

**ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS,
AND PHOTOGRAPHS**

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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 copy produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Comment

This rule is identical to F.R.E. 1001, except that the word “copy” in Pa.R.E. 1001(4) replaces the word “counterpart” used in F.R.E. 1001(4).

Paragraphs 1001(1) and (2) have no precise equivalent in Pennsylvania law, but the definitions of the terms writings, recordings and photographs are consistent with lay and legal usage in Pennsylvania.

The definition of an original writing, recording or photograph contained in paragraph 1001(3) appears to be consistent with Pennsylvania practice.

The definition of an original of data stored in a computer or similar device in paragraph 1001(3) is consistent with Pa.R.E. 901(b)(9) (authentication of evidence produced by a process or system).

Paragraph 1001(4) defines the term duplicate. This term is important because of the admissibility of duplicates under Pa.R.E. 1003. This Rule differs from the Federal Rule in that the word “counter-

part” has been replaced by the word “copy.” The word “counterpart” is used in paragraph 1001(3) to refer to a copy intended to have the same effect as the writing or recording itself. The word “copy” is used to mean a copy that was not intended to have the same effect as the original. Pennsylvania law has permitted the use of duplicates produced by the same impression as the original, as is the case with carbon copies. See *Brenner v. Leshner*, 332 Pa. 522, 2 A.2d 731 (1938); *Commonwealth v. Johnson*, 373 Pa. Super. 312, 541 A.2d 332 (1988); *Pennsylvania Liquor Control Bd. v. Evolo*, 204 Pa. Super. 225, 203 A.2d 332 (1964). Pennsylvania has not treated other duplicates as admissible unless the original was shown to be unavailable through no fault of the proponent. See *Hera v. McCormick*, 425 Pa. Super. 432, 625 A.2d 682 (1993); *Warren v. Mosites Constr. Co.*, 253 Pa. Super. 395, 385 A.2d 397 (1978). For this reason, the definition of duplicates, other than those produced by the same impression as the original, is new to Pennsylvania law. The justification for adopting the new definition is discussed in the Comment to Pa.R.E. 1003.

Rule 1002. Requirement of Original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, by other rules prescribed by the Supreme Court, or by statute.

Comment

Pa.R.E. 1002 differs from F.R.E. 1002 to eliminate the reference to Federal law and to make the Rule conform to Pennsylvania law. Pa.R.E. 1002 is consistent with Pennsylvania law.

This rule corresponds to the common law “best evidence rule.” See *Warren v. Mosites Constr. Co.*, 253 Pa. Super. 395, 385 A.2d 397 (1978). The rationale for the rule was not expressed in Pennsylvania cases, but commentators have mentioned four reasons justifying the rule.

- (1) The exact words of many documents, especially operative or dispositive documents, such as deeds, wills or contracts, are so important in determining a party’s rights accruing under those documents.
- (2) Secondary evidence of the contents of documents, whether copies or testimony, is susceptible to inaccuracy.
- (3) The rule inhibits fraud because it allows the parties to examine the original documents to detect alterations and erroneous testimony about the contents of the document.
- (4) The appearance of the original may furnish information as to its authenticity.

5 Weinstein & Berger, *Weinstein’s Evidence* § 1002(2) (Sandra D. Katz rev. 1994).

The common law formulation of the rule provided that the rule was applicable when the terms of the document were “material.” The materiality requirement has not been eliminated, but is now dealt with in Pa.R.E. 1004(4). That rule provides that the original is not required when the writing, recording or photograph is not closely related to a controlling issue.

