

A defendant is being prosecuted for conspiracy to possess cocaine with intent to distribute. At trial, the government seeks to have its agent testify to a conversation that he overheard between the defendant and a coconspirator regarding the incoming shipment of a large quantity of cocaine. That conversation was also audiotaped, though critical portions of it are inaudible.

The defendant objects to the testimony of the agent on the ground that it is not the best evidence of the conversation.

Is the testimony admissible?

- A. No, because the testimony of the agent is not the best evidence of the conversation.
- B. No, because the testimony of the agent reports hearsay not within any exception.
- C. Yes, because the audiotape is partly inaudible.
- D. Yes, because the best evidence rule does not require proof of the conversation through the audiotape.

Explanation:

Best evidence rule

(FRE 1002–04)

Original (or reliable duplicate) of writing, recording, or photograph must be produced to prove its content *unless*:

all originals lost or destroyed by means other than proponent acting in bad faith

original cannot be obtained by judicial process

nonproponent had control of original & notice that original was required at trial or hearing, but failed to produce it

writing, recording, or photograph not closely related to controlling issue

FRE = Federal Rules of Evidence.

The **best evidence rule** generally requires that an original or reliable duplicate of a recording, writing, or photograph (collectively referred to as "document") be produced to prove its contents. As a result, this rule **only applies** when a document's **contents are at issue**—ie, when:

the document is used to prove happening of an event (eg, video of bank robbery)

the document has a legal effect (eg, audiotape of oral contract) *or*

the witness is **testifying** based on **facts learned from the document** (eg, x-ray image)

Here, the agent seeks to testify based on his personal knowledge (ie, what the agent overheard)—not on facts learned from the audiotape. Therefore, the best evidence rule does not apply, and the agent's testimony is admissible regardless of whether the audiotape is produced (**Choice A**).

(Choice B) Statements made by or attributable to a party-opponent—eg, those made by a defendant's coconspirator—are **nonhearsay** and admissible if offered against that party. Therefore, the testimony reporting what the defendant and coconspirator said is nonhearsay.

(Choice C) The agent may testify to what he *personally* heard regardless of whether an audiotape exists or is audible.

Educational objective:

The best evidence rule only applies when a document's contents are at issue—ie, when (1) the document is used to prove the happening of an event, (2) the document has a legal effect, or (3) the witness is testifying based on facts learned from the document.

References

Fed R. Evid. 1002-04 (best evidence rule).

Fed. R. Evid. 602 (witness's personal knowledge).

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