EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE

Third Edition

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Introduction

Article X deals with what at common law was termed the "best evidence rule," but should, more accurately, be called the "original document rule." Rule 1002 sets forth a classical statement of the rule, ostensibly preserving the common law requirement that the original be produced to prove the contents of any writing, recording or photograph. Moreover, the breadth of the definitions contained in Rule 1001 seemingly expands the coverage of the Rule beyond simple documents to all writings, recordings, and photographs, including virtually all methods of data storage. Rules 1003-1007, however, provide a series of exceptions which largely envelop the common law rule. Finally, Rule 1008 defines the respective roles of court and jury with respect to Article X issues, carving out a substantial role for the jury in resolving disputed fact questions.

RULE 1001

I. TEXT OF RULE

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 reproduces the original.

II. DISCUSSION

Rule 1001 sets out definitions of terms that are used throughout Article 10. The approach of Rule 1001(1) and Rule 1001(2) is to define broadly the matters to which Rule 1002 applies. Rule 1001(3) states what can constitute the "original" of a writing, recording or photograph, and Rule 1001(4) provides what constitutes a "duplicate," which is generally admissible under Rule 1003.

The Rule's definitions have presented few problems in application, but the breadth of Rule 1001(1)'s definition of "writings and recordings" is at least potentially problematic in that, literally applied, the rule comprehends inscribed chattels.[1] Historically, the courts have never rigorously applied the

1. Inscribed chattels are non-documentary chattels, other than recordings or photographs, which bear letters, words or number. Common examples include revolvers, automobiles, police badges, license plates, money, billboards and tombstones.

original document rule in inscribed chattel cases,[2] due to the fact that the reasons underlying the Rule are less, if at all, applicable in such cases. The loss of fine detail through mistransmission ordinarily is not a major concern in cases of inscribed chattels, as opposed to documents, either because no legally consequential detail exists (*e.g.*, handwriting or erasures) or because it is strictly limited in quantity.[3] As a result, whether, or to what extent, to apply the original document rule to inscribed chattels has traditionally been a matter committed to the sound discretion of the trial judge[4] which approach continues under Rule 1001(1).[5]

In determining whether to apply the original document rule to inscribed chattels or whether a particular item constitutes the "equivalent" of "letters, words or numbers," courts have, laudably, looked to the Rule's purposes: preventing fraud and reducing the hazards of mistransmission or misrecollection. Thus, the Second Circuit, in a prosecution for the sale of watches bearing counterfeit trademarks, rejected the contention that the watches themselves must be introduced.[6] In contrast, in a copyright infringement case, the Ninth Circuit applied the rule to "reconstructions" of lost original drawings of science fiction characters that the plaintiff-artist alleged had been infringed by characters appearing in a feature film, *The Empire Strikes Back*.[7] Though the Second Circuit found the original document rule inapplicable because the trademarks were "more like a picture or a symbol than a written document,"[8]

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2. 4 Wigmore, EVIDENCE § 1182 at 421 (Chadbourn rev. 1972); WEINSTEIN'S FEDERAL EVIDENCE § 1001.03[2] (2d ed 1997).

3. *Id.* at §§ 1181-1182; 2 MCCORMICK ON EVIDENCE § 232 (4th ed. 1992).

4. *See, e.g.*, United States v. Duffy, 454 F.2d 809 (5th Cir. 1972).

5. *See, e.g.*, United States v. Yamin, 868 F.2d 130, 134 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989).

6. United States v. Yamin, 868 F.2d 130, 134 (5th Cir.) ("The purpose of the best evidence rule, however, is to prevent inaccuracy and fraud when attempting to prove the contents of a writing. Neither of those purposes was violated here. The viewing of a simple and recognized trademark is not likely to be inaccurately remembered."), *cert. denied*, 492 U.S. 924 (1989). *Cf.* United States v. Bueno-Risquet, 799 F.2d 804 (2d Cir. 1986) (applying rule to skull-and-crossbones markings on bags of heroin).

7. Seiler v. Lucasfilm, Ltd., 808 F.2d 1316 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987):

> The dangers of fraud in this situation are clear. The rule would ensure that proof of the infringement claim consists of the works alleged to be infringed. Otherwise, "reconstructions" which might have no resemblance to the purported original would suffice as proof for infringement of the original....
>
> Our holding is also supported by the policy served by the best evidence rule in protecting against faulty memory. [Plaintiff's] reconstructions were made four to seven years after the alleged originals; his memory as to specifications and dimensions may have dimmed significantly. Furthermore, reconstructions made after the release of The Empire Strikes Back may be tainted, even if unintentionally, by exposure to the movie.

