

Faculty Publications

1991

Best Evidence Rule

Paul C. Giannelli

Follow this and additional works at: https://scholarlycommons.law.case.edu/faculty_publications

 Part of the [Evidence Commons](#), and the [Litigation Commons](#)

Repository Citation

Giannelli, Paul C., "Best Evidence Rule" (1991). *Faculty Publications*. 511.
https://scholarlycommons.law.case.edu/faculty_publications/511

This Article is brought to you for free and open access by Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

PUBLIC DEFENDER REPORTER

Vol. 14, No. 1

MAR 08 1991

Winter 1991

BEST EVIDENCE RULE

Paul C. Giannelli

Albert J. Weatherhead III & Richard W. Weatherhead
Professor of Law, Case Western Reserve University

Article X of the Ohio Rules of Evidence sets forth the requirements of the "best evidence" rule. Rule 1002 states the rule — to prove the contents of a writing, recording or photograph, the original must be introduced at trial unless a statute or another rule recognizes an exception. Rules 1003 to 1007 specify exceptions. Rule 1002 must be read in conjunction with Rule 1001, which defines the terms writing, recording, photograph, and original.

Rule 1002 is consistent with prior Ohio law. See *Gennaro Pavers, Inc. v. Kosydar*, 42 Ohio St.2d 491, 330 N.E. 665 (1975); *Sinks v. Reese*, 19 Ohio St. 306 (1869); *Hine v. Dayton Speedway Corp.*, 20 Ohio App.2d 185, 187, 252 N.E.2d 648 (1969); *City Club of Toledo, Inc. v. Board of Liquor Control*, 3 Ohio App.2d 339, 341, 210 N.E.2d 726, 728 (1964) ("Secondary evidence is never admitted unless it is made manifest that that which is better cannot be obtained.").

APPLICATION OF RULE

Rule 1002 applies only to writings, recordings, and photographs, and then only when a party seeks to prove their contents. There is no general rule requiring the "best evidence." For example, a party may offer testimony describing an object without being required to offer the actual object into evidence. See *United States v. Figueroa*, 618 F.2d 934, 941 (2d Cir. 1980)(heroin); *Chandler v. United States*, 318 F.2d 356, 357 (10th Cir. 1963)(whiskey jars); *Holle v. State*, 26 Md. App. 267, 274, 337 A.2d 163, 166 (1975)(stolen marked currency).

Thus, a more apt description of the rule is the "original writing" rule. See *McCormick*, Evidence § 229 (3d ed. 1984). The Ohio cases are in accord. See *State v. Maupin*, 42 Ohio St.2d 473, 330 N.E.2d 708 (1975) (best evidence rule does not apply to physical evidence); *Napolet v. Board of Liquor Control*, 67 Ohio Abs. 108, 119 N.E.2d 93 (App. 1953).

The special nature of writings gives rise to their being singled out for application of this rule. The copying of a writing is especially susceptible to the introduction of inaccuracies, and even a minor inaccuracy may have significant legal consequences. See 4 *Wigmore*, Evidence § 1181 (Chadbourn rev. 1972).

Proving the Contents of a Writing

The rule applies only when a party attempts to prove the contents of a writing or recording. Some events and transactions, such as those involving deeds, contracts, and judgments, are essentially written transactions, and the rule requires production of the original writing. See *Toledo v. Tucker*, 99 Ohio App. 346, 133 N.E.2d 411 (1954) (testimony regarding contents of agency regulation inadmissible).

The rule, however, does not apply when the event sought to be proved existed *independently* of a writing. For example, if an accused makes an oral confession which is recorded or subsequently reduced to writing, the rule does not require the production of the recording or writing. The prosecution is not attempting to prove the contents of the recording or writing, but rather the independent event (oral confession) that happened to be recorded. See also *State v. James*, 41 Ohio App.2d 248, 325 N.E.2d 267 (1974) (telephone conversation could be proved by testimony of person who received call or by tape recording of the call); *American Security Service, Inc. v. Baumann*, 32 Ohio App.2d 237, 289 N.E.2d 373 (1972) (account could be proved by testimony of witnesses or by records); *McCormick*, Evidence § 233 (3d ed. 1984) ("evidence of a payment may be given without production of the receipt, or evidence of a marriage without production of the marriage certificate."). The trial court, however, has authority to require production of the writing or recording pursuant to Rule 611(A), which recognizes the court's general authority to control the presentation of evidence.

