CHAPTER 10

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CHAPTER 10

CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

I. INDIANA RULE OF EVIDENCE 1001

A. OFFICIAL TEXT:

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

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

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

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

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

B. THE "REQUIREMENT OF ORIGINAL" RULE (also known as the "BEST EVIDENCE RULE" or the "ORIGINAL DOCUMENTS RULE")

1. Rules 1001 through 1004

Indiana Rules of Evidence 1001, 1002, 1003 and 1004 collectively make up the "best evidence rule." A better term is the "original documents rule." Hudson v. State, 443 N.E.2d 834 (Ind. 1983).

a. Rule 1001 defines the terms used in Article 10 of the Indiana Rules of Evidence.
b. Rule 1002 establishes the general rule of the requirement of the original.
c. Rule 1003 permits a duplicate to be used in place if the original under certain circumstances.
d. Rule 1004 sets forth exceptions to the rule and identifies the circumstances under which the content of a writing, recording, or photograph can be proven by evidence other than the original or a duplicate.

Miller, 13 *Indiana Evidence* 648 § 1001.100 (4th ed.).

2. Terms defined

Rule 1001 defines terms used in Article 10 of the Indiana Rules of Evidence and does not necessarily apply in interpreting other rules. DesJardins v. State, 759 N.E.2d 1036 (Ind. 2001).

Before adoption of the Indiana Rules of Evidence, Indiana law did not apply the "best evidence rule" to photographs or X-rays. Miller, 13 *Indiana Evidence* 648 § 1001.100 (4th ed). Rule 1001 produced a change as to those items and is otherwise consistent with prior Indiana law.

3. Disputing accuracy of secondary evidence

To be entitled to reversal for the improper use of secondary evidence, an effective objection must identify an actual dispute over the accuracy of the secondary evidence. See Jones v. State, 780 N.E.2d 373, 378 (Ind. 2002).

C. SPECIFIC EXAMPLES

1. Writings and recordings

The definitions of "writing" in Rule 1001(a) and "recording" in Rule 1001(b) are broad in anticipation of the need to encompass future technological developments. Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 1001.03[1] (2d ed.).

Blood alcohol analysis machine printouts. Glasscock v. State, 576 N.E.2d 600, 603 (Ind. Ct. App. 1991) (error to admit lab report instead of machine printout "because it was not best evidence," but harmless because no challenge to accuracy of transcription onto lab report), *overruled on other grounds by* Abney v. State, 821 N.E.2d 375 (Ind. 2005); Miller, 13 *Indiana Evidence* 649-50 § 1001.101 n.6 (4th ed.).

Audio tapes. King v. State, 540 N.E.2d 1203, 1205 (Ind. 1989) (duplicate audiotape admissible); Miller, 13A *Indiana Evidence* 125 § 1001.101 n.7 (3d ed. 2007).

Carbon copies. Executed copies of an original document are originals. U.S. v. Dancy, 861 F.2d 77, 80 n.1 (5th Cir. 1988.

Drawings have been included in the meaning of Rule 1001(1). Seiler v. Lucasfilm, Ltd., 808 F.2d 1316, 1318-19 (9th Cir. 1986), *cert. den*. 484 U.S. 826 (1987).

> Seiler v. Lucasfilm, Ltd., 808 F.2d 1316, 1318-19 (9th Cir. 1986), *cert. den*. 484 U.S. 826 (1987) (plaintiff alleged that movie 'The Empire Strikes Back' had infringed his earlier designs for walking robots but could "produce no documentary evidence of any originals existing before the release of the movie." Trial court applied the best evidence rule to exclude proof of contents of original drawings, predating the release of the film, by later "reconstructions").

2. Photographs

For purposes of Article 10 of the Rules of Evidence only, the term "photographs" means a photographic image or its equivalent stored in any form.

DesJardins v. State, 759 N.E.2d 1036 (Ind. 2001) (includes still photographs, X-ray films, video tapes, and motion pictures).

The original document rule does not apply when a photograph is offered solely to illustrate the testimony of a witness, rather than to prove the contents of the photograph. However, the original document rule does apply when the proponent is seeking to prove the contents of the photograph. See, e.g., U.S. v. Stockton, 968 F.2d 715 (8th Cir. 1992); Saltzburg et al., 5 *Federal Rules of Evidence Manual* 1001-4 (11th ed. 2015).

In re J.V., 875 N.E.2d 395, 401 (Ind. Ct. App. 2007) ("To the extent that Parents are arguing that the admission of the photo of the camera violated the best evidence rule because the actual camera should have been admitted, they are mistaken because the best evidence rule only requires that the photograph be original and does not require admission of the object, which was the subject of the photograph.").

Sutherlin v. State, 784 N.E.2d 971 (Ind. Ct. App. 2003) (police lineup photo array stored in digital form on a computer was an "original" under Ind. R. Evid. 1001(3); a printout or projection of digital photographic images accessed through a computer is an original if it is shown to reflect the data accurately).

3. Transcripts of audio tapes

It is the tape recording of the conversation that constitutes evidence of what was said, not the transcript. Stringel v. Methodist Hospital of Indiana, 89 F.3d 415, 420 (7th Cir. 1996). For a more complete discussion on the use of transcripts, see Chapter 9, Rule 901, of this manual.

