

## NY CLS CPLR R 4539

Current through 2025 released Chapters 1-207

*New York*

*Consolidated Laws Service* >

*Civil Practice Law And Rules (Arts. 1 — 100)* >

*Article 45 Evidence (§§ 4501 — 4551)*

### **R 4539. Reproductions of original**

---

**(a)** If any business, institution, or member of a profession or calling, in the regular course of business or activity has made, kept or recorded any writing, entry, print or representation and in the regular course of business has recorded, copied, or reproduced it by any process, including reproduction, which accurately reproduces or forms a durable medium for reproducing the original, such reproduction, when satisfactorily identified, is as admissible in evidence as the original, whether the original is in existence or not, and an enlargement or facsimile of such reproduction is admissible in evidence if the original reproduction is in existence and available for inspection under direction of the court. The introduction of a reproduction does not preclude admission of the original.

**(b)** A reproduction created by any process which stores an image of any writing, entry, print or representation and which does not permit additions, deletions, or changes without leaving a record of such additions, deletions, or changes, when authenticated by competent testimony or affidavit which shall include the manner or method by which tampering or degradation of the reproduction is prevented, shall be as admissible in evidence as the original.

### **History**

---

Formerly § 4539, add, L 1962, ch 308; amd, L 1962, ch 315, § 1, eff Sept 1, 1963; L 1996, ch 27, § 1, eff Nov 1, 1996.

Annotations

## **Notes**

---

### **Prior Law:**

Earlier statutes: CPA § 374–b.

### **Advisory Committee Notes:**

This rule is the same as CPA § 374-b, except that unnecessary language has been omitted. In addition the word “made” has been added before “kept” to meet the request of the New York Clearing House Association. The Committee on State Legislation of the Association of the Bar of the City of New York gives the following description and reason for the change:

Due to the words “held in custodial or fiduciary capacity,” trust departments of banks fear that if trust department records are destroyed after microfilming, the reproduction will not be accepted as evidence. Apparently the quoted exclusionary words were added from the floor to the original draft of the Uniform Act at a meeting of the Commissioners on Uniform State Law. The New York Clearing House Association reports that the Commissioners apparently accepted the amendment under the misapprehension that records maintained by a bank in a fiduciary or custodial capacity are the property of its customers. The Clearing House Association states that this is in fact almost never the case, and that in any event the statute related to records kept in the regular course of business, which would not cover documents held for the account of the customer.

Trust departments of banks are burdened, as are all similar institutions, by a vast accumulated mass of records. There seems no good reason why they should not microfilm and destroy such records as debit and credit tickets to a trust and custody account, brokers slips, checks,

statements, etc., without the fear that they will be excluded from the benefits of § 374-b. [Bulletin No. 8, 504 (1957).].

The phrase, “the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law,” in the former section has been omitted as unnecessary. See Cal Code Civ Proc § 1953i; Uniform Rules of Evidence, Rule 72. The phrase appeared to authorize destruction of records. It was inappropriate in rules of evidence and, indeed, accomplished no purpose. It was evident that a business might destroy its records unless private obligations or public statutes forbade it to do so. Insofar as the phrase implied that the reproduction might not have been used unless the original had been destroyed, it was misleading. The statute was designed to permit a photostat or other facsimile to be used even if the original was in existence. This was indicated by the next to the last sentence in the former section. Should the custodian destroy an individual record not following its usual course of business in doing so, the matter can be handled by using general rules on spoliation. Accordingly, the phrase found in the uniform statute “whether the original is in existence or not,” omitted when the act was adopted in New York, has been reinserted. New York, of the more than thirty adopting it, is apparently the only state which omitted this language. See 9 Uniform Laws Ann 291–92 (Supp 1956).

## **Notes to Decisions**

---

Trial court properly admitted a record of testing of the simulator solution used during the breath test administered to defendant, despite its lack of a verification to show the record could not be tampered with, as this section did not apply to documents like the one at issue that were originally created in electronic form; the record was admissible under N.Y. C.P.L.R. 4518(a), which was the applicable statute. *People v Kangas*, 28 N.Y.3d 984, 63 N.E.3d 1133, 41 N.Y.S.3d 189, 2016 N.Y. LEXIS 3180 (N.Y. 2016).