8. United States v. Yamin, 868 F.2d 130, 134 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989).

and the Ninth Circuit found the Rule applicable to the drawings because "[j]ust as a contract objectively manifests the subjective intent of the makers, so [plaintiff's] drawings are objective manifestations of the creative mind,"[9] their results seem consistent with each other and with the language and purposes of the Rule.

It should be noted that one reason why inscribed chattels have probably presented few problems for federal courts is that often the contents of such chattels relate to collateral matters within Rule 1004(4). When this is the case, secondary evidence is permitted. The more central the inscription on a chattel is to the merits of a case, the more likely a court is to insist upon production of the chattel unless Rule 1004 provides some excuse for nonproduction. Also, it may be helpful to recall that the definition of a duplicate in Rule 1001(4) includes a photograph. Often, the evidence offered as a substitute for a chattel will be a photo. When this evidence is offered, it is presumptively admissible under Rule 1003, and the original (i.e., the chattel) will not be required unless special circumstances are present.

Apart from the inscribed chattel issue, it deserves mention that Montana, in promulgating Rule 1001, believed it necessary to add a section entitled "Copies of entries in the regular course of business" to cover business records copied from other business records. Some commentators have expressed the view that such provision is unnecessary because each business record may be an original under the rule.[10] In any event the issue does not appear to have caused problems for federal courts, nor has Montana's lead been followed by any other jurisdiction adopting the Rules.[11]

New York recently enacted legislation concerning the increasing use of electronic data imaging, i.e., records stored on a computer disk that were electronically scanned from the originals, as a means for future retrieval of the information contained in those records.[12] The purpose of the legislation was to ensure that under New York's common law "original document rule" these computer stored images when reproduced will be admissible without the need to explain the non-production of the original record, albeit with rigorous requirements to be satisfied. Such legislation is unnecessary where the Federal Rules of Evidence govern. Such computer stored images when reproduced would be considered "duplicates" under Rule 1001(4), and thus admissible under Rule 1003 without the need to explain the absence of the original record.

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9. Seiler v. Lucasfilm, Ltd., 808 F.2d 1316 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987).

10. 3 Saltzburg, Martin & Capra, FEDERAL RULES OF EVIDENCE MANUAL 2046-47 (7th ed. 1998).

11. *See generally* 2 Joseph & Saltzburg, EVIDENCE IN AMERICA §§ 65.2-65.4 (1987 & Supp. 1994).

12. New York Civil Practice Law and Rules 4539(b).

RULE 1002

I. TEXT OF RULE

RULE 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recordings, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

II. DISCUSSION

Rule 1002 sets out the "original document rule." To guard against fraud and mistake, it requires the production of the original writing, recording or photograph where the contents of the writing, recording or photograph are the object of proof, except in situations where such risks are minimal, or other policy reasons justify the non-production of the original.

Rule 1002 has presented no novel problems in application. The difficulties associated with it are the same difficulties lawyers encountered at common law. Usually, the problem lies in determining when a writing or recording is offered to prove its contents and when it is offered for another reason.[13]

Some lawyers, though apparently not judges, appear to still be confused by the persistence of the "best evidence" nomenclature, and continue to argue that oral testimony should be inadmissible where the same facts could be proven by "better evidence," i.e., documents or recordings. Such argument are uniformly, and rightly, rejected.[14]

Most original document rule problems are resolved in pre-trial proceedings, or through scheduling or pre-trial orders issued pursuant to Rule 16 of the

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13. *Compare, for example*, United States v. Levine, 546 F.2d 658, 668 (5th Cir. 1977) (stating that, in an obscenity case, the contents of films were sought to be proved so that the Rule applied) *with* United States v. Rose, 590 F.2d 232, 236-37 (7th Cir. 1978) (tape recording of telephone conversation need not be offered to prove contents of conversation), *cert. denied*, 442 U.S. 929 (1979); United States v. Boley, 730 F.2d 1326, 1332-33 (10th Cir. 1984) (tape recording used only to prove contents of conversation and not contents of tape recording so that Rule did not apply). For the states' experience, *see generally* 2 Joseph & Saltzburg, EVIDENCE IN AMERICA §§ 66.2-66.4 (1987).

