

## BEST EVIDENCE

The most important aspect of the “best evidence” rule is its narrow scope. The best evidence rule applies only when a party is attempting to prove the *contents* of a writing. When attempting to prove a writing, that party must offer the “best evidence” of that writing. In other words, you are not allowed to offer the testimony of a witness who claims to have seen and memorized the writing; you must offer the writing itself. IN ALL OTHER CASES, THE RULES OF EVIDENCE DO NOT REQUIRE YOU TO PRODUCE THE “BEST” EVIDENCE. Thus, for example, even when the declarant is available, you are permitted to offer the declarant’s out-of-court statement by another witness (one who heard the statement), as long as the statement fits one of the hearsay exceptions.

This rule should be called the original documents rule. The reason we call it the best evidence rule is because in the 1700s, the goal of the rules of evidence was to limit, as much as possible, actual live testimony in favor of documentary evidence. The former was considered largely unreliable, and the latter was considered quite reliable. So, when the first treatise on the law of evidence was written in the 1700s, the author claimed that the most important aspect of evidence law was its search for the “best” evidence, which meant a search for written evidence. And, as you all know, there were no typewriters in those days (for carbon copies), much less copying machines, but there were scribes, who made several copies of the “original” writing, so finding the original writing was considered crucial.

The rules concerning best evidence are found at FRE 1001-08. After defining the terms in FRE 1001, FRE 1002 sets forth the rule that proof of the contents of a writing or a photograph requires production of the original writing or photograph. But FRE 1003 gives away much of the force of the rule by allowing the use of a duplicate in lieu of the original unless there is some question about the authenticity of the original, or if the court finds it would be unfair to admit the duplicate. FRE 1004 follows the trend of FRE 1003 by allowing the court to dispense with the best evidence rule if the original (1) was lost, not due to the bad faith of the proponent, (2) can’t be obtained, (3) is in the possession of the opposing side, or (4) goes to a collateral matter. The only other rule of which you need to be aware is FRE 1008, which discusses the roles of the court and jury when original documents are involved. FRE 1008 states that the general rule is that preliminary questions of fact regarding writings are for the court to decide under FRE 104(a). However, the party opposing admissibility raises as an issue (a) whether the writing ever existed, (b) whether another writing is the actual original, or (c) whether other evidence of the contents of the original document accurately reflects the contents in the original (for example, a party offers testimony about the contents of the original because the original can’t be produced for some reason), that issue is to be decided by the jury. The reason for this exception to the general rule is that to hold otherwise would allow the court to take some important factual issues away from the jury on foundational grounds, which violates our view that trial by jury is important.