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Even Better than the Real Thing: How Courts Have Been Anything But Liberal in Finding Genuine Questions Raised as to the Authenticity of Originals Under Rule 1003

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**EVEN BETTER THAN THE REAL THING: HOW COURTS HAVE
BEEN ANYTHING BUT LIBERAL IN FINDING GENUINE
QUESTIONS RAISED AS TO THE AUTHENTICITY OF
ORIGINALS UNDER RULE 1003**

COLIN MILLER*

The year is 1814. A man claiming that he owns property in Connecticut brings a lawsuit to eject an alleged squatter on his land.¹ The man can neither locate the original deed establishing his title to the property, nor account for its nonproduction, but he instead produces a certified copy of the deed, which was “regularly recorded in the town clerk’s office, agreeably to the laws of th[e] state”² The Supreme Court of Errors of Connecticut determines that the trial court properly rejected the copy, finding that a party seeking to establish and enforce property rights “is of course bound to produce the original deed, or sh[o]w some reason for not producing it.”³ Courts across the country render similar decisions when parties unable to account for the nonproduction of originals attempt to prove the contents of grants,⁴ letters,⁵ contracts,⁶ and other written documents through copies or testimony, pursuant to the Best Evidence Rule, which seeks to ensure that a party’s substantive rights are not affected by the possibility of fraud and the errors of human transcription and memory attendant in copies and testimony about the contents of documents.⁷

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1. *Cunningham v. Tracy*, 1 Conn. 252, 253 (1814).

2. *Id.*

3. *Id.* at 254–54a.

4. *See, e.g., Malcolmsen v. McKee*, 3 S.C.L. (1 Brev.) 168 (1802) (affirming the trial court’s decision to exclude the copy of a grant, certified by the Secretary of State to be a true copy, because the proponent could not account for his nonproduction of the original).

5. *See, e.g., Murphy v. McNiel*, 19 N.C. (2 Dev. & Bat.) 244, 245–46 (1837) (affirming the trial court’s decision to exclude the sworn copy of a letter because the plaintiff did not show that it was out of his power to produce the original).

6. *See, e.g., Fisk v. Tank*, 12 Wis. 276, 300 (1860) (“The exhibit marked ‘B,’ being a copy of the original contract, the non-production of which was not sufficiently accounted for, was improperly admitted.”).

7. *See infra* note 45 and accompanying text.

The year is 2005. Ayman Amin, an Egyptian national living in the United States since 1996, is the Assistant General Manager at a Hampton Inn operated by Flagstone Hospitality Management, L.L.C., and Monica Jenkins is the General Manager.⁸ In February, with Hampton Inn Chief Engineer Sulayman N'jie present, Jenkins gives Amin a disciplinary write-up based upon alleged insubordination.⁹ Jenkins claims that Amin was verbally abusive to her, and Amin counters that Jenkins was rude and made racist remarks to him.¹⁰ During the next ten days, Amin files a discrimination complaint with the Minnesota Department of Human Rights; Amin informs Jenkins of the complaint; Amin meets with Jenkins, N'jie, and Flagstone's Regional Manager Mark Kucera; and Kucera fires Amin.¹¹

Amin thereafter sues Flagstone, asserting, *inter alia*, retaliation under Minnesota's Whistleblower Act, and discrimination and retaliation under Title VII and the Minnesota Human Rights Act.¹² In its defense, Flagstone submits a copy of a declaration by Kucera with a copy of N'jie's typewritten and signed declaration attached to it; Flagstone neither produces the original of either document nor justifies their nonproduction.¹³ During N'jie's deposition, he "testifie[s] that he never typed his [declaration], nor did he sign any typed statement. He denie[s] writing the substance of the statement, and agree[s] that while some of the statement was true, many things were taken out of context."¹⁴ The final page of the copy of Kucera's declaration "has printing across the top indicative of a fax, and the remainder of the document does not."¹⁵

The court finds both of the copies admissible pursuant to Federal Rule of Evidence 1003, an exception to the Best Evidence Rule.¹⁶ Enacted in 1975, and thereafter incorporated into most states' rules of evidence,¹⁷ Rule 1003 indicates that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."¹⁸ Of the two, the

8. *Amin v. Flagstone Hospitality Mgmt., LLC*, No. 03-1181 (JRT/JSM), 2005 WL 3054599, at *1 (D. Minn. Nov. 14, 2005).

9. *Id.* at *2.

10. *Id.*

11. *Id.*

12. *Id.* at *1.

13. *Id.* at *3.

14. *Id.*

15. *Id.* at *5.

16. *Id.*

17. *See, e.g.*, N.J. R. EVID. 1003.

18. FED. R. EVID. 1003.

exception contained in subsection (2) “is more obscure,”¹⁹ and yet courts have created and fairly applied a test to determine whether the opponent of a duplicate has established that it would be unfair to admit the duplicate in lieu of the original. Under this exception, courts consistently find that a duplicate is inadmissible when the proponent offers a duplicate that fails to reproduce important or critical parts of an original, and the opponent establishes that the remainder is needed for some purpose such as cross-examination.²⁰

Conversely, when, as in Amin’s case, the party opposing the admission of a duplicate contends that there is a genuine question as to the authenticity of the original, courts consistently reject the claim, whether the contested evidence is a deed,²¹ grant,²² letter,²³ contract,²⁴ photograph,²⁵ audio tape,²⁶ or digital recording.²⁷ Indeed, “[a]lmost all of the reported cases which address complaints that a duplicate was admitted over an objection asserting the existence of a genuine question of authenticity reject the claim.”²⁸ Since the enactment of Rule 1003, “duplicates are more often admitted into evidence than originals,”²⁹ meaning that such rulings affect a significant number of litigants.

This Article contends that courts have both failed to adopt a consistent approach to Rule 1003(1) challenges and that the scattershot approach that they have taken has resulted in an improperly narrow construction and application of the exception. It argues that courts

19. Olin Guy Wellborn III, *The “Best Evidence” Article of the Texas Rules of Evidence*, 18 ST. MARY’S L.J. 99, 116 (1986).

20. See *infra* notes 102–103 and accompanying text.

21. See, e.g., *United States v. Walls*, 577 F.2d 690, 699 (9th Cir. 1978) (finding that a quitclaim deed was properly admitted because there was no genuine question raised as to the authenticity of the original).

22. See, e.g., *United States v. Fink*, No. CIV 04-4130, 2007 WL 4287648, at *3–*4 (D.S.D. Nov. 30, 2007) (rejecting the defendant’s challenge to a copy of a grant deed under Rule 1003(1)).

23. See, e.g., *Dietrich v. Bauer*, 126 F. Supp. 2d 759, 763–64 (S.D.N.Y. 2001) (rejecting Dietrich’s Rule 1003(1) argument that a copy of a letter dated January 4, 1991, was inauthentic, despite forensic expert testimony that the original was not created on that date).

24. See, e.g., *Simons v. Simons*, 11 P.3d 20, 24–25 (Idaho 2000) (admitting a copy of a memorandum agreement despite a witness’s testimony that the items in the document had been altered).

25. See, e.g., *United States v. Stockton*, 968 F.2d 715, 719 (8th Cir. 1992) (admitting a copy of a photograph over defendant’s objection).

26. See, e.g., *Smith v. City of Chicago*, 242 F.3d 737, 741–42 (7th Cir. 2001) (admitting a copy of an audio tape over a plaintiff’s Rule 1003(1) objection).

27. See, e.g., *United States v. Savarese*, 404 F.3d 651, 656 (2d Cir. 2005) (admitting a copy of a digital recording over a defendant’s Rule 1003(1) objection).

28. Wellborn, *supra* note 19, at 114.

29. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 576 (D. Md. 2007).

should instead determine whether parties opposing the admission of duplicates raise genuine questions as to the authenticity of originals by applying the same test that they use to determine whether parties opposing motions for summary judgment raise genuine issues of fact for trial.

Part I looks at how and why courts adopted the Best Evidence Rule starting in 1700 and how they applied it to exclude any secondary evidence when the proponent sought to prove the contents of a writing but could not explain his nonproduction of the original. It then explains how states in the twentieth century began loosening the Best Evidence Rule with the advent of technologies that ostensibly allowed for copies to be produced without the possibility of error inherent in human transcription. Part I concludes with a look at Article X of the Federal Rules of Evidence, which, *inter alia*, codified the emerging state trend of finding copies produced without human transcription to be admissible even without proponents accounting for nonproduction of originals.

Part II contends that Federal Rule of Evidence 1003(1) and Federal Rule of Civil Procedure 56(e)(2) have similar language in that the former states that a duplicate is not admissible to the same extent as an original when there is a *genuine question* raised as to the authenticity of the original, while the latter indicates that a party opposing a motion for summary judgment must raise a *genuine issue* for trial. It argues that, despite (1) the rule of construction that federal rules are to be taken according to their natural meaning, (2) the consistent conflation of the phrases “genuine question” and “genuine issue” in case law, and (3) precedent giving the same effect to similar phrases in other Federal Rules of Evidence and Federal Rules of Civil Procedure, courts have required a greater evidentiary showing by parties opposing the admission of duplicates than they require of parties opposing motions for summary judgment. Accordingly, Part II concludes that courts should find that parties opposing the admission of duplicates raise genuine questions as to the authenticity of originals under the same circumstances in which they find that parties opposing motions for summary judgment raise genuine issues of fact for trial.

Part III claims that the legislative history of Federal Rule of Evidence 1003 provides an even stronger basis for the argument that courts should treat parties opposing the admission of duplicates under Rule 1003(1) in the same manner that they treat parties opposing motions for summary judgment. It notes that (1) the House Committee on the Judiciary approved Rule 1003 “with the expectation that

the courts would be liberal in deciding that a ‘genuine question is raised as to the authenticity of the original’;³⁰ (2) Edward Cleary, the Chief Reporter for the Advisory Committee on the Federal Rules of Evidence, claimed that “[t]he party complaining of lack of opportunity to see the original would, in my opinion, find in the exceptions of Rule 1003 any protection which the circumstances justified”;³¹ and (3) the first case cited in the Advisory Committee’s Note to Proposed Rule 1003 was a case where an appellate court affirmed a trial court’s decision that a duplicate was admissible but cautioned that the trial judge would have taken “appropriate action” had opposing counsel “made the slightest suggestion that the photostats offered in evidence were incorrect.”³² This Part notes, however, that courts have been anything but liberal in finding genuine questions raised as to the authenticity of originals, almost never granting evidentiary challenges made under Rule 1003(1). Instead, courts have given an improperly narrow construction and application to the exception, in effect rendering it meaningless.

Part IV contends that technological developments since Rule 1003’s enactment provide another basis for using the summary judgment test in Rule 1003(1) cases. It notes that, although the legal community thought in 1975 that modern copying technologies eliminated the possibility of human transcription errors and largely obviated concerns about fraud in the duplication process, there is a growing recognition of the ease with which material can be quickly and convincingly manipulated by nearly anyone. And yet, while these concerns have found voice in digital forensics scholarship, the Department of Justice, and even popular fiction, they have not yet led judges to give increased credence to Rule 1003(1) objections. Finally, the Article concludes that these factors have made duplicates even better than the real thing because they are largely treated the same as originals for authentication purposes, and yet originals may possess physical characteristics of the highest importance that no copying process can reproduce.

30. FED. R. EVID. 1003 advisory committee’s note.

31. Letter from Professor Edward W. Cleary to Herbert E. Hoffman, Esq. (May 15, 1973) [hereinafter Cleary Letter], in *Proposed Rules of Evidence (supplement): Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93rd Cong. 83–84 (1973) [hereinafter *Hearings*].

32. *Myrick v. United States*, 332 F.2d 279, 282 (5th Cir. 1964).

I. THE FORMATION, APPLICATION, AND ALTERATION OF THE BEST EVIDENCE RULE

A. *The “Medieval Mind” and the Origins of the Best Evidence Rule*

Pre-Roman inhabitants of England, who were mostly illiterate, placed great importance on ceremony and “viewed written documents affecting property or contractual rights not as mere indicia of those rights, but as the rights themselves.”³³ While this mindset, dubbed the “medieval mind” by Wigmore,³⁴ eventually dissipated before disappearing entirely in the early 1800s, it permeated evidence law, setting the stage for both the doctrine of *profert in curia* and the Best Evidence Rule.³⁵ In courts of law, the ancient pleading doctrine of *profert in curia* required a party seeking relief based upon a written instrument to allege that he could produce the original.³⁶ If a party could not produce the original document when its contents were at issue, he literally lost the rights it allegedly created.³⁷

Closely related to the doctrine of *profert in curia* is the Best Evidence Rule,³⁸ also known as the Original Document Rule.³⁹ Under the Best Evidence Rule, first enunciated in *Ford v. Hopkins*⁴⁰ in 1700, the proponent of evidence concerning the contents of a written document had to produce the original document or account for its nonproduction.⁴¹ If the proponent could neither produce the original document nor provide a satisfactory reason for its nonproduction, he could not prove the contents of the document through secondary evi-

33. Cynthia A. De Silva, *California’s Best Evidence Rule Repeal: Toward a Greater Appreciation for Secondary Evidence*, 30 McGEORGE L. REV. 646, 648 (1999).

