which would enable a reasonable jury to reject the duplicate on the ground that the so-called original is not genuine does not justify excluding the duplicate from the jury's consideration."[83] They would permit "exclusion of a duplicate on account of the adverse party's attack upon authenticity of the original only where this attack amounts to cogent and compelling evidence which would require the jury to find that the original is not authentic."[84] They base this mildly remarkable conclusion partly upon analysis of Rule 1008, but mainly upon the argument that "there is simply no good reason to

---

79. *Id.* at 83-84 (Letter of May 15, 1973, from Professor Edward W. Cleary to Herbert E. Hoffman, Esq.).

80. H.R. Rep. No. 90-650, 93rd Cong., 1st Sess. 17 (1973).

81. *See* Greater Kansas City Laborers Pension Fund v. Thummel, 738 F.2d 926, 928 (8th Cir. 1984); United States v. DiMatteo, 716 F.2d 1361, 1368 (11th Cir. 1983), *cert. denied*, — U.S. —, 106 S. Ct. 172, 88 L. Ed. 2d 143 (1985); United States v. Balzano, 687 F.2d 6, 7-8 (1st Cir. 1982); United States v. Georgalis, 631 F.2d 1199, 1205 (5th Cir. 1980); United States v. Enstam, 622 F.2d 857, 866 (5th Cir.), *cert. denied*, 451 U.S. 907 (1981). *But see* Fox v. Peck Iron & Metal Co., 25 Bankr. 674, 679-80 (Bankr. S.D. Cal. 1982).

82. *See* D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 577, at 451-58 (1981).

83. *Id.* at 452.

84. *Id.* at 452-53.

exclude a purported duplicate where the adverse party's counterproof would merely suffice to enable a jury to find that the original is not authentic."[85]

This premise appears to be incorrect. One should ask, why did the drafters of Rule 1003 incorporate this exception? In Professor Cleary's evidence casebook, the following analysis is suggested: "[C]ontroversy as to documents may arise as to terms or as to authenticity. As to terms, an accurate reproduction is no less satisfactory than the original. As to authenticity, however, the original may possess physical characteristics of the highest importance which no copying process can reproduce."[86]

This analysis helps to explain the design of Rule 1003. A party is generally free to substitute a duplicate for an original; however, if the jury is going to address a question of authenticity, it should receive the original. In other words, in ascertaining terms, a duplicate is "as good as" the original; in ascertaining authenticity, however, the original is "best." Therefore, Rule 1003 provides that where a "genuine question" [read: jury question] of authenticity is presented, the proponent may not use a duplicate if he is in a position to produce the original. Of course, if he is excused from production of the original because, for example, the original has been lost or destroyed, then any secondary evidence, including a duplicate, will be permitted as provided in Rule 1004.

Louisell and Mueller's standard for inadmissibility of a duplicate in lieu of the original turns out to be utterly nonsensical: "And it is only where a reasonable jury must find that the original is not authentic that an attack upon the original's authenticity should lead to exclusion of the purported copy."[87] In that case, the *original* would be inadmissible, and the exception which it is supposed to implement is an exception to the general rule that "[a] duplicate is admissible to the same extent as an original."[88] Obviously this is not a construction of the exception, but, rather, a destruction of it.

Clearly, Louisell and Mueller's misinterpretation results from their mistaken theory that "there is simply no good reason" to prefer the original over a duplicate in cases where there is a jury issue of authen-

85. *Id.* at 452.
86. E. CLEARY & J. STRONG, EVIDENCE 388 (3d ed. 1981).
87. 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 577, at 453 (1981).
88. TEX. R. EVID. 1003.

ticity. The drafters disagreed, and that is exactly why they inserted the first exception in Rule 1003. The Rule should be read accordingly, so that the phrase "genuine question" is used in the ordinary sense: a question upon which, on the evidence presented, reasonable persons might differ.[89]

The second exception to the general admissibility of duplicates is more obscure. Under what circumstances would it be unfair to admit the duplicate in lieu of the original? The Advisory Committee's Note uses this example: "when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party," citing two cases.[90] In one case, a conviction for theft of a social security check from the mail was reversed for improper receipt of an incomplete photocopy of the check as evidence.[91] The court expressed concern for "the effect of a witness's failure to notice, or a reproducing machine's failure to copy, an indorsement on the back of a check," and concluded that "it was for the purpose of avoiding the possibility of such errors as might have occurred here that the best evidence rule was formulated."[92] In another case, a civil fraud action, photocopies of business records of the plaintiff Japanese corporation were excluded.[93] The original records were in Japan, and the plaintiffs offered no excuse for failure to produce them. The court expressed concern that the photocopies were prepared for trial, rather than in the regular course of business, and the defendant had no opportunity to examine the originals to determine whether other omitted portions might also be relevant.[94]

It seems likely that cases excluding duplicates on account of con-

---

89. *See* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 1003.1 (1981). Graham attributes a different, narrower reading of the exception to Weinstein and Berger. *See id.* § 1003.1, at 1005 n.38 (citing 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 1003 [01], at 1003-5 (1983)). However, Graham misinterprets Weinstein and Berger. In the cited passage, Weinstein and Berger address cases of dispute as to the accuracy of the duplicate, not authenticity of the original. *See* 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 1003 [01], at 1003-5 (1983).

90. *See* FED. R. EVID. 1003 advisory committee note (citing United States v. Alexander, 326 F.2d 736 (4th Cir. 1964) and Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd., 265 F.2d 418 (2d Cir. 1959)).

91. *See* United States v. Alexander, 326 F.2d 736, 742 (4th Cir. 1964).

92. *See id.* at 742.

93. *See* Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd., 265 F.2d 418, 422-24 (2d Cir. 1959).