14. *See, e.g.*, Allstate Ins. Co. v. Swann, 27 F.3d 1539, 1543 (11th Cir. 1994) (Rule 1002 does not "require production of a document simply because the document contains facts that are also testified to by a witness"); R & R Assocs., Inc. v. Visual Scene, Inc., 726 F.2d 36, 38 (1st Cir. 1984) ("Rule 1002 applies not when a piece of evidence sought to be introduced has been somewhere recorded in writing but when it is that written record itself that the party seeks to prove"). One commentator, however, has argued that the original document rule is limited example of a more general "best evidence" principle that can be found in the law of evidence and should be expanded. *See* Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988).

Federal Rules of Civil Procedure. This is especially true in civil cases. In complicated civil litigation, some courts have developed forms or pretrial statements that require parties to state whether they have authentication or best evidence objections and, if so, to raise them. Virtually all such objections are resolved before trial begins. Criminal proceedings may cause more problems because the government, and the defendant as well, can choose not to disclose written statements or copies thereof until after its witnesses testify on direct examination. Such choices are permitted by the Jencks Act, 18 U.S.C. § 3500, and Federal Rule of Criminal Procedure 26.2. Where the parties are willing to afford discovery, pretrial resolution of best evidence questions is accomplished as easily in criminal as in civil cases. Where discovery is restricted, original document rule questions may arise for the first time during trial.

RULE 1003

I. TEXT OF RULE

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.

II. DISCUSSION

As the Introduction to this section states, Rules 1003-1007 largely supersede the application of Rule 1002. Rule 1003 is probably the most significant Rule in this respect because it permits duplicates (defined by Rule 1001(4)) to be admitted without accounting for nonproduction of the original absent special circumstances. Duplicates at common law would not have been so readily admitted.

This Rule has presented no problems in application. It has been adopted, verbatim or in substance, by every jurisdiction which has promulgated or enacted the Rules, except Maine, which declined to depart from the common law rule.[15]

The most important decision that a court is called upon to make is when to reject a duplicate and call for the original or an explanation for its nonproduction. Because Rule 1001 covers tape recordings as well as writings, it is not surprising that tapes that have been re-recorded with some editing or erased may trigger special concern. For example, in *United States v. Balzano*,[16] where the government erased an original tape in the course of re-recording it, the trial judge admitted the re-recording only after hearing testimony concerning the government's procedure and assuring itself that the defense had no real claim that the re-recording was inaccurate. Given the accuracy and ubiquity of contemporary duplicating techniques, courts rarely reject duplicates.[17]

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15. 2 Joseph & Saltzburg, EVIDENCE IN AMERICA §§ 67.2-67.4 (1987 & Supp. 1994).

16. 687 F.2d 6 (1st Cir. 1982).

17. *See, e.g.*, Moretti v. Comm'r of Internal Revenue, 77 F.3d 637, 645 (2d Cir. 1996) ("[X]erox copies" should have been admitted); United States v. Leight, 818 F.2d 1297 (7th Cir.), *cert. denied*, 484 U.S. 958 (1987) (not error to admit "diagnostic-quality" copy of x-ray where original was accidentally destroyed by government). *But see* United States v. Haddock, 956 F.2d 1534, 1545 (10th Cir. 1992) (not error to exclude photocopied documents as they bore markings and included statements that "did not comport" with similar documents prepared by entity in question); Ruberto v. Comm'r, 774 F.2d 61 (2d Cir. 1985) (tax court did not err in refusing to

RULE 1004

I. TEXT OF RULE

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 he 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.

II. DISCUSSION

Rule 1004, as an exception to the Rule 1002 requirement that an original be offered, specifies four circumstances in which nonproduction of the original is excused, and, correspondingly, when "other evidence," referred to as secondary evidence, is admissible to prove the contents of the writing, recording, or photograph. No degrees, or order of preference, of secondary evidence are specified. Thus, except for public records, which are governed by Rule 1005, once the failure to produce an original is excused, any available evidence, i.e., oral testimony or a copy of the original, can be used to prove the contents of the original.

The Rule has not produced any major difficulties in practice. Some concerns, however, exist.

By its terms, Rule 1004(2) provides that secondary evidence may be offered to prove the contents of the original writing, recording or photograph only if "[n]o original *can* be obtained by *any* available judicial process or procedure" (emphasis added). This language suggests an imperative which is not recognized in practice; the terms of the Rule are not so strictly construed:

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admit photocopies of canceled checks, since problems in matching the copies of the backs of the checks with copies of the fronts made them somewhat suspect).