34. 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1177, at 406 (Chadbourn rev. 1972).

35. John Robinson Thomas, Note, *Legal Responses to Commercial Transactions Employing Novel Communications Media*, 90 MICH. L. REV. 1145, 1166 (1992).

36. *Twp. of Haddon v. Royal Ins. Co. of Am.*, 929 F. Supp. 774, 779 & n.3 (D.N.J. 1996). Courts of law required plaintiffs to “make” *profert in curia*, which meant that the plaintiff had to insert the words “*profert in curia*” in “a declaration as an allegation that [he] was ready to produce, or did produce in court, the written instrument on which the suit was founded.” *Id.* (citation omitted).

37. *Id.* at 779.

38. Thomas, *supra* note 35, at 1166.

39. Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 177 (2006).

40. (1700) 91 Eng. Rep. 250, 250–51 (K.B.).

41. See Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 880 (1988) (“The common law [best evidence rule] enforces this preference by excluding other evidence of the document’s contents, such as oral testimony describing the document, unless there is an adequate excuse for the nonproduction of the document.”).

dence such as witness testimony⁴² or a handwritten copy.⁴³ Courts applied this Best Evidence Rule with an understanding of the central position that the written word occupies in the law and the knowledge that “a slight variation of words may mean a great difference in rights.”⁴⁴ The requirement that the proponent of a document produce an original or account for its nonproduction was thus an effort to ensure that a party’s substantive rights were not affected by the possibility of fraud or errors of human transcription and memory attendant in handwritten copies and testimony.⁴⁵

B. The Federal Rules of Evidence and the “Duplicate” Exception

The twentieth century witnessed the invention of new technologies, such as the process of xerography, invented by attorney Chester Carlson in 1937, which “revolutionize[d] the document reproduction industry”⁴⁶ because originals could be ostensibly reproduced without the errors inherent in human transcription.⁴⁷ In response to these new technologies, states began enacting exceptions to the Best Evidence Rule that allowed for the admission of “duplicates” or “duplicate originals” created without manual transcription even when proponents could not account for the nonproduction of originals.⁴⁸ These changes paved the way for the eventual adoption of Article X, and specifically Rule 1003, of the Federal Rules of Evidence in 1975. Before discussing Article X, however, a brief discussion of the rules of authentication under Article IX is necessary.

42. *See, e.g.*, *Auten v. Jacobus*, 47 N.Y.S. 1119, 1121 (N.Y. App. Term 1897) (affirming the trial court’s exclusion of the defendant’s testimony about the contents of a letter when the defendant did not explain his nonproduction of the original letter at trial).

43. *See, e.g.*, *Fisk v. Tank*, 12 Wis. 276, 282, 300 (1860) (rejecting a handwritten copy of a contract when the proponent did not sufficiently account for his nonproduction of the original).

44. MCCORMICK ON EVIDENCE § 231, at 704 (Edward W. Cleary ed., 3d ed. 1984).

45. *See Williams v. United States*, 3 F.2d 129, 134 (8th Cir. 1924) (“The rule requiring record evidence, or the best evidence of which a case in its nature is susceptible, is to prevent fraud, and reduce possibility of error to a minimum.”); De Silva, *supra* note 33, at 651–52 (“Therefore, many courts and scholars consider the accurate representation of the original text to be the fundamental policy underlying the rule, as introduction of the original can ensure that errors in transcription and foggy memories of the writing’s contents will not affect a party’s substantive rights.”).

46. *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1197 (2d Cir. 1981).

47. When the Supreme Court initially proposed Article X of the Federal Rules of Evidence in 1972, the Advisory Committee included a note to Rule 1001, which indicated that duplicates such as photocopies were largely treated like originals pursuant to Rule 1003 because they were “produced by methods possessing an accuracy which virtually eliminates the possibility of error.” FED. R. EVID. 1001 advisory committee’s note.

48. *See, e.g.*, Wellborn, *supra* note 19, at 113 (noting that Texas allowed for the admission of such duplicates starting in 1959).

1. Article IX: Authentication

As a general rule, before a party can introduce tangible evidence at a trial or hearing, the party must properly authenticate or identify the evidence in accordance with Article IX of the Federal Rules of Evidence or state counterparts.⁴⁹ Pursuant to Federal Rule of Evidence 901(a) and most state equivalents, “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”⁵⁰ In other words, pursuant to the guidance of the Advisory Committee’s notes, courts have treated preliminary questions of authenticity and identification as matters of conditional relevance according to the standards of Federal Rule of Evidence 104(b).⁵¹

Once a court determines that a party has satisfied Rule 901(a)’s liberal⁵² test for authenticating a piece of evidence, any challenges that the opposing party has with regard to its authenticity “go to the *weight* of the evidence—not to its *admissibility*.”⁵³ Thus, for instance, if the proponent of a document properly authenticates it, and the opposing party has significant evidence that the document is a forgery, the document will be submitted to the jury based upon the proponent’s authentication, with the jury using the opposing party’s evidence merely to determine how much weight or significance to afford the document.⁵⁴

Federal Rule of Evidence 901(b) sets out a list of ten specific ways in which the proponent can authenticate a tangible piece of evidence.⁵⁵ For example, a plaintiff could authenticate a letter allegedly written by the defendant by testifying that he saw the defendant write the letter,⁵⁶ having a lay witness familiar with the defendant’s handwriting testify that the letter appeared to be written by the defen-

49. *United States v. Lawson*, 494 F.3d 1046, 1052 (D.C. Cir. 2007).

50. FED. R. EVID. 901(a).

51. See FED. R. EVID. 901 advisory committee’s note (“This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).”).

52. See, e.g., *Sewell v. State*, 721 So. 2d 129, 140 (Miss. 1998) (“[T]he state cites a liberal preference for admission of evidence as the approach for authentication and identification under Rule 901(a) on the federal level, after which our rule is patterned.”).

53. *United States v. Tin Yat Chin*, 371 F.3d 31, 38 (2d Cir. 2004).

54. See, e.g., *United States v. Koziy*, 728 F.2d 1314, 1322 (11th Cir. 1984) (“Whether or not the . . . abmeldung were forgeries fails to go to their admissibility, but rather to the weight of the evidence.”).

55. FED. R. EVID. 901(b).

56. *Id.* 901(b)(1).

dant,⁵⁷ or having either a handwriting expert or the jury compare the letter with a handwriting exemplar submitted by the defendant.⁵⁸ This list, however, is non-exhaustive, and courts have repeatedly found that parties can authenticate tangible evidence through methods not listed in Rule 901(b) as long as those methods meet the liberal standard set out in Rule 901(a).⁵⁹ Furthermore, Federal Rule of Evidence 902 lists twelve types of self-authenticating documents, such as certified copies of public records,⁶⁰ official publications,⁶¹ and acknowledged documents.⁶² Documents listed under Rule 902 do not need to be authenticated through extrinsic evidence.⁶³

2. *Article X: The Modern Best Evidence Rule*

Article X of the Federal Rules of Evidence, which consists of Rules 1001–1008, contains the modern Best Evidence Rule. Most states have modified their Best Evidence Rules to conform to the federal counterpart.⁶⁴

a. *Rule 1002: The Rule's Scope*

Federal Rule of Evidence 1002 sets forth the general Best Evidence Rule: “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.”⁶⁵ Thus, the Best Evidence Rule is inapplicable when a party seeks to admit evidence or testimony which relates to a writing, recording, or photograph, but does not seek to prove its contents.⁶⁶ For example, in *State v. Clark*,⁶⁷ the defendant allegedly murdered her husband, and the trial court allowed a witness to testify that she discovered a life insurance policy on the husband’s life in the defendant’s personal be-

57. *Id.* 901(b)(2).

58. *Id.* 901(b)(3).

59. *See* *United States v. Simpson*, 152 F.3d 1241, 1249–50 (10th Cir. 1998) (“The specific examples of authentication referred to by *Simpson* are merely illustrative, however, and are not intended as an exclusive enumeration of allowable methods of authentication. Rather, all that is ultimately required is evidence sufficient to support a finding that the matter in question is what its proponent claims.”) (citations and internal quotation marks omitted).

60. FED. R. EVID. 902(4).

61. *Id.* 902(5).

62. *Id.* 902(8).

63. *Id.* 902.

64. *See, e.g.*, N.J. R. EVID. 1001–08.

65. FED. R. EVID. 1002.

66. *See id.*

67. 377 S.E.2d 54 (N.C. 1989).

longings, even though the prosecution did not produce the original policy.⁶⁸ On the defendant's appeal, the Supreme Court of North Carolina affirmed the trial court's finding of first degree murder, stating that the witness's testimony "was offered not to prove contents or terms, but simply to show defendant's knowledge that the policy existed."⁶⁹

Furthermore, "[t]he best-evidence rule does not apply where a party seeks to prove a fact which has an existence independent of any writing, even though the fact might have been reduced to, or is evidenced by, a writing."⁷⁰ Thus, in *JAG Consulting v. Eubanks*, an appellate court found, in a shop owner's lawsuit for conversion of his tools and equipment, that the trial court properly allowed his wife to testify about his lost income resulting from the conversion because she had personal knowledge of the lost income.⁷¹ The fact that the wife later used this knowledge to prepare his tax returns did not make her testimony inadmissible pursuant to the Best Evidence Rule, even though the plaintiff did not produce the tax returns at trial.⁷²

b. Rule 1001: Defining the Relevant Terms

Meanwhile, Federal Rule of Evidence 1001 defines the relevant terms contained in Rule 1002 and sets forth the definition of a "duplicate" as used in Rule 1003. According to Rule 1001(1), "'[w]ritings' and 'recordings' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation."⁷³ Under this definition, the Best Evidence Rule covers a wide range of evidence, including title records,⁷⁴ claim forms,⁷⁵ bills,⁷⁶ deeds,⁷⁷ and sound recordings.⁷⁸

68. *Id.* at 60.

69. *Id.* One might just as easily argue that the witness's testimony was offered to prove the contents of the document. In other words, one could argue that the only way that the witness's testimony proved that the wife knew "that the policy existed" was by the witness testifying that the document she found was a life insurance policy on the husband's life, proving the contents of that document. This underscores the fact that courts have conflicting theories of when writings, recordings, or photographs are offered for purposes other than proving their contents. See *R.R. Mgmt. Co. v. CFS La. Midstream Co.*, 428 F.3d 214, 218 (5th Cir. 2005) ("The authorities from other jurisdictions appear to be in conflict.").

70. *JAG Consulting v. Eubanks*, 72 S.W.3d 549, 555 (Ark. Ct. App. 2002).

71. *Id.* at 552, 555.

72. *Id.* at 555.

73. FED. R. EVID. 1001(1).

74. See, e.g., *White Indus. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1077-78 (W.D. Mo. 1985) (finding that the Best Evidence Rule applies to Federal Aviation Administration title records).

Moreover, courts have given the phrase “their equivalent” an expansive reading, capturing an even broader range of items under the purview of the Best Evidence Rule.⁷⁹ For instance, in *Seiler v. Lucasfilm, Ltd.*,⁸⁰ graphic artist Lee Seiler brought a copyright infringement claim against Lucasfilm alleging that the “Imperial Walkers” from the movie *The Empire Strikes Back* infringed on Seiler’s copyrighted “Garthian Striders.”⁸¹ Seiler, however, did not obtain his copyright until after the movie was released, but alleged that he first published his “Garthian Striders” in 1976 and 1977.⁸² At trial, Seiler could not produce his original drawings and instead sought to prove his case through reconstructions he created for trial.⁸³ Seiler alleged that the Best Evidence Rule did not apply to his drawings because they were not writings, recordings, or photographs.⁸⁴ The United States Court of Appeals for the Ninth Circuit disagreed, finding that his drawings “consist[ed] not of ‘letters, words, or numbers’ but of ‘their equivalent.’”⁸⁵ It found that the drawings were equivalents because “[j]ust as a contract objectively manifests the subjective intent of the makers, so Seiler’s drawings are objective manifestations of the creative mind.”⁸⁶

Federal Rule of Evidence 1001(2) more clearly defines the term “photograph.” According to the Rule, the term “[p]hotographs” include[s] still photographs, X-ray films, video tapes, and motion pictures.⁸⁷ Federal Rule of Evidence 1001(3) indicates that “[a]n ‘original’ of a photograph includes the negative or any print therefrom.”⁸⁸ Furthermore, “[i]f data are stored in a computer or similar device, any printout or other output readable by sight, shown to re-

75. See, e.g., *United States ex rel. El-Amin v. George Washington Univ.*, 522 F. Supp. 2d 135, 140, 144–45 (D.D.C. 2007) (finding that the Best Evidence Rule applies to Health Care Financing Administration claim forms).