Admission of photocopy of mechanic’s report submitted in support of plaintiff’s claim that defective door was the proximate cause of death of intestate constituted reversible error in the

absence of a proper foundation having been laid for the receipt of the exhibit identified as a “type” of record kept by defendant and in the absence of proof of the source of the exhibit as well as the failure to comply with the statute admitting in evidence copies of records made in the regular course of business. *Dipace v Hertz Corp.*, 30 A.D.2d 515, 290 N.Y.S.2d 124, 1968 N.Y. App. Div. LEXIS 4022 (N.Y. App. Div. 1st Dep't 1968).

In prosecution for possession and sale of controlled substance, photocopies of police lab submission forms which accompanied packets of cocaine through series of laboratory tests were properly admitted in evidence where trial testimony established that copies were exact duplicates of original forms and that it was standard procedure for lab to reproduce original forms; CLS CPLR § 4539 recognizes that photographic reproductions made in regular course of business are sufficiently trustworthy to be treated as originals for purpose of best evidence rule. *People v Flores*, 138 A.D.2d 512, 526 N.Y.S.2d 125, 1988 N.Y. App. Div. LEXIS 2827 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 859, 532 N.Y.S.2d 509, 528 N.E.2d 899, 1988 N.Y. LEXIS 3710 (N.Y. 1988).

Introduction of photocopy of defendant's statement was proper where officer testified that original statement was mislaid at pretrial hearing and that he made copy immediately after defendant signed original, and defendant acknowledged that copy was fair representation of original statement. *People v McCargo*, 144 A.D.2d 496, 534 N.Y.S.2d 195, 1988 N.Y. App. Div. LEXIS 11821 (N.Y. App. Div. 2d Dep't 1988).

Authenticity of restrictive covenant was established by unchallenged expert testimony, despite plaintiff's inability to produce original document, where photocopy had been made in ordinary course of business. *Anametrics Services, Inc. v Clifford A. Botway, Inc.*, 159 A.D.2d 247, 552 N.Y.S.2d 238, 1990 N.Y. App. Div. LEXIS 2378 (N.Y. App. Div. 1st Dep't 1990).

In trial for driving while intoxicated, People were authorized under CLS CPLR § 4539(a) to introduce copies, rather than original documentation, of breathalyzer's accuracy. *People v Roach*, 226 A.D.2d 55, 649 N.Y.S.2d 607, 1996 N.Y. App. Div. LEXIS 13342 (N.Y. App. Div. 4th Dep't 1996).

Photocopies of 2 pages of forensic laboratory log book and laboratory submission receipts were properly admitted against drug defendant as business records where proper foundation was laid. *People v Gentle*, 245 A.D.2d 463, 666 N.Y.S.2d 455, 1997 N.Y. App. Div. LEXIS 14136 (N.Y. App. Div. 2d Dep't 1997), app. denied, 91 N.Y.2d 973, 672 N.Y.S.2d 852, 695 N.E.2d 721, 1998 N.Y. LEXIS 1560 (N.Y. 1998).

In worker's action against landowner for negligent failure to provide adequate security, allegedly causing worker's fall into manhole from which cover had been removed by vandals and replaced by thin piece of plywood as trap, result in favor of landowner would not have been different if court had allowed into evidence facsimile transmission, authored by geologist employed by landowner, concerning vandalism in area. *Lind v Suffolk County Water Auth.*, 251 A.D.2d 295, 673 N.Y.S.2d 215, 1998 N.Y. App. Div. LEXIS 6353 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 810, 680 N.Y.S.2d 55, 702 N.E.2d 840, 1998 N.Y. LEXIS 3080 (N.Y. 1998).