The case law has not been entirely clear as to when a party is trying “to prove the content of a writing, recording, or photograph.” However, writings that are viewed as operative or dispositive have usually been considered to be subject to the operation of the rule. Such writings include deeds, see *Gallagher v. London Assurance Corp.*, 149 Pa. 25, 24 A. 115 (1892), contracts, see *In re Reuss’ Estate*, 422 Pa. 58, 220 A.2d 822 (1966), and attachments, see *L.C.S. Colliery, Inc. v. Globe Coal Co.*, 369 Pa. 1, 84 A.2d 776 (1951). On the other hand, writings are not usually treated as subject to the rule if they are only evidence of the transaction, thing or event. See *Hamill-Quinlan, Inc. v. Fisher*, 404 Pa. Super. 482, 591 A.2d 309 (1991); *Noble C. Quandt Co. v. Slough Flooring, Inc.*, 384 Pa. Super. 236, 558 A.2d 99 (1989). Thus, testimony as to a person’s age may be offered; it is not necessary to produce a birth certificate. See *Commonwealth ex rel. Park v. Joyce*, 316 Pa. 434, 175 A. 422

(1934). Or, a party's earnings may be proven by testimony; it is not necessary to offer business records. See *Noble C. Quandt Co. v. Slough Flooring, Inc.*, 384 Pa. Super. 236, 558 A.2d 99 (1989).

Traditionally, the best evidence rule applied only to writings. Photographs, which under the definition established by Pa.R.E. 1001(2) include x-ray films, videotapes, and motion pictures, are usually only evidence of the transaction, thing or event. It is rare that a photograph would be operative or dispositive, but in cases involving matters such as infringement of copyright, defamation, pornography and invasion of privacy, the requirement for the production of the original should be applicable. There is support for this approach in Pennsylvania law. See *Commonwealth v. Lewis*, 424 Pa. Super. 531, 623 A.2d 355 (1993) (video tape); *Anderson v. Commonwealth*, 121 Pa. Cmwlth. 521, 550 A.2d 1049 (1988) (film).

Rule 1003. Admissibility of Duplicates.

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

Comment

This rule is identical to F.R.E. 1003 and is a modest extension of Pennsylvania law.

Under the traditional best evidence rule, copies of documents were not routinely admissible. This view dated back to the time when copies were made by hand copying and were therefore subject to inaccuracy. On the other hand, Pennsylvania courts have admitted copies made by techniques that are more likely to produce accurate copies. For example, when a writing is produced in duplicate or multiply each of the copies is treated as admissible for purposes of the best evidence rule. See *Brenner v. Leshner*, 332 Pa. 522, 2 A.2d 731 (1938); *Pennsylvania Liquor Control Bd. v. Evolo*, 204 Pa. Super. 225, 203 A.2d 332 (1964).

In addition, various Pennsylvania statutes have treated some accurate copies as admissible. See 42 Pa.C.S.A. § 6104 (governmental records in the Commonwealth); 42 Pa.C.S.A. § 5328 (domestic records outside the Commonwealth and foreign records); 42 Pa.C.S.A. § 6106 (documents recorded or filed in a public office); 42 Pa.C.S.A. § 6109 (photographic copies of business and public records); 42 Pa.C.S.A. § 6151-59 (certified copies of medical records).

The extension of similar treatment to all accurate copies seems justified in light of modern practice. Pleading and discovery rules such as Pa.R.C.P. 4009.1 (requiring production of originals of documents and photographs etc.) and Pa.R.Crim.P. 573(B)(1)(f) and (g) (requiring disclosure of originals of documents, photographs and recordings of electronic surveillance) will usually provide an adequate opportunity to discover fraudulent copies. As a result, Pa.R.E. 1003 should tend to eliminate purely technical objections and unnecessary delay. In those cases where the opposing party raises a genuine question as to authenticity or the fairness of using a duplicate, the trial court may require the production of the original under this rule.

Official Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001.

Committee Explanatory Reports:

Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).

Source

The provisions of this Rule 1003 amended March 29, 2001, effective April 1, 2001, 31 Pa.B. 1993. Immediately preceding text appears at serial page (245809).

Rule 1004. Admissibility of Other Evidence of Contents.

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

- (1) *Originals Lost or Destroyed.* All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
- (2) *Original Not Obtainable.* No original can be obtained by any available judicial process or procedure; or
- (3) *Original in Possession of Opponent.* At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
- (4) *Collateral Matters.* The writing, recording, or photograph is not closely related to a controlling issue.