The original document rule also applies where a party chooses to introduce a writing to prove a fact that could be proved without the writing. Thus, in the confession example cited above, if the prosecution chose to use a writing to prove the confession, it would have to offer the original writing. A copy of the writing or testimony by a witness who read the written confession would be inadmissible unless the original was unavailable.

The Advisory Committee's Note to Federal Rule 1002 contains the following comment:

Application of the rule requires a resolution of the

question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. McCormick § 198; 4 Wigmore § 1245. Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

Photographs

Rule 1002 provides that the original photograph is required to prove the contents of the photograph. Rule 1001(2) defines photographs to include X-ray films, video-tapes, and motion pictures. In most cases, however, photographs are *not* offered to prove their contents. The Advisory Committee's Note to Federal Rule 1002 explains:

The assumption should not be made that the rule will come into operation on every occasion when use is made of the photograph in evidence. On the contrary, the rule will seldom apply to ordinary photographs. In most instances a party *wishes* to introduce the item and the question raised is the propriety of receiving it in evidence. Cases in which an offer is made of the testimony of a witness as to what he saw in a photograph or motion picture, without producing the same, are most unusual. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable. *Paradis, The Celluloid Witness*, 37 U.Colo.L.Rev. 235, 249-251 (1965).

On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture falls in this category. Similarly as to situations in which the picture is offered as having independent probative value, e.g. automatic photograph of bank robber. See *People v. Doggett*, 83 Cal.App.2d 405, 188 P.2d 792 (1948), photograph of defendants engaged in indecent act; *Mouser and Philbin, Photographic Evidence — Is There a Recognized Basis for Admissibility?* 8 Hastings L.J. 310 (1957). The most commonly encountered of this latter group is of course, the X-ray, with substantial authority calling for production of the original

DEFINITIONS: WRITINGS, ORIGINALS, AND DUPLICATES

Application of the original writing rule requires that terms such as writing, original, and duplicate be defined. Rule 1001 contains the definitional provisions for Article X.

Writings and Recordings

Rule 1001(1) defines writings and recordings broadly to include writings produced from modern photographic and computer systems. Rules 1001(2) defines photographs

to include X-ray films, video-tapes, and motion pictures. The Advisory Committee's Note to Federal Rule 1001 comments:

Traditionally the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments.

Originals

Rule 1001(3) defines an original as the writing or recording itself or any "counterpart intended to have the same effect by a person executing or issuing it." Hence, the test for determining whether a counterpart is an original is the *intent* of the person executing or issuing the writing or recording. This represents a change in Ohio law. See *Chrismer v. Chrismer*, 103 Ohio App. 23, 144 N.E.2d 494 (1956) (carbon copy not separately executed is not an original); Comment, *Duplicate Originals and the Best Evidence Rule*, 19 Ohio St. L.J. 520 (1958).

Rule 1001(3) contains a specific provision on computer-generated writing: "any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'" See *Touche Ross & Co. v. Landskroner*, 20 Ohio App.3d 354, 356, 486 N.E.2d 850, 852 (1984).

The Advisory Committee's Note to Federal Rule 1001 contains the following comment:

In most instances, what is an original will be self-evident and further refinement will be unnecessary. However, in some instances particularized definition is required. A carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer. While strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage require that any print from the negative be regarded as an original. Similarly, practicality and usage confer the status of original upon any computer printout. *Transport Indemnity Co. v. Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965).

Duplicates

Rule 1001(4) defines a duplicate as a counterpart produced by a process "which accurately reproduce[s] the original." Thus, handwritten copies are not duplicates. If a counterpart, no matter how produced, is intended by the person executing or issuing it to have the same effect as the original, the counterpart is an original under Rule 1001(3). A counterpart, therefore, may be either an original or a duplicate, depending on the intent of the person executing or issuing it. The rule must be read in conjunction with Rule 1003, which provides that "duplicates" are generally admissible on the same basis as originals.

The Advisory Committee's Note to Federal Rule 1001 comments:

The definition describes 'copies' produced by methods possessing an accuracy which virtually eliminates the possibility of error. Copies thus

produced are given the status of originals in large measure by Rule 1003, *infra*. Copies subsequently produced manually, whether handwritten or typed, are not within the definition. 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. . . .