Small v. State, 736 N.E.2d 742 (Ind. 2000) (trial court erred in admitting transcript as exhibit as opposed to serving only as aid to jury in interpreting inaudible or indistinct portions of tape-recorded statement). See also Blanchard v. State, 802 N.E.2d 14 (Ind. Ct. App. 2004); Roby v. State, 742 N.E.2d 505 (Ind. 2001).

a. Content of tape recording at issue

The original documents rule applies when the contents of the tape recording are in issue. For example, where the defendant is charged with intimidation based on a threat allegedly left on an answering machine tape, the contents of the tape recording are at issue, and the original documents rule will apply to use of the transcript.

b. Content of tape recording proved by other evidence

The original documents rule does not apply when the contents of the tape are not themselves at issue but are offered as evidence to prove some other issue in the case. For example, where an undercover officer has taped a conversation with the defendant in which the defendant agrees to sell contraband, the original documents rule does not

prevent the officer from testifying to the content of the conversation from his own memory.

However, the original documents rule would prevent the officer from testifying to the content of the conversation based on having listened to the tape.

PRACTICE POINTER: When a party offers an audio tape and transcripts thereof, the jury should be instructed that it must rely upon the audible record and not the transcripts. Bryan v. State, 450 N.E.2d 53, 59 (Ind. 1983). The jury may use the transcripts while listening to the audio tape, but the transcripts should not be sent back to the jury room. Id.

The proponent of the transcript (usually the State) has the burden of showing that it is an accurate transcription. (Fred W. Bennett, Federal Rules of Evidence Tools for the Defense, 1993). If the transcripts are inaccurate (and harmful to your case), object to their admission as evidence and to their use by the jury. If the court permits the jury to see the transcripts without admitting them into evidence, ask that the transcripts be made a part of the record for the sole purpose of appellate review without waiving the objection to their admission into evidence.

4. Duplicates

A "duplicate" is a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process that reproduces the original, Ind. Evid. Rule 1001(e), including enlargements and miniatures, or by mechanical, electronic, or chemical reproduction. Rogers v. State, 902 N.E.2d 871, 877 (Ind. Ct. App. 2009). To qualify as a duplicate under Rule 1001(e), a copy should have been made by a method "possessing an accuracy which virtually eliminates the possibility of error." Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1001-7 (10th ed. 2011) (reprinting Advisory Committee's Note to Federal Rule 1001(4)). Copies subsequently produced manually, whether handwritten or typed, are not within the definition. Id.

Rogers v. State, 902 N.E.2d 871 (Ind. Ct. App. 2009) (discs and photographs were merely duplicates of the original recording; although they were redacted versions of the original, there is no evidence that they were altered or changed).

U.S. v. Mulinelli-Navas, 111 F.3d 983 (1st.Cir. 1997) (micro-formed copy of a check is a duplicate under Rule 1001(4); a print made from the microfilm is a duplicate of a duplicate).

U.S. v. Perry, 925 F.2d 1077 (8th.Cir. 1991), *cert. den*. (still photograph made from a bank videotape has been held to be a duplicate, because it was a counterpart made from the same impression as the original).

A document may be an original for one purpose and a duplicate for another. For example, "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." Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1001-7 (10th ed. 2011) (reprinting Advisory Committee's Note to Federal Rule 1001(4)).

Indiana's Electronic Transactions Act provides that an electronic record or electronic signature is not to be excluded from evidence because it is not an original or in original form. Ind. Code 26-2-8-112.

II. REQUIREMENT OF THE ORIGINAL - RULE 1002

A. OFFICIAL TEXT:

An original writing, recording, or photograph is required in order to prove its content unless these rules or a statute provides otherwise. An electronic record of the Indiana Bureau of Motor Vehicles obtained from the Bureau that bears an electronic or digital signature, as defined by statute, is admissible in a court proceeding as if the signature were an original.

B. APPLICATION OF RULE 1002

1. Original required to prove contents

Where the proponent of evidence offers it to prove the contents of a writing, recording, or photograph. Rule 1002, also known as the best evidence rule, generally requires the original document. The Rule also applies to video recordings. Wise v. State, 26 N.E.3d 137, 143 (Ind. Ct. App. 2015). Rule 1002 does not bar the use of evidence which incidentally shows the contents of a writing or recording, where the proponent of the evidence offers it to prove something other than the contents of a writing or recording. See Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1002-2-3 (11th ed. 2015). "The fact that a writing exists that describes or records an event, or a condition does not prevent testimony by knowledgeable witnesses about the same event or condition, if it is the event or condition to be proved and not the contents of the document itself." Id.

Minnick v. State, 544 N.E.2d 471 (Ind. 1989) (where witness relates a conversation he overheard and which also happens to be recorded, that witness's testimony is the best evidence). See also Lopez v. State, 527 N.E.2d 1119 (Ind. 1988).

Gerrick v. State, 451 N.E.2d 327 (Ind. 1983) (testimony of witness as to facts personally observed is not inadmissible simply because these observations have been embodied in a written report).

PRACTICE POINTER: An example of when the contents of a document are, or are not, at issue:

1. In a prosecution for selling an obscene videotape, the contents of the videotape are at issue. The prosecution may not prove the contents of the videotape by relying on testimony from a witness who has watched the tape; the videotape itself must be introduced into evidence. A videotape is included in the definition of "photograph" under Rule 1001(2).
2. In a (hypothetical) prosecution for indecent exposure, where the defendant was observed by undercover police who captured his antics on videotape, the prosecution may prove the defendant's conduct by testimony from the undercover officer who witnessed it. The videotape in this case is merely an alternative form of evidence of the issue of the defendant's conduct. Note that Rule 1002 would prevent the officer from testifying about the contents of the videotape. Cf. Caesar v. State, 139 N.E.3d 289 (Ind. Ct. App. 2020) (any error in admitting police officer's testimony about the content of a CVS store's security video, which the State did not admit into evidence at trial, was harmless).