76. See, e.g., *Oliver v. Sioux City Cmty. Sch. Dist.*, 389 N.W.2d 665, 667 (Iowa 1986) (finding that a bill for ambulance services is a writing under the Best Evidence Rule).

77. See, e.g., *Gleason v. Galvin*, 373 N.E.2d 357, 359 (Mass. 1978) (assuming, *arguendo*, that the Best Evidence Rule would bar admission of a certified copy of a deed).

78. See, e.g., *Hall v. State*, 829 S.W.2d 407, 409 (Tex. App. 1992) (“[S]ound recordings are included in the definition of ‘recordings.’”).

79. See *Rule 1001: The “Original Document” Rule*, 12 *TOURO L. REV.* 617, 621 (1996) (discussing the “expansive definition” of words and recordings under Rule 1001(1)).

80. 808 F.2d 1316 (9th Cir. 1986).

81. *Id.* at 1317.

82. *Id.*

83. *Id.* at 1318.

84. *Id.* at 1319.

85. *Id.* at 1318–19.

86. *Id.* at 1320.

87. *FED. R. EVID.* 1001(2).

88. *Id.* 1001(3).

flect the data accurately, is an ‘original.’”⁸⁹ Therefore, if the proponent of the evidence creates data, such as work logs, not on paper, but on a computer, any printout from the computer is admissible as an “original,” and the proponent does not have to introduce the computer or hard drive at trial.⁹⁰ The “output readable by sight” portion of the Rule covers evidence such as computer-generated displays.⁹¹

Rule 1001(3) also defines “[a]n ‘original’ of a writing or recording [a]s the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it.”⁹² Therefore, when a person executes a document such as a contract, will, or deed, the writing that he executed is clearly an original.⁹³ Moreover, under the Rule, there can be multiple originals. To wit, “[i]f each party to a contract, lease, sale, or other transaction receives or retains a copy of the instrument that embodies or evidences the transaction, each copy is considered an original, regardless of the mechanism or the chronology of their creation.”⁹⁴

Finally, Federal Rule of Evidence 1001(4) defines a “duplicate” as “a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.”⁹⁵ Rule 1001(4) thus refers to four kinds of duplicates: “same impression (such as carbon or so-called ‘carbonless’ or ‘formpack’ copies), same matrix (such as offset printing, often called ‘multilith’; stencil duplication or ‘mimeograph’; or hectograph or ‘ditto’), photography (such as micrography or microfiche), and chemical reproduction (such as electrostatic or xerigraphic [sic] ‘photocopies’).”⁹⁶ Courts have used the “other equivalent techniques” language of Rule 1001(4) to qualify, *inter alia*,

89. *Id.*

90. *See, e.g., Touche Ross & Co. v. Landskroner*, 486 N.E.2d 850, 852 (Ohio Ct. App. 1984) (holding that printouts of work logs on the appellant’s account were “originals” under Ohio’s counterpart to Rule 1001(3)).

91. *See Burlison v. State*, 802 S.W.2d 429, 441 (Tex. App. 1991) (“If the objection was addressed to the actual display itself, the display qualified as an original under the best evidence rule because it was output other than a printout, was readable by sight, and was shown to be an accurate reflection of data.”).

92. FED. R. EVID. 1001(3).

93. *See Andrew M. Grossman, No, Don’t IM Me—Instant Messaging, Authentication, and the Best Evidence Rule*, 13 GEO. MASON L. REV. 1309, 1336 (2006) (“The language applies most readily, of course, to matters of contracts, wills, deeds, and the like . . .”).

94. Wellborn, *supra* note 19, at 105.

95. FED. R. EVID. 1001(4).

96. Wellborn, *supra* note 19, at 107–08.

facsimiles as duplicates.⁹⁷ Essentially, then, “any mechanically created reproduction is a duplicate; a manually created production, because of the risk of human error, is not.”⁹⁸

c. Rule 1003: The Duplicate Exception

Federal Rule of Evidence 1003 is consistent with the emerging state trend finding mechanically produced duplicates admissible even when proponents could not account for the nonproduction of originals. It states that “[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”⁹⁹ Under Rule 1003, duplicates are thus admissible as long as they can meet the liberal authentication test laid out in Rule 901(a), unless one of the exceptions in subsections (1) or (2) applies. Since Rule 1003 was passed, “duplicates are more often admitted into evidence than originals.”¹⁰⁰ Every state has either adopted a counterpart to Rule 1003 or some version of the similar Uniform Photographic Copies of Business and Public Records as Evidence Act.¹⁰¹

The exception contained in subsection (2) of Rule 1003 applies where only part of an original document or recording is reproduced in a duplicate, and the remainder is needed for some purpose, such as cross-examination.¹⁰² Courts have consistently found that the exception contained in Rule 1003(2) applies when duplicates fail to fully reproduce important or critical parts of an original document or recording.¹⁰³ This exception is not the focus of this Article.

In contrast, I cannot locate a single case where a court sets forth a test for determining when the opponent of a duplicate raises a genuine question as to the authenticity of the original under Rule 1003(1). What is clear, however, is that “[a]lmost all of the reported cases

97. See, e.g., *Burger Man, Inc. v. Jordan Paper Prods., Inc.*, 352 N.E.2d 821, 829–30 (Ind. Ct. App. 1976) (finding that a facsimile qualified as a duplicate).

98. Wellborn, *supra* note 19, at 107. The advisory committee noted that “[c]opies subsequently produced manually, whether handwritten or typed, are not within the definition.” FED. R. EVID. 1001(4) advisory committee’s note.

99. FED. R. EVID. 1003.

100. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 576 (D. Md. 2007).

101. See Jeffrey S. Kinsler & Anne R. Keyes MacIver, *Demistifying Spoliation of Evidence*, 34 TORT & INS. L.J. 761, 779–82 (1999).

102. FED. R. EVID. 1003 advisory committee’s note (construing *United States v. Alexander*, 326 F.2d 736 (4th Cir. 1964)).

103. See, e.g., *Amoco Prod. Co. v. United States*, 619 F.2d 1383, 1391 (10th Cir. 1980) (affirming the district court’s exclusion of a duplicate of a deed under Rule 1003(2) on the ground that the copy did not reproduce the most critical part of the original).

which address complaints that a duplicate was admitted over an objection asserting the existence of a genuine question of authenticity reject the claim.”¹⁰⁴ These cases will be addressed in Part II. The few instances in which courts have found that opponents of duplicates raised genuine questions as to the authenticity of originals have consisted mainly of cases where the proponents of duplicates admitted that they altered either the duplicates or the originals from which the duplicates were produced.¹⁰⁵

For instance, in *Boswell v. Jaspersen*,¹⁰⁶ Marsden and Melva Larsen sold land, including a feed yard, to Garth Boswell in 1974.¹⁰⁷ Garth later obtained loans on the property from Zions First National Bank and the Farmers Home Administration.¹⁰⁸ In 1982, Garth filed for bankruptcy, listing the feed yard as part of his real estate property holdings on the petition, and his son, William P. Boswell, sought to establish that he had an ownership interest in the feed yard.¹⁰⁹ As support for his claim, William introduced an alleged copy of the original deed from the Larsens to his father, which he claimed was altered with the consent of all parties “to substitute his name, William P. Boswell and his d/b/a Rafter ‘B’ Ranch, as grantees.”¹¹⁰ William admitted, however, that the loan holders were never notified of this alleged alteration, and Garth contradicted himself, alternatively contending that the original deed was and was not altered.¹¹¹ Although the court failed to set forth a test for determining whether there was a genuine question raised as to the original’s authenticity, it concluded that “there [wa]s a genuine question as to the authenticity of the proffered altered deed.”¹¹²

Furthermore, courts have held in some circumstances that the opponent of a duplicate raises a genuine question as to the authenticity of an original under Rule 1003(1) by either demonstrating a genuine question “‘as to the authenticity of the un-introduced original, or

104. Wellborn, *supra* note 19, at 114. Although Wellborn made this comment in 1986, the same remains true today. See, e.g., *supra* notes 21–27 and accompanying text.

105. See, e.g., *S.E.C. v. Hughes Capital Corp.*, 124 F.3d 449, 456 (3d Cir. 1997) (finding that a genuine question existed as to the authenticity of check stubs where the proponent admitted that the original stubs were altered before photocopying).

106. 266 F. Supp. 2d 1314 (D. Utah 2003).

107. *Id.* at 1316.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1316–17.

112. *Id.* at 1321.

as to the trustworthiness of the duplicate”¹¹³ For instance, courts are unanimous in finding that when the opponent of an alleged duplicate, such as a “copy” of a note, claims that the duplicate is inauthentic because the original note never existed, the opponent potentially raises a genuine question as to the authenticity of the original under Rule 1003(1).¹¹⁴

What happens, however, when the opponent of this same “copy” admits that there was an original note at some point, but claims that the alleged duplicate is not an accurate copy of the original because, *inter alia*, it was materially altered in some fashion? As will be noted *infra*, some courts hold that the opponent in this situation is merely raising genuine questions as to the authenticity of the *duplicate* and is not raising genuine questions as to the authenticity of the *original*, making Rule 1003(1) inapplicable.¹¹⁵ But this analysis is nonsensical. Pursuant to Rule 1001(4), “[a]uthentication [of a photocopy] requires proving two facts: the original from which the duplicate was copied is itself authentic and, again, the duplicate is an accurate reproduction of that original.”¹¹⁶

In other words, when a proponent authenticates a duplicate under Rule 1001(4), he is saying that the duplicate, *B*, is an accurate reproduction of the original, *A*. Thus, the proponent is saying that $A = B$. If the opponent admits that the original existed at some point but claims that the “duplicate” was materially altered, he is saying that the duplicate, *B*, is inauthentic and that $A \neq B$. Because the proponent claims that $A = B$ and the opponent claims that $A \neq B$, there is a dispute as to the authenticity of both the duplicate and the original, despite what some courts have held.

d. Rule 1004: Excusing Nonproduction of Originals

Federal Rule of Evidence 1004 states that there are four circumstances under which the proponent of evidence concerning the contents of a writing, recording, or photograph is not required to produce the original and instead can prove its contents through sec-

113. *United States v. Chang An-Lo*, 851 F.2d 547, 557 (2d Cir. 1988) (quoting *United States v. Georgalis*, 631 F.2d 1199, 1205 (5th Cir. 1980)).

114. *See, e.g., Pro Bono Invs. v. Gerry*, No. 03 Civ. 4347 (JGK), 2005 WL 2429777, at *4–5 (S.D.N.Y. Sept. 30, 2005) (finding a genuine question as to the authenticity of a note when the opponent raised the issue of whether the original note ever existed).

115. *See infra* Part III.D.

116. *Dietrich v. Bauer*, 126 F. Supp. 2d 759, 763 (S.D.N.Y. 2001) (alteration in original) (quoting CHARLES ALAN WRIGHT & VICTOR GOLD, 31 FEDERAL PRACTICE AND PROCEDURE § 1004 (2000)).

ondary evidence.¹¹⁷ Secondary evidence includes any type of evidence besides the original, “ranging from photographs and handwritten copies to oral testimony of a witness whose credibility is suspect.”¹¹⁸ Indeed, courts have even held that when the opponent of a duplicate has made a successful challenge to it under Rule 1003(1), the proponent can still introduce the “duplicate” if he establishes one of the Rule 1004 circumstances.¹¹⁹ Furthermore, courts have relied upon the Advisory Committee’s notes to Rule 1004 in concluding that there are no “degrees” of secondary evidence.¹²⁰ Accordingly, once the proponent meets his burden of proof in establishing one of the Rule 1004 circumstances, he is free to submit any type of secondary evidence;¹²¹ there is no requirement, for instance, that a “copy be introduced in preference to . . . oral testimony” on the ground that the former is better evidence.¹²² Unfortunately, while most courts have placed the burden of proof on proponents to establish one of the Rule 1004 circumstances,¹²³ they have consistently failed to flesh out the nature of that burden.¹²⁴

The first circumstance is triggered under Rule 1004(1) when “[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.”¹²⁵ An example of this circum-

117. FED. R. EVID. 1004.

118. 6 WEINSTEIN’S FEDERAL EVIDENCE § 1004.02[1] (Joseph M. McLaughlin ed., 2d ed. 2008).