94. *See id.*

cerns for fairness, which do not amount to authentication disputes, will resemble these cases, which express concern about completeness. Thus, Rule 1003(2) may be related, in spirit at least, to Rule 106.[95]

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

Rule 1004 codifies the common law doctrines excusing a party from compliance with the Best Evidence Rule in various circumstances. The Texas version lists five exceptions, adding one (paragraph (3)) to the federal model. As thus adapted, it embodies prior Texas common law.[96]

If any of the five conditions is established, the proponent is then free to prove the contents of a writing, recording or photograph by any secondary evidence he chooses. As explained in the Federal Advisory Committee's Note, "The rule recognizes no 'degrees' of secondary evidence."[97] For example, in a breach of warranty action against a seller of insulation, it was proper to permit the buyer to testify as to the contents of the seller's promotional brochure which was destroyed in the fire, despite the availability of a similar brochure.[98] In a criminal case, a police officer could testify as to the contents of a lost note written by the defendant, although a typed copy existed.[99]

The Advisory Committee justified its decision to adopt the so-called "English" rule[100] on two grounds: the practical difficulty of "the formulation of a hierarchy of preferences and a procedure for making it effective;"[101] and the likelihood that parties will tend to produce the most convincing secondary evidence without being required to do

---

95. *See* TEX. R. EVID. 106. Rule 106, "Remainder of or Related Writings or Recorded Statements," provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. 'Writing or recorded statement' includes depositions." *Id.*; *see also* TEX. R. CRIM. EVID. 107 (Rule of Optional Completeness).

96. *See* Hippard, *Article X: Contents of Writings, Recordings and Photographs*, 20 HOUS. L. REV. 595, 611 (1983).

97. FED. R. EVID. 1004 advisory committee note.

98. *See* Neville Constr. Co. v. Cook Paint & Varnish Co., 671 F.2d 1107, 1109 (8th Cir. 1982).

99. *See* United States v. Standing Soldier, 538 F.2d 196, 202-03 (8th Cir.), *cert. denied*, 429 U.S. 1025 (1976).

100. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 241 (3d ed. 1984) (description of English and American authorities prior to Federal Rules).

101. FED. R. EVID. 1004 advisory committee note.

so.[102] Only the first argument seems persuasive, since the second appears inconsistent with having any Best Evidence Rule. In any event, Texas courts have always followed the English rule.[103]

I. *Rule 1004(1): Originals Lost or Destroyed*

Since the Best Evidence Rule is one of preference, rather than exclusion, loss or destruction of the original has always been regarded as a circumstance permitting secondary evidence of contents.[104] Proof that the original is lost normally consists of testimony describing a fruitless diligent search.[105] Sufficiency of the foundation is traditionally regarded as a matter within the trial court's discretion.[106]

Intentional destruction by the proponent by no means forecloses use of this exception; instead, bad faith must appear. In many cases, the proponent destroyed the original in the regular course of business,[107] or for some other reason not indicative of a design to spoil evidence.[108] Even a negligent destruction does not amount to "bad faith."[109]

---

102. *See id.*

103. *See* Lindsay v. Woods, 27 S.W.2d 263, 265-66 (Tex. Civ. App.—Amarillo 1930, no writ); Barclay v. Deyerle, 116 S.W. 123, 125 (Tex. Civ. App. 1909, writ ref'd) ("Our courts have repeatedly held, in adhering to the English doctrine, that there are no degrees in secondary evidence."). *See generally* 2 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1579 (Texas Practice 3d ed. 1980) (discussion of Texas cases adopting English doctrine).

104. *See* Travis County Water Control & Improvement Dist. No. 12 v. McMillen, 414 S.W.2d 450, 452-53 (Tex. 1966); *see also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 237, at 715-16 (3d ed. 1984); 2 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL §§ 1571-74, at 284-91 (Texas Practice 3d ed. 1980).

105. *See, e.g.*, Travis County Water Control & Improvement Dist. No. 12 v. McMillen, 414 S.W.2d 450, 453 (Tex. 1966); Texas Warehouse Co. v. Spring Mills, Inc., 511 S.W.2d 735, 741 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.); Walker v. Lorehn, 355 S.W.2d 71, 74 (Tex. Civ. App.—Houston [14th Dist.] 1962, writ ref'd n.r.e.).

106. *See* United States v. Shoels, 685 F.2d 379, 384 (10th Cir. 1982); Wright v. Farmers Co-Op of Arkansas & Oklahoma, 681 F.2d 549, 553 (8th Cir. 1982); Holley v. Mucher, 165 S.W.2d 1015, 1018 (Tex. Civ. App.—Texarkana 1942, writ ref'd w.o.m.); Pacific Mid-Continent Corp. v. Tunstill, 159 S.W.2d 908, 912 (Tex. Civ. App.—Fort Worth 1942, no writ). *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 237 (3d ed. 1984); 2 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1573 (Texas Practice 3d ed. 1980).

107. *See* United States v. Conry, 631 F.2d 599, 600 (9th Cir. 1980).

108. *See* United States v. Balzano, 687 F.2d 6, 7-8 (1st Cir. 1982) (re-recording of wire to tape by process that erased original that otherwise could not be played back).

109. *See* Estate of Gryder v. Commissioner of Internal Revenue, 705 F.2d 336, 338 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983).

J. *Rule 1004(2): Original Not Obtainable*

Rule 1004(2) of the Texas Rules of Evidence, although identical to the federal counterpart, is given a very different meaning by the addition of Texas Rule 1004(3), which excuses production of the original in any case where the original is outside Texas. The effect is that the "unavailability" requirement under the Texas provisions is far less onerous than under the federal model. In the Texas scheme, invocation of a judicial process or procedure outside Texas is never required. A sufficient foundation for the excuse of not producing the original consists of showing: (1) the original, though located in Texas, is in the possession of a third party; and (2) the proponent has unsuccessfully sought to obtain the original from the third party by appropriate subpoena duces tecum.