ADMISSIBILITY OF DUPLICATES

Rule 1003 governs the admissibility of "duplicates," as defined in Rule 1001(4). It is sometimes called the "Xerox" rule, because it makes Xerox copies generally admissible.

Rule 1003 changes prior Ohio law. Under prior law the offering party had the burden of establishing an adequate excuse for failing to produce the original before secondary evidence could be admitted. Rule 1003 reverses this burden for duplicates as defined in Rule 1001(4); not all copies qualify as duplicates under that provision. Duplicates are admissible *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."

The Advisory Committee's Note to Federal Rule 1003 contains the following commentary:

When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in Rule 1001(4), *supra*, a "duplicate" possesses this character.

Therefore, if no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under the rule. . . . Other reasons for requiring the original may be present 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. *United States v. Alexander*, 326 F.2d 736 (4th Cir. 1964). And see *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*, 265 F.2d 418, 76 A.L.R.2d 1344 (2d Cir. 1959).

The House Judiciary Committee added the following comment: "The Committee approved this Rule in the form submitted by the Court, with the expectation that the courts would be liberal in deciding that a 'genuine question is raised as to the authenticity of the original.' " H.R. Rep. No. 650, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7075, 7090.

In *National City Bank v. Fleming*, 2 Ohio App.3d 50, 440 N.E.2d 590 (1981), the court wrote:

A party seeking to exclude a duplicate from the evidence pursuant to Evid. R. 1003 has the burden of demonstrating that the duplicate should not be admitted. Under this rule, a determination as to whether such duplicate should be admitted is within the sound discretion of the trial court, and unless it is apparent from the record that the decision of the court is arbitrary or unreasonable, the determination will not be disturbed on appeal. *Id.* at 57.

EXCEPTIONS

As discussed above, Rule 1003, the "Xerox" rule, carves out an exception for duplicates. Evidence Rule 1004 specifies four additional conditions under which production of an original is not required. If any of the conditions specified in Rule 1004 are satisfied, secondary evidence is admissible. The rule does not prescribe the type of secondary evidence that must be produced. For example, if an original is lost, secondary evidence in the form of a copy or in the form of the testimony of a witness is permitted. The copy is not preferred. The Advisory Committee's Note to Federal Rule 1004 explains:

The rule recognizes no "degrees" of secondary evidence. While strict logic might call for extending the principle of preference beyond simply preferring the original, the formulation of a hierarchy of preferences and a procedure for making it effective is believed to involve unwarranted complexities. Most, if not all, that would be accomplished by an extended scheme of preferences will, in any event, be achieved through the normal motivation of a party to present the most convincing evidence possible and the arguments and procedures available to his opponent if he does not. Compare McCormick § 207.

Originals Lost or Destroyed

Rule 1004(1) provides that secondary evidence is admissible if all the originals are lost or destroyed, provided that the offering party has not lost or destroyed the originals in bad faith. According to the House Judiciary Committee Report, "loss or destruction of an original by another person at the instigation of the proponent should be considered as tantamount to loss or destruction in bad faith by the proponent himself." H.R. No. 650, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News, 7075, 7090.

The rule is consistent with prior Ohio law. See R.C. 1217.41 (copy of business record admissible if original "destroyed or otherwise disposed of in good faith in the regular course of business"); *Gennaro Pavers, Inc. v. Kosydar*, 42 Ohio St.2d 491, 330 N.E.2d 665 (1975) (carbon copies admitted where originals destroyed in fire); *Lessee of Blackburn v. Blackburn*, 8 Ohio 81 (1837); *Lessee of Allen v. Parish*, 3 Ohio 107 (1827); *Hine v. Dayton Speedway Corp.*, 20 Ohio App.2d 185, 252 N.E.2d 648 (1969); *Bevis v. American Railway Express Co.*, 17 Ohio App. 73 (1922); *Weisenberg v. State*, 12 Ohio App. 272, 274 (1920) (secondary evidence inadmissible without proof that reasonable diligence had been exercised to secure production of original); *Cities Services Oil Co. v. Dayton Reliable Motors, Inc.*, 44 Ohio Abs. 559, 65 N.E.2d 727 (App. 1943) (insufficient proof that sales slips were lost).

Original Not Obtainable

Rule 1004(2) provides that secondary evidence is admissible if no original can be obtained by any available judicial process or procedure. The Advisory Committee's Note to Federal Rule 1004 elaborates:

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. No further showing is required. See McCormick § 202.