> While the rule is written in absolute terms, the courts are afforded a good deal of discretion to use common sense. ... [I]t would be ludicrous to force a litigant to expend thousands of dollars to obtain a document abroad when $10,000 or so is at stake. The phrase "to the extent practicable and reasonable should be read into the rule.[18]

It is clear that pointless process need not be issued. Thus, in a bank robbery prosecution, oral proof was admitted as to the serial numbers on marked bills which had been seen by police at the defendants' residence, even though no subpoena had been issued for the bills. Fifth Amendment issues aside, the court ruled it unnecessary for the government to "go through the motion of having a subpoena issued, served [upon defendants] and returned unexecuted in order to establish, under section (2), that the bills were not obtainable."[19]

There is, however, some dispute concerning the reach of the requirement to resort to "any available" process. The Advisory Committee Note states that, for Rule 1004(2) purposes, "[j]udicial procedure includes subpoena[e] duces tecum as an incident to the taking of a deposition in another jurisdiction."[20] In contrast, the select committee of the Colorado Bar Association, which adopted and urged promulgation of Rule 1004(2) in Colorado, expressly took issue with the Federal Advisory Committee's position, stating that "such time and expense would often appear to be unjustified, and should in part be taken care of by ... pre-trial procedures."[21] Moreover, the Oklahoma Evidence Subcommittee's Note to the identical Oklahoma Rule 1004(2), refers with approval to a venerable Oklahoma precedent holding that secondary evidence is admissible where the original is in the possession of a third party in another state and he refuses to deliver the document.[22]

With or without an amendment to the rule, courts that reason that efforts made to secure the original need only be reasonable in the circumstances to permit introduction of "other evidence" under Rule 1004 are unlikely to treat

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18. WEINSTEIN'S FEDERAL EVIDENCE, § 1004.20 (2d ed. 1997).

19. United States v. Marcantoni, 590 F.2d 1324, 1330 (5th Cir.), *cert. denied*, 441 U.S. 937 (1979).

20. It has even been suggested that the Hague Convention on the Taking of Evidence Abroad, 23 UST 2555, TIAS 7444, entered into by various signatory nations including the United States, may have implications on what is "available" within Rule 1004(2). *See* Schmertz, 5 *Fed. R. Evid. News* 80-132 (1980).

21. 7B Colo. Rev. Stat. Ann., 1981 Supp. at p. 300. With respect to the role of pretrial procedure in resolving Article X issues, the Colorado committee specifically "note[d] the desirability of requiring, in pretrial procedures, that any genuine questions as to the authenticity ... or of the circumstances ... be raised so that the offering party may take appropriate steps under R. 1004 to obtain the original." *Id.* at p. 299 (Comment to Rule 1003).

22. 12 Okla. Stat. Ann. at p. 525 (foll. § 3004), *citing* Pringey v. Guss, 16 Okla. 82, 86 P. 292 (1905).

litigants unfairly. Idaho and Louisiana have adopted this suggestion and permit introduction of a duplicate where no original can be obtained practicably.[23]

Pursuant to Rule 1004(1), secondary evidence is admissible to prove the contents of an original that has been lost or destroyed "unless the proponent lost or destroyed them in bad faith." The Rule does not specify what kind of showing must be made that when an original was lost there was no bad faith involved. The courts have employed the same kind of reasoning that they used at common law.[24] They have consistently applied a subjective test of bad faith, allowing "other evidence" where, for example, originals were stolen by an Assistant United States Attorney for his personal use,[25] where the government negligently destroyed originals,[26] where the government destroyed originals in violation of both statute and regulation,[27] where tax records were "unavoidably" lost,[28] and where a private party destroyed records in violation of a specific court order of which he was unaware.[29]

The burden of proving the absence of bad faith by a preponderance of the evidence is on the proponent, and a court may impute bad faith in the absence of a satisfactory explanation for the loss or destruction of originals.[30]

In two cases, parties sought to introduce "reconstructions" of lost original documents as "other evidence" of their content.[31] Although both panels of the Ninth Circuit upheld exclusion of the "reconstructions" under conventional Rule 1004 analyses, both were also clearly troubled by this particular approach to proving the contents of missing documents. It is important that courts keep in mind that "other evidence," even if permissible under Rule 1004, is subject to all other rules of evidence, including Rule 403 and Rule

23. *See* 2 Joseph & Saltzburg, EVIDENCE IN AMERICA § 68.2 (1987 & Supp. 1994).

