

The Best Evidence Rule & Video Recordings

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New York courts have applied the best evidence rule to video surveillance recordings in a variety of circumstances. This article addresses holdings in which an original video recording has been destroyed or is otherwise unavailable and secondary evidence is offered in lieu of the original. The best evidence rule requires the production of an original version of evidentiary material when its contents are in dispute and sought to be proven.¹

Historically, the best evidence rule was intended to reduce fraud or perjury and prevent the introduction of inaccuracies into evidence, which may occur when "secondary evidence" is allowed.² Secondary material is permitted, as an exception to the rule, only if the proponent carries the burden to sufficiently explain the unavailability of the original, and further proves that the copy is an accurate and reliable portrayal of the original.³

Formulated during the time of medieval scribes, the best evidence rule was not intended for digital video technology. Mechanical application of the old rule to constantly developing video surveillance technology could become a vexing exercise. For instance, strict application would require entering a DVR's hard disk drive (HDD) into evidence rather than an extraction onto a disc or an external drive. Increasingly common network video recorders (NVRs), store digital images on an IP network or "cloud," in addition to the HDD. Presenting original digital data from an IP network or cloud would be impossible. Technically, any initial download or extraction from current video surveillance systems would constitute a "copy."

Inevitably, courts simply sidestep the theory/reality dissonance imposed by strict application of the best evidence rule in this context and assume that the first download onto a DVD or external drive is an "original" under the rule. Duplicates made from the initial extraction, even in non-rewritable form (DVD+R or DVD-R), nonetheless may be subject to best evidence challenge.⁴ As a practical matter, CPLR §3101(i), requiring disclosure of all video recordings in discovery, provides a sufficient opportunity to review and test copies prior to trial, affording the protection the best evidence rule was intended to yield.⁵ Nonetheless, it is advisable to preserve the initial extraction, just as you would safeguard any original.⁶

Federal Rule of Evidence §1003 avoids the rule/reality quandary by permitting introduction of video copies or "duplicates" to the same extent as an original: Admissibility of Duplicates: A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.⁷

According to Fed. R. Evid. §1001(e):

(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.⁸

In *Asociacion De Periodistas De Puerto Rico v. Mueller*,⁹ the court considered a best evidence challenge to replications of original video footage of FBI activities, which were originally recorded by journalists and then aired during local news broadcasts. Ruling on the plaintiffs' contention that the DVD copies violated the best evidence rule, the court held that, although they were not originals, such "duplicates" were admissible to the same extent as originals pursuant to Fed. R. Evid. §1003.¹⁰

Repeated efforts to codify a uniform and complete set of evidence rules, which are currently scattered throughout common law precedents and various statutes, have never been successful.¹¹ Although a proposed analog to Fed. R. Evid. §1003, and related provisions, has been recommended by the New York State Law Revision Committee, the proposal, as part of a total evidence package, has never been promulgated by the Legislature.¹² Under New York law, the burden still remains on the proponent of secondary evidence, including copies of surveillance video, to satisfy the two-prong exception to the best evidence rule.

Testimonial Descriptions

New York courts have applied the best evidence rule when oral testimony describing the contents of video is elicited and the original video is no longer available. In such circumstances, courts are reluctant to permit raw testimonial descriptions of absent video, generally holding that such testimony violates the best evidence rule.¹³

In *Ware v. Atl. Towers Apt. Corp.*,¹⁴ the Supreme Court, Kings Co., reviewed cases that addressed the admissibility of verbal descriptions of unpreserved video, and ruled that the failure to satisfy the second prong of the best evidence exception, proof of an accurate and reliable description of the lost video, precluded the witness' observational testimony. The Ware court attempted to strike a fair balance in a multi-party context where the non-culpable (non-spoliating) parties sought to diminish the detriment of unpreserved video by offering descriptive testimony. The court

recognized that the spoliator should not unfairly reap a windfall from the lost video, but ultimately barred the testimony. The court concluded that the witness who viewed the video before it was destroyed was unable to "recount or recite, from personal knowledge, substantially and with reasonable accuracy all" the contents of the video.¹⁵

Phoning It In

*People v. Butler*¹⁶ is representative of another line of cases in which the best evidence rule has been applied to hand-held recordings of monitor playback or re-recordings. In *Butler*, a crime was captured on a surveillance system. Rather than extract a copy of the footage from the system DVR, the person seeking to secure the video used his cell phone to re-record the original video while it was playing back on the monitor. So called "phoning it in," a procedure employed when the person trying to download video does not know how to operate the equipment, can create a host of potential problems. And in *Butler*, the makeshift method prompted a best evidence challenge.

Ultimately, the *Butler* court (Supreme Court, Kings County) held that the cell phone re-recording was properly admitted into evidence. The court concluded that the proffering party was not responsible for the loss of the original recording, satisfying the first prong of the exception.¹⁷ Link to the text of the note The court further held that because an eyewitness to the actual occurrence testified before introduction of the video, and provided a direct pictorial foundation for the rerecording, the exception's second prong-that the re-recording accurately and reliably portrayed the original-was also satisfied. As the court reasoned, "Since the witness was able to testify first hand as to the events that occurred and what was depicted on the video that was entered into evidence, any deficiencies went to the weight of the video not the admissibility..."¹⁸

Butler would have necessitated a different outcome if the court had determined that the proffering party was responsible for the failure to secure the original video, or if an eyewitness was unable to establish that the re-recorded video reliably and accurately portrayed the events.¹⁹

Live-Feed Observations

Another line of decisions has evolved where testimony is elicited of the live-feed of video-surveillance observations, i.e., someone watched the monitor at the time of the incident, without the system actually recording. Courts have held that introduction of live-feed observation testimony does not violate the best evidence rule provided that the proffering party establishes that the video equipment functioned properly at the time of the viewing and the cameras provided a contemporaneous and "true-to-life" view of the events.