The rule is consistent with prior Ohio law. See Fosdick v. Van Horn, 40 Ohio St. 459 (1884) (secondary evidence admissible if originals out of state and beyond jurisdiction of the court); Reed v. State, 15 Ohio 217 (1846) (secondary evidence admissible if original is in foreign jurisdiction beyond reach of subpoena power); Falardeau v. W.H.H. Smith Co., 13 C.C.(NS) 268, 21 C.C. 649 (1909) (secondary evidence inadmissible due to lack of attempt to subpoena original).

Original in Possession of Opponent

Rule 1004(3) provides that secondary evidence is admissible if the opposing party fails to produce the original at trial, despite having been put on notice while the original was under his control that the contents of the original would be subject to proof at trial. Notice may be by pleadings or otherwise.

The Advisory Committee's Note to Federal Rule 1004 contains the following commentary:

A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to be confused with orders to produce or other discovery procedures, as the purpose of the procedure under this rule is to afford the opposite party an opportunity to produce the original, not to compel him to do so. McCormick § 203.

In *Railway Co. v. Cronin*, 38 Ohio St. 122 (1882), the Supreme Court held that "where a written instrument is in the hands of an adverse party, its contents cannot be proved by parol until its production has been called for and refused. There are, however, . . . three well-established exceptions to this general rule, and in which notice to produce is not necessary. . . . Thirdly, where, *from the nature of the action, the defendant has notice that the plaintiff intends to charge him with possession of the instrument.*" *Id.* at 125. See also *Choteau v. Raitt*, 20 Ohio 132 (1851) (syllabus, para. 2) ("A notice given to produce a paper, claimed to be in the possession of the party to whom notice is given, is not, as a general rule, a reasonable notice, unless given before the trial of the cause, in which said paper is wanted, is commenced."); *Johnson v. Stedman*, 3 Ohio 94, 97 (1827) ("It is a common practice to receive parol evidence of the contents of a deed or other instruments of writing, where the deed or instrument . . . is in the possession of the opposite party, if notice has first been given to produce it."); *Janchar v. Cerkenik*, 35 Ohio App. 519, 172 N.E. 634 (1930).

Collateral Matters

Rule 1004(4) provides that an original is not required with respect to collateral matters, that is, matters "not closely related to a controlling issue." The Advisory Committee's Note to Federal Rule 1004 comments: "While difficult to define with precision, situations arise in which no good purpose is served by production of the original. Examples are the newspaper in an action for the price of publishing defendant's advertisement, *Foster-Holcomb Investment Co. v. Little Rock Publishing Co.*, 151 Ark. 449, 236 S.W. 597 (1922), and the streetcar

transfer of plaintiff claiming status as a passenger, *Chicago City Ry. Co. v. Carroll*, 206 Ill. 318, 68 N.E. 1087 (1903). Numerous cases are collected in McCormick § 200, p. 412, n. 1."

There are few Ohio cases on this issue. See *Babcock v. Prudential Insurance Co. of America*, 42 Ohio Abs. 271, 280, 60 N.E.2d 495 (App. 1944) ("The rule is well recognized that where writing is *pertinent* to a question under consideration, the writing itself is the best evidence.") (emphasis added).

PUBLIC RECORDS

Rule 1005 provides for the admissibility of copies of official records and recorded documents, thus recognizing an automatic exception from the requirements of the original writing rule. This exception is consistent with the treatment of public records throughout the Rules of Evidence. For example, Rule 902, which governs authentication of documents, makes most public records "self-authenticating." In addition, Rule 803(8) recognizes a hearsay exception for public records. The end result of these rules is that certified copies of public records are often admissible without the need to call a witness.

The Advisory Committee's Note to Federal Rule 1005 contains the following commentary:

Public records call for somewhat different treatment. Removing them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian. As a consequence judicial decision and statutes commonly hold that no explanation need be given for failure to produce the original of a public record. McCormick § 204; 4 Wigmore §§ 1215-1228. This blanket dispensation from producing or accounting for the original would open the door to the introduction of every kind of secondary evidence of contents of public records were it not for the preference given certified or compared copies. Recognition of degrees of secondary evidence in this situation is an appropriate *quid pro quo* for not applying the requirement of producing the original.

