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11-2014

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#### Recommended Citation

Ford, Cynthia, "What the Best Evidence Rule is - and what it isn't" (2014). *Faculty Journal Articles & Other Writings*. 115.

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# What the Best Evidence Rule is — and what it isn't

By Cynthia Ford

Two witnesses are sitting at a bar: Larry Liar, just released from prison on his fifth perjury conviction, and the Dalai Lama. Just 10 feet away from them, they see another patron, Abe Accused, stagger up to the bartender, who is wiping a table. A scuffle ensues; a shot rings out; the bartender falls over dead.

At the wrongful death trial against Accused, you represent the defendant. The plaintiff elects to call only Larry Liar, rather than the Dalai Lama. (The Dalai Lama is available, in Montana to bless the Garden of One Thousand Buddhas, in Arlee).

Larry Liar was also deposed, and has a slightly different recollection of the events. He is back in the Montana State Prison, but the plaintiff was able to arrange his transport for the day and he is eager for the excursion.

Is this the “best evidence” available to the plaintiff? No! Is it the basis for a valid “Best Evidence Rule” objection? Also no. Of course you should always introduce the best evidence you have of the facts you are trying to prove. “Put your best foot forward,” as your mother used to say. That is a rule of life, and a no-brainer.

However, it is NOT the Best Evidence Rule.

The Best Evidence Rule is much more limited. Although it is often over-cited, in fact it only applies in a very few situations. In those situations, it is easy to meet. So, the big lesson of this month's column is “Don't be scared of the Best Evidence Rule.” Conversely, the other lesson is “Don't make stupid Best Evidence Rule objections.”

## Montana, federal Best Evidence Rule similar

The Montana and Federal Rules of Evidence both contain Article X, each entitled “Contents of Writings, Recordings and Photographs.” In both systems, the Best Evidence Rule (“BER”) is stated in Rule 1002, which basically provides that an original is necessary to prove the contents of a writing, recording or photograph:

[Montana] **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 by statute, these rules, or other rules applicable in the courts of this state.

[Federal] **Rule 1002. Requirement of the Original**

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.<sup>1</sup>

The Montana Evidence Commission Comment to M.R.E. 1002 states:

This rule is identical to Federal and Uniform Rules (1974) Rule 1002 except the exception clause found in those rules is deleted and an exceptions clause previously used in the Rules is substituted. It states the common-law rule that to prove the contents of a writing, the original of that writing is required, unless otherwise provided. The exceptions to this rule of major concern are those found in the rules that follow. Rules 1003 through 1007.

The policy behind the Best Evidence Rule is to prevent unnecessary inaccuracy stemming from the fallibility of human memory or transcription

Remember Tiny Tim's father, Bob Cratchit, in Charles Dickens' “A Christmas Carol”? Cratchit worked for Ebenezer Scrooge as a scrivener, required to hunch over documents and hand-copy them, word for word. Of course, because he was cold, tired, hungry, and over-worked, it was inevitable that Cratchit's copies could carry mistakes, maybe even in critical terms. The common law Best Evidence Rule's requirement of the original to prove the contents of a document was meant to prevent such mistakes, in cases where the contents legally mattered. Lots of old Montana cases discuss the admissibility of handwritten copies of documents at issue in those cases, requiring the original of the document.

Because today we have so many ways to exactly replicate a writing, recording or photograph without the opportunity for human error (photocopying etc.), the “Cratchit” rationale for the rule has eroded. However, technology has not been able to improve the human memory, which was the other reason for requiring the document at issue, and the original thereof. My law students are perhaps the best example: at the beginning of each semester, I issue and post a syllabus for the course, which

<sup>1</sup> The federal rule was amended as part of the restyling of the FRE in 2011, “to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.”

includes detailed information about various assignments and how they will be graded and weighted for the final letter grade. Eight weeks<sup>2</sup> into the semester, I usually am peppered with questions in class about how much the midterm will count, etc. I might think I remember whether the midterm/final exam split is 40/60 or 30/70, but the only good way to see what the class terms are is to consult the written document. The BER would require an original of the syllabus to answer the question “what does the syllabus say?”