The Federal Advisory Committee's Note to Rule 1004(2) states: "When the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is a sufficient explanation of nonproduction. Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction."[110] Thus under the Federal Rule, a party seeking to justify secondary evidence under this provision would fail if there existed any judicial procedure for obtaining the original, even if it required resort to a separate proceeding in a distant jurisdiction.[111]

The drafters of the Texas Rules believed that this was too onerous a burden as a precondition to the use of secondary evidence to prove contents. Therefore, they added paragraph 1004(3) as an excuse which is applicable whenever the original is not in Texas. This limits, in effect, paragraph 1004(2). "Any available judicial process or procedure," in the Texas Rule, refers to any process or procedure within Texas. If the original is shown to be in the hands of a third party in Texas who has not voluntarily provided it to the proponent, then the proponent must seek to obtain the original by judicial process before he can invoke the excuse provided by 1004(2). The proper process in

---

110. FED. R. EVID. 1004(2) advisory committee note.

111. *See* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 1004.3 (1981). Considerable authority suggests, however, that the Federal Rule will be construed not to impose "unreasonable" burdens in this regard. *See* United States v. Marcantoni, 590 F.2d 1324, 1329-30 (5th Cir.), *cert. denied*, 441 U.S. 937 (1979); *see also* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 585 (1981); 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 1004(2) [01] (1983).

such a situation is a subpoena duces tecum. In civil cases, a deposition subpoena duces tecum may be served anywhere in Texas, though the party seeking the deposition may be required to take the deposition in the county where the deponent resides or regularly does business.[112] A civil trial subpoena, on the other hand, only reaches one hundred miles from the courthouse.[113] Nevertheless, by analogy to the federal model, a party may not resort to Rule 1004(2) on the ground that, at trial, the third party possessor of a document is more than one hundred miles from the courthouse, if the third party is in Texas and hence could have been reached by a deposition subpoena duces tecum in the county where he resides. This is true even though the deposition subpoena might not yield actual possession of the original document to the party seeking to prove it, since the deposition would at least (assuming compliance by the deponent) yield an opportunity to make a duplicate admissible under Rule 1003.[114]

In criminal cases, a trial subpoena duces tecum may be served anywhere in Texas,[115] thus yielding the same net result: if the original is in Texas, the proponent may not use the excuse in this section unless he has attempted to subpoena the original.

K. *Rule 1004(3): Original Outside the State*

Texas, along with many other jurisdictions,[116] has regarded possession of the original by a third person outside the state as a sufficient circumstance, by itself, to justify resort to secondary evidence to prove terms or contents.[117] This doctrine is codified in Rule 1004(3). As noted in the previous section, the effect of this doctrine is to relieve a proponent of any burden of invoking any judicial process outside the state as a precondition for secondary evidence. Under the federal rules, where there is no counterpart to this provision, a party may be

---

112. *See* TEX. R. CIV. P. 201 (compelling production of documents).

113. *See id.* (subpoena of witnesses); *id.* 177a (subpoena for production of documentary evidence).

114. *See* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 585, at 500 (1981).

115. *See* TEX. CODE CRIM. PROC. ANN. arts. 24.01, 24.02, 24.16 (Vernon 1966 & Supp. 1986).

116. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 238, at 717 & n.5 (3d ed. 1984).

117. *See* Haire v. State, 118 Tex. Crim. 16, 18, 39 S.W.2d 70, 73-74 (1931); Standard Nat'l Ins. Co. v. Bayless, 338 S.W.2d 313, 319 (Tex. Civ. App.—Beaumont 1960, writ ref'd n.r.e.).

required to exhaust judicial processes in another jurisdiction.[118]

L. *Rule 1004(4): Original in Possession of Opponent*

The exemption from the Best Evidence Rule codified in Rule 1004(4) is an estoppel doctrine. It is supported by numerous decisions in Texas prior to the adoption of the Rules.[119] For example, if party X is in possession or control of an original document, and had notice in any form that its contents would be in issue at the trial, then X ought to be estopped from objecting to Y's offer of secondary evidence, since X, not Y, is the one in a position to produce the original. Two circumstances give rise to this estoppel: (1) possession or control of the original by the opponent; and (2) opponent's knowledge or notice, at any time sufficiently in advance of the hearing to have brought the original, that the terms or contents of the original would be in issue. Proof of these two circumstances constitutes the proper foundation for the introduction of secondary evidence under this section. Whether they have been established is a question of law to be determined by the judge.[120]

The notice served under this provision does not compel the party to produce the original; it merely justifies the admission of secondary evidence to prove contents.[121] Thus, the notice cannot serve as a substitute for a subpoena duces tecum[122] or a discovery request for production[123] if the original is desired. The only sanction for ignoring a notice under Rule 1004(4) is overruling of an objection to secondary evidence.

Sufficiency of the notice should be determined by practical, as opposed to technical, standards. Oral notice may suffice in proper cir-

---

118. *See* FED. R. EVID. 1004(2) advisory committee note; *see supra* text accompanying notes 110-111.

119. *See* McConnell Const. Co. v. Insurance Co. of St. Louis, 428 S.W.2d 659, 661-62 (Tex. 1968); Walters v. State, 102 Tex. Crim. 243, 277 S.W. 653, 656 (1925); *see also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 239, at 717-19 (3d ed. 1984); 2 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1570, at 280-83 (Texas Practice 3d ed. 1980); 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1199-1210 (Chadbourn rev. ed. 1972).

120. *See* TEX. R. EVID. 1008; *see also infra* text accompanying notes 182-90.

121. *See* FED. R. EVID. 1004(4) advisory committee note; *see also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 239 (3d ed. 1984).

122. *See* TEX. R. CIV. P. 201 (compelling production of documents).