The rule is consistent with prior Ohio law. See Civ. R. 44 (certified copies of domestic and foreign official records); R.C. 121.20 (certified copies of official records); R.C. 1701.92 and 1702.53 (certified copies of articles of incorporation and record of corporate minutes); R.C. 2317.42 (certified copies of official reports); R.C. 5301.43 (certified copies of deeds); *Lessee of Sheldon v. Coates*, 10 Ohio 278, 282 (1840) ("All public documents which cannot be removed from one place to another, may be authenticated by means of a copy, proved on oath to have been examined with the original."); *State v. Smith*, 55 Ohio App.2d 202, 380 N.E.2d 353 (1977).

SUMMARIES

Rule 1006 provides that 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 Advisory Committee's Note to Federal Rule 1006 contains the following comment: "The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury. The rule recognizes this practice, with

appropriate safeguards.”

The rule is consistent with prior Ohio law. See R.C. 2317.36 (reports of experts); *Petticrew v. Petticrew*, 98 Ohio App. 260, 129 N.E.2d 194 (1953), *appeal dismissed* by 161 Ohio St. 118 (1954); *Heiser Brothers Co. v. Cleveland*, 44 Ohio App. 560, 186 N.E. 620 (1932); *McNaughton v. Presbyterian Church of Coshocton County*, 35 Ohio App. 443, 172 N.E. 561 (1930); *Accurate Die Casting Co. v. Cleveland*, 68 Ohio Abs. 230, 113 N.E.2d 401 (App. 1953).

Requirements

Rule 1006 explicitly provides for two safeguards. First, the originals or duplicates must be made available for inspection and copying by the other parties. Second, the court may order the originals or duplicates produced in court.

Case law imposes additional requirements. For example, a summary is not admissible if the originals upon which it is based are inadmissible. See *Horning-Wright Co. v. Great American Ins. Co.*, 27 Ohio App.3d 261, 263, 500 N.E.2d 890 (1985); *State Office Systems, Inc. v. Olivetti Corp. of American*, 762 F.2d 843, 845 (10th Cir. 1985); *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1259 (9th Cir. 1984). In other words, Rule 1006 is only an exception to the original writing rule; it is not an exception to the hearsay rule. The underlying documents must qualify as business records, Rule 803(6), public records, Rule 803(8), or be otherwise admissible.

Similarly, because Rule 1006 is an exception to the original writing rule, it does not apply to verbal statements. “[T]here is no provision for the admission of summaries of the testimony of out-of-court witnesses.” *United States v. Goss*, 650 F.2d 1336, 1344 n.5 (5th Cir. 1981).

Implicit in the rule is the requirement that the summary accurately summarize the original documents. A number of cases have excluded proffered summaries on this basis. See *Needham v. White Labs, Inc.*, 639 F.2d 394, 403 (7th Cir.), *cert. denied*, 454 U.S. 927 (1981) (summary of medical articles excluded because expert had not read all of the articles); *United States v. Sorrention*, 726 F.2d 876, 884 (1st Cir. 1984) (summaries of figures excluded because “there was virtually no documentation.”).

The use of summaries often requires expert testimony. See *United States v. Kaatz*, 705 F.2d 1237, 1245 (10th Cir. 1983). Rule 702 governs the qualifications of experts. Expert testimony, however, is not always required when summaries are introduced. See *United States v. Jennings*, 724 F.2d 436, 443 (5th Cir.), *cert. denied*, 467 U.S. 1227 (1984) (“When a chart does not contain complicated calculations requiring the need of an expert for accuracy, no special expertise is required in presenting the chart.”).

Pedagogical Aids to Jury

The use of summaries or charts as evidence must be distinguished from the use of summaries and charts as pedagogical devices. A summary admitted under Rule 1006 is itself evidence and should go to the jury room along with other exhibits. Charts and other visual aids that merely summarize or organize testimony or documents that have already been admitted in evidence are not themselves evidence and should not be sent to the jury room. See *United States v. Possick*, 849 F.2d 332,

339 (8th Cir. 1988), *cert. denied*, 110 S. Ct. 213 (1989); *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 431 (5th Cir. 1985).