The Montana Commission explained the purpose for the BER in its comment to Rule 1002:

(T)he purposes of the rule requiring the production of the original should be kept in mind: first, the legal significance of particular words in a document requires the use of the original so that legal rights under those documents are not misinterpreted; second, use of the original prevents, to some degree, fraudulent use of copies; third, mechanical or human errors made in the process of copying are apt to be ignored when copies or other secondary evidence of the original is used; and finally, the use of the original allows a complete view of all that is contained in that document. McCormick, Handbook on the Law of Evidence, 561 (2d ed. 1972).

The modern version of the BER still requires an original to prove contents, but has expanded the definition of an original to allow introduction of those replications which are guaranteed to be accurate. Furthermore, it provides liberal exceptions allowing secondary evidence for cases where no original is available, so long as the proponent satisfies the court that there is a good reason for non-production.

The BER does not apply to most uses of writings, recordings, or photographs; it is implicated ONLY when you are attempting to prove the contents of the writing, recording, or photograph

The Best Evidence Rule requires the original only to prove the contents of a writing, photograph, or recording. Thus, whether the BER applies depends on the reason the writing, photograph or recording is being offered. In the vast majority of cases, the writing/photograph/recording is being offered to prove a fact, which does not implicate the BER. As the Advisory Committee noted in its comments to FRE 1002, there are only a few types of cases in which the content of the writing/photograph/recording is directly at issue, and should be proven by introduction of the original:

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.

The Advisory Committee Note to FRE 1002 indicates that most trial uses do NOT implicate the BER:

**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. The assumption should not be made that the rule will come into operation on every occasion when use is made of a 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... 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.

Advisory Committee Note to FRE 1002. (emphasis added)  
The Montana Evidence Commission agreed in its own comments to both MRE 1001 and 1002:

(T)he rule requiring the production of the original applies to photographs in only a few special cases and not in the usual instance where the witness incorporates a photograph as part of his testimony by identifying it as a correct and accurate representation of what it depicts. Advisory Committee's Note to Federal Rule 1002, supra at 56 F.R.D. at 342. Examples of when a photograph is to be included within this rule are: “copyright, defamation, and invasion of privacy by photograph or motion picture ... Similarly as to situations in which the picture is offered as having independent probative value, e.g., automatic photograph of bank robber.” Id. This definition is also new to and

<sup>2</sup> This is the week in which “it’s a long way to exams” morphs into “OMG! I am not ready to take an exam! Help!”

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an expansion of existing Montana law.

Comment to M.R.E. 1001.

The Commission intends Rule 1002 to clarify these [former confusing common law] cases...; that is, the **mere existence of a written record does not mean that it is the only source of evidence to prove the existence of facts or occurrence of events, but when the facts or events are sought to be proved by a writing, unless an exception applies, the original of that writing is required.**

Finally, as noted in the Commission Comments to Rule 1001(2), defining photographs, the **Commission intends Rule 1002 to apply to photographs in only a few special instances. The Commission does not intend to change the longstanding rule in Montana allowing photographs to be made part of the witness' testimony or illustrative of his testimony to assist the jury in their determinations.** *Stokes v. Long*, 52 Mont. 470, 485, 159 P.2d 28 (1916); *Fulton v. Chouteau County Farmers' Bank Co.*, 98 Mont. 48, 60, 37 P.2d 1025 (1934). Under this case law rule, the trial court has the discretion to admit photographs.

Comment to M.R.E. 1002. (Emphasis added)

Therefore, the best response to an objection based on the Best Evidence Rule is: "Rule 1002 does not apply, Your Honor. We are not proving the content of the [writing/recording/photograph]. The fact we are trying to prove is ..., and this [writing/recording/photograph] is simply a method of proving that fact."