24. *See, e.g.*, Wright v. Farmers Co-op, 681 F.2d 549, 553 (8th Cir. 1982) (court suggests that where a tape of a statement was destroyed and a transcript of the statement was offered instead, some careful examination of the circumstances of the destruction may be required); Sylvania Elec. Prod., Inc. v. Flanagan, 352 F.2d 1005, 1008 (1st Cir. 1965) (each case is governed "by its own particular facts and circumstances").

25. United States v. Bueno-Risquet, 799 F.2d 804 (2d Cir. 1986).

26. Estate of Gryder v. Comm'r, 705 F.2d 336 (8th Cir), *cert. denied*, 464 U.S. 1008 (1983).

27. Murray v. Dist. of Columbia Bd. of Educ., 13 Fed. R. Evid. Serv. 554 (D.D.C. 1983).

28. White Indus., Inc. v. The Cessna Aircraft Co., 611 F. Supp. 1049, 1079 (W.D. Mo. 1985).

29. Andrew Crispo Gallery, Inc. v. Comm'r, 16 F.3d 1336, 1343-44 (2d Cir. 1994).

30. *See, e.g.*, Seiler v. Lucasfilm, Ltd., 613 F. Supp. 1253 (N.D. Cal. 1984) (finding bad faith where proponent's testimony regarding destruction by flood was "inherently unbelievable and disturbingly contradictory"), *aff'd*, 808 F.2d 1316.

31. *See* Seiler v. Lucasfilm, Ltd., 808 F.2d 1316 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987); United States v. Feldman, 788 F.2d 544 (9th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987).

901, either of which might call for exclusion of document "reconstructions" in a given case.

RULE 1005

I. TEXT OF RULE

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.

II. DISCUSSION

Rule 1005 is concerned with proving the contents of two categories of public records: official records and documents authorized to be recorded or filed that have actually been recorded or filed. It is predicated on the theory that "[p]ublic records call for somewhat different treatment" than other documents in order to avoid the disruption entailed by removing originals for evidentiary use.[32] Rule 1005 deletes the Rule 1002 requirement that an original be offered. Rule 1005 also creates a separate hierarchy of evidence admissible to prove the contents of a public record, which expressly gives "preference [to] certified or compared copies" even though such "[r]ecognition of degrees of secondary evidence" stands at odds with the philosophy reflected in Rules 1003-1004.[33]

Rule 1005 is closely linked to Rule 902, which prescribes the methods of certification which render public records self-authenticating. With respect to certified copies of public records, the determination of admissibility under Rule 902 is a prerequisite to, and sufficient foundation for, admissibility under Rule 1005, provided that the evidence is otherwise admissible.

The relationship between Rules 1004 and 1005 has been the subject of commentary as to the ramifications of Rule 1005's evidentiary hierarchy. The commentators, however, differ as to the admissibility of "other evidence" in the absence of a certified or compared copy of the public record at issue. Some commentators assert that when neither a certified nor compared copy can be obtained by the exercise of reasonable diligence, then any other probative evidence is admissible since the "other evidence" clause at the end of the Rule "signifies that no hierarchy of preferences is created, an approach

32. *See* Advisory Committee Note to Rule 1005.
33. *Ibid.*

that is consistent with Rule 1004 but is a change from the common law.[34] Others, however, contend that: "Only if *both the original and a Rule 1005 copy* are unavailable may other evidence be used."[35]

While this dispute, as such, does not merit rule-changing attention,[36] it reflects uncertainty in the case law which extends even to cases in which Rule 1005 copies do exist and are in evidence. In *Amoco Production Co. v. United States*,[37] a quiet title action, the pivotal issue was whether a 1942 deed from defendant to plaintiffs contained a reservation of oil, gas and mineral rights. The original deed was lost; however, it had been manually recorded — a copy typed by county personnel — in the county recorder's office. Because plaintiffs had obtained and offered (1) a certified copy of the recorded version (containing no such reservation of rights), which the court admitted into evidence, the court excluded defendants' proffer of (2) evidence of defendants' routine practice, in 1942, of including such clauses and (3) a photocopy of a conformed file copy maintained by defendants. The district court reasoned that, because a Rule 1005 copy, item (1), was available, all "other evidence" was barred.

On appeal, the Tenth Circuit reversed the exclusion of (2) routine practice and remanded for reconsideration of the exclusion of (3) the conformed file copy.[38] The court of appeals reasoned that:

> [t]he purpose of the rule is to eliminate the necessity of the custodian of public records producing the originals in court [, and that] purpose is not furthered by extending the rule to encompass documents not filed and stored in public offices. ... [I]t is the actual record maintained by the public office which is the object of Rule 1005, not the original deed for which the record is made. If the original deed is returned to the parties after it is recorded, it is not a public record as contemplated by Rule 1005.[39]

Accordingly, the court of appeals ruled that Rule 1004(1), not Rule 1005, governed admissibility of the "other evidence" proffered, but improperly excluded, below.