Business records

The advent of computer-generated business records has sometimes caused confusion between Rule 1006 and the business records exception to the hearsay rule, Rule 803(6). For example, computer printouts of a business ledger kept on a computer are the actual records, not summaries, and thus Rule 803(6) controls, not Rule 1006. *United States v. Catabran*, 836 F.2d 453, 457 (9th Cir. 1988). Similarly, the retrieval of data stored on a computer, as opposed to a selective compilation of random pieces of data, are business records, not summaries. *United States v. Sanders*, 749 F.2d 195, 199 (5th Cir. 1984).

Additional Problems

Summaries should be carefully scrutinized by the adverse party. One ABA report highlights the problem:

The use of summaries has become an integral part of complex litigation. Yet, in such cases, summaries rarely ‘summarize’ in a neutral fashion.

Within the frequently complicated calculations which may underlie them, such summaries are often replete with assumptions (and, commonly, arguments) concerning factual or legal matters which are the subject of vigorous dispute. Due to the sophistication and expertise of the preparers, moreover, such assumptions (or arguments) may well be unascertainable except upon very close scrutiny. ABA Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* 344 (1983).

United States v. Seelig, 622 F.2d 207 (6th Cir.), *cert. denied*, 449 U.S. 869 (1980), illustrates this point. It involved the prosecution of three pharmacists for improperly dispensing drugs. The prosecution offered a sales chart comparing the defendants’ sale of certain items with those of eight other pharmacies. On appeal, the Sixth Circuit ruled the summary inadmissible because there had been no attempt to compare the stores: “The record does not show these other stores were the same size, covered the same marketing area, were open the same hours, had pharmacists on duty at all times, had the same access to the public, or most importantly, charged the same prices — all of which could have significantly affected the volume of sales.” *Id.* at 215.

ADMISSIONS

Rule 1007 recognizes an exception to the original writing rule where the party against whom the contents of a writing, recording or photograph is offered admits the contents. The rule is limited to admissions that are in writing or are part of the testimony or deposition of the party. This limitation was not recognized by the prior Ohio cases. See *Edgar v. Richardson*, 33 Ohio St. 581 (1878).

The Advisory Committee’s Note to Federal Rule 1007 explains the decision to limit the exception:

While the parent case, *Slaterie v. Pooley*, 6 M. & W. 664, 151 Eng. Rep. 579 (Exch. 1840), allows proof of contents by evidence of an oral admission by the party against whom offered, without accounting for non-production of the original, the risk of inaccuracy is

substantial and the decision is at odds with the purpose of the rule giving preference to the original. See 4 Wigmore § 1255. The instant rule follows Professor McCormick's suggestion of limiting this use of admissions to those made in the course of giving testimony or in writing. McCormick § 208, p. 424. The limitation, of course, does not call for excluding evidence of an oral admission when nonproduction of the original has been accounted for and secondary evidence generally has become admissible. Rule 1004, *supra*.

Accordingly, oral admissions may be admissible if the original cannot be produced under Rule 1004. They would not be admissible under Rule 1007.

FUNCTIONS OF JUDGE AND JURY

Rule 1008 specifies the functions of the court and jury in applying the requirements of the original writing rule. Under most circumstances, the court decides preliminary questions concerning the applicability of the rule. See Rule 104(A). This part of the rule is consistent with prior Ohio law. See *Lessee of Blackburn v. Blackburn*, 8 Ohio 81 (1837). In *Hine v. Dayton Speedway Corp.*, 20 Ohio App.2d 185, 252 N.E.2d 648 (1969), the court wrote: "The quantum and quality of proof required for the admission of secondary evidence is not gauged by a uniform rule, but rests largely within the discretion of the trial court." *Id.* at 188. See *also Sprang v. Doench*, 3 Ohio Abs. 752 (C.P. 1925).

The second part of the rule recognizes three circumstances in which the jury, rather than the court, decides the issue. These circumstances arise in cases in which "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." This provision represents a specialized application of Rule 104(B) on conditional relevancy.

The Advisory Committee's Note to Federal Rule 1008 elaborates:

Most preliminary questions of fact in connection with applying the rule preferring the original as evidence of contents are for the judge, under the general principles announced in Rule 104, *supra*. 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. However, questions may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. 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. Levin, *Authentication and Content of Writings*, 10 Rutgers L. Rev. 632, 644 (1956). The latter portion of the instant rule is designed to insure treatment of these situations as raising jury questions. 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. See Rule 104(b), *supra*.

See generally Morgan, *The Law of Evidence, 1941-45*, 59 Harv. L. Rev. 481, 490-91 (1946).