119. See, e.g., *In re Anthony*, No. 2002-A-0096, 2003 WL 22429035, at *4 (Ohio Ct. App. Oct. 24, 2003) (“Even if Anthony met his burden to exclude the duplicate pursuant to Evid. R. 1003, ‘[t]he original is not required, and other evidence of the contents of the writing . . . is admissible if . . . all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith . . .’” (quoting OHIO R. EVID. 1004(1))).

120. *United States v. Standing Soldier*, 538 F.2d 196, 203 n.8 (8th Cir. 1976) (citing FED. R. EVID. 1004 advisory committee’s note) (internal quotation marks omitted).

121. See *United States v. Johnson*, 362 F. Supp. 2d 1043, 1068 (N.D. Iowa 2005) (“Once the terms of Rule 1004 are satisfied, the party seeking to prove the contents of the recording . . . may do so by any kind of secondary evidence.”).

122. *Standing Soldier*, 538 F.2d at 203 n.8; see also *Neville Constr. Co. v. Cook Paint & Varnish Co.*, 671 F.2d 1107, 1109 (8th Cir. 1982) (finding that a buyer properly provided testimony concerning the contents of a brochure destroyed by a fire despite the availability of a similar brochure).

123. See, e.g., *Burroughs Wellcome Co. v. Commercial Union Ins. Co.*, 632 F. Supp. 1213, 1223 (S.D.N.Y. 1986) (stating that the proponent “bears the burden of producing the original . . . or proffering an explanation for its absence”).

124. I have not found a single case where a court specified the burden of proof that the proponent bears in the Rule 1004 context, such as proof by a preponderance of the evidence.

125. FED. R. EVID. 1004(1). In order to establish that the original was in fact “lost or destroyed” under Rule 1004(1), the proponent “may use circumstantial evidence such as evidence of a diligent but unsuccessful search for the document.” *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 810 F. Supp. 1420, 1426 (D. Del. 1992).

stance can be found in *United States v. McMahon*,¹²⁶ where the First Circuit found that the district court properly allowed testimony about the contents of a note allegedly written by the defendant.¹²⁷ The court came to this conclusion under Rule 1004(1) because the defendant did “not suggest that the government lost or destroyed the document in bad faith.”¹²⁸ It is difficult for the opponent of secondary evidence to prove that its proponent lost or destroyed the original in bad faith.¹²⁹ Courts have determined that proponents of secondary evidence satisfied Rule 1004(1) even when they acknowledged negligently destroying documents,¹³⁰ using a process to copy a tape which they knew would destroy the original,¹³¹ and erasing tapes in the ordinary course of business.¹³²

Furthermore, a couple of recent court decisions have heightened the hurdle that opponents of secondary evidence must leap in opposing the admission of secondary evidence pursuant to Rule 1004(1). As noted, courts typically require the proponent of secondary evidence to establish one of the Rule 1004 circumstances, such as proof that the original was lost or destroyed without bad faith.¹³³ In two 2007 decisions, however, the United States District Court for the Eastern District of Michigan indicated that the opponent of secondary evidence “has the burden of establishing bad faith” under Rule 1004(1), shifting the burden from the proponent to the opponent.¹³⁴

The second circumstance in which a proponent may prove contents through secondary evidence occurs when “[n]o original can be obtained by any available judicial process or procedure.”¹³⁵ For in-

126. 938 F.2d 1501 (1st Cir. 1991).

127. *Id.* at 1508, 1509 n.4.

128. *Id.* at 1509 n.4.

129. *See Wellborn*, *supra* note 19, at 118 (stating that destruction often occurs in the ordinary course of business and that negligent destruction may not rise to the level of bad faith).

130. *See, e.g., Estate of Gryder v. Comm’r*, 705 F.2d 336, 338 (8th Cir. 1983) (affirming the Tax Court’s finding that the Commissioner of Internal Revenue could produce secondary evidence concerning the contents of corporate records because IRS employees destroyed the originals “negligently but not in bad faith”).

131. *See, e.g., United States v. Balzano*, 687 F.2d 6, 7 (1st Cir. 1982) (finding that an original tape was not destroyed in bad faith despite the government’s use of a process to copy the tape that erased the original).

132. *See, e.g., United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996) (finding that a lawyer’s erasure of a taped conversation in the ordinary course of business did not constitute bad faith under Rule 1004(1)).

133. *See supra* note 123 and accompanying text.

134. *United States v. Culberson*, No. 05-80972, 2007 WL 1452902, at *1 (E.D. Mich. May 15, 2007); *United States v. Culberson*, No. 05-80972, 2007 WL 1266131, at *2 (E.D. Mich. Apr. 27, 2007).

135. FED. R. EVID. 1004(2).

stance, in *Allegra v. Bowen*,¹³⁶ the plaintiff applied for child's disability insurance because she had allegedly suffered from muscular dystrophy since early childhood.¹³⁷ The plaintiff claimed that her childhood physician in Italy diagnosed her with this condition and attempted to prove this diagnosis through a sworn physician's letter rather than the original clinical documents in which the diagnosis was made.¹³⁸ An administrative law judge denied the plaintiff's application, finding that the letter was inadmissible under the Best Evidence Rule, but the Eastern District of New York reversed, concluding that the original clinical documents were unobtainable "by available judicial process or procedure" under Rule 1004(2), and allowing the plaintiff to prove the documents' contents through secondary evidence such as the letter.¹³⁹ Courts have made clear that the proponents of secondary evidence need not make Herculean efforts to try to obtain the original for Rule 1004(2) to apply.¹⁴⁰ When, however, proponents of duplicates fail to engage in "diligent" efforts to establish that originals are lost, destroyed, or unobtainable, courts will not permit the introduction of secondary evidence pursuant to Rule 1004(1) or 1004(2).¹⁴¹

Under Rule 1004(3), the third circumstance in which a proponent may prove contents through secondary evidence occurs when:

[a]t a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing.¹⁴²

The Eastern District of California found this portion of the Rule applicable in *United States v. Cuesta*,¹⁴³ where the defendant appealed from his conviction for being a minor knowingly driving a vehicle containing alcohol.¹⁴⁴ At the defendant's trial, the prosecution requested that the defendant produce his driver's license to prove his age, but

136. 670 F. Supp. 465 (E.D.N.Y. 1987).

137. *Id.* at 466.

138. *Id.* at 468.

139. *Id.* at 468–69.

140. *See, e.g.*, *United States v. Marcantoni*, 590 F.2d 1324, 1329–30 (5th Cir. 1979) (finding that the government did not need to attempt to subpoena originals where it was "unrealistic" to expect that the subpoenaed documents would be produced).

141. *See, e.g.*, *Cartier v. Jackson*, 59 F.3d 1046, 1048 (10th Cir. 1995) (finding that the proponent could not present secondary evidence concerning demo tapes when she failed to conduct a diligent search for the original demo tapes).

142. FED. R. EVID. 1004(3).

143. No. 1:06-CR-40 AWI, 2007 WL 2729853 (E.D. Cal. Sept. 19, 2007).

144. *Id.* at *2, *20.

he refused; thereafter, the magistrate judge allowed the prosecution to call the ranger who arrested the defendant to testify as to the defendant's date of birth on his driver's license.¹⁴⁵ The court rejected the defendant's argument that this testimony violated the Best Evidence Rule, finding, pursuant to Rule 1004(3), that the driver's license was in the defendant's possession and that he failed to produce it at his trial.¹⁴⁶

Finally, under the "collateral matters" circumstance enunciated in Rule 1004(4), secondary evidence is admissible when "[t]he writing, recording, or photograph is not closely related to a controlling issue."¹⁴⁷ In *Jackson v. Crews*,¹⁴⁸ a movie theater patron who had been arrested for public intoxication and resisting arrest brought a Section 1983 action against the municipality and his arresting officer for excessive force.¹⁴⁹ On appeal, after the district court awarded damages to the plaintiff, the arresting officer alleged that the district court erred by allowing the plaintiff to question a witness about the contents of a flyer describing the arrest and asking "any eye-witnesses to contact the person named on the flyer."¹⁵⁰ The Eighth Circuit determined that the Best Evidence Rule did not preclude the testimony despite the nonproduction of the flyer because, *inter alia*, the contents of the flyer were "collateral to the principal issue in the trial."¹⁵¹

e. Rule 1005: Public Records

Federal Rule of Evidence 1005 covers public records and indicates that:

[t]he contents of an official record, or of a document authorized to be recorded or filed, and actually recorded or filed, including data compilations in any form . . . may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original.¹⁵²

Rule 1005 also provides that "[i]f a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given."¹⁵³ In other words,

145. *Id.* at *20.

146. *Id.*

147. FED. R. EVID. 1004(4).

148. 873 F.2d 1105 (8th Cir. 1989).

149. *Id.* at 1106-07.

150. *Id.* at 1109-10.

151. *Id.* at 1110.

152. FED. R. EVID. 1005.

153. *Id.*

the proponent can introduce a properly certified copy of a public record without accounting for the original, and, if a public record is lost or destroyed without bad faith or is not available through any judicial process, the proponent may prove its contents through secondary evidence pursuant to Rule 1004(1) and (2).¹⁵⁴

f. Rule 1006: Summaries

Federal Rule of Evidence 1006 states that “[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.”¹⁵⁵ For this rule to apply, however, the proponent must make the originals or duplicates “available for examination or copying, or both, by other parties at a reasonable time and place.”¹⁵⁶ Rule 1006 is thus not an exception to the rule that proponents must produce originals or duplicates pursuant to Rules 1002 and 1003; instead, it merely states that proponents who have already made lengthy originals or duplicates available for examination, copying, or both can later prove their contents through charts, summaries, or calculations.

g. Rule 1007: Admissions

Federal Rule of Evidence 1007 allows for proof of the contents of a writing, recording, or photograph through “the testimony or deposition of the party against whom offered or by that party’s written admission, without accounting for the nonproduction of the original.”¹⁵⁷ For example, in *Vigil v. Division of Child and Family Services*,¹⁵⁸ the trial court considered whether David R. Vigil possessed material harmful to a child in his home.¹⁵⁹ At trial, a detective gave testimony and introduced into evidence a report concerning the contents of pornographic magazines and photographs seized from Vigil’s house pursuant to a search warrant.¹⁶⁰ On appeal, Vigil claimed that the testimony and report violated the Best Evidence Rule because the magazines and photographs were not produced.¹⁶¹ The Court of Ap-

154. See *Brown for Brown v. Bowen*, 668 F. Supp. 146, 150 (E.D.N.Y. 1987) (“Once plaintiff introduces credible evidence of loss or destruction of a public record by the agency with which it was filed, other evidence of contents of the record is admissible.”).

155. FED. R. EVID. 1006.

156. *Id.* The court may also “order that they be produced in court.” *Id.*

157. FED. R. EVID. 1007.

158. 107 P.3d 716 (Utah Ct. App. 2005).

159. *Id.* at 718.

160. *Id.* at 718–19.

161. *Id.* at 719.

peals of Utah rejected this argument, noting that Vigil “testified at trial that he had Playboy magazines and some videotapes that could be considered pornographic in [his] house.”¹⁶² Because Playboy magazine was “material considered harmful to a child” pursuant to the Division of Child and Family Services Manual, the court found that Vigil had admitted the contents of the seized items pursuant to Rule 1007, precluding any Best Evidence objection.¹⁶³

h. Rule 1008: Functions of the Court and Jury

Federal Rule of Evidence 1008 sets forth the respective functions of the court and the jury in applying the Best Evidence Rule. Rule 1008 states that the court must resolve preliminary issues of fact while the trier of fact must determine: “(a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents”¹⁶⁴ The Advisory Committee specifically noted that “the question whether the loss of the originals has been established, or of the fulfillment of other conditions specified in Rule 1004 . . . is for the judge” to resolve as a preliminary issue of fact.¹⁶⁵ Commentators and judges have determined that the issue of whether the party opposing the admission of a duplicate has raised a genuine question as to the authenticity of the original under 1003(1) is a preliminary issue of fact to be resolved by the court.¹⁶⁶

i. The Best Evidence Framework

Articles IX and X thus set up the following framework for how a party can authenticate a writing, recording, or photograph or otherwise prove its contents. If the proponent of a writing, recording, or photograph has the original, he can authenticate it under Rule 901, or it can be self-authenticating under Rule 902. If the proponent does

162. *Id.*

163. *Id.*

164. FED. R. EVID. 1008.

165. *Id.* 1008 advisory committee’s note.

