

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

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Rule 1001. Definitions That Apply to This Article.

In this article:

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

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

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

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

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

Comment

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

Paragraph 1001(e) 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 This rule differs from the Federal Rule in that the word “counterpart” has been replaced by the word “copy.” The word “counterpart” is used in paragraph 1001(d) to refer to a copy intended to have the same effect as the writing or recording itself. The word “copy” is used in paragraph 1003(e) 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. 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.

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Source

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Rule 1002. Requirement of the Original.

An original writing, recording, or photograph is required in order to prove its content unless these rules, other rules prescribed by the Supreme Court, or a statute provides otherwise.

Comment

Pa.R.E. 1002 differs from F.R.E. 1002 to eliminate the reference to Federal law.

This rule corresponds to the common law "best evidence rule." See *Hera v. McCormick*, 425 Pa. Super. 432, 625 A.2d 682 (1993). 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(d). 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. 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. Quandel 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. Quandel Co., supra*.

Traditionally, the best evidence rule applied only to writings, but Pa.R.E. 1002 may be applicable to recordings or photographs. However, recordings and photographs are usually only evidence of the transaction, thing or event. It is rare that a recording or photograph would be operative or dispositive, but in cases involving matters such as infringement of copyright, defamation, pornography and inva-

sion 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).

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Rule 1003. Admissibility of Duplicates.

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

Comment

This rule is identical to F.R.E. 1003.

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 multiplicate 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. § 6104 (governmental records in the Commonwealth); 42 Pa.C.S. § 5328 (domestic records outside the Commonwealth and foreign records); 42 Pa.C.S. § 6106 (documents recorded or filed in a public office); 42 Pa.C.S. § 6109 (photographic copies of business and public records); 42 Pa.C.S. §§ 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. No. 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.

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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).

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 1003 amended March 29, 2001, effective April 1, 2001, 31 Pa.B. 1993; rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial page (276591).

Rule 1004. Admissibility of Other Evidence of Content.

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

- (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
- (b) an original cannot be obtained by any available judicial process;
- (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
- (d) the writing, recording, or photograph is not closely related to a controlling issue.

Comment

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

When the proponent of the evidence alleges that it is lost, there should be evidence that a sufficient search was made. *See Hera v. McCormick*, 425 Pa. Super. 432, 625 A.2d 682 (1993).

Under Pa.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. 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.

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The provisions of this Rule 1004 rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial page (276592).

Rule 1005. Copies of Public Records to Prove Content.

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

Comment

This rule is identical to F.R.E. 1005.

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The provisions of this Rule 1005 rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial pages (276592) to (276593).

Rule 1006. Summaries to Prove Content.

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

Comment

This rule is identical to F.R.E. 1006.

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The provisions of this Rule 1006 rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial page (276593).

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

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

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. For example, Pa.R.C.P. No. 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 Rule 1002.

Similarly, Pa.R.C.P. No. 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. No. 4014(d) provides that any matter admitted is conclusively established.

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The provisions of this Rule 1007 rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial page (276593).

Rule 1008. Functions of the Court and Jury.

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

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

Comment

This rule is identical to F.R.E. 1008.

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