2. Exceptions found in Rules 1003 and 1004

Rule 1002 must be read together with the exceptions in Rules 1003 and 1004. Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1002-2 (11th ed. 2015). Although not yet addressed in Indiana, other jurisdictions have held that a witness may not testify as to what they saw on a video recording without introduction of the video that the witness actually watched, unless the requirements of Evidence Rule 1004 or its equivalent are satisfied. See, e.g., T.D.W. v. State, 137 So. 3d 574, 576 (Fla. Dist. Ct. App. 2014); State v. Teague, 64 S.W.3d 917, 922 (Mo. Ct. App. 2002); and State v. Urbaschak, 342 P.3d 1108 (Or. Ct. App. 2015).

3. Statutes

The reference to statutes in Rule 1002 includes provisions such as 26 U.S.C. § 7513, providing that photographic copies of income tax returns are treated as originals, and Ind.Code 5-15-6-3, dealing with the destruction of public records.

Ind.Code 5-15-6-3 provides: No financial records or records relating to financial records shall be destroyed until the earlier of the following actions:

(1) The audit of the records by the state board of accounts has been completed, report filed, and any exceptions set out in the report satisfied.
(2) The financial record or records have been copied or reproduced in accordance with a retention schedule or with the written consent of the administration.

4. Foreign Language Recordings

The general requirement that an original recording is required to prove the content of a recording does not apply when the conversations in the original recording were entirely in a foreign language.

> Romo v. State, 941 N.E.2d 504 (Ind. 2011) (the admission into evidence of foreign language translation transcripts is not governed by Rule 1002 as applying the rule to limit the evidence of content to the original Spanish records would not serve the purpose of the rule because it could not prove any content to the jury).

5. Specific instances

a. Content of confessions

Rule 1002 is usually inapplicable to police testimony about the contents of a confession. The original document rule does not prevent a police officer who heard the defendant confess from testifying to the content of the confession, even though the confession may have also been recorded on video or audio tape. See, e.g., U.S. v. Ortiz, 966 F.2d 707 (1st Cir. 1992); Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1002-4 (11th ed. 2015).

b. Expert opinion based on documents

Example: X-rays and medical records. Although under Rule 1001(c) and Rule 1002, X-

rays are considered "documents", under Rule 703 an expert may testify to an opinion which is based on inadmissible evidence. Therefore, an expert witness could testify to an opinion which was based on another expert's report interpreting X-rays or other medical documents. Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1002-12 (11th ed. 2015) (Advisory Committee's Note).

> Meisberger v. State, 640 N.E.2d 716 (Ind. Ct. App. 1994) (trial court did not err in permitting dentist to identify decomposed body as that of victim by comparing teeth of body with dental x-rays which were never properly authenticated; absent some question as to accuracy of dentist's identification, it was competent for dentist to rely on hearsay information, which consisted of unauthenticated dental x-rays).

c. Photographs

Photographs are most commonly offered into evidence to illustrate a witness's testimony, rather than as independent proof of what is depicted in the photograph. Miller, 13 *Indiana Evidence* 661 §1002.103 (4th ed. 2016). The original document rule usually will not apply to photographs for this reason. Id. As a practical matter, even when the original document rule applies, a photographic print (including an enlargement) or photocopy of a photograph will usually be admissible as either an original or a 'duplicate' under Rule 1001((d)).

Exception: The "Silent Witness." Where an alleged crime, or an element thereof, is captured on photograph or videotape but is NOT observed at the same time by a witness, the photograph or videotape is subject to the original document rule because it is offered as independent proof of its contents. See, e.g., Shepherd v. State, 690 N.E.2d 318 (Ind. Ct. App. 1997). For a more detailed discussion on photographs being admitted as a "silent witness," see Chapter 9, Rule 901, of this Manual.

PRACTICE POINTER: For example, the defendant, a clerk at an all-night store, is charged with theft, allegedly having been caught on video surveillance camera stealing money from the cash register. No one else was present at the time of the alleged offense. The detective reviewed the video tape hours after the time of the alleged theft and the prosecutor now offers the detective's testimony that the video tape clearly shows the defendant removing cash from the drawer and pocketing it. This testimony is inadmissible under Rule 1002 because the video tape is a document, and the State is trying to prove its content. Note that it makes no difference that the content of the tape is not directly an issue in the case; the State is trying to prove the contents of the tape in order to prove an element of the crime.

d. Refreshing memory

Rule 1002 does not require the use of the original document when a witness uses a writing to refresh his memory. U.S. v. Finkelstain, 718 F. Supp. 1187, 1192 (S.D.N.Y. 1989); Miller 13 *Indiana Evidence* 660 § 1002.102 (4th ed. 2016).

e. Testimony about what a writing does not contain

According to Miller, Rule 1002 does not require the original when a witness testifies that a writing contains no reference to a particular matter. Miller, 13 *Indiana Evidence* 660 § 1002.102 (4th ed. 2016); Accord, Advisory Committee's Note, Federal Rule 1002.