166. *See, e.g., In re Porras*, 224 B.R. 367, 371 (Bankr. W.D. Tex. 1998) (explaining that a judge has “broad discretion” in determining whether a legitimate issue has been raised as to the authenticity of a duplicate under Rule 1003 (quoting 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 1003.02 (2d ed. 1997))); Wellborn, *supra* note 19, at 133 (“The following issues of fact must be decided by the judge, not the jury, under the allocation made in Rule 1008 . . . whether, when a duplicate is offered, one of the two conditions specified in rule 1003 . . . is present, so that the duplicate must be excluded . . .”).

not produce the original but can account for its nonproduction under Rule 1004(1), (2), or (3), he can prove its contents through any type of secondary evidence, including duplicates falling under the exception contained in Rule 1003(1). Alternatively, if he can prove that the original is not closely related to a controlling issue, he can do the same under Rule 1004(4). If the proponent does not produce the original and cannot account for its nonproduction, he can still prove its contents through the opposing party's admissions under Rule 1007, or, if the original is a public record, he can introduce a certified copy in compliance with Rule 1005. If the proponent does not produce the original and cannot prove its contents pursuant to Rule 1004, 1005, or 1007, he can still prove its contents by introducing a duplicate of the original pursuant to Rule 1003, "unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."¹⁶⁷ Thus, the only party who would be "aggrieved" by courts more readily finding genuine questions raised as to the authenticity of originals would be a party submitting a contested "duplicate" of a non-public record which is closely tied to a controlling issue, but who is unable to establish that the original was unobtainable, in the other party's possession, or lost or destroyed in the absence of bad faith.

II. TREATING PARTIES OPPOSING DUPLICATES THE SAME AS PARTIES OPPOSING SUMMARY JUDGMENT

A. "Genuine Question" vs. "Genuine Issue"

A well-established and frequently invoked rule of construction is "that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning."¹⁶⁸ Federal rules such as the Federal Rules of Evidence fall under the "other document" heading of this rule,¹⁶⁹ forming a legitimate basis for the argument that Rule 1003(1) should be read "so that the phrase 'genuine question' is used in the ordinary sense: a question upon which, on the evidence presented, reasonable persons might differ."¹⁷⁰ In other words, duplicates should be excluded under Rule 1003(1) when the party oppos-

167. FED. R. EVID. 1003.

168. *Mason v. United States*, 260 U.S. 545, 554 (1923).

169. *See, e.g., In re Tetracycline Cases*, 107 F.R.D. 719, 727 (W.D. Mo. 1985) ("Reference to the general rules of construction suggests that any interpretation which makes a federal rule superfluous is to be avoided.").

170. Wellborn, *supra* note 19, at 116.

ing their admission can make the same evidentiary showing as a party opposing a motion for summary judgment.

One basis for this argument is that Federal Rule of Civil Procedure 56(e)(2) contains similar language to Rule 1003(1). As noted, under Rule 1003(1), a duplicate is not admissible to the same extent as an original when “a genuine question is raised as to the authenticity of the original.”¹⁷¹ Meanwhile, Rule 56(e)(2) indicates:

[w]hen a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a *genuine issue* for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.¹⁷²

Furthermore, beyond the apparent similarity between “genuine question” and “genuine issue,” it is clear that courts have conflated the two phrases. To wit, there are several cases where courts addressing motions for summary judgment have asked whether the opposing party raised a “genuine question” of fact instead of a “genuine issue” of fact.¹⁷³ Other courts addressing motions for summary judgment have used both phrases in the same sentence of an opinion.¹⁷⁴

Similarly, in cases considering the applicability of Rule 1003(1), at least one court has asked whether the party opposing the admission of a duplicate raised a “genuine issue,” instead of a “genuine question,” as to the authenticity of the original.¹⁷⁵ In fact, at least one court has even misquoted Rule 1003(1) as stating that a duplicate is not admissible to the same extent as an original when “‘a genuine issue is raised as to the authenticity of the original’”¹⁷⁶ Furthermore, as in the summary judgment context, other courts addressing

171. FED. R. EVID. 1003(1).

172. FED. R. CIV. P. 56(e)(2) (emphasis added).

173. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 796 (1998) (resolving a motion for summary judgment by addressing whether there was a “genuine question” as to an employer’s responsibility for unauthorized harmful conduct); *Bowers v. NCAA*, 9 F. Supp. 2d 460, 494 (D.N.J. 1998) (finding that “specific facts illustrate . . . genuine questions of material fact” and denying summary judgment).

174. *See, e.g.*, *Jaramillo v. Colo. Judicial Dept.*, 427 F.3d 1303, 1310 (10th Cir. 2005) (finding that an opposing party creates a “genuine issue” of fact precluding the entry of summary judgment by raising a “genuine question”).

175. *See, e.g.*, *Tyson v. Jones & Laughlin Steel Corp.*, 958 F.2d 756, 761 (7th Cir. 1992) (“In particular, it is the opponent of the evidence who bears the burden of showing that a genuine issue of authenticity exists.”).

176. *United States v. Hausmann*, 711 F.2d 615, 618 (5th Cir. 1983) (quoting FED. R. EVID. 1003).

Rule 1003(1) have used both phrases in the same sentence of an opinion.¹⁷⁷

Courts have consistently found that similar phrases in the Federal Rules of Evidence and the Federal Rules of Civil Procedure should be given the same effect. Looking back at Federal Rule of Civil Procedure 56, Subsection (e)(1) requires that an affidavit supporting or opposing summary judgment “must be made on personal knowledge.”¹⁷⁸ Likewise, Federal Rule of Evidence 602 states that “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”¹⁷⁹ Courts addressing the issue of whether evidence is admissible under both of these rules have found that evidence inadmissible under one Rule is also inadmissible under the other Rule “for the same reason.”¹⁸⁰

By no means, however, have courts found that phrases in the Federal Rules of Evidence and the Federal Rules of Civil Procedure should be given the same effect only when they are identical. Federal Rule of Civil Procedure 43(b) states that “[w]hen these rules require an oath, a solemn affirmation suffices.”¹⁸¹ Federal Rule of Evidence 603 provides that “[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ [sic] conscience and impress the witness’ [sic] mind with the duty to do so.”¹⁸² Notwithstanding these differences in phraseology, courts have determined that the two Rules are “parallel”¹⁸³ and have the “same” effect in that they afford a witness “the option of giving a nonreligious affirmation of her commitment to tell the truth rather than swearing on a bible or to a divine Being.”¹⁸⁴ Other examples where courts have interpreted similar language to have the same effect include Federal Rule of Civil Procedure 61 and Federal Rule of Evidence 103(a),¹⁸⁵ Federal Rule of Civil Procedure 32(a)(4) and Federal Rule of Evi-

177. *See, e.g.*, *United States v. Harris*, Nos. 88-5663 to 88-5667 and 88-5691, 1990 WL 27340, at *5 (4th Cir. Feb. 26, 1990) (“Defendant Freeman raises no genuine issues as to the authenticity of the original; mere speculation that the document is not a duplicate of the original is insufficient to invoke a genuine question as to the original’s authenticity.”).

178. FED. R. CIV. PRO. 56(e)(1).

179. FED. R. EVID. 602.

180. *Marley v. Addus Healthcare, Inc.*, 122 F. Supp. 2d 954, 956 n.2 (N.D. Ill. 2000).

181. FED. R. CIV. PRO. 43(b).

182. FED. R. EVID. 603.

183. *Ferguson v. Comm’r*, 921 F.2d 588, 589 (5th Cir. 1991) (citing *Gordon v. State*, 778 F.2d 1397, 1400 (9th Cir. 1985)).

184. *Doe v. Phillips*, 81 F.3d 1204, 1211 (2d Cir. 1996).

185. Federal Rule of Civil Procedure 61 indicates:

dence 804(b)(1),¹⁸⁶ and Federal Rule of Civil Procedure 1 and Federal Rule of Evidence 102.¹⁸⁷

Assuming that courts should give the phrases “genuine issue” and “genuine question” the same meaning, the question becomes whether courts have treated parties opposing the admission of duplicates under Rule 1003(1) in the same manner that they have treated parties opposing motions for summary judgment under Rule 56(e)(2).

B. Summary Judgment Feature 1: Material Disputes of Fact

Pursuant to Federal Rule of Civil Procedure 56(c), a party may prevail on summary judgment if “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”¹⁸⁸ As noted, when the movant has met the requirements of Rule 56(c), the court should grant his motion for summary judgment unless, pursuant to Federal Rule of Civil Procedure 56(e)(2), the nonmoving party “by affidavits or as otherwise provided in this rule—set[s] out specific facts showing a genuine issue for trial.”¹⁸⁹

Pursuant to Rule 56, courts have consistently found that “at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”¹⁹⁰ In deciding whether there is such an issue, the judge “must look at the record in the light

[u]nless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.

FED. R. CIV. PRO. 61. In relevant part, Federal Rule of Evidence 103(a) states that “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected” FED. R. EVID. 103(a). Courts have indicated that these Rules have the same effect: the improper exclusion or admission of evidence does not form the basis for a reversal if it constituted harmless error and substantial justice is not denied. *See, e.g.*, *Fernandez v. Leonard*, 963 F.2d 459, 465 (1st Cir. 1992).

186. *See* *Wallace v. City of Tarpon Springs*, No. 8:05-CV-979-T-EAJ, 2007 WL 128839, at *2 (M.D. Fla. Jan. 12, 2007) (“[C]ourts have stated that Fed.R.Civ.P. 32(a)(4) and Fed.R.Evid. 804(b)(1) should be construed together to resolve the question of a deposition’s admissibility.” (citing *Clay v. Buzas*, 208 F.R.D. 636, 638 (D. Utah 2002))).

187. *See* *Duquense Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 609 (3d Cir. 1995) (stating that both Federal Rule of Civil Procedure 1 and Federal Rule of Evidence 102 “embody the principle that trials should be both fair and efficient”).

188. FED. R. CIV. PRO. 56(c).

189. *Id.* 56(e)(2).

190. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

most favorable to the party opposing the motion, drawing all inferences most favorable to that party.”¹⁹¹ Accordingly, because the judge “must accept the [nonmoving party’s] version of any disputed facts,”¹⁹² courts often deny motions for summary judgment because they can grant such motions only if “there is no dispute as to any fact material to the issue being litigated.”¹⁹³

Conversely, courts have consistently found that parties opposing the admission of duplicates under Rule 1003(1) have failed to raise genuine questions as to the authenticity of originals even when they have raised material disputes of fact. In *Dietrich v. Bauer*,¹⁹⁴ an investor, Del Dietrich, brought a class action lawsuit against Scorpion Technologies, Inc. (“Scorpion”) and its brokerage firms, among others, claiming that all engaged in a plan to sell unregistered Scorpion shares.¹⁹⁵ Specifically, the class action alleged that the brokerage firm Green-Cohn Group, Inc. (“Green-Cohn”), formed by Morton Cohn and Van D. Greenfield, “acted as the conduit through which nearly 11 million shares of unregistered Scorpion stock were sold by foreign entities to investors in the United States, and that Green-Cohn reaped substantial profits from these sales by being allowed to charge grossly excessive commission rates on the trades.”¹⁹⁶

After a complicated legal history, the surviving claims in the class action lawsuit were against defendants Green-Cohn and Cohn himself.¹⁹⁷ Cohn sought to submit into evidence a photocopy of a letter from Greenfield to him dated January 4, 1991.¹⁹⁸ The letter stated that Cohn was the 100% owner of Green-Cohn, but it also indicated, *inter alia*, “that Greenfield would ‘unilaterally make all management, employment and trading decisions of [Green-Cohn]’ and would ‘have total control over the entity and its management’”¹⁹⁹

Dietrich moved to strike the photocopied letter under Rule 1003 based upon both lay and expert testimony.²⁰⁰ Greenfield testified that he was uncertain whether he sent the original letter to Cohn and indicated that he only provided the photocopy to Cohn approximately

191. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 n.26 (1982).

192. *Forsham v. Harris*, 445 U.S. 169, 191 n.10 (1980) (Brennan, J., dissenting).

193. *Fountain v. Filson*, 336 U.S. 681, 682–83 (1949); *see also* *Weise v. Casper*, 507 F.3d 1260, 1270 (10th Cir. 2007) (noting that the Supreme Court has explained that summary judgment motions are “often denied” because there are material fact disputes).

194. 126 F. Supp. 2d 759 (S.D.N.Y. 2001).

195. *Id.* at 761.

196. *Id.*

197. *Id.*

198. *Id.* at 762.

199. *Id.* (quoting the January 4, 1991 letter).

