

A plaintiff sued a defendant for breach of contract. At a jury trial, the plaintiff testified that the original contract was destroyed in a fire at his office that was caused by faulty electrical wiring. The plaintiff further testified that no copies of the contract exist. Over the defendant's objection, the judge allowed the plaintiff to testify as to the terms of the contract. The defendant then testified that no contract between the parties was ever executed and, on that basis, moved to strike the plaintiff's testimony regarding the contract from the record.

How should the court proceed?

- A. The court must deny the motion, because a party may properly prove the terms of the contract by testimony.
- B. The court must deny the motion, because whether there was a contract between the parties is a question for the jury.
- C. The court may grant the motion, provided it is convinced that a contract between the parties never existed.
- D. The court must grant the motion, because the original contract was never produced.

## Explanation:

### Overview of best evidence rule

#### General rule

Must produce original or reliable duplicate\* to prove contents of document relied on by witness or whose contents are at issue

#### Exceptions

Original unavailable	Other evidence can be used to prove content if: originals lost or destroyed (not by proponent's bad faith) originals not attainable by judicial process opponent had original, knew it was required & failed to produce <i>or</i> content not closely related to controlling issue
Admission by party	Contents can be proven by opposing party's testimony, deposition, or written statement
Public record	Contents of public record can be proven by: certified copy copy of records & comparison testimony <i>or</i> other evidence if above proof is not reasonably obtainable

\*Duplicates are admissible unless original's authenticity is questioned or it would be unfair to admit them.

The **best evidence rule** requires that an original or reliable duplicate of a recording, writing, or photograph (referred to as the "document") be produced to **prove its contents**. However, a party may use other, **secondary evidence** (eg, testimony) to prove a document's contents if certain **factual conditions are established** (eg, all originals are lost or destroyed).

Whether a party has fulfilled the factual conditions for admitting secondary evidence is ordinarily a **determination for the court**. But in a jury trial, the **jury determines** any issue about **whether**:

an asserted **document ever existed**

**another document** produced at a hearing or trial is the **original or other evidence** of content **accurately reflects** the document's content.

Here, the plaintiff testified that the original contract was destroyed and no duplicate exists, so the court allowed the plaintiff to testify to the contract's terms in lieu of producing the

original contract **(Choice D)**. The defendant then testified that no contract was ever executed, thereby raising an issue that the jury must decide. The court should therefore deny the defendant's motion to strike the plaintiff's testimony so that the jury can consider the evidence on this issue **(Choice A)**.

**(Choice C)** Even if the court was convinced that no contract existed, it could only decide this issue if a directed verdict was warranted—ie, if there was *no* legally sufficient evidence for a reasonable jury to reach a different conclusion. Since a reasonable jury *could* find that a contract existed, the court must allow the jury to resolve this issue.

**Educational objective:**

The court ordinarily determines whether factual conditions allow the admission of secondary evidence to prove a document's contents. But in a jury trial, the jury determines any issues of whether (1) the document ever existed, (2) another document is the original, or (3) other evidence of content accurately reflects the document's content.

**References**

Fed. R. Evid. 1008 (functions of court and jury).

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