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34. 3 Saltzburg, Martin & Capra, FEDERAL RULES OF EVIDENCE MANUAL 2073 (7th ed. 1998).

35. 6 WEINSTEIN'S FEDERAL EVIDENCE ¶ 1005.05[2] (2d ed. 1997) (emphasis added).

36. No reported decision has found this issue problematic. Moreover, given that Rule 1005 expressly authorizes introduction of other evidence "[i]f a copy which does not comply with the foregoing cannot be obtained ...," and in view of advocates' desire to proffer the most persuasive evidence, the original would most likely be subpoenaed (or sought) if certified/compared copies were for some reason unobtainable. However, expressly to compel production of the original in these circumstances — which the current Rule does not — seems to run counter to the thrust of the Rules' deletion of the original requirement *ab initio*. The Rule should, therefore, remain intact.

37. 455 F. Supp. 46 (D. Utah 1977).

38. Amoco Prod. Co. v. United States, 619 F.2d 1383, 1390-91 (10th Cir. 1980).

39. *Id.* at 1390.

The Tenth Circuit's reasoning is not easy to grasp, but it is worth attention. If the law makes a recorded document conclusive, Rule 1005 governs. If, however, both recorded and unrecorded documents are relevant in a case, Rule 1004 applies to the non-recorded document while Rule 1005 applies to the recorded document. Assuming that the document ultimately at issue at *Amoco* was not the recorded version of the deed but the original unfiled document, the Tenth Circuit was correct. Further, because the actual contents of the original deed were in dispute, the question whether evidence other than the recorded version "correctly reflect[ed] the contents" was properly admissible under Rule 1008.

The *Amoco* decision is also significant for its further analysis of what constitutes a public record, which term is not defined in the Rule. The Tenth Circuit observed that not every document "filed and stored in public offices" constitutes a "public record" for Rule 1005 purposes. Thus, with respect to (3) the proffered photocopy of a conformed file copy, the court of appeals declared:

> [T]he mere fact that a document is kept in a working file of a governmental agency does not automatically qualify it as a public record for purposes of authentication or hearsay. Although the recorded version of a deed is public record, a copy of a deed deposited in a working file of the [government] is not, by that fact alone, a public record.[40]

40. *Id.* at 1391 n.7.

RULE 1006

I. TEXT OF RULE

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.

II. DISCUSSION

This Rule permits litigants, as an exception to the Rule 1002 requirement that an original be offered, to prove the contents of voluminous written, recorded or photographic materials not amenable to examination in court by the use of summaries of their contents. This exception rests on the theory that "charts, summaries, or calculations are not only convenient for proving the contents of voluminous materials, but sometimes are the only practicable way to do so."[41] The policy rationale for demanding production of the original writing, recording or photograph is satisfied by the Rule's requirement as a condition precedent for the use of summaries, that the originals or duplicates, from which the summaries were prepared, be made available for examination or copying at a reasonable time or place.[42]

Pretrial review of summaries. The absence of a right of pretrial review of written charts, summaries and calculations ("summaries") expected to be offered under this Rule by adversaries could in certain cases create an unnecessary risk of unfairness, prejudice or confusion as well as needless prolongation of trial.

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 assump-

41. 6 WEINSTEIN'S FEDERAL EVIDENCE § 1006.02 (2d ed. 1997).

42. *See* Air Safety, Inc. v. Roman Catholic Archbishop of Boston, 94 F.3d 1, 7-8 (1st Cir. 1996) (discussion of when underlying materials are "made available").

tions (or arguments) may well be unascertainable except upon very close scrutiny.[43]

Cross-examination does not, moreover, uniformly afford an adequate opportunity to reveal internal inconsistencies, unsupported assumptions or argumentative premises. The short time frame aside, courts have facilitated the authentication process by allowing supervisory personnel to attest to the authenticity and accuracy of charts[44] and such personnel need not be — often are not — intimately familiar with all of the minutiae relating to summaries' composition. The opportunity for cross-examination may be meaningless where a summary is first presented at trial and the underlying documents are in a remote location.[45]

Further, the availability to both sides of the raw data from which the summaries have been compiled may be entirely inadequate to permit brief and cogent cross-examination as to matters buried beneath a simple entry on a chart, due to the permutation and combination of those data in the calculation/summarization process.