123. *See id.* 167 (Discovery and Production of Documents for Inspection, Copying or Photographing).

cumstances.[124] Explicit written notice is obviously sufficient. Moreover, many cases demonstrate that where a writing or instrument is central to the litigation, implied notice may result from the nature of the controversy as stated in the pleadings.[125]

M. *Rule 1004(5): Collateral Matters*

The final paragraph of Rule 1004 codifies another familiar common law exemption from the Best Evidence Rule: the collateral writing doctrine. The purpose of the common law doctrine, here preserved, is to prevent the Best Evidence Rule from becoming a burdensome obstruction to natural narration and presentation. As the Advisory Committee put it: "While difficult to define with precision, situations arise in which no good purpose is served by production of the original."[126] If a witness in the course of testifying refers to a writing which is not a part of the underlying dispute, this doctrine obviates production of that "collateral" writing, even if, strictly speaking, the witness has testified to the terms or contents of it. McCormick's oft-cited example is a witness who testifies that he knew the date on which an event occurred because he saw it on a newspaper.[127] A similar example is a decision permitting testimony of an insurance underwriter to the effect that rates for buildings used commercially were higher than for residential buildings, without production of rate schedules and other documents on which his knowledge was based.[128]

In pre-Rules decisions in Texas, the collateral writing doctrine was frequently invoked when a Best Evidence objection was raised against

---

124. *See* Walters v. State, 102 Tex. Crim. 243, 247, 277 S.W. 653, 656 (1925); *see also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 239, at 717-19 (3d ed. 1984); 2 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1570, at 280-83 (Texas Practice 3d ed. 1980).

125. *See* McConnell Const. Co. v. Insurance Company of St. Louis, 428 S.W.2d 659, 661-62 (Tex. 1968) (suit on insurance policy); Harris v. State, 150 Tex. Crim. 137, 139, 199 S.W.2d 522, 523 (1947) (indictment for forgery); Standard Nat'l Insurance Company v. Bayless, 338 S.W.2d 313, 319 (Tex. Civ. App.—Beaumont 1960, writ ref'd n.r.e.) (suit on insurance policy); City of San Antonio v. Grayburg Oil Co., 259 S.W. 985, 986 (Tex. Civ. App.—San Antonio 1924, no writ) (action to recover taxes paid, pleadings sufficient notice to city to produce original tax rendition). *See generally* 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1205 (Chadbourn rev. ed. 1972) (discussion of implied notice).

126. FED. R. EVID. 1004(4) advisory committee note.

127. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 234, at 709-10 (3d ed. 1984).

128. *See* Freeman v. Commercial Union Assurance Co., 317 S.W.2d 563, 565-68 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.).

testimony concerning ownership or interests in land where the interest in question was not the principal dispute.[129] For example, in a condemnation case to acquire an easement, a witness could testify to the terms of similar easements based in part upon instruments not produced.[130] In addition, a plaintiff in an action for rent could testify that he purchased the premises from the lessor and took assignment of the lease, without producing title documents.[131] The Court of Criminal Appeals adopted a similar holding in arson cases by not requiring documents and permitting testimony as to ownership.[132] Similar cases may be found in other jurisdictions, such as a Connecticut decision allowing plaintiffs to establish their standing as aggrieved owners in a zoning case without offering title instruments.[133]

As McCormick comments, "the purposes for which references to documents may be made by witnesses are so variegated that the concept of collateralness defies precise definition."[134] McCormick went on to identify three factors that preponderate in the determination of collateralness: "the centrality of the writing to the principal issues of the litigation, the complexity of the relevant features of the writing, and the existence of a genuine dispute as to the contents of the writing."[135] These three factors remain appropriate in the application of Rule 1004(5).

N. *Rule 1005: Public Records*

Public records have traditionally been accorded special treatment dispensing with production of the original because, as explained by the Federal Advisory Committee, "[r]emoving them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian."[136] The particular special treatment set

---

129. *See* 2 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1568, at 276-77 (Texas Practice 3d ed. 1980).

130. *See* McConnico v. Texas Power & Light Co., 335 S.W.2d 397, 399 (Tex. Civ. App.—Beaumont 1960, writ ref'd n.r.e.); Texas Elec. Serv. Co. v. Lineberry, 327 S.W.2d 657, 664-65 (Tex. Civ. App.—El Paso 1959, writ dism'd).

131. *See* Prudential Ins. Co. v. Black, 572 S.W.2d 379, 380 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

132. *See* Drew v. State, 147 Tex. Crim. 29, 31, 177 S.W.2d 787, 788-79 (1944).

133. *See* Farr v. Zoning Bd. of Appeals, 95 A.2d 792, 794 (Conn. 1953).

134. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 234, at 709-10 (3d ed. 1984).

135. *Id.*

136. FED. R. EVID. 1005 advisory committee note.

forth in Rule 1005 is more or less identical to the previous Texas statutory and case law.[137] Production of the original is never required; rather, a hierarchy of secondary evidence is established. Instead of the original, the proponent must offer a certified or "compared" copy. Only if such a certified copy "cannot be obtained by the exercise of reasonable diligence" may other evidence of the contents be offered.

Rule 1005 addresses only the Best Evidence aspect of public record evidence;[138] other Rules address the authentication and hearsay aspects. Under Rule 901(b)(7), evidence of custody in a proper place, by itself, is sufficient to authenticate any public record.[139] More importantly, under Rule 902(4), a copy of any public record that is "certified as correct by the custodian or other person authorized to make the certification" is self-authenticating.[140] Several hearsay exceptions apply to various public records.[141]

With respect to the Best Evidence issue, Rule 1005 is distinguished from Rules 1001-1004 by the documents these rules embrace. Instead

---

137. *See* TEX. REV. CIV. STAT. ANN. arts. 3718-3722, 3724-3731, 3731a (Vernon 1926 & Supp. 1986) (repealed as to civil actions, effective Sept. 1, 1983; repealed as to criminal cases, effective Sept. 1, 1986); *see also* 2 R. RAY, TEXAS LAW OF EVIDENCE § 1576, at 297-98 (Texas Practice 3d ed. 1980). Article 3726, which governed recorded instruments, required loss or unavailability of the original instrument as a prerequisite to proof of its execution by certified copy of the record. *See* TEX. REV. CIV. STAT. ANN. art. 3726 (Vernon 1926 & Supp 1986) (repealed). Rule 1005 permits proof by certified or compared copy without regard to unavailability of the original. *See* TEX. R. EVID. 1005.