Proffered copy of a personal guaranty of a commercial lease was inadmissible as secondary evidence of the terms of the guaranty or pursuant to this rule because, inter alia, the landlord did not sufficiently explain the unavailability of the original guaranty, the copy was not satisfactorily identified as a copy of the guaranty, and the guarantor testified that the guaranty she executed contained complete paragraphs while the proffered copy did not. *76-82 St. Marks, LLC v Gluck*, 147 A.D.3d 1011, 48 N.Y.S.3d 210, 2017 N.Y. App. Div. LEXIS 1311 (N.Y. App. Div. 2d Dep't 2017).

In action against guarantor of Mexican promissory note, court properly found that original note did not have to be filed with court where there was no dispute as to note's authenticity or plaintiff's ownership of note, and defendant filed copy of note certified by Mexican court in which original note had been filed in connection with another action to which defendant was not party. *Banco Nacional De Mex. v Ecoban Fin. Ltd.*, 276 A.D.2d 284, 713 N.Y.S.2d 869, 2000 N.Y. App. Div. LEXIS 9967 (N.Y. App. Div. 1st Dep't 2000).

"Faxed" copies of accusatory instrument and supporting depositions may confer jurisdiction over person so as to permit arraignment, since use of fax machines is inevitable step in process of

improving speed and efficiency of court process, and court would allow use of faxed copy of supporting deposition, providing that original document was kept by district attorney and made available for inspection on proper request. *People v Guzman*, 151 Misc. 2d 289, 581 N.Y.S.2d 117, 1992 N.Y. Misc. LEXIS 24 (N.Y. City Crim. Ct. 1992).

In breach of contract action wherein no contract was attached to complaint and plaintiff's only witness was employee through which it offered facsimile of copy of microfilm of original alleged contract, exception to best evidence rule did not apply where witness testified as to nature of plaintiff's business, and that plaintiff microfilmed contracts in regular course of business, but she had no knowledge of whether contract in question actually was copied in regular course of business, and she had insufficient knowledge of whether plaintiff's reproduction process permitted additions, deletions or changes, or whether tampering or degradation of reproduction was prevented. *Bell Atl. Yellow Pages v Havana Rio Enters.*, 184 Misc. 2d 863, 710 N.Y.S.2d 751, 2000 N.Y. Misc. LEXIS 246 (N.Y. Civ. Ct. 2000).

In a driving while intoxicated case, the trial court properly admitted into evidence electronic records relating to the calibration and maintenance of the breath testing device used by police; as the records never existed as paper documents, the best evidence rule did not apply and they were admissible as business records under N.Y. C.P.L.R. 4518(a), with or without certification or authentication. *People v Rath*, 975 N.Y.S.2d 567, 41 Misc. 3d 869, 2013 N.Y. Misc. LEXIS 4249 (N.Y. Dist. Ct. 2013).

N.Y. C.P.L.R. 4539 does not apply to electronic records which never existed as a paper document. *People v Rath*, 975 N.Y.S.2d 567, 41 Misc. 3d 869, 2013 N.Y. Misc. LEXIS 4249 (N.Y. Dist. Ct. 2013).

Bank did not establish by admissible proof its entitlement to damages against a borrower because, inter alia, the contract was not received into evidence, and a witness's testimony concerning the terms of the contract and the borrower's breach of the contract constituted inadmissible hearsay and a violation of the best evidence rule. *JP Morgan Chase Bank, N.A. v Rabel*, 894 N.Y.S.2d 857, 27 Misc. 3d 656, 2010 N.Y. Misc. LEXIS 307 (N.Y. Civ. Ct. 2010).

Affidavit submitted in support of an affirmative defense to a foreclosure action clearly met the requirements of N.Y. C.P.L.R. § 4539(b) as it was a photocopy of an original and it was authenticated by the mortgagors' attorney who also notarized the document and thus had personal knowledge of its authenticity; a second affidavit also clearly met the requirements of § 4539(b) as it was authenticated by the mortgagee's attorney in his reply to the mortgagors' opposition to the summary judgment motion. Had plaintiff's attorney not authenticated these photocopied affidavits himself, the court would nonetheless have taken judicial notice of their authenticity as the originals are on file with the clerk of this court. *Fried v Tucker*, 897 N.Y.S.2d 878, 27 Misc. 3d 871, 2010 N.Y. Misc. LEXIS 589 (N.Y. Sup. Ct. 2010).