This is exactly what happened in *Watkins v. Williams*,<sup>3</sup> 265 Mont. 306, 877 P.2d 19 (1994), a contractual dispute between the owners of several racehorses and a horse trainer. The trainer sued for the balance of the money the owner allegedly owed him under their oral agreement. The trainer took the stand and testified at trial, saying that he charged \$18 per day for each horse he trained:

[W]hile testifying, Watkins allegedly read from a document which was excluded from evidence. The document was a summary of contents contained in a wall calendar kept by horse trainers in Sallisaw. Watkins presented it to the court for admission into evidence and the Williamses **objected, stating that the summary was not the best evidence of Watkins' training services.** After voir dire of Watkins, the Williamses also alleged that the document should be excluded as self-serving.<sup>3</sup> The court sustained the Williamses' objection.

<sup>3</sup> I can't keep myself from commenting on this second ground: DUH! Of course a party's documents are "self-serving" — presumably that is why they are being offered — but that is NOT a valid objection based on any rule of evidence.

Watkins thereafter testified about the amount of training services he rendered. He specifically stated that he charged \$18 per day per horse trained. ... The total bill for his services for the year was \$37,888. ... Disputing the figure, the Williamses argue that the court erred by allowing Watkins to testify while reading from the calendar summary. They allege that the testimony is improper according to Rules 1002 and 1006, M.R.Evid.

Watkins responds by asserting that the best evidence rule does not exclude oral testimony and that the court correctly permitted him to testify about the damages he suffered.

877 P.2d at 22. The Supreme Court agreed that the BER did not apply:

**The best evidence rule** pertains to evidentiary documents only when the terms of the writing are material. *State v. Cronin* (1978), 179 Mont. 481, 587 P.2d 395. It **comes into play only when the terms of a writing are being established** and an attempt is being made to offer secondary evidence to prove the contents of the original document. See *Application of Angus* (1982), 60 Or.App. 546, 655 P.2d 208, cert. denied (1983), 464 U.S. 830, 104 S.Ct. 107, 78 L.Ed.2d 109.

Secondary evidence may include a copy of an original or testimony in regards to the contents of the original. See 32A C.J.S.2d *Evidence*, § 775. The secondary evidence is admissible over a best evidence objection if one of the requirements set forth at Rule 1004, M.R.Evid., has been met and proper foundation is laid.

Witness testimony adduced from personal experience or knowledge is not within the ambit of secondary evidence; **witnesses may freely testify about events which have occurred independently from and may have been memorialized by an antecedent writing.** See, e.g., *Roods v. Roods* (Utah 1982), 645 P.2d 640; see also *D'Angelo v. United States* (1978), 456 F.Supp. 127; Cf. Rule 602, M.R.Evid. **The best evidence rule remains inapplicable when a witness testifies about personal knowledge of a matter, regardless whether the same information may be contained in an inadmissible writing.** Moreover, our rules of evidence permit witnesses to use writings to refresh their memory while testifying. Rule 612, M.R.Evid.

After reviewing the record, we conclude that Watkins testified from personal knowledge and experience and that his concurrent use of the summary of contents from the wall calendar was not reversible error. The summary's contents, as stated by Watkins during oral testimony, merely

set forth the number of days he trained the horses and the resulting charges which were incurred by the Williamses.

*Watkins v. Williams*, 265 Mont. 306, 312, 877 P.2d 19, 22-23 (1994). (Emphasis added)

The Court affirmed the jury's verdict and judgment thereon for the plaintiff trainer.

It is easy to comply with the BER, in the few circumstances when it does apply, by introducing the original

Both versions, state and federal, of the BER, provide an easy route to compliance: when the BER applies, because a party is trying to prove the contents: simply introduce the original of the writing, recording or photograph. M.R.E. 1001(3) defines "original:"

(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.

