

A defendant has been charged with making false statements to a financial institution in order to obtain a loan. The government alleges that the defendant misrepresented the value of foreign treasury bonds he wished to use as collateral for the loan. To support that contention at trial, the prosecutor called a foreign banker to testify to the content of a document created by an overseas bond-rating company that is not subject to judicial process. The document, which was not produced at trial, contained the actual values of the defendant's bonds. The actual values of the bonds were much lower than what the defendant stated on his loan application.

The defendant has objected on the ground that the banker's testimony violates the best evidence rule.

Which of the following, if established, would best support admission of the banker's testimony?

- A. The banker is an expert in the valuation of treasury bonds.
- B. The defendant was given notice that the prosecution would seek to introduce the content of the document at trial.
- C. The document was easily obtainable by the defendant prior to trial.
- D. The document was not obtainable via subpoena or other judicial process.

Explanation:

Original document unobtainable by judicial process

(FRE 1004(b))

Examples of when original cannot be obtained by judicial process include:

foreign third party not subject to court's subpoena power in possession of original

proponent unable to locate & serve person in possession of original

person in possession of original served but fails/refuses to produce original

third party asserts claim of privilege as to original

FRE = Federal Rule of Evidence.

The **best evidence rule** (ie, original document rule) applies when a **witness relies** on a **document's content while testifying** (as seen here) or when the content of a document is at issue. Under this rule, an **original or reliable duplicate** of a **recording, writing, or photograph** (referred to as "document") must be produced to **prove its content**.

However, one **exception** to this rule allows a party to introduce **other evidence** of a document's content (eg, testimony) when the **original** (1) is in the possession of a **person or entity** that is **not a party** to the litigation and (2) **cannot be obtained** by any available **judicial process**. For example, a party might rely on this exception when the original document is in the possession of a foreign third party who is not subject to the court's subpoena power—as seen with the bond-rating company.*

*A third party located abroad who is neither a national nor a resident of the United States is beyond the subpoena power of a federal district court.

(Choice A) The banker's expertise in the valuation of treasury bonds might provide a basis for the banker to testify to his/her opinion on the value of the defendant's bonds. But it would not provide a basis to admit the banker's testimony about the content of the document created by the bond-rating company.

(Choices B & C) The *proponent* (here, the prosecution) of a document is required to produce the original or establish an exception to the best evidence rule. Therefore, neither notice that the prosecution would seek to introduce the content of the document nor the fact that the document was easily obtainable by the defendant would support admission of the banker's testimony.

Educational objective:

An exception to the best evidence rule allows a party to introduce other evidence of a document's content when the original (1) is in the possession of a person or entity that is not a party to the litigation and (2) cannot be obtained by any available judicial process.

References

Fed. R. Evid. 1002-07 (best evidence rule).

Copyright © UWorld. All rights reserved.