United States v. Diaz-Lopez, 625 F.3d 1198 (9th Cir. 2010) (border patrol agent's testimony that he did not find any record that defendant had applied for permission to re-enter U.S. when he searched the Computer Linked Application Information Management System was not barred by Best Evidence Rule 1002).

United States v. Valdovinos-Mendez, 641 F.3d 1031 (9th Cir. 2011) (*citing* Rule 1002 and Advisory Committee Note for the proposition that the best evidence rule applies when the contents of a record are sought to be proved and not when records are searched and found not to contain any reference to the designated matter).

f. BMV records

The second sentence of Rule 1002 was apparently added for the convenience of the Bureau of Motor Vehicles in response to the Court of Appeals' opinion in Dumes v. State, 718 N.E.2d 1171 (Ind. Ct. App. 2000), *on rehearing* 723 N.E.2d 460 (Ind. Ct. App. 2000). The Dumes opinion held that the BMV, as the custodian of driving records, must be the entity to certify their accuracy, and not the prosecutor. In 2001, Ind. Code 9-14-3-4 was amended to allow the BMV to certify records remotely. The following year, Rule 1002 was amended to bring it into alignment with the statute. Miller, 13 *Indiana Evidence*, 662-63 §1002.105 (4th ed. 2016). A BMV record might be admissible over a hearsay objection under the hearsay exception in Rule 803(8) for public records and reports. See Coates v. State, 650 N.E.2d 58, 63 (Ind. Ct. App. 1995).

g. Product labels/ labels on chattels

Labels on chattels are not always subject to the best evidence rule. The trial court should consider: (1) the need of precise information as to the exact inscription, (2) the ease or difficulty of production, and (3) the simplicity or complexity of the inscription. Lawson v. State, 803 N.E.2d 237, 240-41 (Ind. Ct. App. 2004) (*quoting* Charles T. McCormick on Evidence § 234 (4th ed. 1992).

Lawson v. State, 803 N.E.2d 237 (Ind. Ct. App. 2004) (police officer's testimony that defendant's vehicle contained beer bottles labeled "Budweiser" did not violate the best evidence rule without the beer bottles).

III. ADMISSIBILITY OF DUPLICATES - RULE 1003

A. OFFICIAL TEXT:

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

B. DUPLICATES

1. Generally admissible

A duplicate, as defined by Rule 1001(e), is generally admissible as if it were an original. There are two exceptions.

1) Where the opposing party has raised a genuine question as to the authenticity of the original.
2) Where in the circumstances it would be unfair to admit the duplicate instead of the original. See Rogers v. State, 902 N.E.2d 871, 877 (Ind. Ct. App. 2009); and Wilson v. State, 169 Ind.App. 297, 348 N.E.2d 90 (1976).

For example, where the duplicate is not fully legible, or where the duplicate only reproduces part of the original and the remainder would be useful for cross-examination. Wilson v. State, 169 Ind.App. 297, 348 N.E.2d 90, 95 (1976); Miller, 13A Indiana Evidence 141 § 1003.101 (3d ed. 2007). When addressing whether it would be unfair to admit the duplicate in lieu of the original, the court should look primarily to circumstances affecting the trustworthiness of the duplicate for the purpose for which it is offered.

Belcher v. State, 797 N.E.2d 307 (Ind. Ct. App. 2003) (admitting partially obscured and incomplete photocopy of document signed by defendant, acknowledging notice of trespass, was error, but harmless where defendant admitted having been barred from premises).

D.Z. v. State, 100 N.E.3d 246, 249 n.1 (Ind. 2018) (Court asked, but did not decide, question whether a still photo pulled from a video recording is a "duplicate" and thus admissible to the same extent as a recording under Rule 1003, or is "other evidence of a recording" which would potentially require a showing that the original was unavailable under Rule 1004).

Wise v. State, 26 N.E.3d 137 (Ind. Ct. App. 2015) (complaining witness's renaming of cell phone videos did not mean that they had somehow been altered, thus admission of her recording as a duplicate did not violate best evidence rule).

Hamilton v. State, 182 N.E.3d 936, 938 (Ind. Ct. App. 2022) (rejecting defendant's argument that duplicate of original surveillance video was inadmissible under Indiana Evidence Rule 1002, the "best evidence rule"; defendant ignores Rule 1003, which

provides that "[a] duplicate is admissible to the same extent as an original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate").

Levi v. State, 627 N.E.2d 1345 (Ind. Ct. App. 1994) (photocopy of consent to search form was admissible, even though the defendant speculated that original may have had additional markings that did not copy; speculation isn't enough to make a photocopy inadmissible and officer testified there were no such markings).

2. Consistent with earlier law

Indiana Rule 1003 is identical to Federal Rule 1003 and is consistent with earlier Indiana case law. See Levi v. State, 627 N.E.2d 1345 (Ind. Ct. App.1994) ("Copies are admissible to the same extent as the original unless a genuine issue is raised as to the authenticity of the original, or under such circumstances that it would be unfair to admit the duplicate as an original.") (*citing* Wilson v. State, 348 N.E.2d 90 (Ind. Ct. App. 1976)).

3. Duplicates of business records admissible by statute

I.C. 34-42-1-1 specifically authorizes business to make duplicates of business records and provides for the admissibility of the duplicates to the same extent as the originals.

IV. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS - RULE 1004

A. OFFICIAL TEXT:

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

(a) all originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.