138. *See* United States v. Ruffin, 575 F.2d 346, 356 (2d Cir. 1978) (record inadmissible hearsay but admission harmless error). The court stated "The government's reliance on Fed. R. Evid. 1005 is misplaced inasmuch as that rule does not purport to guarantee the admissibility of the content of public records but only insures that those contents may under the conditions specified in Fed. R. Evid. 1005 be introduced by way of copy rather than production of the original but *only* 'if [the contents of the original record are] otherwise admissible.' " *Id.* at 356 (emphasis and brackets in original).

139. *See* TEX. R. EVID. 901(b)(7) (requirement of authentication; illustrations; public records or reports). *See generally* Wellborn, *Authentication and Identification Under Article IX of the Texas Rules of Evidence*, 16 ST. MARY'S L.J. 371, 383-84 (1985) (discussion of Rule 901(b)(7)).

140. *See* TEX. R. EVID. 902(4) (self-authentication; certified copies of public records). *See generally* Wellborn, *Authentication and Identification Under Article IX of the Texas Rules of Evidence*, 16 ST. MARY'S L.J. 371, 388-90, 393-94 (1985) (discussing Rule 902(4) and self-authentication in general).

141. *See* TEX. R. EVID. 803(8) (public records and reports), *id.* 803(9) (records of vital statistics), *id.* 803(10) (absence of public record or entry), *id.* 803(12) (marriage, baptismal, and similar certificates), *id.* 803(14) (records of documents affecting interest in property), *id.* 803(22) (judgment of previous conviction), *id.* 803(23) (judgment as to personal, family, or general history, or boundaries); *see also* Wellborn, *Article VIII: Hearsay*, 20 HOUS. L. REV. 477, 521-24, 528-30 (1983) (discussing Rules 803(8)-(10), (12), (14), (22), (23)).

of the system contained in Rules 1001-1004, which prefers the original or a duplicate, Rule 1005 substitutes quite a different system. Under Rule 1005, the original is not required in any case.[142] Instead of a duplicate, Rule 1005 authorizes a different special category of secondary evidence: a certified or compared copy. Note that a certified or compared copy may or may not be a duplicate as defined in Rule 1001(4); that is immaterial. If it is a certified or compared copy, it is admissible under Rule 1005 whether or not the copy is a duplicate;[143] if it is not certified or compared, it is not admissible even if it is a duplicate.

The Rule requires a certified or compared copy unless one "cannot be obtained by reasonable diligence." The phrase "reasonable diligence" has not yet received judicial interpretation in this context.[144] Louisell and Mueller persuasively argue that "[s]urely the proponent has been reasonably diligent if, in his search for a copy, he has taken the kinds of steps which would excuse nonproduction of an original in cases in which Rule 1004 applies."[145] They add that "[w]hether 'reasonable diligence' under Rule 1005 can mean *less than* the kind of effort which Rule 1004 requires in cases where it applies remains to be seen."[146] Given that Rule 1004 comprises a supposedly comprehensive set of excuses for general applications of the Best Evidence Rule, one is inclined to believe that it would be adequate in this context as well. Therefore, efforts that would not suffice to excuse the nonproduction of an original under Rule 1004 would, by analogy, fall short of "reasonable diligence" under Rule 1005.

Application of Rule 1005 sometimes requires careful attention to be given to the question of which writing is the "original" that the proponent seeks to prove.[147] This may be particularly necessary where the evidence concerns "a document authorized to be recorded and filed and actually recorded or filed," as opposed to "an official rec-

142. *See* FED. R. EVID. 1005 advisory committee note.

143. *See* United States v. Torres, 733 F.2d 449, 455 n.5 (7th Cir.), *cert. denied*, — U.S. —, 105 S. Ct. 204, 85 L. Ed. 2d 482 (1984). In *Torres*, the court held that "certificates of enrollment prepared by the menominee enrollment clerk and certified by her at trial to be accurate representations of the information contained in the original Tribal Roll, were admissible under Fed. R. Evid. 902(4) as certified copies of the original public record." *Id.*

144. *See* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 593, at 532 n.2 (1981).

145. *Id.* at 532.

146. *Id.* at 533 (emphasis in original).

147. *See supra* text accompanying notes 28-36.

ord."[148] Recorded documents often are copies of original private documents, such as deeds or encumbrances on real property. After recordation, the private original is returned to the owner. In this situation, there are really two originals: the owner's document is the original as the conveyance, but the recorded copy is the original as the public record. If a party seeks to prove the terms of an original conveyance, he may do so by proving the public record in accordance with Rule 1005, but he is not required to do so. The party might instead offer the original conveyance, or a duplicate, or show an excuse under Rule 1004 for nonproduction of the original (such as loss or destruction or possession by opponent and notice) and offer any form of secondary evidence.[149] On the other hand, a party may seek to prove not the terms of the conveyance, but the public record, since for some purposes (such as establishing record notice) the latter would be the material issue. In that case, only such proof as stated in Rule 1005 would be proper.[150]

A case illustrating the foregoing point is *Amoco Production Co. v. United States*,[151] a suit to quiet title by the lessees of mineral interests. Defendants contended that an original deed in the lessor's chain of title reserved a one-half mineral interest, but the original and all copies of the deed were lost, and the recorded version did not contain the reservation. The trial court, citing Rule 1005, excluded all other evidence offered to prove that the original deed had contained the reservation. The Court of Appeals reversed, correctly pointing out that the original deed was not a public record; therefore, Rule 1005 was inapplicable. Since the original deed was lost, Rule 1004(1) permitted any relevant secondary evidence to prove its contents.[152]

The operative phrases in Rule 1005 — "official record" and "document authorized to be recorded" — should be interpreted very broadly in light of the purposes of the doctrine. Otherwise a "governmental agency will be disrupted by the necessity of bringing its original records to court."[153] This broad, functional approach to the scope of Rule 1005 is already supported by case authority in Texas. In

148. *See* TEX. R. EVID. 1005.

149. *See* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 593, at 533 (1981).

150. *See id.* at 531.

151. 619 F.2d 1383 (10th Cir. 1980).

152. *See id.* at 1390-91 and n.6.

153. 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 1005 [01], at 1005-5 (1983).