In *Matter of Jayshawn B.*,²⁰ the Family Court, New York County, reasoned that a witness' observations of what was observed on a video surveillance monitor was essentially the same as observations made through binoculars, and, therefore, did not implicate the best evidence rule.²¹ Link to the text of the note The same result has been reached in other live-feed observation cases, predicated on three conditions: (1) the witness' observations of the monitor are contemporaneous with the actual event; (2) the witness subjected to cross examination can accurately and reliably describe what was observed, and; (3) some showing is made that the layer of technology between the witness and the actual event was functioning properly.²² Link to the

text of the note Of course, one could also conclude that the best evidence rule should not even govern when there is no "original" recording.

Conclusion

Following standard video extraction protocols, documenting the process, preserving the initial download, labeling it properly, maintaining chain of custody for preservation, and complying with CPLR §3101(i)23Link to the text of the note will normally suffice to defeat a best evidence or authentication challenge to third party surveillance video recordings. New York's enactment of an evidentiary rule similar to Fed. R. Evid. §1003, which is followed in numerous other states, would alleviate messy collisions between the anachronistic best evidence rule and digital era video surveillance.

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Footnotes

1 See, e.g., *Fed. R. Evid. R. 1002*; *Schozer v. William Penn Life Ins. Co. of New York*, 84 N.Y.2d 639, 643, 644 N.E.2d 1353, 620 N.Y.S.2d 797 (1994).

2 See, e.g., *Ware v. Atl. Towers Apt. Corp.*, 40 Misc.3d 1213[A], 2013 NY Slip Op 51177[U] (Sup. Ct., Kings County 2013).

3 *Schozer*, 84 N.Y.2d 639, 645.

4 *The same analysis applies to data on camcorders and SD cards.*

5 *Once data is burned onto a "read only" DVD or CD, it cannot be altered or deleted. Only the files can be viewed.*

6 *U.S. v. Yevakpor*, 419 F.Supp.2d 242 (N.D.N.Y. 2006) (*preclusion of "cherry picked video" when all potentially relevant portions were not preserved*); *Taylor v. City of N.Y.*, 293 F.R.D. 601 (S.D.N.Y. 2013) (*preclusion of video portions offered when entirety was not preserved*).

7 *Fed. R. Evid. R. 1003.*

8 *Fed. R. Evid. R. 1001(e).*

9 680 F.3d 70 (1st Cir. 2012).

10 680 F.3d at 79-80.

11 *Salken, Symposium: Comparing New York and Federal Evidence Law-A Brief Look at New York's Efforts to Codify Its Law of Evidence*, 17 *Pace L. Rev.* 237 (1997).

12 *Proposed Code of Evidence for New York §1003, Law Revision Commission Report for 1987, Leg. Doc. (1987), No. 65[P]. Parenthetically, in Zegarelli v. Hughes*, 303 A.D.2d 916 (4th Dept. 2003), the dissenting judge reasoned that an electronically produced copy of a video is admissible pursuant to CPLR §4539. However, as discussed in *People v. Rath*, 41 Misc.3d 869 (Dist. Ct.,

Nassau County 2013), CPLR §4539(b) applies to reproductions of business records that are stored by means of optical scanning or imaging, and was not intended to apply to video.

13 People v. Jimenez, 8 Misc. 3d 803, 796 N.Y.S.2d 232 (Sup. Ct., Bronx County 2005) (observational testimony of surveillance video when the recording is not produced prohibited); People v. Cyrus, 48 A.D.3d 150, 159, 848 N.Y.S.2d 67 (1st Dept. 2007) (best evidence rule applied to observational testimony).

14 Ware, 40 Misc.3d 1213[A].

15 Ware, 40 Misc.3d 1213[A], citing Schozer, 84 N.Y.2d at 645. Cf. Suazo v. Linden Plaza Assoc., 102 A.D.3d 570 (1st Dept. 2013), and People v. Cyrus, 48 A.D.3d 150.

16 People v. Butler, ___Misc.3d___, 17 N.Y.S.3d 847, 2015 NY Slip Op 25343 (Sup. Ct., Kings County 2015).

17 17 N.Y.S.3d at 849-850.

18 17 N.Y.S.3d 847. A similar result was reached in State v. Taylor, 2012 Ohio 5421 (Ct App 2012) (witness to events recorded was able to authenticate rerecording), and Ostalaza v. People of the Virgin Is., 58 VI 531 (2013) (camcorder recording of monitor permitted under Fed. R. Evid. R. 1004 given "technological limitations" of the surveillance system and lack of availability of original).

19 New York v. Patterson, 93 N.Y.2d 80 (1999); People v. Manohar, 40 A.D.3d 1123 (2d Dept. 2007).

20 42 Misc.3d 492 (Family Ct., N.Y. County 2013).

21 Citing People v. Garcia, 207 A.D.2d 664, 616 N.Y.S.2d 37 (1st Dept. 1994) (binoculars).

22 See also People v. Tharpe-Williams, 286 Ill. App. 3d 605, 676 N.E.2d 717 (1997) (best evidence challenge denied, live observations on the monitor equivalent to looking through a telescope); United States v. Perez, 36 M.J. 583, 585 (A.F.C.M.R. 1992) ("an electronic or mechanical aid does not make one any less an eyewitness"); Johnson v. Commonwealth, 2015 Ky. Unpub. LEXIS 32 (June 11, 2015).

23 A notice to admit pursuant to CPLR 3123, accompanying the disclosed video, should be considered.