While the recorded conversation between an investigator and a witness was authenticated it was not admissible because it did not meet criteria in the CPLR and State Technology Law, in that the investigator failed to describe if the record-keeping system permitted additions, deletions or changes without record of it or how tampering was prevented. *Vrlaku v Plaza Constr. Corp.*, 57 Misc. 3d 643, 62 N.Y.S.3d 894, 2017 N.Y. Misc. LEXIS 3202 (N.Y. Sup. Ct.), dismissed in part, 57 Misc. 3d 1215(A), 71 N.Y.S.3d 925, 2017 N.Y. Misc. LEXIS 4159 (N.Y. Sup. Ct. 2017).

## **Opinion Notes**

---

### **Agency Opinions**

By following proper procedural steps, microphotographs of a set of fingerprints received at the time of arrest or incarceration may be used for identification of an individual during judicial proceedings. 1967 N.Y. Op. Att'y Gen. No. 11, 1967 N.Y. AG LEXIS 4.

## **Research References & Practice Aids**

---

### **Federal Aspects:**

Authentication and identification of records in United States courts, USCS Court Rules, Federal Rules of Evidence, Rules 901., 902.

Admissibility of duplicate writings, recordings, and photographs in United States courts, USCS Court Rules, Federal Rules of Evidence, Rule 1003.

Documentary evidence: record made in regular course of business and photographic copies, 28 USCS § 1732.

Copies of government records and papers in United States courts, 28 USCS § 1733.

Copy of officer's bond, 28 USCS § 1737.

Copies of consular papers in United States courts, 28 USCS § 1740.

Copies of Patent and Trademark Office documents in United States courts, 28 USCS § 1744.

Copies of foreign patent documents in United States courts, 28 USCS § 1745.

### **Jurisprudences:**

58 NY Jur 2d Evidence and Witnesses § 479. .

### **Law Reviews:**

Evidence symposium. 52 Cornell L.Q. 177.

### **Treatises**

#### **Matthew Bender's New York Civil Practice:**

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4539, Reproductions of Original.

#### **Matthew Bender's New York Practice Guides:**

LexisNexis Practice Guide New York e-Discovery and Evidence § 15.11. CHECKLIST:  
Admitting ESI.



LexisNexis Practice Guide New York e-Discovery and Evidence § 15.12. Examining Hearsay Issues in Use of ESI as Evidence.

LexisNexis Practice Guide New York e-Discovery and Evidence § 15.13. Understanding Best Evidence Rule as Applied to ESI.

**Matthew Bender's New York AnswerGuides:**

**Matthew Bender's New York Practice Guides:**

LexisNexis AnswerGuide New York Civil Litigation § 10.08. Admitting Record Under Exceptions to Admission Requirements.

**Warren's Weed New York Real Property:**

Warren's Weed: New York Real Property § 24.52.

**Matthew Bender's New York Evidence:**

1 Bender's New York Evidence § 114.03. Original Writings.

3 Bender's New York Evidence § 149.05. Record May Qualify For Admission Under Other Evidentiary Rules.

3 Bender's New York Evidence § 149.06. Computer Print-Outs of Business Records.

**Annotations:**

Record of instrument which comprises or includes an interest or right that is not a proper subject of record. 3 ALR2d 577.

**Matthew Bender's New York Checklists:**

Checklist for Introducing Documents and Information into Evidence LexisNexis AnswerGuide New York Civil Litigation § 10.05.

**Texts:**

Jonakait, Baer, Jones, & Imwinkelried, New York Evidentiary Foundations (Michie), Ch 8 .The Best Evidence Rule.

2 New York Trial Guide (Matthew Bender) §§ 31.01, 31.11.

**Hierarchy Notes:**

NY CLS CPLR, Art. 45

New York Consolidated Laws Service

Copyright © 2025 All rights reserved.