

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, she destroyed it.

If the plaintiff seeks to testify to the model's appearance, what must she do prior to testifying?

- A. The plaintiff must give advance notice of her intent to introduce the oral testimony.
- B. The plaintiff must introduce a photograph of the model if one exists.
- C. The plaintiff must show that she did not destroy the model in bad faith.
- D. The plaintiff need do nothing because the "best evidence rule" applies only to writings, recordings, and photographs.

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 the 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), as opposed to personal knowledge (ie, knowledge based on firsthand observations or experience).

Here, the plaintiff seeks to testify to her personal knowledge of the model's appearance—not to prove the contents of a recording, writing, or photograph. Therefore, the best evidence rule does not apply. And since a witness can testify to any relevant matter of which the witness has personal knowledge—and personal knowledge can be established by the witness's own testimony (or other means)—the plaintiff need not do anything prior to testifying.

(Choice A) A party need not provide advance notice of his/her intent to orally testify.

(Choice B) The plaintiff would have needed to introduce a photograph of the model or a reliable duplicate to testify to the model's appearance if the plaintiff learned of the model's appearance through a photograph (not seen here).

(Choice C) The plaintiff need not show that she did not destroy the model in bad faith. Instead, she need do nothing because the best evidence rule applies only to writings,

recordings, and photographs—not to the plaintiff's testimony about her personal knowledge of the model's appearance.

Educational objective:

The best evidence rule applies only when the contents of a recording, writing, or photograph are at issue—not when a witness is testifying based on personal knowledge.

References

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

Fed. R. Evid. 602 (personal knowledge requirement).

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