B. EXCEPTIONS TO THE REQUIREMENT OF THE ORIGINAL

1. Rule of preference

The Original Documents Rule is a rule of preference and not necessarily a rule of exclusion. Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1004-2 (11th ed. 2015). Secondary evidence of the contents of a document will be admissible if the proponent can show that one of the exceptions in Rule 1004 applies. Id. In D.Z. v. State, 100 N.E.3d 246, 249 n.1 (Ind. 2018), the Supreme Court asked, but did not decide, the question whether a still photo pulled from a video recording is a "duplicate" and thus admissible to the same extent as a recording under Rule 1003 or is "other evidence of a recording" which would potentially require a showing that the original was unavailable under Rule 1004. One pre-Rules case suggests the later, that when a proffered exhibit constitutes "only a portion of the total original document [and] the remainder would be useful for cross examination, or might qualify the portion offered," the common-law best evidence rule would prevent admitting the extract. See Wilson v. State, 348 N.E.2d 90, 95 (Ind. Ct. App. 1976).

2. "Secondary evidence"

"Secondary evidence" in this context means any evidence of the contents of the document other than the original document or a duplicate thereof.

Rule 1004 does not recognize degrees of preference for secondary evidence; any secondary evidence is permissible if the original is not required. Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1004-5 (11th ed. 2015); Miller, 13 *Indiana Evidence* 668 §1004.100 n.5 (4th ed.). Before the Indiana Rules of Evidence were adopted, some Indiana cases and authorities suggested that where the original was shown to be unavailable, the 'next best evidence' was required. Miller, 13 *Indiana Evidence* 668 §1004.100 (4th ed. 2016). Although the Rules do not require the 'next best evidence,' parties still have an incentive to use the most reliable evidence available because of the adversarial process and the fact that the opposing party may still cross-examine about the witness's destruction or loss of the

original document. Id., n. 6 at 668-69.

Bickford v. State, 25 N.E.3d 1275 (Ind. Ct. App. 2015) (recorded playback of videos from cell phone did not violate best evidence rule).

Exception: Rule 1005 creates a limited hierarchy of secondary evidence with regard to public records, excusing the production of the originals under certain circumstances. Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1004-5 (11th ed. 2015).

3. Instances where original not required

a. Lost or destroyed original

(1) No bad faith

Secondary evidence will be admissible to prove the contents of a writing, recording, or photograph if the proponent can show that the original has been destroyed or lost, unless the proponent lost or destroyed the original in bad faith. Wise v. State, 26 N.E.3d 137, 143 (Ind. Ct. App. 2015); Miller, 13 *Indiana Evidence* 672 §1004.102 (4th ed. 2016).

"[One who caused or allowed the destruction of a writing cannot present secondary evidence of its contents without first introducing evidence explaining the destruction and overcoming any inferences of bad faith arising from such destruction," because a party should not gain an evidentiary benefit from the destruction of evidence. Miller, 13 *Indiana Evidence* 672 § 1004.102 (4th ed. 2016).

(2) Destroyed original

Good faith destruction of writings and records has been held to include situations where originals are routinely destroyed or reformulated "in the ordinary course of proper record keeping, for example, pursuant to an established document retention policy." Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1004-2 (11th ed. 2015); Ind.Code 5-15-6-3.

U.S. v. Dudley, 941 F.2d 260 (4th Cir. 1991), *cert. den.* 502 U.S. 1046 (1992) (government routinely destroyed old U.S. currency circulation records; secondary evidence of contents was admissible)

(3) Lost original

The foundational elements for showing that the original was lost are:

(a) The witness discovered that the original was lost.
(b) The witness then searched for the original.
(c) The search was reasonably diligent.
(d) Despite the search, the witness could not locate the original.

Courts have strictly enforced the diligence requirement when the secondary evidence appears to be suspect. See Cartier v. Jackson, 59 F.3d 1046 (10th Cir. 1995).

(4) Despite the search, the witness could not locate the original

Imwinkelried & Blinka, *Criminal Evidentiary Foundations* 445, (3d ed. 2016); see Marksill Specialties, Inc. v. Barger, 428 N.E.2d 65, 68 (Ind. Ct. App. 1981); Miller, 13 *Indiana Evidence* 670 §1004.101 n.4 (4th ed. 2016).

Whether the proof discloses a diligent enough search for the original will depend on the circumstances of the case and rests in the trial court's discretion. In re J.V., 875 N.E.3d 395, 401-02 (Ind. Ct. App. 2007)

b. No original can be obtained by judicial process

The foundation for this exception includes these elements:

(1) A third party has the original.
(2) The third party resides in a certain place.
(3) That place is beyond the reach of the court's compulsory process.
(4) There may be a fourth element, that is, the proponent may have to show that she unsuccessfully attempted to persuade the third party to voluntarily send the original document to the place of trial, or that it would be futile to attempt to persuade the third party to do so under the circumstances.

Imwinkelried & Blinka, *Criminal Evidentiary Foundations* 453, (3d ed. 2016). Rule 1004(b) does not expressly require this, and Indiana courts have not addressed the question. Miller, 13 *Indiana Evidence* 673-74 §1004.102 (4th ed. 2016).

c. Original is in opponent's possession

(1) Notice

A party may prove the contents of a document with secondary evidence if the original is in the hands of the opposing party. The opposing party must be given reasonable notice of the intent to use secondary evidence to prove the contents of the document and an opportunity to produce the original. Miller, 13 *Indiana Evidence* 674 §1004.104 (4th ed. 2016).