200. *Id.* at 763–64.

nine years after he allegedly wrote the original letter.²⁰¹ More importantly, Cohn admitted “at his deposition that he did not know he was the owner of the firm or even that there was a firm called Green-Cohn, as well as that he had no recollection of the letter.”²⁰² Cohn apparently did present expert evidence that the photocopy of the letter was an authentic duplicate of a letter actually written on January 4, 1991,²⁰³ but Dietrich “retained a forensic expert who concluded that the January 4 Letter was not in fact created on January 4, 1991.”²⁰⁴

Finding that Dietrich had not raised a genuine question as to the authenticity of the original,²⁰⁵ the Southern District of New York’s decision clearly establishes that courts place a higher burden on parties opposing the admissibility of duplicates than they place on parties opposing motions for summary judgment. The court first determined that the fact that Dietrich had an expert whose conclusions regarding the authenticity of the letter contradicted those of Cohn’s expert “merely demonstrate[d] that there [wa]s a *dispute of fact* as to the authenticity of the document.”²⁰⁶ It then acknowledged that Dietrich had pointed out that there were “certain inconsistencies between the testimony of Cohn and Greenfield and the January 4 Letter.”²⁰⁷ Nonetheless, the court rejected Dietrich’s Rule 1003 challenge, finding that “there [wa]s sufficient evidence from which a jury could conclude that the document [wa]s indeed authentic”²⁰⁸

While courts have found that a nonmoving party raises the requisite genuine issue of fact necessary to defeat a motion for summary judgment by creating a material dispute of fact,²⁰⁹ the *Bauer* case makes clear that courts require a greater evidentiary showing by parties opposing the admission of duplicates under Rule 1003(1).²¹⁰ Furthermore, while courts have found that nonmoving parties identifying “specific factual inconsistencies” within and between witnesses’ testimony raise genuine issues of fact, precluding the award of summary judgment,²¹¹ *Bauer* also establishes that specific factual disputes not

201. *Id.* at 762.

202. *Id.*

203. The court references “Cohn’s own expert evidence,” but never specifies what expert evidence he produced to support the authenticity of the letter. *See id.* at 763.

204. *Id.*

205. *Id.* at 764.

206. *Id.* (emphasis added).

207. *Id.*

208. *Id.*

209. *See supra* note 193 and accompanying text.

210. *See supra* notes 205–208 and accompanying text.

211. *See, e.g.,* *Corrugated Paper Prods., Inc. v. Longview Fibre Co.*, 868 F.2d 908, 914 (7th Cir. 1989) (noting that a nonmoving party raises genuine issues of fact for trial suffi-

only within and between the testimony of witnesses, but also between testimony and the duplicate itself, are not necessarily sufficient to raise a genuine question as to the authenticity of the original.²¹²

Both federal²¹³ and state²¹⁴ courts across the country have rendered decisions in line with the district court's decision in *Bauer*, finding that the opponents of duplicates failed to raise genuine questions as to the authenticity of originals despite pointing out or creating inconsistencies within and between witnesses' testimony or between testimony and the duplicate itself. In addition, while courts cannot grant summary judgment when there are competing expert opinions,²¹⁵ courts have also agreed with *Bauer* that even expert evidence questioning the authenticity of originals is not necessarily sufficient to raise genuine questions under Rule 1003(1).²¹⁶ Finally, while judges considering motions for summary judgment must draw all inferences most favorable to the nonmoving party,²¹⁷ courts resolving Rule 1003(1) challenges frequently find that opponents of duplicates fail to raise genuine questions as to the authenticity of originals even when the issue of authenticity is subject to conflicting inferences.²¹⁸

Courts have not been alone in requiring a higher evidentiary showing by parties making Rule 1003(1) challenges than they require

cient to defeat a motion for summary judgment by identifying "specific factual inconsistencies" in witnesses' testimony).

212. See *supra* notes 206–208 and accompanying text.

213. See, e.g., *Amin v. Flagstone Hospitality Mgmt.*, No. 03-1181 (JRT/JSM), 2005 WL 3054599, at *3, *5 (D. Minn. Nov. 14, 2005) (finding a copy of a witness's declaration admissible despite the witness claiming that he did not type or sign the declaration).

214. See, e.g., *Simons v. Simons*, 11 P.3d 20, 25 (Idaho 2000). In *Simons*, the defendant claimed that a duplicate memorandum agreement had been altered and presented the testimony of one of the signers of the agreement to the same effect. See *id.* at 24. The trial court, however, found that there was no genuine question raised as to the authenticity of the original because the proponent presented witnesses who claimed that the duplicate was authentic, and the Supreme Court of Idaho affirmed, finding that there was "substantial, competent evidence to support the decision . . ." *Id.* at 25.

215. *Phillips v. Cohen*, 400 F.3d 388, 399 (6th Cir. 2005) (finding that summary judgment is improper when there is a battle of the experts).

216. See, e.g., *WestRN-West Risk Markets, Ltd. v. XL Reinsurance Am., Inc.*, No. 02 Civ. 7344 (MGC), 2006 WL 2034627, at *7 (S.D.N.Y. July 19, 2006) (finding no genuine question as to the authenticity of a Premium Finance Agreement despite the defendant denying signing it, an expert report concluding that the defendant did not sign it, and no expert evidence to the contrary).

217. See *supra* notes 191–193 and accompanying text.

218. See, e.g., *People v. Garcia*, 247 Cal. Rptr. 94, 97 (Cal. Ct. App. 1988) ("The existence of this possible conflicting inference goes to the weight rather than the admissibility of the photograph, because conflicting inferences are for the jury to resolve."). In contrast, courts have found that summary judgment is appropriate only when "the record reveals no evidence from which reasonable persons might draw conflicting inferences about the facts." *Templet v. Hydrochem, Inc.*, 367 F.3d 473, 480 (5th Cir. 2004).

of parties opposing motions for summary judgment. In *Federal Evidence*, authors Louisell and Mueller assert that despite the “apparent meaning” of the phrase “genuine question,” “the mere fact that [the proponent’s] adversary adduces counterproof which would enable a reasonable jury to reject the duplicate upon the ground that the so-called original is not genuine does not justify excluding the duplicate from the jury’s consideration.”²¹⁹ They claim that the opponent of a duplicate only raises a genuine question as to the authenticity of an original when he presents “cogent and compelling evidence which would *require* the jury to find that the original is not authentic.”²²⁰

C. Summary Judgment Feature 2: Not Resolving Credibility Issues

A subset of the principle that “at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial”²²¹ is the precept that it is inappropriate for a court “to resolve issues of credibility, motive, and intent on motions for summary judgment.”²²² Phrased differently, when resolving a motion for summary judgment, a judge must draw all reasonable inferences in favor of the nonmoving party on questions of credibility.²²³

In contrast, it is abundantly clear that courts faced with evidentiary challenges under Rule 1003(1) are resolving issues of credibility and not drawing reasonable inferences in favor of nonmoving parties. In *Pahl v. Commissioner*,²²⁴ the Ninth Circuit reviewed the United States Tax Court’s conclusion that, in 1990, Stephen Pahl was a shareholder in a law firm and failed to report his pro rata share of the firm’s 1990 income on his tax returns.²²⁵ Prior to 1989, Gerald Niesar and Garrett Cecchini were the sole shareholders in their law firm, Niesar & Cecchini.²²⁶ In 1989, Stephen Pahl and Thomas Gosselin successfully negotiated with Niesar and Cecchini to join their law firm,

219. DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 577, at 452 (1981).

220. *Id.* at 452–53 (emphasis added).

221. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

222. *Hardin v. Pitney-Bowes Inc.*, 451 U.S. 1008, 1008 (1981) (Rehnquist, J., dissenting).

223. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991) (stating that a court “must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence”).

224. 150 F.3d 1124 (9th Cir. 1998).

225. *Id.* at 1125.

226. *Id.*

but Pahl and Gosselin subsequently left the firm less than a year later.²²⁷

An issue at Pahl's trial was whether he joined the law firm as a shareholder or in some lesser capacity.²²⁸ As support for the argument that Pahl was a shareholder, the Commissioner of Internal Revenue ("Commissioner") attempted to introduce into evidence Exhibit O, a non-certified copy of a Certificate of Amendment that changed the firm name to Niesar, Pahl, Cecchini & Gosselin, A Professional Corporation.²²⁹ Pahl's attorney objected to the introduction of this copy on the ground that Pahl's signature was forged. The court overruled his objection, but "did hold the record open so that [Commissioner] could submit certain documents."²³⁰ Despite this, during trial, the Commissioner never submitted any additional documents, and at the end of trial, defense counsel renewed his objection, claiming that the Commissioner "promised to provide an original or certified copy of Exhibit O and failed to do so."²³¹

The court rejected this argument, noting that while it held the record open during trial so that the Commissioner could submit additional documents, it could not conclude from the trial transcript that the Commissioner "promised to submit an original or certified copy of Exhibit O."²³² The court also found that Niesar properly authenticated Exhibit O pursuant to Federal Rule of Evidence 901(b)(1) because he testified that he saw Pahl sign the original Certificate, even though there was no indication that Niesar had familiarity with Pahl's handwriting or signature.²³³ The court further found that Pahl had not raised a genuine question as to the authenticity of the original Certificate because it credited Niesar's testimony that he saw Pahl sign the original Certificate and "disbelieved [Pahl's] testimony to the contrary."²³⁴ On appeal, the Ninth Circuit affirmed, finding that the Tax Court did not abuse its discretion in "credit[ing] Niesar's testimony that he saw Pahl actually sign the [Certificate] and disbeliev[ing] Pahl's testimony to the contrary."²³⁵

227. *Id.*

228. *Pahl v. Comm'r*, 71 T.C.M. (CCH) 2744, 2746 (1996), *aff'd*, 150 F.3d 1124 (9th Cir. 1998).

229. *Id.* at 2747 & n.1.

230. *Id.* at 2747 n.1.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Pahl v. Comm'r*, 150 F.3d 1124, 1132 (9th Cir. 1998).

Pahl seems to be a clear case where a court should not have weighed credibility in determining whether there was a genuine question as to the authenticity of an original because: (1) the Commissioner did not produce an original or a certified copy of the Certificate; (2) the sole authenticating witness was unfamiliar with Pahl's handwriting and biased against Pahl based on his abrupt departure from the firm; and (3) although it is unclear whether the Commissioner specifically promised to produce an original or certified copy of the Certificate, it is clear that the Tax Court held the record open in anticipation of the Commissioner producing such documentation.²³⁶ However, instead of finding that these facts raised genuine questions as to the authenticity of the original, the Tax Court and the Ninth Circuit answered those questions by weighing the credibility of the witnesses and not drawing reasonable inferences in favor of the nonmoving party.²³⁷ Courts at both the federal and state level have largely followed suit, determining that genuine questions were not raised as to the authenticity of originals only after deciding that the proponents of duplicates were more credible than their opponents.²³⁸

D. Summary Judgment Feature 3: Not Weighing the Preponderance of the Evidence

Another well-established principle in summary judgment jurisprudence is that the party opposing summary judgment does not need to prove his claim or defense by a preponderance of the evidence; instead, the nonmoving party merely needs to present evidence which, when taken in the light most favorable to him, could allow a jury to find by a preponderance of the evidence that he established his claim or defense.²³⁹ Courts have consistently found that a judge deciding a motion for summary judgment does "not weigh the preponderance of the evidence"²⁴⁰ and that actually deciding whether the moving or nonmoving party has established his claim or defense

236. See *supra* notes 230–233 and accompanying text.

237. See *supra* notes 234–235 and accompanying text.

238. See, e.g., *FDIC v. Hutcheson*, No. 92-1679, 1993 WL 117828, at *3 (5th Cir. Mar. 26, 1993) (finding that discrepancies between the authenticating witness's affidavit and supplemental affidavits were not sufficient to undermine his credibility enough to render copy of a note inadmissible); *Matter of Respondent V.*, No. 91-O-07092, 1995 WL 662679, at *6, 8 (Cal. Bar Ct. Nov. 1, 1995) (affirming denial of opponent's authenticity challenge by "defer[ring] to the hearing judge's credibility determination").

239. See, e.g., *Humphrey v. Sears, Roebuck, & Co.*, 192 F. Supp. 2d 1371, 1375 (S.D. Fla. 2002) ("Plaintiff, in order to avoid summary judgment, does not need to show by a preponderance of the evidence that the reason given for her termination was pretextual.").

