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Writings, Recordings, and Photographs

1. In order for the plaintiff to testify to the appearance of the model, the plaintiff

A plaintiff sued a defendant for unlawfully using the plaintiff's idea for an animal robot as a character in the defendant's science fiction movie. The defendant admitted that he had received a model of an animal robot from the plaintiff, but he denied that it had any substantial similarity to the movie character. After the model had been returned to the plaintiff, the plaintiff destroyed it.

- Must show that he did not destroy the model in bad faith
- Must give advance notice of his intent to introduce the oral testimony
- Must introduce a photograph of the model if one exists
- **Need not do any of the above, because the "best evidence rule" applies only to writings, recordings, and photographs**

Note:

The best evidence rule is more accurately called the "original document rule." The rule is as follows: In proving the terms of a writing (recording, photograph, or X-ray), where the terms are material, the original writing must be produced. Secondary evidence of the writing, such as oral testimony regarding the writing's contents, is permitted only after it has been shown that the original is unavailable for some reason other than serious misconduct of the proponent. Fed. R. Evid. 1002.

D is correct. The best evidence rule is only applicable to writings, recordings, photographs, or X-rays, and the robot falls under none of those categories. Therefore, there is no need to satisfy the best evidence rule by showing it was not destroyed in bad faith, or by giving advance notice of the intent to give oral testimony about it, or by introducing a photograph of it if one exists. Because the plaintiff has personal knowledge of the appearance of the model, he can testify without having to introduce the model into evidence.

A is incorrect. The plaintiff would have to show that the original model is unavailable for a reason other than misconduct if the best evidence rule were to apply. However, because the best evidence rule does not apply here, there is no requirement that the plaintiff must show a lack of bad faith.

B is incorrect. The plaintiff would have to give advance notice of his intent to give oral testimony regarding the appearance of the model if the best evidence rule were to apply. However, because it does not apply, there is no such requirement.

C is incorrect. For the reasons explained above, the best evidence rule does not apply, and therefore the plaintiff is under no obligation to introduce a photograph of the model if one existed.

2. Should the officer's testimony concerning the defendant's recorded confession be admitted?

A defendant was charged with burglary. At trial, a police officer testified that, after the defendant had been arrested and had agreed to answer questions, the officer had interrogated him with a stenographer present, but that the officer could not recall what the defendant had said. The prosecutor presented the officer with a photocopy of the stenographic transcript of the interrogation. After looking at it, the officer began to testify that he recalled that the defendant had admitted to being in the area of the burglary. The defendant has objected to the officer's testimony on the ground that it violates the "original document" rule (also known as the "best evidence" rule).

- No, because a photocopy cannot be used without a showing that the original is unavailable
- No, because the stenographer has not testified to the accuracy of the transcript
- Yes, because a photocopy is a duplicate of the original
- **Yes, because the prosecutor is not attempting to prove the contents of the document**

Note:

D is correct. The prosecutor is trying to prove what the defendant said, not what the transcript says. Accordingly, Federal Rule of Evidence (FRE) 1003, the best evidence rule, is not relevant. It would be different, for example, if this was a contract, and the parties differed over the wording of a clause in the contract. In this case, the copy of the transcript may be used under FRE 612 to refresh the officer's recollection.

A is incorrect. The prosecutor is trying to prove what the defendant said, not what the transcript says. Accordingly, FRE 1003, the best evidence rule, is not relevant. Even assuming that the best evidence rule applied here, this is not an accurate statement of the law. Under Rule 1003, a duplicate is admissible without any showing that the original is unavailable. A showing of unavailability is required only if the party is seeking to introduce something other than a duplicate (e.g., oral testimony) to prove the contents of a document. See Fed. R. of Evid. 1004.

B is incorrect. Under FRE 612, the copy of the transcript may be used to refresh the officer's recollection. This is not a case of past recollection recorded, in which the prosecutor would have to show that the stenographer accurately recorded what the defendant said. In this case, the officer is testifying to his own recollection of what the defendant said, that recollection having been refreshed by looking at the transcript. A document used only to refresh recollection does not have to be accurate or reliable, because the document is not being admitted into evidence. The officer's testimony is the evidence.

C is incorrect. Although FRE 1003 supports the admission of photocopies with some exceptions, this answer assumes that the best evidence rule applies here, which it doesn't. The prosecutor is trying to prove what the defendant said, not what the transcript says. The transcript here is being used to refresh the officer's recollection under FRE 612, and Rule 1003 is not relevant.