(2) Foundation

The elements of this exception are:

(a) The party-opponent has the original.
(b) The party-opponent knew that the original would be needed at trial.
(c) The party-opponent nevertheless failed to produce the original at trial.

Imwinkelried & Blinka, *Criminal Evidentiary Foundations* 455 (3d ed. 2016).

(3) Fifth Amendment implications

A defendant (or other witness) in possession of incriminating writings, recordings, or photographs often may not be compelled to produce them without violating constitutional rights, such as the privilege against self-incrimination. U.S. v. Hubbell, 530 U.S. 27, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000); Miller, 13 *Indiana Evidence* 156 §1004.301 (4th ed. 2016). The purpose of the notice provision in Rule 1004(c) is to give the opposing party an opportunity to produce the original, not to compel him to do so. Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1004-10 (10th ed. 2011) (reprinting Advisory Committee's Note to Federal Rule 1004(3)); 2 *McCormick on Evidence* 156 § 237, n.21 (7th ed. 2013).

The court may permit the State to lay a foundation for the use of secondary evidence by showing that the original document is in the defendant's possession and was not produced in response to a notice to produce. Miller, 13 *Indiana Evidence* 675 §1004.104 (4th ed. 2016). However, this foundation should be made outside the presence of the jury. Otherwise, the foundational evidence would amount to an impermissible comment on the defendant's right against self-incrimination. Miller, 13 *Indiana Evidence* 675 §1004.104 (4th ed. 2016). "[A] demand upon the accused to produce which is delivered before the jury clearly has a tendency to coerce the defendant and thus cheapen the privilege [against self-incrimination.]" 2 *McCormick on Evidence* 158 § 237, n. 29 (7th ed. 2013).

(4) Waiver: failure to produce under Trial Rules

The original documents rule does not apply when a party in control of a writing fails to produce it for inspection under Trial Rule 9.2(E) or fails or refuses to produce it for inspection or copying under Trial Rule 34. Miller, 13 *Indiana Evidence* 676 §1004.104 (4th ed. 2016). A party may not produce a document pursuant to T.R. 34 and later object to the same document on best evidence grounds. Smith v. City of South Bend, 399 N.E.2d 846, 851 (Ind. Ct. App. 1980); Miller, 13 *Indiana Evidence* 676 §1004.104 (4th ed. 2016).

d. Collateral matters

Documentary evidence which is not closely related to a controlling issue is often referred to as collateral evidence. Secondary evidence may be used to prove the contents of documents which are collateral. Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1004-5 (11th ed. 2015).

McCormick suggests that trial courts should consider three factors in determining whether a document is collateral:

(1) whether the writing is central to the principal issues of the litigation,
(2) the complexity of the relevant features of the writing,
(3) whether the contents of the writing are in genuine dispute.

Miller, 13 *Indiana Evidence* 152 §1004.105 (4th ed. 2016); 2 *McCormick on Evidence* 162 § 239 (7th ed. 2013).

e. Original recording made in a foreign language

The general requirement that an original recording is required to prove the content of a recording does not apply when the conversations in the original recording were entirely in a foreign language. See Romo v. State, 941 N.E.2d 504 (Ind. 2011) (the admission into evidence of foreign language translation transcripts is not governed by Rule 1002 as applying the rule to limit the evidence of content to the original Spanish records would not serve the purpose of the rule because it could not prove any content to the jury).

V. COPIES OF PUBLIC RECORDS TO PROVE CONTENT - RULE 1005

A. OFFICIAL TEXT:

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

B. RATIONALE BEHIND RULE 1005

Because public records are frequently required in court, and because it would be impractical to require the original record to be physically produced every time the document was needed in court, Rule 1005 makes a copy admissible even if its accuracy is disputed. Miller, 13 *Indiana Evidence* 678 §1005.101 (4th ed. 2016).

There are several reasons for this exception. First, requiring the original to be removed from official custody might inconvenience other persons who need access to the document. Second, removing the original from official custody would create a risk of loss or destruction of the original. Imwinkelried & Blinka, *Criminal Evidentiary Foundations* 449 (3d ed. 2016).

C. EFFECT OF RULE 1005

1. Hierarchy established

Unlike Rule 1004, Rule 1005 establishes a preference among different types of secondary evidence. Saltzburg et al., 5 Federal Rules of Evidence Manual 1005-2 (11th ed. 2015). The preferred types of secondary evidence are:

(a) a copy certified to be correct in accordance with Rule 902, or

(b) a copy testified to be correct by a witness who has compared it with the original (a 'compared copy').

"If a certified or compared copy of a record or document covered by Rule 1005 cannot be obtained by the exercise of reasonable diligence" (which should be an extremely rare occurrence), the Rule allows that the proponent may use "other evidence to prove the content." Id.

2. Requires diligent search

"When a public record is claimed to be lost, the [trial] court may require proof of a diligent search of the office in which the record should be kept, by one with sufficient acquaintance with the office to be likely to find the record if it is there, before allowing other evidence of

the record's contents." Miller, 13 *Indiana Evidence* 680 §1005.101 (4th ed. 2016).

D. RELATIONSHIP TO RULE 1003

Rule 1005 only applies when "the proponent is offering to prove the contents of the document as a public document." U.S. v. Childs, 5 F.3d 1328 (9th Cir. 1993).

"If the proponent is not attempting to establish the content of the public record as such, but rather is trying to prove the content of the original record regardless of whether or not it is a public record, the rationale behind Rule 1005 does not apply. In that situation it is more appropriate to admit a copy of that document under Rule 1003… rather than under Rule 1005." U.S. v. Childs, 5 F.3d 1328, 1335 (9th Cir. 1993).