To show the Court (and your opponent) that you have met the BER by producing an original, just ask your foundation witness an additional question:

Q. I am handing you plaintiff's proposed Exhibit 1. Do you recognize Exhibit 1?

A. Yes, I do.

Q. How do you recognize Exhibit 1<sup>4</sup>?

A. I remember reading it at the bank, and then signing it.

Q. What is Exhibit 1?

A. It is the promissory note I signed when I got the money for the loan.

Q. Is Exhibit 1 the original of the note?

A. Yes, it is.

Q. How do you know that Exhibit 1 is the original?

A. I signed it in my special turquoise ink, and my signature appears in that ink on Exhibit 1.

This straightforward set of foundation questions should get you past both the authentication requirements of Article IX and the Best Evidence Rule of Article X. (If you are proving the contents of a photograph or recording, rather than a writing, you will have to add some additional questions of your foundation witness to establish that you have an exact print or printout, made electronically, so that you comply with the definition of "original," discussed below).

### The definition of 'original' is broad

MRE 1001(3) defines "original" broadly:

<sup>4</sup> Notice that in each question about any exhibit, counsel should use the formal designation (letter or number) of the exhibit, to preserve the record on appeal. "I am handing you this" and "How do you know what it is?" may be obvious to the observers in the trial courtroom, but are prone to murkiness to later readers in Helena.

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.

The Montana Commission Comment to Rule 1001 states:

Existing Montana law has never precisely defined "original". However, in *Bond v. Hurd*, 31 Mont. 314, 318, 78 P 579 (1904), the court stated the common-law rule of what is an original of a telegram, which is dependent upon whether the telegraph company is the agent of the sender or the receiver. Montana law has also recognized the "duplicate original rule", superseded by this definition, in *Morris v. Langhausen*, 155 Mont. 362, 365, 472 P2d 860 (1970), which admitted an executed carbon copy of a retail installment sales contract. Therefore, this definition is consistent with existing Montana law as well as expanding the definition into new areas of photographs and computer printouts.

The "I signed in blue ink" testimony would certainly meet the definition of original, and thus comply with Rule 1002.

There can be more than one original. If you and I each signed two "copies" of the same contract, so that I signed both in blue ink, so did you, and we each kept a blue-ink-signed document, both of them are originals and admissible under the BER. Similarly, in a will contest, each party could have an "original" will — each document signed in blue ink, by the testator, maybe even with the same date, with different provisions. Both are "original" per Rule 1001, and admissible under Rule 1002. The factfinder will have to decide which of the two is legally operable, but they should both be admitted over any "Best Evidence" objection.

If you can't produce the original, you may still be able to meet the BER.

Both the state and federal versions of Rule 1002 require the original, but specifically state "except as provided..." The rest of Article X lays out several exceptions, carving routes for admission of other, non-original, evidence of the contents of a writing/recording/photograph.

### DUPLICATES

The first is Rule 1003, which allows duplicates in most cases:

**Rule 1003. Admissibility of duplicates, copies of certain entries.** A duplicate, or copy of an entry in the regular course of business as defined in Rule 1001(5)<sup>5</sup>, is admissible to the same extent as an

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<sup>5</sup> This clause appears in the state rule only, making it more liberal than the federal Best Evidence Rule.

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original unless:  
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 or copy of an entry in the regular course of business in lieu of the original; or otherwise provided by statute.

Rule 1001(4) and (5) define “duplicate” and “copy of an entry in the regular course of business”:

**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 reproduce the original.

Copies of entries in the regular course of business. A copy of an entry in the regular course of business consists of an entry in a writing kept in the regular course of business copied from another such writing by manual or mechanical means at or near the time of the transaction.

Carbon paper—some of you remember that, I hope? — and “Xerox” copies clearly are duplicates, and thus usually admissible under Rule 1003. Here, the rationale is that some process has created a certainly accurate version of the original, so there is no danger of misapprehension of the contents of the original. Bob Cratchit is not a factor for duplicates, and we are still getting a physical representation of the contents, so human memory is not a problem either.

Thus, if you have a duplicate of the writing/recording/ photograph whose contents you seek to prove, you can simply respond to “OBJECTION! BER” with: “Your Honor, we are offering a duplicate, per Rule 1003” and, if necessary, use your foundation witness to establish that the exhibit IS a duplicate.