Hickson v. Martinez,[154] the Dallas Court of Appeals held that the trial court, in a hospital negligence case, committed reversible error in refusing plaintiff's offer of a photocopy of certain federal regulations applicable to hospitals that receive Medicare and Medicaid funds. The trial court had sustained defendants' Best Evidence objection. The Court of Appeals held that the photocopy was admissible under Rule 1005 as a compared copy of an official record. The plaintiff had supplied a foundation consisting of testimony that the copy was correct when compared with the original and that the original was a bound volume of the Code of Federal Regulations. Additionally, the plaintiff offered testimony "that it is a policy of Parkland Hospital to maintain [the copy] in its records and library."[155] The decision is certainly consistent with the purposes of Rule 1005; however, the issue of the content of the regulations published in the Code of Federal Regulations should not be a matter for proof by evidence at all, but rather, a matter for judicial notice.[156]

O. *Rule 1006: Summaries*

In Rule 1006, the Texas drafters made a minor change in the federal model by inserting the phrase "otherwise admissible" in the first sentence. The requirement that the underlying materials be admissible has been read into the Federal Rules by all authorities.[157]

The Rule merely codifies prior common law in Texas,[158] which in turn was identical to the general common law.[159] In *Duncan Develop-*

154. 707 S.W.2d 919 (Tex. App.—Dallas 1985, no writ).

155. *Id.* at 926.

156. *See* Federal Register Act § 7, 82 Stat. 1276, 44 U.S.C. § 1507 ("the contents of the Federal Register shall be judicially noticed"); Tippett v. Hart, 497 S.W.2d 606, 613 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.)(judicial notice taken of Department of Commerce regulation); Mosqueda v. Albright Transfer & Storage Co., 320 S.W.2d 867, 876-77 (Tex. Civ. App.—Forth Worth 1958, write ref'd n.r.e.)(judicial notice taken of ICC regulation): Dallas General Drivers, Warehouseman & Helpers v. Jax Beer Co., 276 S.W.2d 384, 389-90 (Tex. Civ. App.—Dallas 1955, no writ)(judical notice taken of NLRB rule).

157. *See* United States v. Johnson, 594 F.2d 1253, 1255 (9th Cir.), *cert. denied*, 444 U.S. 964 (1979); *see also* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 1006.1 (1981); 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 599, at 543-46 (1981); 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 1006 [03], at 1006-7 (1983).

158. *See, e.g.*, Duncan Dev., Inc. v. Haney, 634 S.W.2d 811, 812-13 (Tex. 1982); Black Lake Pipe Line Co. v. Union Constr. Co., 538 S.W.2d 80, 92-93 (Tex. 1976); Cooper Petroleum Co. v. La Gloria Oil & Gas Co., 436 S.W.2d 889, 891 (Tex. 1969).

159. *See* 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1230 (Chadbourn rev. ed. 1972).

ment, Inc. v. Haney, [160] the Texas Supreme Court set forth three requirements for the admissibility of summaries: "(1) that the records are voluminous, (2) they have been made available to the opponent for a reasonable period of time to afford inspection and an opportunity for cross-examination, and (3) the supporting documents are themselves admissible in evidence."[161] Rule 1006 is indistinguishable in substance from the *Duncan Development* formulation.

The test stated in Rule 1006 for voluminousness, which qualifies documents for summary presentation, is simply a practical one of convenience. Clearly, as the supreme court stated in a pre-Rules case, "trial courts have wide discretion in determining whether summaries are necessary to expedite the trial."[162] The court added: "[s]imilarly, it is for the trial court in the exercise of its discretion to determine whether the opposing party had an adequate opportunity to examine the records."[163]

The "summary" permitted by the Rule may be either a tangible exhibit or testimony.[164] Abridged recordings, resulting from edited voluminous originals, have been received under this Rule.[165] Although Rule 1006 does not specify that the person who prepared a written summary, chart, or other exhibit must testify, "[a]s a practical matter it would be very difficult to authenticate the chart, summary, or calculation, or to establish its accuracy without calling as a witness the person who is responsible for its preparation."[166]

Rule 1006, with its dual requirements of establishing admissibility of, and providing opponents with an opportunity for inspection of, underlying materials, only applies to a summary that is created for use at trial. A business record made and kept in the regular course of business, properly qualified according to the requirements of Rule

---

160. 634 S.W.2d 811 (Tex. 1982).

161. *Id.* at 812-13.

162. Black Lake Pipe Line Co. v. Union Constr. Co., 538 S.W.2d 80, 93 (Tex. 1976).

163. *Id.* at 93; *see also* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 600, at 558-59 (1981).

164. *See* Nichols v. Upjohn Co., 610 F.2d 293, 293-94 (5th Cir. 1980) (oral testimony of physician summarizing contents of 94,000 page F.D.A. new drug application).

165. *See* United States v. Denton, 556 F.2d 811, 815-17 (6th Cir.), *cert. denied*, 434 U.S. 892 (1977) ("composite tape" of selected conversations taped during twenty-day wiretap).

166. 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 1006 [06], at 1006-13 (1983); *accord*, M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 1006.1, at 1017 (1981); 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 599, at 547 (1981).

803(6),[167] is not subject to these two Rule 1006 requirements, even though the record may in fact be a "summary" of some underlying materials. This distinction is correctly drawn in *McAllen State Bank v. Linbeck Construction Corp.*[168] Computer printouts, described as "an accounting summary/breakdown of charges for work performed," were admitted over the objection that they were summaries of underlying records that had not been made available for inspection. Affirming, the Corpus Christi Court of Appeals noted:

> [H]ere we are dealing with two computer printout summary/breakdowns that, although each is a summary of underlying business records (labor and materials records), are themselves business records. Therefore, the computer printouts were entitled to be treated as business records, and not as a summary of business records for trial purposes.[169]

The San Antonio Court of Appeals contemporaneously drew the same correct distinction in a very similar case.[170]

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

Rule 1007 restricts the party-admission exception of the Best Evidence Rule to testimonial or written admissions. The common law version of the exception allowed extrajudicial oral admissions as well. The leading case was Baron Parke's decision in *Slatterie v. Pooley*,[171] which, notwithstanding Best Evidence objections, allowed proof of a document's contents in the form of a witness' oral testimony as to the defendant's alleged oral, out-of-court admission. This doctrine was followed in Texas,[172] with some restrictions.[173]

---

167. *See* Wellborn, *Article VIII: Hearsay*, 20 HOUS. L. REV. 477, 519-21 (1983) (discussing Rule 803(6)); Wellborn, *Authentication and Identification Under Article IX of the Texas Rules of Evidence*, 16 ST. MARY'S L.J. 371, 400 (1985) (discussing affidavit authentication of business records under Rule 902(10)).