> U.S. v. Childs, 5 F.3d 1328, 1335 (9th Cir. 1993) (in prosecution for auto theft, Government offered duplicates of automobile title certificates and other records from automobile dealer's files rather than from official custody; exhibits were admissible under Rule 1003 as proof of the contents of the dealer's files and were not required to comply with Rule 1005 because they were not offered to prove the contents of public records).

E. HABITUAL OFFENDER PROCEEDINGS

Copies of public records, such as indictments, judgments, and other writings referring to a former conviction are admissible if their authenticity is properly certified. Kelly v. State, 561 N.E.2d 771, 773-75 (Ind. 1990). However, a certification itself is not a public record; the admissibility of a copy or duplicate of the certification itself will be governed by Rule 1003, and where a genuine question is raised as to the authenticity of the original, a duplicate may not be admissible. Kelly v. State, 561 N.E.2d 771, 773-75 (Ind. 1990); see Rule 1003. Moreover, photocopies of certification of authenticity are inadmissible. Id.

F. ELECTRONIC SIGNATURES: BUREAU OF MOTOR VEHICLE RECORDS

Under Rule 1002 "[a]n electronic record of the Indiana Bureau of Motor Vehicles obtained from the Bureau that bears an electronic or digital signature, as defined by statute, is admissible in a court proceeding as if the signature were an original." This change to the Rules was apparently made for the convenience of the Bureau in response to the Court of Appeals' opinion in Dumes v. State, 718 N.E.2d 1171 (Ind. Ct. App. 2000), *on rehearing* 723 N.E.2d 460 (Ind. Ct. App. 2000). The Dumes opinion held that the BMV, as the custodian of driving records, must be the entity to certify their accuracy, and not the prosecutor. This part of the holding is still true, but the amendment to Rule 1002 allows the BMV to certify electronic records remotely.

VI. SUMMARIES TO PROVE CONTENT - RULE 1006

A. OFFICIAL TEXT:

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

B. EFFECT OF RULE 1006

Rule 1006 is an exception to the original documents rule. A summary of the original documents is admissible when the materials summarized "cannot be conveniently examined in court." Rule 1006. "A Rule 1006 summary also may establish the absence of mention of a topic in underlying voluminous records." Miller, 13 *Indiana Evidence* 685 §1006.101 (4th ed. 2016). Under prior case law, summaries were only admissible if the originals were "of such a nature as to make it difficult for the trier of fact to understand." Chicago, St. L. and Pittsburgh R.R. Co. v. Wolcott, 141 Ind. 267, 39 N.E. 451 (1895).

Rule 1006 may only be used to admit summaries of writings, recordings, and photographs (as defined by Rule 1001). Testimony may not be summarized under Rule 1006. Miller, 13 *Indiana Evidence* 684 §1006.101 (4th ed. 2016). However, "[t]he summary itself need not be written, and may be presented by testimony[.]" Id. Rule 1006 also does not apply when the originals have been destroyed and the summary is offered as secondary evidence of the contents of the original under Rule 1004.

C. FOUNDATION

Foundation for summary under Rule 1006 (from Miller, 13 *Indiana Evidence* 684 § 1006 .101 (4th ed. 2016). The proponent of the summary must show that:

1. Underlying originals are 'voluminous'

The originals must be 'voluminous' enough that they cannot be conveniently examined in court. This is within the trial court's discretion.

2. Originals or duplicates were made available to the opposing party for examination and/or copying

The trial court has discretion to determine the reasonableness of the opportunity of the other party to inspect or copy. The opposing party must have had adequate time to prepare a defense or challenge the summary's accuracy. The trial court does not have discretion to dispense with this requirement. The trial judge may order that the summarized materials be produced in court. If the material is produced in court but not earlier, the opposing party may

be entitled to a continuance to review the materials and prepare a challenge to the summary.

Crawford v. State, 401 N.E.2d 715 (Ind. Ct. App. 1980) (voluminous records may be summarized if the underlying records are admissible and available to the opposing party).

3. The summary is essentially accurate

Ordinarily, the preparer of the summary will have to testify to authenticate the summary. The summary's accuracy is a question for the jury, and the trial court should admit the summary if there is evidence from which the jury could find the summary to be accurate.

Shively v. Shively, 680 N.E.2d 877 (Ind. Ct. App. 1997) (exhibit tendered by wife was two-page summary comprised of data from twenty-eight pages of pay records and tax documents previously admitted into evidence and made available for husband's inspection was admissible, despite husband's argument that law clerk was not qualified to make the summary).

PRACTICE POINTER: Be especially alert for graphical 'summaries' that distort the data they are purported to summarize. For an excellent treatise on the subject of graphical practice, and graphical integrity, see Edward R. Tufte, *The Visual Display of Quantitative Information* 52-77 (1983).

4. The underlying originals are themselves admissible

The original records must be admissible, but not necessarily admitted into evidence themselves. Summaries are subject to Rule 403, which provides that relevant evidence may still be excluded on grounds of prejudice, confusion, or undue delay.

If the underlying records are inadmissible hearsay, a summary of the records is not admissible under Rule 1006. However, an expert witness may present a summary of her opinion based on inadmissible evidence under Rule 703. See, e.g., Meisberger v. State, 640 N.E.2d 716 (Ind. Ct. App. 1994).