### BUSINESS HAND-COPIES??

In Montana, different from the federal rule, Bob Cratchit’s work explicitly is allowed into evidence in lieu of an original, on the same footing as a duplicate. The Commission Comment to Rule 1001 explains why Montana chose to allow hand-made “copies” as well as duplicates:

(5) **Copies.** This definition is based on Section 93-1101-18, R.C.M. 1947 [superseded], which provides: “When an entry is repeated in the regular course of business, one being copied from another or (sic) at or near the time of the transaction, all the entries are equally regarded as originals”. It is included here so that it may be made admissible under Rule 1003. The Commission feels that this type of evidence is not admissible under any of the other definitions in Federal Rule 1001. The entry cannot be considered an original because

the person making the entry has no such intent, but is carrying on a normal business function of collecting information to be stored in a single record. The entry cannot be considered a duplicate because as previously indicated, duplicates are defined to include only mechanical means of duplication and not manual means. Therefore, this definition is intended to continue existing Montana law contained in the statute.

The cases to which the Commission referred in the full version of the comment both involved “ledgers” made in businesses in the early 1900s.

There is only one Montana Supreme Court decision which touches on the “copies of entries in the regular course of business” language after the Rule was adopted, but it confuses rather than clarifies the matter. Albeit in dicta (after reversing summary judgment for an insurer based on a release executed by the plaintiff),<sup>6</sup> the Court tried to alert the trial court and/or the parties that the BER should be an issue at trial:

There are other issues raised in this case which require a comment. The admissibility of the release in this case is in issue. On discovery, Farmer’s produced what appears to be a photocopy of a carbon copy of the original of the release. The original of the release was not produced by the insurer.

Under Rules 1001, 1002, 1003 of the Montana Rules of Evidence, a copy of a writing kept in the regular course of business copied from another writing is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original, or if under the circumstances it would be unfair to admit the duplicate or copy in the regular course of business in lieu of the original, or if a specific statute otherwise requires admissibility. We determine that whether the original of an instrument is authentic is a different question from whether an authentic original instrument was entered into by fraud or mistake. Unless, therefore, in this case Buskirk disputes the authenticity of the original, a true copy would be admissible. The original, of course, is the best evidence of the instrument, if it is available.

*Buskirk v. Nelson*,<sup>237</sup> Mont. 455, 460-461, 774 P.2d 398 (1989).

With due respect, Montana evidence law might have been better off without this gratuitous comment. Although I have not seen the release produced by the insurance company, the Court described it as “a photocopy of a carbon copy of the original of the [1983] release.” The plaintiffs apparently signed in (blue?) ink, and the carbon paper immediately below the top sheet was a “counterpart intended to have the same effect

<sup>6</sup> The Court found that there were disputed issues of material fact, which the trial judge had ruled on in the course of deciding the summary judgment motion, and remanded the case for trial.

by a person executing or issuing it.” Carbon paper is expressly mentioned in the Comments as being a form of original. Thus, the carbon copy was also an original of the release, and should be admitted. The document which was produced was “a photocopy” of the carbon original, and thus was a “duplicate” per MRE 1001(4): “a counterpart produced 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 reproduce the original.” The *Buskirk* release should have been admitted as a duplicate per 1003 and 1001(4), just as it would have been in federal court.

This case does not shed any light whatsoever on the puzzling “copy in the regular course of business” license issued to Bob Cratchit’s work by the MRE. In my view, given the inherent possibility of error in hand-made copies and given further the advances in technology whereby even Tiny Tim could “snap to pdf” on his phone any document anywhere anytime, Montana should remove these provisions from the Best Evidence Rule.

### LOST/DESTROYED/OPPONENT HAS

Rule 1004 forgives the non-production of the original AND allows ANY evidence of the contents of the writing/recording/photograph if the proponent has a good reason for not having the original to offer:

**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:  
Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or  
Original not obtainable. No original can be obtained by any available judicial process or procedure; or  
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  
Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

This boils down to “Rule 1002 does not apply” if you have tried but simply cannot, for reasons outside your control, find an original. However, you have to put on some modicum of proof of the destruction or your attempts to find the document which lead you to believe it has been lost; the court should not simply accept the assurance of counsel. It is up to you to produce an original, a duplicate, or evidence as to why you cannot which meets the conditions of Rule 1004.

