

E ORIGINAL: THE BEST EVIDENCE RULE IN FLORIDA

Criminal Law Section

Author: Mark Rankin, Carlton Fields, P.A.

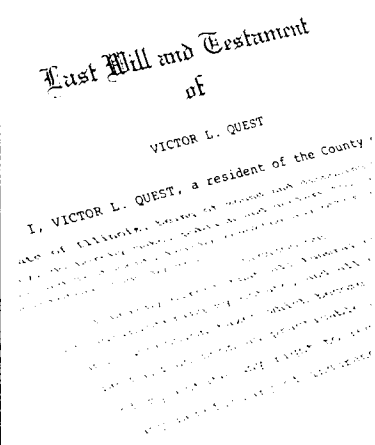


The so-called "Best Evidence Rule" seems like common sense: a party must put forth the best evidence available to establish something. Unfortunately, the Best Evidence Rule is a commonly used nickname for what is more accurately described as the Original Writing Rule or Original Recording Rule. No matter what you call it, the rule is easily understood and potentially important in criminal cases.

The Best Evidence Rule, set forth in the Florida Statutes as a "Requirement of originals," requires that "[e]xcept as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." § 90.952, Fla. Stat. (2009). In other words, if you want to prove up the contents of such a writing or recording, you must produce the original writing or recording in court. The rule is, however, subject to certain exceptions. An original need not be produced where: 1) "all originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith;" 2) the "original cannot be obtained [in Florida] by any judicial process or procedure;" 3) the other party controls the original and was put on notice that it would be relevant to the

proceedings; or 4) the writing or recording "is not related to a controlling issue." § 90.954, Fla. Stat. (2009). See also *McKeehan v. State*, 838 So. 2d 1257 (Fla. 5th DCA 2003) (explaining the Best Evidence Rule under Florida law).

The rule is arguably most important in cases involving wills and contracts, where the original document is surely more compelling than the potentially biased testimony of a witness. However, the rule frequently arises in the criminal context, particularly in cases involving written confessions or videotape evidence. *Russell v. State*, 844 So. 2d 725 (Fla. 5th DCA 2003), underscores the importance of the State and defense understanding the Best Evidence Rule. In *Russell*, the defendant was charged with attempted burglary and petit theft at a Taco Bell, which he allegedly broke into and stole change from the registers. At trial, the State called a detective to the stand. On direct examination, he was asked about a videotape of an individual spending a large quantity of change at a nearby



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7-Eleven store. The detective testified that the 7-Eleven videotape showed that the defendant was at the store counter with a large quantity of change. The videotape itself was not admitted into evidence and the trial court overruled the defendant's Best Evidence Rule objection. The Fifth District Court of Appeal reversed *Russell's* conviction, holding that "since [the detective] testified as to the content of the 7-Eleven videotape instead of admitting the tape into evidence, defense

counsel's best evidence objection should have been sustained." *Id.* at 728.

Although the exceptions to the Best Evidence Rule present their own nuances, those are matters for another (longer) article. Nevertheless, the basic rule is quite simple. If you want your witness to describe the contents of a writing or recording, be prepared to enter the original into evidence.

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