168. 695 S.W.2d 10 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

169. *Id.* at 16.

170. *See* Longoria v. Greyhound Lines, Inc., 699 S.W.2d 298, 302-03 (Tex. App.—San Antonio 1985, no writ).

171. 151 Eng. Rep. 579 (Ex. 1840).

172. *See* Hoefling v. Hambleton, 84 Tex. 517, 519, 19 S.W. 689, 690 (1892) (adverse party's testimonial admission competent to prove terms of deed); Mecaskey v. Bewley Mills, 8 S.W.2d 688, 690 (Tex. Civ. App.—Fort Worth 1928, writ dism'd) (oral out-of-court statements and acquiescence admissible to prove terms of written partnership settlement). *See generally* 2 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1580 (Texas Practice 3d ed. 1980).

173. *See* Sanders v. Lane, 227 S.W. 946, 947 (Tex. Comm'n App. 1921, judgmt adopted).

Most authorities, including Wigmore[174] and McCormick,[175] criticized *Slatterie* as having carried the admission concept too far, in the face of legitimate Best Evidence concerns. McCormick argued:

> The evidence determined admissible in *Slatterie v. Pooley* was actually at two removes from the writing itself, being witness' report of the defendant's comment. Perhaps the policy of holding admissible any admission which a party-opponent chooses to make will suffice to justify the first step, but the second frequently raises the possibility of erroneous transmission without corresponding justification.[176]

Accordingly, McCormick argued that *Slatterie* should be rejected and only testimonial or written admissions received.[177] The Advisory Committee's Note to Federal Rule 1007 (which the Texas Rule copies verbatim) expressly adopted McCormick's analysis.[178]

The operation of the Rule may be illustrated as follows. In a case concerning a written contract, the terms of the contract may be shown by the opposing party's deposition or trial testimony, or by a letter in which he describes the terms. The terms, however, may not be proven by testimony of another witness to the party's oral statement describing the terms, although the latter would have been admissible at common law under the authority of *Slatterie*.

As the Advisory Committee further explained, the exclusion of oral admissions ceases "when nonproduction of the original has been accounted for and secondary evidence generally has become admissible."[179] Therefore, to return to the contract case example, after a showing that the original contract has been lost or destroyed,[180] or that it is in the opposing party's possession and he had notice that its

---

The court in *Sanders* stated that oral admissions of the grantor "as to the contents of an instrument, are receivable without producing it or accounting for its absence when no question arises as to its execution; but where its execution is directly involved . . . the declarations by the grantor of its execution are inadmissible in the absence of proof of its execution or existence." *Id.* at 947; *see also* 2 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1580 (Texas Practice 3d ed. 1980) (describing *Sanders* as "a rather surprising result since it is not proof of the execution primarily but of the *contents* that necessitates production under the Best Evidence Rule as usually stated." (emphasis in original; citation omitted)).

174. *See* 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1255 (Chadbourn rev. ed. 1972).

175. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 242 (3d ed. 1984).

176. *Id.*

177. *See id.*

178. *See* FED. R. EVID. 1007 advisory committee note.

179. *Id.*

180. *See* TEX. R. EVID. 1004(1).

terms would be in issue,[181] testimony of any witness to the party's oral description of the contract's terms would become admissible.

Q. *Rule 1008: Functions of Court and Jury*

Rule 1008 governs the allocation, between the judge and the jury, of authority to make fact determinations concerning Article X issues. It is designed to embody principles that have presumably governed these matters at common law.[182] Its effect is consistent with that of the more general provision, Rule 104, which governs the allocation between judge and jury in applying the Rules of Evidence.[183] The drafters of the Federal Rules apparently felt that this problem in the Best Evidence context was particularly tricky, and thus, called for a comparatively concrete and explicit allocation of issues.[184]

The purpose of Rule 1008, like Rule 104, is to leave to the jury all "ultimate" or "central" fact issues on which evidence creating a jury

---

181. *See id.* 1004(4); *see also supra* text accompanying notes 119-125.

182. *See* Levin, *Authentication and Content of Writings*, 10 RUTGERS L. REV. 632, 644 (1956) (cited in FED. R. EVID. 1008 advisory committee note); Morgan, *The Law of Evidence, 1941-45*, 59 HARV. L. REV. 481, 490-91 (1946). In Texas, there is considerable authority for the first sentence of the Rule, granting to the trial judge most decisions required in implementing the Best Evidence Rule. *See* 2 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1573 (Texas Practice 3d ed. 1980); Black, *The Texas Rules of Evidence — A Proposed Codification*, 31 SW. L.J. 969, 1015 (1977). Although Texas case authority is lacking for the second sentence, which gives certain ultimate or central issues to the jury, there is no contrary authority, and ample reason to believe that the Rule's content is fully consistent with the common law. *See* Black, *The Texas Rules of Evidence — A Proposed Codification*, 31 SW. L.J. 969, 1015-16 (1977).