In *U.S.F. & G. v. Cromwell*, 237 Mont. 72, 771 P.2d 970 (1989), a bond company paid on its performance bond for

a farm lease, and then sought indemnification from one of the farmers. The trial judge, sitting without a jury, found against the bond company, holding that it had never proven there was an indemnification agreement. The Supreme Court affirmed:

#### Best Evidence

At trial USF & G failed to introduce the original bond or the original rider. Instead, Williams, as custodian of the records for USF & G, introduced a sample form of the bond and the rider with the appropriate information typed in to show the court what obligations the bond purported to impose. Williams testified that the originals were likely in the hands of the lessors. However, USF & G offered no certainty as to where the originals were and no reason as to why they were not produced. That is not acceptable under the Rules of Evidence.

Rule 1004, M.R.Evid., states that the original writing is not required if it is

- [1] lost or destroyed;
- [2] not obtainable by judicial process;
- [3] in the hands of the opponent; or
- [4] if it relates only to a collateral matter.

The District Court was not allowed to make a finding under this rule as to whether the original was necessary because the plaintiff offered no reason for its absence.

Rule 1007, M.R.Evid., states that no accounting for the nonproduction of the original will be required if the contents of the writing (1) may be proved by testimony or (2) by written admissions of the party against whom it is offered. However, this rule is inapplicable to these facts because USF & G tried both approaches and failed.

During discovery USF & G requested Cromwell to admit the authenticity of a copy of the bond. Cromwell declined, stating that he had no actual knowledge that a bond had been issued and did not recall ever signing a bond. During trial Cromwell testified that while he believed a bond may have been issued, he did not know if he was the named principal and had no recall of signing a bond charging him with its obligations. Cromwell stated that he only signed an application filled out by an insurance agent in order to fulfill his obligations under the farm lease.

When Cromwell declined to admit to the authenticity of a copy of the bond during discovery, it became incumbent upon USF & G at trial to come forth and produce the bond, or put in evidence the reason why the original bond was not produced and why secondary evidence should be allowed to prove that the contract existed, Rule 1004, M.R.Evid. **Those failures by USF & G were**

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## Epilogue

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**fatal to its case.**

237 Mont. at 75-76. (Emphasis supplied)

More recently, a husband in a divorce tried to use a purported prenuptial agreement to constrain the district judge in division of the marital assets. The husband testified that he remembered going to his lawyer's office with his fiancée two days before their wedding; he remembered paying his lawyer to draft a pre-nup; and he remembered both himself and his fiancée signing the agreement. He also testified that he looked for, but never found, the signed agreement. He did not put on any evidence from the lawyer to corroborate either the preparation or signing of the document, or from any notary who should have notarized such a document. The wife, on the other hand, testified that she had never signed any such document. The trial judge apparently concluded that in fact no such document had ever been signed by both parties, as MCA 40-2-604 requires, so that there was no original in the first place, and thus it could not have been lost. Therefore, the secondary evidence provisions of Rule 1004 did not apply. The Supreme Court affirmed, commenting that the trial judge's "application of Rule 1004 to the proceedings was correct in all respects." *In re Marriage of Gochanour*, 300 Mont. 155, 163, 4 P.3d 643, 648 (2000).

The husband in *In re Marriage of Powell*, 231 Mont. 72, 750 P.2d 1099 (1988), tried a different tack. During the dissolution proceedings, he refused to respond to discovery requests and ultimately failed to show up for the final hearing. The wife appeared and presented to the court copies of two lists of the husband's assets, made in his own handwriting. The wife testified that she had found the originals of the documents in the husband's home office, and made copies but returned the originals to his desk. The trial judge admitted the lists over a Best Evidence objection, and the Supreme Court affirmed: "The copies of the original documents were admissible under Rule 1004(3), M.R.Evid." 231 Mont. at 75, 750 P.2d at 1101. This wife used the exception to the BER successfully; Mrs. Gochanour used the BER successfully because the husband failed to show he was entitled to the exception.