Finally, there is a danger of substantial prejudice whenever argumentative matter goes before a jury in the guise of a "summary."[46]

While the Rule itself does not require a pre-trial exchange of summaries which could serve as the basis for avoiding or minimizing such risks,[47] and the federal courts have not read such an exchange into the Rule,[48] a recent

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43. For example, in a case in which the plaintiff asserted approximately two dozen antitrust, contract, fiduciary-duty and other claims against the defendant, plaintiff proffered some two dozen summaries among hundreds of other exhibits. The summaries in many cases consisted of one or two pages of figures which had been derived by sophisticated calculations, many of which assumed matters of fact and not law immediately apparent from the face of the summary. Due to the strictures of local practice, all exhibits, including the summaries, were exchanged between counsel prior to trial. As a result, defense counsel had the opportunity to scrutinize plaintiff's summaries in detail, ascertain the factual and legal assumptions upon which each was predicated and discern internal inconsistencies among them. Consequently, many of the summaries were the subject of successful objections and were kept from the jury's consideration. Brierwood Shoe Corp. v. Sears Roebuck and Co., No. 79 Civ. 2832 (S.D.N.Y. 1980). In complicated cases, some judges have developed document identification forms that are especially helpful in identifying disputed issues surrounding documents of all sorts and in resolving them before trial. *See, e.g.*, Zenith Radio Corp. v. Matsushita Elec. Ind. Co., 505 F. Supp. 1125, 1189-90 (E.D. Pa. 1980).

44. 6 WEINSTEIN'S FEDERAL EVIDENCE § 1006.05[3] (2d ed. 1997).

45. White Indus., Inc. v. The Cessna Aircraft Co., 611 F. Supp. 1049, 1078 (W.D. Mo. 1985) (assuming without deciding, that Rule 1006 could apply to an *oral* summary).

46. *See, e.g.*, United States v. Smyth, 556 F.2d 1179, 1184 and n.12 (5th Cir.), *cert. denied*, 434 U.S. 862 (1977); United States v. Scales, 594 F. 2d 558, 564 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979).

47. Such a requirement was suggested in second edition of this book at pages 302-03.

48. *See* United States v. Foley, 598 F.2d 1232, 1338 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980).

amendment to Rule 26 of the Federal Rules of Civil Procedure now requires that the proponent of a summary to be offered under the Rule to disclose the summary prior to trial.[49] Scheduling or pre-trial orders entered pursuant to Rule 16 of the Federal Rules of Civil Procedure will govern more specifically such disclosure.[50]

Foundation. Summaries to be admissible under the Rule must have a sufficient foundation. In addition to the Rule's specified requirements that the proponent of a summary show that the underlying writings, recordings or photographs are "voluminous" and that in-court examination is not convenient, the courts have also held that the proponent must show that the underlying material itself is admissible.[51] Thus, if the materials are excludable under the hearsay rule,[52] or have not been authenticated,[53] or have been barred by some other evidentiary rule,[54] the summary based on the materials is inadmissible. Additionally, the summary itself must be authenticated.[55]

Admissibility of summary. Summaries admissible under this Rule constitute substantive evidence.[56] In instances where the originals are already in evidence, a summary of those originals may be admitted under this Rule and also be considered substantive evidence.[57]

Summaries used as demonstrative aids or pedagogical devices to summarize or organize testimony or documents in evidence are not governed by Rule 1006, but rather by Rule 611(a).[58] Such summaries do not constitute evidence, and the jury should be instructed as to their limited use and that they do not

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49. *See* Federal Rule of Civil Procedure 26(a)(3)(c) (amended December 1, 1993).

50. State experience is discussed in 2 Joseph & Saltzburg, EVIDENCE IN AMERICA §§ 70.2-70.4 (1987 & Supp. 1994).

51. *See* 6 WEINSTEIN'S EVIDENCE § 1006.06[3] (2d ed. 1997).

52. *See, e.g.*, Martin v. Funtime, Inc., 963 F.2d 110, 116 (6th Cir. 1992); Paddock v. Dave Christensen, Inc., 745 F.2d 1254, 1260 (9th Cir. 1984).

53. *See, e.g.*, Fagiola v. Nat'l Gypsum Co., 906 F.2d 53, 58 (2d Cir. 1990).

54. *See* Mueller and Kirkpatrick, MODERN EVIDENCE § 10.15 (1995).

55. *See, e.g.*, United States v. Scales, 594 F.2d 558, 563 (6th Cir. 1978), *cert. denied*, 441 U.S. 946 (1979).