183. *See* FED. R. EVID. 1008 advisory committee note (citing Rule 104); *see also* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 1008.1 (1981); D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 611 (1981); J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 1008[01] (1983). Rule 104(a) prescribes that the court determines preliminary questions concerning the admissibility of evidence, subject to Rule 104(b), which provides: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." FED. R. EVID. 104(b). The Advisory Committee explained the purpose of reserving preliminary issues covered by paragraph (b) to the jury as simply to preserve "the functioning of the jury as a trier of fact" as to "appropriate questions for juries." *See* FED. R. EVID. 104(b) advisory committee note; *see also* Wellborn, *Authentication and Identification Under Article IX of the Texas Rules of Evidence*, 16 ST. MARY'S L.J. 371, 374-75 (1985) (discussing the approach in the Rules to these issues of "conditional relevancy"). The specific divisions among issues made in Rule 1008 for Article X preliminary questions are consistent with this purpose.

184. *See* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 611, at 579 (1981).

issue has been presented,[185] while requiring the judge, as usual, to make preliminary fact determinations that the technical rules of evidence require. The latter allocation is stated in the opening sentence of the Rule; the former, in the second sentence.

Rule 1008 lists three issues that are to be construed as questions of fact for the jury: "(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 Advisory Committee's Note describes the three issues which are made jury questions, as "questions . . . which go beyond the mere administration of the rule preferring the original and into the merits of the controversy."[186] The Committee's Note adds the following illustration:

> For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue.[187]

This illutrates issue (a) in the Rule. Issue (b) may be illustrated quite simply: Surely if two documents were produced, the plaintiff claiming one to be the original and the defendant the other, the dispute must be settled by the jury.[188] Issue (c) is exemplified by the following: Plaintiff, having established that a written contract is lost, testifies to its terms by using evidence other than the original. Defendant objects on the ground that the plaintiff's testimony is inaccurate and offers his own "correct" version. The issue is for the jury, not the judge.

The more normal case, covered by the first sentence of the Rule, in which a preliminary fact issue is for the judge, is illustrated by the Advisory Committee as follows: "Thus, 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."[189] Many other

---

185. *See id.* § 613, at 590; *see also* 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 1008[02], at 1008-8 to 1008-9 (1983).

186. FED. R. EVID. 1008 advisory committee note.

187. *Id.* (citing Levin, *Authentication and Content of Writings*, 10 RUTGERS L. REV. 632 (1956)).

188. *See* Morgan, *The Law of Evidence, 1941-45*, 59 HARV. L. REV. 481, 490 (1946).

189. FED. R. EVID. 1008 advisory committee note.

examples may be given. The following issues of fact must be decided by the judge, not the jury, under the allocation made in Rule 1008: (1) whether an item that is the object of proof is a "writing," "recording," or "photograph" within the definitions in Rule 1001; (2) whether a proffered item is an "original" as defined in Rule 1001(3) (unless one of the circumstances described in Rule 1008(a) or (b) is presented); (3) whether a proffered item is a "duplicate" as defined in Rule 1001(4); (4) whether, when a duplicate is offered, one of the two conditions specified in rule 1003 ("(1) a 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") is present, so that the duplicate must be excluded; (5) whether all originals have been lost or destroyed (Rule 1004(1)); (6) whether originals were lost or destroyed by the proponent in bad faith (Rule 1004(1)); (7) whether no original is obtainable (Rule 1001(2)); (8) whether no original is in Texas (Rule 1001(3)); (9) whether an original is under the control of the party against whom other evidence of contents is offered, and whether he was put on notice that the content would be a subject of proof (Rule 1004(4)); (10) whether an item is "not closely related to a controlling issue" (Rule 1004(5)); (11) whether a document is either an official record, or a document authorized to be recorded or filed and actually recorded or filed (Rule 1005); (12) whether a copy offered to prove the terms of a public record is properly certified (Rule 1005); (13) whether a certified or compared copy can be obtained by the exercise of reasonable diligence (Rule 1005); (14) whether an item is so voluminous as to justify summary presentation under Rule 1006; (15) whether the originals of which a summary is offered were reasonably made available to other parties (Rule 1006).

Undoubtedly the foregoing list is incomplete, but it suffices to make the point that the great majority of fact issues arising in connection with the Best Evidence doctrines are for the trial judge to resolve. It is only where a fact issue is among the few specified in the second sentence of Rule 1008 that it is for the jury. Even in those instances, of course, the judge is required to exercise the usual control over the submission of jury issues. That is, the judge must first determine whether evidence has been presented sufficient to support a finding of the matter.[190]

190. *See id.* "The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations."

IV. CONCLUSION

It appears to be a matter of consensus that the Best Evidence Rule continues to serve a useful function in the modern world, because the underlying justification for the Rule—the special need for accuracy, and hence the special preference for primary evidence, when the written word is in issue [191]—remains a reality.[192] There have been changes in the world since the development of the Rule at common law, a few of which have been pertinent to Best Evidence doctrines. These include the development and proliferation of highly accurate techniques of reproduction of writings, and the development and ubiquity of many kinds of sound recordings, photography, and electronic data processing. These scientific and social events have not been ignored by the law. Thus, Article X contains provisions permitting rather free substitution of duplicates for originals, reflecting the law's adaptation to the development of copying techniques.[193] Also, the Best Evidence doctrines have been expanded to cover recordings, photographs, and electronically stored data of every kind, as well as writings.[194] With these modernizations, the Best Evidence doctrines seem to be uncontroversial. Texas adopted Article X of the Federal Rules of Evidence with very few changes. It appears likely that its provisions will serve usefuly without significant change for many years.

---

191. *See supra* text accompanying note 3.

192. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 231, at 705 (3d ed. 1984); *see also* Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 IOWA L. REV. 825, 847-48 (1966).

193. *See* TEX. R. EVID. 1001(4), 1003.

194. *See id.* 1001(1), (2), 1002.

APPENDIX

TEXAS RULES OF EVIDENCE
TEXAS RULES OF CRIMINAL EVIDENCE

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

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 reproduce the original.

Rule 1002. Requirement of Originals

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 law.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a 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.

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 outside the state.** No original is located in Texas; or

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

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

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.

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs, otherwise admissible, 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 a reasonable time and place. The court may order that they be produced in court.

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 his written admission, without accounting for the nonproduction of the original.

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.