### Conclusion

If you are the proponent, bring the original. If you can't, bring a duplicate. If you can't bring either, bring evidence as to why you can't which meets one of the excuses listed in Rule 1004.

If you are the opponent, check to see if the BER even applies. Don't object unless the proponent needs to prove the contents of the writing/photograph/recording. Don't object if the writing/photograph/recording is simply being used to prove another fact. If the contents are necessary, hold the proponent to the fire. Insist on an original: failure to bring one may be fatal.

While Larry Liar and the Dalai Lama were sitting at that bar, Larry asked the Dalai Lama to speak at the Montana State Prison in Deer Lodge, after the dedication of the Garden of One Thousand Buddhas. However, the Dalai Lama does not come to the prison. Larry sues him for breach of contract. The Dalai Lama answers, denying that any contract ever existed, and affirmatively alleging that he had said he could not do so. At trial, Larry is on the stand on direct examination:

#### Scenario One:

Q. What made you think that the Dalai Lama agreed to speak at the prison?

A. We made a deal, a contract.

When did you make this deal?

At the Thousand Drinks Bar, that night we were both there and started talking. I asked him if he would speak to the prison, and he said yes, if I would give him \$10,000 for the Garden of a Thousand Buddhas. I was flush from the bank job, so I handed over the money right then. I asked the bartender to take a photo of the moment to record our deal.

I am handing you Exhibit 1. Do you recognize it?

Yes, it is a copy of the photo from that night.

Does Exhibit 1 accurately reflect what you remember from that night?

Yes, it does.

I move the admission of Exhibit 1. OBJECTION! BEST EVIDENCE RULE!

What is the best response/ruling?

Sustained.

Overruled, the BER applies but it was met.

Overruled, the BER does not apply.

**Scenario Two** — same underlying case, but different testimony from Larry:

What made you think that the Dalai Lama agreed to speak at the prison?

We made a deal, a contract.

When did you make this deal?

At the Thousand Drinks Bar, that night we were both there and started talking. I asked him if he would speak to the prison, and he said yes, if I would give him \$10,000 for the Garden of a Thousand Buddhas. I was flush from the bank job, so I handed over the money right then.

Did you write out an agreement?

Yes, I pulled out a pen and we used a cocktail napkin.

We both signed it. I wrote out the words, which were...

OBJECTION! BEST EVIDENCE RULE!

What is the best response/ruling?

Sustained.

Overruled, the BER applies but it was met.

Overruled, the BER does not apply.

Correct answers:

Scenario One involves an oral contract. There is no writing at issue. The photograph's contents are not at issue, either. Rather, the sole function of the photograph is to illustrate the

<sup>7</sup> The case does not say whether these were



oral testimony of the percipient<sup>8</sup> witness. The fact he is trying to prove is that there was an oral agreement, with a physical exchange of funds. The BER does not apply at all. Remember, Rule 1002 operates ONLY when the proponent is trying “to prove the content of a writing, recording, or photograph,” M.R.E. 1002, which is not the case here.

In Scenario Two, however, the plaintiff is alleging that there was a written contract, and its contents are the basis of this lawsuit. The plaintiff is testifying from his memory as to what words were written, and signed to, on the cocktail napkin. This is EXACTLY what the BER prohibits. Because we are all forgetful—and some of us, certainly a guy named “Larry Liar,” are prone to intentional misstatement for profit—the BER requires the writing itself. Thus, the objection should be sustained.

That does not leave the plaintiff without a way to prove the contents of the writing, however. He has two choices:

#### Scenario Two-A:

Do you still have that cocktail napkin?

Why, yes, I do.

I am handing you Exhibit 2. Can you identify Exhibit 2?