56. *See, e.g.*, Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp., 41 F.3d 182, 189-90 (4th Cir. 1994) (Rule 1006 contemplates that summaries are introduced as the evidence); Pierce v. Ramsey Winch Co., 753 F.2d 416, 430 (5th Cir. 1985) ("A chart admitted pursuant to Rule 1006 is itself evidence and should go to the jury room during deliberations along with the other exhibits.").

57. *See, e.g.*, United States v. Campbell, 845 F.2d 1374, 1381 (6th Cir.), *cert. denied*, 488 U.S. 908 (1988); United States v. Orlowski, 808 F.2d 1283, 1289 (8th Cir.), *cert. denied*, 482 U.S. 927 (1986).

58. *See, e.g.*, United States v. Gardner, 611 F.2d 770, 776 (9th Cir. 1980) (court has discretion to admit summary where it "contributed to the clarity of the presentation to the jury, avoids needless consummation of time and was a reasonable method of presenting the evidence").

constitute substantive evidence.[59] Where both a Rule 1006 summary and the underlying documentation are in evidence, some courts make it a practice to instruct the jury, somewhat paradoxically, that "the summary charts [do] not constitute evidence in the case, the real evidence [is] the underlying documents."[60] Other courts believe that a better approach, exemplified by *United States v. Pinto*,[61] is to instruct the jurors that it is "their responsibility to determine whether the charts accurately [reflect] the evidence presented."

59. *See, e.g.*, United States v. Wood, 943 F.2d 1048, 1053 (9th Cir. 1991) (drawing distinction between Rule 1006 summaries an summaries as pedagogical devices); United States v. Bakker, 925 F.2d 728, 736-37 (4th Cir. 1991) (pedagogical device is not itself evidence); Gomez v. Great Lakes Steel Div., 803 F.2d 250, 257-58 (6th Cir. 1986) (district court erred in admitting summary for pedagogical purposes without limiting instructions explaining its nature and limited purpose).

60. United States v. Stephens, 779 F.2d 232, 238 (5th Cir. 1985). *See also* United States v. Lewis, 759 F.2d 1316, 1329 n.6 (8th Cir.) (summary exhibits solely for convenience and not evidence themselves), *cert. denied*, 474 U.S. 867 (1988).

61. 850 F.2d 927, 935 (2d Cir.), *cert. denied*, 488 U.S. 867 (1988).

RULE 1007

I. TEXT OF RULE

RULE 1007. Testimony of 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.

II. DISCUSSION

This Rule sets forth an exception to the Rule 1002 requirement that an original be offered, the theory that in the enumerated situations the policy rationale for requiring the production of the original writing, recording, or photograph is satisfied.[62] It does not include oral out-of-court admissions by the party against whom they are offered because the risk of inaccuracy is substantial.[63] However, such oral admissions are admissible to prove the contents of the original under Rule 1004 when nonproduction of the original has been excused.

Several commentators have observed that the Rule does not expressly state whether it applies to a written admission or admission under oath made by the adverse party's representative.[64] They suggest that the hearsay definition of "admission" set forth in Rule 801(d)(2) should also be applied to this Rule, thus authorizing the admissibility of admissions by the party's authorized speaker, agent or employee, or co-conspirator.[65] It is difficult to argue against this result. An admission is substantive evidence that may be decisive against a party. It seems correct that such evidence should be required to satisfy the original document rule.

No actual problems have been presented by this Rule. State experience is reported in 2 Joseph & Saltzburg, EVIDENCE IN AMERICA §§ 71.2-71.4 (1987).

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62. *See* Saltzburg, Martin & Capra, FEDERAL RULES OF EVIDENCE MANUAL 2094 (7th ed. 1998); 6 WEINSTEIN'S FEDERAL EVIDENCE § 1007.04 (2d ed. 1997).

63. *See* Advisory Committee Note to Rule 1007.

64. *See, e.g.*, 3 Saltzburg, Martin & Capra, FEDERAL RULES OF EVIDENCE MANUAL 2094 (7th ed 1998); 6 WEINSTEIN'S FEDERAL EVIDENCE § 1000.06 (2d ed. 1997).

65. *Ibid.*

RULE 1008

I. TEXT OF RULE

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.

II. DISCUSSION

No actual problems have been presented by this Rule. State experience is reported in 2 Joseph & Saltzburg, EVIDENCE IN AMERICA §§ 72.2-72.4 (1987 & Supp. 1994).