240. *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1068 (9th Cir. 2005) (Thomas, J., dissenting).

by a preponderance of the evidence is “altogether foreign to summary judgment.”²⁴¹ Indeed, as the Supreme Court of the United States has noted, when a defendant brings a motion for summary judgment, “the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.”²⁴²

Conversely, courts faced with Rule 1003(1) challenges have found that parties failed to raise genuine questions as to the authenticity of originals based upon the bare finding that the proponents of duplicates established authenticity by a preponderance of the evidence. In *Braut v. Tarabochia*,²⁴³ John Braut, the former president of the Washington corporation Inseafuture, Inc. (“Inseafuture”), claimed that in 1979 he loaned Arthur and Marilyn Tarabochia \$30,000 secured by their home.²⁴⁴ The Tarabochias subsequently divorced in 1988, and Marilyn received title to the house.²⁴⁵ James and Susan Wierzbicki purchased the property from Marilyn’s estate after her death in 1995.²⁴⁶ After the sale, the title company insuring the sale learned of the alleged loan, and assisted Marilyn’s estate in a quiet title action to remove the mortgage.²⁴⁷

At the ensuing proceeding, Braut “could not produce any written documentation of the loan,” and summary judgment was entered for the estate.²⁴⁸ Seven days later, Braut found a photocopy entitled “Collateral Agreement to Mortgage” bearing Arthur Tarabochia’s signature, and establishing loan terms.²⁴⁹ Marilyn’s estate subsequently dismissed its claim.²⁵⁰

Inseafuture thereafter brought a mortgage foreclosure claim against Tarabochia, the Wierzbickis, and a subsequent mortgage holder, Washington Federal Savings.²⁵¹ Before trial, the defendants brought a motion *in limine* seeking to preclude admission of Exhibit 4, the photocopied document, claiming that Arthur’s signature on the photocopied document was a forgery, but the court reserved its decision until after trial.²⁵²

241. *United States v. White*, 366 F.3d 291, 300 (4th Cir. 2004).

242. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

243. 17 P.3d 1248 (Wash. Ct. App. 2001).

244. *Id.* at 1249.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 1249 & n.1.

250. *Id.* at 1249.

251. *Id.*

252. *Id.*

At trial, certain evidence supported the authenticity of the photocopied document. Specifically, John McPhee, an ex-FBI employee, testified that he examined the photocopy and concluded that Arthur Tarabochia's signature did not indicate a "cut and paste" job.²⁵³ Additionally, a notarized mortgage in the record, which bore the Tarabochias' signatures, referred to the "'terms of an agreement bearing even date,'" which ostensibly referred to the alleged loan.²⁵⁴ Finally, Richard Arambaru, Inseafuture's attorney in 1979, stated that he prepared the mortgage on a promissory note, presumably the alleged loan, and recorded it on August 16, 1979.²⁵⁵

Conversely, other evidence called into question the authenticity of Exhibit 4. Braut testified at trial that he could not remember the details of the transaction.²⁵⁶ Arthur Tarabochia then testified that he could not remember Braut making a loan to him or his wife, that he never signed any agreement with Braut, and that Braut had attempted to bribe him before trial to testify that Braut had indeed loaned him the money.²⁵⁷ Lastly, there were unanswered questions of why there was a "considerable delay" before Braut attempted to recover on the alleged loan and why Braut did not produce the photocopy at the initial hearing during the quiet title action.²⁵⁸

At the close of the evidence, the court was ostensibly presented with three possibilities: (1) Arthur Tarabochia never signed a loan document and Braut's alleged copy was a forgery; (2) Arthur Tarabochia signed a loan document at some point, but Braut lost or destroyed it, and Braut's alleged copy was a forgery; or (3) Braut's alleged copy was an authentic copy of a loan document that Arthur Tarabochia signed. The court accepted the third alternative, finding that the photocopied document was admissible because the preponderance of the evidence did not suggest that Arthur's signature was a forgery.²⁵⁹ The trial court entered a judgment in favor of Inseafuture, after which the Wierzbickis and Washington Federal Savings and Loan Association appealed.²⁶⁰

On appeal, the Court of Appeals of Washington noted that "Washington courts have not addressed the circumstances in which a

253. *Id.* at 1250. Furthermore, "[h]e testified that this was the highest degree of certainty he could give to a photocopy." *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 1249.

257. *Id.*

258. *Id.* at 1250.

259. *Id.* at 1249.

260. *Id.*

trial court abuses its discretion by admitting a duplicate of questionable authenticity.”²⁶¹ Thereafter, the court deferred to the trial court’s ruling, finding that the evidence supporting the authenticity of the copy, “while not overwhelming, d[id] establish tenable grounds for the trial court’s decision to admit the photocopy.”²⁶² Several courts across the country have come to the same conclusion as the trial court in *Tarabochia* in Rule 1003(1) cases, finding duplicates to be admissible based upon finding by a mere preponderance of the evidence that they were authentic.²⁶³ In contrast, appellate courts reviewing trial court orders granting motions for summary judgment reverse those orders based upon anything less than affidavits and other evidence which “are so overwhelming that there is no basis for a trial and specific factual findings.”²⁶⁴

E. Conclusion

Courts consistently have required a greater evidentiary showing by parties opposing the admission of duplicates under Rule 1003(1) than they require of parties opposing motions for summary judgment under Rule 56(e)(2). Based upon the similarity in language between these rules and precedent giving the same effect to similar phrases in other Federal Rules of Evidence and Federal Rules of Civil Procedure, this disparate treatment appears unjustified. The question then becomes whether these courts are relying upon Rule 1003’s legislative history for this disparate treatment.

III. RULE 1003’S LEGISLATIVE HISTORY SUPPORTS TREATING DUPLICATE OPPONENTS THE SAME AS SUMMARY JUDGMENT OPPONENTS

The legislative history behind Federal Rule of Evidence 1003 provides an even stronger basis for the argument that courts should treat parties opposing the admission of duplicates under Rule 1003(1) in the same manner that they treat parties opposing motions for summary judgment. However, despite the legislative history unequivocally

261. *Id.* at 1250.

262. *Id.*

263. *See, e.g.*, *United States v. Mitchell*, No. 02-3386, 2003 WL 22995207, at *2-*3 (3d Cir. Dec. 22, 2003) (affirming the district court’s decision that a copy of an IRS form was authentic by “the preponderance of the evidence”); *United States v. Titterington*, 354 F. Supp. 2d 778, 787 (W.D. Tenn. 2005) (rejecting the defendant’s Rule 1003(1) objection to the admission of a copy of a Barbados court order because the government proved the authenticity of the original “by a preponderance of the evidence”).

264. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 571 (1st Cir. 2004) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

supporting a "liberal" reading of Rule 1003(1), courts have read the exception in a manner so conservative as to render it meaningless.

A. *The Legislative History Behind Rule 1003*

When the Supreme Court first proposed Federal Rule of Evidence 1003 in 1972, the proposed rule included the same exception that the enacted Rule 1003 contains precluding a duplicate from being admissible to the same extent as an original if the opposing party raises a genuine question as to the authenticity of the original.²⁶⁵ The Supreme Court then sent this proposed rule to the Advisory Committee, and in its note to the proposed rule, the Committee indicated that generally counterparts such as duplicates serve the purposes of ensuring accuracy and genuineness "equally as well as the original . . ."²⁶⁶ The Committee also stated that "if no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under the rule."²⁶⁷ The Committee noted that this position found support in case law.²⁶⁸

For example, in *Myrick v. United States*,²⁶⁹ a case cited by the Committee, the defendant was convicted of two fraud charges and appealed to the Fifth Circuit, claiming in part that the trial court improperly admitted photostats of microfilms of documents such as checks, instead of the originals.²⁷⁰ In finding that the trial court acted properly, the Fifth Circuit cited to a previous case where it had allowed for the admission of a photostat that was identified by the proper custodian, notwithstanding the Best Evidence Rule.²⁷¹ The *Myrick* court then found that the photostats in the case before it were similarly admissible, but added the disclaimer that "[h]ad defense counsel made the slightest suggestion that the photostats offered in evidence were incorrect, or had he demanded production of the microfilms from which they were produced, it is apparent the trial judge would have taken appropriate action, but that was not done."²⁷²

265. See *Dungar v. Happy Tiger Records, Inc.*, 116 Cal. Rptr. 412, 415 (Cal. Ct. App. 1974) (stating that under Proposed Rule 1003, duplicates were to be "admissible as originals unless a genuine question [wa]s raised as to the authenticity of the original").

266. FED. R. EVID. 1003 advisory committee's note.

267. *Id.*

268. *Id.* (citing *Myrick v. United States*, 332 F.2d 279 (5th Cir. 1964); *Johns v. United States*, 323 F.2d 421 (5th Cir. 1963); *Sauget v. Johnston*, 315 F.2d 816 (9th Cir. 1963)).

269. 332 F.2d 279 (5th Cir. 1964).

270. *Id.* at 282.

271. *Id.*

272. *Id.*

After the Advisory Committee considered the proposed rule, the House Committee on the Judiciary held hearings on the proposed rules of evidence.²⁷³ The Committee's report indicated that Herbert Hoffman, Esq., wrote a letter to Professor Edward W. Cleary, the Chief Reporter for the Advisory Committee on the Federal Rules of Evidence, in which he expressed concern that Proposed Rule 1003 would unduly constrict the Best Evidence Rule and practically foreclose the ability of a party who had not seen the original to challenge the accuracy of the duplicate.²⁷⁴ Professor Cleary then responded that "[i]f by 'constricts' it is meant that the rule relaxes the common law insistence that the original in the strict sense be either produced or accounted for, then I agree that the rule has that effect. In fact, that was the end in view . . . drafting . . . the rule."²⁷⁵ He indicated that while originals typically had to be produced in the "pre-discovery and pre-Xerox days" to ensure that the parties presented the "most reliable information" to the court, with the advent of discovery and xerography, this same objective could be achieved through the use of duplicates "without wasting a lot of time over 'originals' which no one really needs."²⁷⁶

Professor Cleary went on to note, however, that when the proponent of a duplicate did not produce the original for the opponent to inspect during discovery and the opponent had questions regarding authenticity, "[t]he party complaining of lack of opportunity to see the original would, in my opinion, find in the exceptions of Rule 1003 any protection which the circumstances justified."²⁷⁷ According to Cleary, "[o]ne relevant circumstance might well be the source of the document. Thus an offer of duplicates of records of a disinterested third party, e.g. a bank, would be less likely to raise a question of genuineness [sic] or unfairness than would an offer of duplicates of a party's own records."²⁷⁸ Other factors listed by Cleary were "[t]he nature of the documents themselves and their apparent completeness or lack of it"²⁷⁹ Cleary finally noted that "[o]ther circumstances might in addition call for consideration."²⁸⁰

Despite Professor Cleary's attempt to quell Hoffman's concerns, it appears that "the House Committee's concerns were not altogether

273. See *Hearings*, *supra* note 31.

274. Letter from Herbert E. Hoffman, Esq., to Professor Edward W. Cleary (May 11, 1973), in *Hearings*, *supra* note 31 at 82-83.

275. Cleary Letter, *supra* note 31.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

assuaged”²⁸¹ Accordingly, in its report on Rule 1003, the House Committee noted that it approved the Rule “with the expectation that the courts would be liberal in deciding that a ‘genuine question is raised as to the authenticity of the original.’”²⁸² The Advisory Committee then repeated this expectation of liberality in its note to Rule 1003.²⁸³

In a 1986 law review article, Professor Otis Guy Wellborn III found that “[w]hether the federal courts in applying Rule 1003 have been ‘liberal’ in this sense cannot be ascertained from reported cases.”²⁸⁴ According to Wellborn, “[a]lmost all of the reported cases which address complaints that a duplicate was admitted over an objection asserting the existence of a genuine question of authenticity reject the claim.”²⁸⁵ Immediately following this statement, Wellborn listed several such cases in a footnote without further explication.²⁸⁶ Wellborn then noted that these cases were not dispositive on the issue of whether courts had been “liberal” in finding genuine questions raised as to the authenticity of originals because, according to him, perhaps “even a ‘liberal’ construction of ‘genuine question’ would not have extended to the objections raised in those cases.”²⁸⁷ With due respect to Professor Wellborn, other cases seem to indicate clearly that courts have been anything but liberal in finding that opponents raised genuine questions as to the authenticity of originals under Rule 1003(1). And as the previous and following cases illustrate, the reluctance of courts to find “duplicates” inadmissible under Rule 1003(1) did not end in 1986; instead, in almost all post-1986 state and federal cases, both reported and unreported, courts presented with Rule 1003(1) challenges have rejected them, often in a manner which has rendered the exception meaningless.²⁸⁸

281. Wellborn, *supra* note 19, at 114.

282. H.R. REP. NO. 93-650, at 17 (1973).

283. FED. R. EVID. 1003 advisory committee’s note.

284. Wellborn, *supra* note 19, at 114.

285. *Id.*

286. *See id.* at 114 n.81 (citing *Greater Kansas City Laborers Pension Fund v. Thummel*, 738 F.2d 926, 928 (8th Cir. 1984); *United States v. DiMatteo*, 716 F.2d 1361, 1368 (11th Cir. 1983); *United States v. Balzano*, 687 F.2d 6, 7–8 (1st Cir. 1982); *United States v. Georgalis*, 631 F.2d 1199, 1205 (5th Cir. 1980); *United States v. Enstam*, 622 F.2d 857, 866 (5th Cir. 1981)).