Yes. It is the cocktail napkin which we signed that night in the bar.

Is Exhibit 2 the original of your written agreement?

Yes.

How do you know?

I remember it, and I have kept it since that night. I signed in my special turquoise ink, and that is on this napkin. The Dalai Lama used a brush and wrote some characters but they weren't

<sup>8</sup> This word is SO lawyerly (even worse, law-professorly), and should be confined to writing only. I wanted to have one big word this month, but in real life, in real courtrooms, it is much better to say “witness with personal knowledge.” If I wouldn't use a word at my dining table (a very low bar, admittedly), I shouldn't use it in court.

## Obituary

### Russell Kenneth Fillner

Russell Kenneth Fillner, 88, passed away on Oct. 9, 2014, at the Montana Veterans home where he was a resident for the past two years.

Russ was born in Forsyth on April 18, 1926, to George and Jane Fillner. He spent his childhood in Forsyth, graduating high school there in 1944. Russ was a WWII veteran who served as part of the occupation forces in Japan. Following the war Russ returned to Montana, attending the University of Montana, where he graduated from law school in 1952. In 1952, he also passed his exam for Engineer for the Northern Pacific Railroad and was elected to his first term as Rosebud County Attorney.



Fillner

While attending college at the University of Montana he met his wife, D. Jane Jackson. They were married on Aug. 28, 1949.

Russ was elected as Rosebud County Attorney in 1952, serving until 1965. In 1967 Russ and family moved to Billings where he practiced law until 1986, when he was appointed District Court Judge by Gov. Schwinden. He retired from the bench in 1996.

in English. My signature and his brush marks are both on this napkin. And see, the other side says “Bar of a Thousand Drinks.” We agreed that I should keep it because the Dalai Lama did not have a pocket. I put it in my safe the next morning.

Q. I move the admission of Exhibit 2.

(This so clearly meets the requirement of the original that any objection would be ridiculous).

ADMITTED.

#### Scenario Two-B:

Do you still have that cocktail napkin?

No. I have looked everywhere for it, but I remember the Dalai Lama taking it with him that night. He seemed to have somewhere to stash it inside his robe, and said he would make a copy and send it to me but he never did. OR

A. No. I meant to put it in my safe deposit box next time I went to the bank, but my house burned down before I could do that, and the napkin burned up.

Do you remember what the cocktail napkin said?

Yes, perfectly. It was pretty short and to the point.

Q. What did it say?

OBJECTION! BEST EVIDENCE RULE!

RESPONSE: Rule 1004, Your Honor. COURT: OVERRULED, YOU MAY ANSWER.

## EXTRA CREDIT

Did you see the copyright on this article? If someone plagiarized (impossible in Montana, I know) this article and published it under his own name in a national magazine without attribution or permission, what would be my cause of action? How would I prove that his publication was the same as this article? Would the Best Evidence Rule require my counsel to offer the original of this article? If so, what would be the original? Is what you are now holding in your hand an original? Why or why not?

Russ enjoyed an active retirement with Jane, traveling, playing golf and spending time with family.

Russ was also active in his community, serving on the Billings City Council as well as many professional and community organizations including the Montana Bar Association, Montana County Attorneys Association, Lions Clubs International, Masons, Shriners, Eastern Star, and Elks Club. He was also an avid fan of the University of Montana Grizzlies.

Russ was a good, honest, fair man. He worked hard, loved his family, put five children through college, served his community in many ways and generously contributed to help those less fortunate. He will be missed by many.

Russ is survived by his wife of 65 years, Jane Fillner; his children Clifford Fillner (Beverly Fillner), William Fillner (Debra Martin), Myrna Ridenour (Bud Ridenour), Russ Fillner (Colleen Urquhart-Fillner); six grandchildren, 12 great-grandchildren and one great-great-grandchild. He was preceded in death by his parents; his sister Marion; half-brother John; his half-sister Frances; and his youngest son John.

Services to be held at a later date. Columbia Mortuary is caring for Russ's family.