VII. TESTIMONY OR STATEMENT OF A PARTY TO PROVE CONTENT - RULE 1007

A. OFFICIAL TEXT:

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

B. ADMISSIONS ABOUT DOCUMENTS

1. By opposing party

Where the opposing party has admitted (either in testimony or in writing) the contents of a writing, recording, or photograph, a party may use the admission to prove the contents. The offering party is not required to show why the original is not produced. Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1007-12 (11th ed. 2015).

2. Exception to Rule 1002

Rule 1007 is an exception to the general rule (Rule 1002) that the contents of a writing, recording, or photograph may not be proven by secondary evidence. The opposing party's admission must have been in writing, testimony, or deposition to be admissible as secondary evidence of the contents of the document under Rule 1007.

Rule 1007 does not allow the use of oral admissions not given during testimony. The risk of inaccuracy in reporting oral admissions is greater than the risk of inaccuracy in written or testimonial admissions. Wright & Gold, 31 *Federal Practice and Procedure: Evidence* § 8054 (2000). However, if the oral admissions would be admissible as secondary evidence of the contents of the document under Rule 1004, Rule 1007 does not make them inadmissible. Saltzburg et al., 5 *Federal Rules of Evidence Manual* 1007-3 (Advisory Committee's Note to Rule 1007) (11th ed. 2015).

3. Relationship to Rule 801(d)(2)

Miller reports that "leading treatises argue that Rule 801(d)(2) (which makes statements of an opposing party non-hearsay) should determine whose prior testimony, deposition, or admission can be used as proof." Miller, 13 *Indiana Evidence* 693-94 § 1007.101 (4th ed. 2016).

VIII. FUNCTIONS OF THE COURT AND JURY - RULE 1008

A. OFFICIAL TEXT:

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

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

B. WHO MAKES FACTUAL DETERMINATIONS

1. Merits of the case

Factual determinations concerning the merits of the case are to be made by the finder of fact. Wright & Gold, 31 *Federal Practice & Procedure: Evidence* § 8064 (2000). If the court were able to decide that a document never existed and that secondary evidence of the document was therefore inadmissible, a party basing its case on the document would lose the right to a trial by jury. Miller, 13 *Indiana Evidence* 695 § 1008.101 (4th ed. 2016).

2. Administration of the rule

Factual determinations concerning the administration of the Original Documents Rule are to be decided solely by the trial court. Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1008-4 (reprinting Advisory Committee's Notes to Rule 1008) (11th ed. 2015).

C. ISSUES FOR THE TRIAL JUDGE

1. Sufficiency and admissibility

Where Rule 1008 assigns an issue to the jury, the trial judge decides whether or not there is sufficient evidence from which the jury could find the necessary facts by a preponderance of the evidence. If there is, the evidence should be admitted. Miller, 13 *Indiana Evidence* 696-97 § 1008.102 (4th ed. 2016).

2. Judge's duty

The trial judge "must ensure that the technical requirements of the Best Evidence [or Original Documents Rule] have been satisfied." Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1008-2 (11th ed. 2015). This includes whether an exception created by Rule 1003 through 1007 allows the use of secondary evidence. Miller, 13 *Indiana Evidence* 696-97 § 1008.102 (3d ed. 2007). The trial judge determines:

a. whether an item of evidence is an "original" under Rule 1001(d);
b. whether an item of evidence is a "duplicate" under Rule 1001(e) and therefore presumptively admissible under Rule 1003;
c. whether it would be unfair to admit a duplicate instead of the original under Rule 1003;
d. whether a genuine dispute about the accuracy of a duplicate exists (Rule 1003);
e. whether the original was lost or destroyed other than by the proponent in bad faith, and whether the search for an allegedly lost or destroyed original was diligent (Rule 1004(a));
f. whether judicial procedures to obtain the original were exhausted (Rule 1004(b));
g. whether the adverse party has possession or control of the original, and if so, whether the party in control of the original was put on notice of the need for the original (Rule 1004(c));
h. whether the writing, recording, or photograph is sufficiently unrelated to the case's subject matter to justify the collateral matters exception in Rule 1004(d);
i. whether a certified copy of an official record can be obtained;
j. whether originals are so voluminous as to warrant a summarization under Rule 1006;
k. whether a statement qualifies as an 'admission' for purposes of Rule 1007.

Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1008-2-3 (10th ed. 2011); Miller, 13 *Indiana Evidence* 696-97 § 1008.102 (4th ed. 2016).

D. ISSUES FOR THE JURY (or finder of fact)

Rule 1008 is illustrative and lists the most common issues reserved for the finder of fact but is not exhaustive. Miller, 13 *Indiana Evidence* 697 § 1008.103 (3d ed. 2007).

a. whether an asserted writing ever existed;
b. whether a different writing, recording or photograph produced at trial is the actual original;
c. whether secondary evidence admitted under Rule 1003 through 1007 accurately reflects the original's contents.

The trial judge determines whether the secondary evidence is admissible to show the contents of the original. Only if the trial judge finds that the secondary evidence complies with the conditions of admissibility does the accuracy of the secondary evidence become a question for the jury. Seiler v. Lucasfilm, Ltd., 808 F.2d 1316 (9th Cir. 1986), *aff'g* 613 F. Supp. 1253 (N.D. Cal. 1984), *cert. den.*; Saltzburg, et al., 5 *Federal Rules of Evidence Manual* 1008-3-4 (11th ed. 2015).