Comment

This rule is identical to F.R.E. 1004.

Paragraph 1004(1) is consistent with Pennsylvania law. See *Olson & French, Inc. v. Commonwealth*, 399 Pa. 266, 160 A.2d 401 (1960); *Brenner v. Lesher*, 332 Pa. 522, 2 A.2d 731 (1938). When the proponent of the evidence alleges that it is lost, there should be evidence that a sufficient search was made. See *Brenner v. Lesher*, 332 Pa. 522, 2 A.2d 731 (1938); *Hera v. McCormick*, 425 Pa. Super. 432, 625 A.2d 682 (1993).

Paragraphs 1004(2), 1004(3) and 1004(4) are consistent with Pennsylvania law. See *Otto v. Trump*, 115 Pa. 425, 8 A. 786 (1887) (consistent with Pa.R.E. 1004(2)); *Abercrombie v. Bailey*, 326 Pa. 65, 190 A. 725 (1937) (consistent with Pa.R.E. 1004(3)); *Durkin v. Equine Clinics, Inc.*, 313 Pa. Super. 75, 459 A.2d 417 (1983) (consistent with Pa.R.E. 1004(4)); *McCullough v. Holland Furnace Co.*, 293 Pa. 45, 141 A. 631 (1928) (consistent with Pa.R.E. 1004(4)); see also Comment to Pa.R.E. 1002.

Under F.R.E. 1004, when production of the original is not required, the proffering party need not offer a duplicate even if that is available; the proffering party may present any evidence including oral testimony. See F.R.E. 1004 advisory committee's note. There is no hierarchy of secondary evidence. There is some authority in Pennsylvania that seems to require the next best evidence when presentation of the original is not required. See *Otto v. Trump*, 115 Pa. 425, 8 A. 786 (1887); *Stevenson, Bowen & Nesmith v. Hoy*, 43 Pa. 191 (1862). This approach adds an unnecessary level of complexity. The normal motivation of a party to produce the most convincing evidence together with the availability of discovery to uncover fraud seems adequate to control abuse. Thus, Pa.R.E. 1004 follows the approach of F.R.E. 1004.

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 a copy as provided by Pa.R.E. 901 or 902, by statute, or by testimony of 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.

Comment

The language of the first sentence of this rule differs somewhat from F.R.E. 1005 to conform more closely to Pa.R.E. 901 and 902. The changes are not intended to be substantive. This rule is consistent with Pennsylvania law. There are several statutes that provide that copies of various kinds of public documents and records are admissible. See Comments to Pa.R.E. 901 and 902.

Rule 1006. Summaries.

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

Comment

This rule is identical to F.R.E. 1006 and is consistent with Pennsylvania law. See *Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 285 A.2d 451 (1971); *Royal Pioneer Paper Box Mfg. Co. v. Louis Dejonge & Co.*, 179 Pa. Super. 155, 115 A.2d 837 (1955); *Keller v. Porta*, 172 Pa. Super. 651, 94 A.2d 140 (1953).

Rule 1007. Testimony or Written Admission of Party.

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

Comment

This rule is identical to F.R.E. 1007. There is no precise equivalent to Pa.R.E. 1007 under Pennsylvania law, but the rule is consistent with Pennsylvania practice. Pa.R.C.P. 1019(h) requires a party to attach a copy of a writing to a pleading if any claim or defense is based on the writing. A responsive pleading admitting the accuracy of the writing would preclude an objection based on the original writings rule. Similarly, Pa.R.C.P. 4014(a) permits a party to serve any other party with a request for admission as to the genuineness, authenticity, correctness, execution, signing, delivery, mailing or receipt of any document described in the request. Pa.R.C.P. 4014(d) provides that any matter admitted is conclusively established.

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 Pa.R.E. 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.

225 Rule 1008

RULES OF EVIDENCE

Comment

This rule is identical to F.R.E. 1008 except for the reference to “Pa.R.E.” instead of “rule.” There is no equivalent to this rule under Pennsylvania law, but this approach is consistent with Pennsylvania practice.