287. *Id.* at 114.

288. *See supra* Part II; *infra* Part III.B.

B. Rule of Construction: Not Rendering Parts of Federal Rules Meaningless

As noted, a well-established and frequently invoked rule of construction is “that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning.”²⁸⁹ Thus, because the Federal Rules of Evidence fall under the “other document” heading, they are not to be read so that any part of them is rendered superfluous.²⁹⁰ Despite the applicability of this rule of construction to the Federal Rules of Evidence, many courts have read Rule 1003 in a manner that renders the exception contained in Rule 1003(1) meaningless, and none have cited the expectation of liberality in its legislative history.

For example, in *People v. Jenkins*,²⁹¹ the defendant appealed his conviction for possession of a weapon by a previous offender.²⁹² At trial, the prosecution proved that the defendant was a previous offender by introducing an arraignment journal documenting the defendant’s felony conviction accompanied by a Certificate of Acknowledgment executed by the Director of Records.²⁹³ The arraignment journal, however, which consisted of copies of Kansas State Penitentiary Records, “was not certified by either the trial court that had entered the judgment of conviction or by the clerk of the court in which it was entered.”²⁹⁴ Furthermore, the registration number on the actual arraignment journal and the Certificate of Acknowledgment did not match.²⁹⁵

The trial court determined that “this discrepancy went to the weight [of the evidence] not the admissibility of the document.”²⁹⁶ On appeal, the Court of Appeals of Colorado found that “the question of the authenticity of the original was resolved” with the Director of Records’ Certificate of Acknowledgement, despite the discrepancy in registration numbers, and held that “[t]he trial court correctly held that [the] discrepancy pertained to the weight not the admissibility of the document.”²⁹⁷

289. *Mason v. United States*, 260 U.S. 545, 554 (1923).

290. *See supra* notes 169–170 and accompanying text.

291. 717 P.2d 994 (Colo. Ct. App. 1985).

292. *Id.* at 994.

293. *Id.* at 994–95.

294. *Id.* at 994.

295. *Id.*

296. *Id.*

297. *Id.*

In effect, this decision rendered the exception contained in Rule 1003(1) superfluous and meaningless. As noted, under Rules 901 and 902, when the proponent of evidence properly authenticates a document or the document is self-authenticating, any challenges that the opposing party has with regard to its authenticity “go to the *weight* of the evidence—not to its *admissibility*.”²⁹⁸ The decision of the Colorado court treats authentication challenges to duplicates in the same manner as challenges to originals. According to the court, once the prosecution properly authenticated the copies of Kansas State Penitentiary Records in the arraignment journal, the discrepancy and lack of certification noted by the defendant could not “raise a question as to the authenticity of the original[s],” but instead merely went to the weight of the evidence.²⁹⁹ As such, under the Colorado court’s interpretation of Rule 1003, the rule should only state that “[a] duplicate is admissible to the same extent as an original” because challenges to properly authenticated duplicates merely go to the weight of the evidence and cannot raise genuine questions as to the authenticity of originals. Federal and state decisions from across the country have similarly held that authenticity challenges to duplicates merely go to the weight of the evidence, not their admissibility.³⁰⁰

Courts, however, have not been alone in construing Rule 1003(1) in a manner that renders it meaningless. In *Federal Practice and Procedure*, Charles Alan Wright and Victor Gold note that authentication of a duplicate “requires proving two facts: the original from which the duplicate was copied is itself authentic and, again, the duplicate is an accurate reproduction of that original.”³⁰¹ They then conclude that “if the evidence concerning these facts is sufficient to support a finding of their existence, the item may be admitted and questions concerning the authenticity of the original and the accuracy of the reproduction become matters for the jury to resolve.”³⁰² Once again, under this reading of Rule 1003, when the proponent properly authenticates a duplicate, the jury will receive the duplicate, and the op-

298. *United States v. Tin Yat Chin*, 371 F.3d 31, 38 (2d Cir. 2004).

299. *Jenkins*, 717 P.2d at 995.

300. *See, e.g.*, *WestRM-West Risk Mkts., Ltd. v. XL Reinsurance Am., Inc.*, No. 02 Civ. 7344 (MGC), 2006 WL 2034627, at *7 (S.D.N.Y. July 19, 2006) (“AIMCO’s arguments, however, go to the weight of the evidence, not to its admissibility.”); *Lakeview Dairy Servs., Inc. v. Dangler*, 585 N.E.2d 472, 474–75 (Ohio Ct. App. 1989) (affirming the trial court’s decision that the appellant’s argument that a duplicate was forged and retyped went to the weight of the evidence, not the duplicate’s admissibility).

301. 31 CHARLES ALAN WRIGHT & VICTOR GOLD, *FEDERAL PRACTICE AND PROCEDURE* § 8004 (2000).

302. *Id.*

ponent's challenges merely go to the weight of the evidence and not its admissibility, rendering Rule 1003(1) superfluous.

Finally, some courts have more bluntly rendered Rule 1003(1) meaningless. For instance, in *State v. Skimmerhorn*,³⁰³ the Court of Appeals of Ohio noted that “[t]he only likely scenario under which a party could raise a genuine question of authenticity, as provided under [Rule] 1003, is if it had access to the original for comparison, in which case the whole issue of admitting [the] copy would be moot.”³⁰⁴ Of course, such a conclusion is the antithesis of the rule that effect should be given to every part of a statute or federal rule.³⁰⁵ It also fails to bear out Professor Cleary’s proclamation in Rule 1003’s legislative history that “[t]he party complaining of lack of opportunity to see the original would, in my opinion, find in the exceptions of Rule 1003 any protection which the circumstances justified.”³⁰⁶ The Court of Appeals of Ohio, however, is not the only court to fail to adhere to Professor Cleary’s words.

C. *Duplicates of a Party’s Own Records*

As noted, when concerns were raised about the ability of a party being able to challenge the authenticity of a duplicate under Rule 1003, Professor Cleary responded that “[t]he party complaining of lack of opportunity to see the original would . . . find in the exceptions of Rule 1003 any protection which the circumstances justified.”³⁰⁷ Cleary then noted that “an offer of duplicates of records of a disinterested third party, e.g. a bank, would be less likely to raise a question of genuineness [sic] or unfairness than would an offer of duplicates of a party’s own records.”³⁰⁸

A review of both federal and state cases, however, reveals that only a single case has cited to Cleary’s proclamation that parties opposing the admission of duplicates would find protection under Rule 1003.³⁰⁹ There, the Court of Criminal Appeals of Texas affirmed the admission of a “duplicate”³¹⁰ over a vociferous dissent which contended that the disputed document was neither an original nor a duplicate.³¹¹ Meanwhile, not a single case has cited to Professor Cleary’s

303. 835 N.E.2d 52 (Ohio Ct. App. 2005).

304. *Id.* at 59 (discussing the admissibility of public records).

305. *See supra* notes 168–169 and accompanying text.

306. *See* Cleary Letter, *supra* note 31.

307. *Id.*

308. *Id.*

309. *Englund v. State*, 946 S.W.2d 64, 65 (Tex. Crim. App. 1997).

310. *Id.* at 71.

311. *Id.* at 72 (Mansfield, J., dissenting).

contention that “duplicates” in the possession of a party opponent should be viewed with higher skepticism than “duplicates” in the possession of a disinterested third party. Furthermore, the cases considering Rule 1003(1) challenges based in part upon the opportunity for mischief inherent in a duplicate being in the possession of an interested party make clear that courts have failed to give effect to Cleary’s words.

In one such case, *Alderson v. Bonner*,³¹² the court considered the appeal of Gary Lynn Bonner who was arrested for prowling outside the residence of Kelli Alderson and carrying a video camera with a tape that contained images of Kelli’s sister and mother in various states of undress.³¹³ A lower court convicted Bonner of a misdemeanor charge in connection with the incident, convicted him of a felony charge which was later reversed, and dismissed a subsequent criminal charge brought against him.³¹⁴ After the court dismissed the last charge, the tape recovered from Bonner’s video camera was destroyed.³¹⁵ Before the tape was destroyed, however, a copy was made, and at the civil trial of Kelli’s mother and sister against Bonner for invasion of privacy and intentional infliction of emotional distress, the court allowed the plaintiffs to introduce the copy of the videotape.³¹⁶

On appeal, Bonner contended that the trial court should have deemed the copy of the tape inadmissible because there were genuine questions as to the authenticity of the original.³¹⁷ The Court of Appeals of Idaho first noted that Officer Skoglund properly authenticated the copy by testifying that “he had viewed the videotape that was being offered as evidence and that it was an accurate copy of the original.”³¹⁸ Bonner alleged inconsistencies between the copy of the tape and information in police reports and testimony, pointing out that “Officer Skoglund’s police report described the videotape as forty-five minutes in length, while the copy [wa]s only thirty-five minutes long.”³¹⁹ Bonner also contended that “the videotape copy was inadmissible because the plaintiffs did not show where the copy ‘came from’ and did not prove a complete chain of custody.”³²⁰

312. 132 P.3d 1261 (Idaho Ct. App. 2006).

313. *Id.* at 1264.

314. *Id.* at 1265.

315. *Id.*

316. *Id.*

317. *Id.* at 1266.

318. *Id.*

319. *Id.*

320. *Id.*

The court rejected these arguments, finding that Officer Skoglund explained that he merely estimated the videotape's length in his report.³²¹ It thus found that the inconsistencies alleged by Bonner, although they ostensibly called into question the authenticity of the original to a certain extent, did "not so refute Officer Skoglund's [sic] testimony as to make the foundation inadequate."³²² With regard to the chain of custody argument, the court found that although the "plaintiffs did not present evidence to show the origin of the copy, Officer Skoglund's testimony demonstrate[d] that there was no break in the chain of custody up to the moment he first viewed the *original* tape, and he testified that there was no material difference between the two tapes."³²³ The court was thus satisfied that plaintiffs demonstrated that the copy was substantially similar to the original.³²⁴

Alderson seems to be a case where application of Cleary's words from the legislative history might have compelled a different result. While the court may have been right that Bonner's challenges did "not so refute Officer Skoglund's testimony as to make the foundation inadequate,"³²⁵ it seems likely that the heightened scrutiny suggested by Cleary in situations where the copy is in the possession of an interested party would have compelled a different conclusion.

Other courts have more explicitly rejected the contention that duplicates in the possession of interested parties, such as law enforcement agencies, "should be given higher scrutiny" because of "the opportunity for mischief."³²⁶ Moreover, as in *Alderson*, courts have consistently found that even parties combining chain of custody arguments with other challenges to the authenticity of documents in the possession of interested parties do not raise genuine questions as to the authenticity of originals.³²⁷ Finally, in anticipation of the argument that application of Professor Cleary's words would too readily result in courts finding genuine questions raised as to the authenticity of originals, it bears repeating that "the House Committee's concerns

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *United States v. Childs*, 5 F.3d 1328, 1335 (9th Cir. 1993); *see also United States v. Georgalis*, 631 F.2d 1199, 1205 (5th Cir. 1980) ("That the government had exclusive possession of certain copies for five years raises no issue.").

327. *See, e.g., United States v. Carrasco*, 887 F.2d 794, 802-03 (7th Cir. 1989) (rejecting a defendant's Rule 1003(1) challenge to duplicate tape recordings in the government's possession despite no evidence of chain of custody and the tapes solely being authenticated by a confidential informant).

were not altogether assuaged³²⁸ by Cleary's claims, resulting in the Committee approving Rule 1003 "with the expectation that the courts would be liberal in deciding that a 'genuine question is raised as to the authenticity of the original.'³²⁹

D. Challenges to the Authenticity of Duplicates

As previously noted, a proper reading of Rule 1003(1) compels the finding that the opponent of a duplicate raises a genuine question as to the authenticity of an original by either "demonstrating 'a genuine issue as to the authenticity of the un-introduced original, or as to the trustworthiness of the duplicate'"³³⁰ Courts categorically have read Rule 1003 in this manner when the opponent of a duplicate contends that the original never existed.³³¹ Many courts, however, have come to the erroneous conclusion that when an opponent admits that the original existed but claims that the alleged duplicate is not an accurate copy of the original because, *inter alia*, it was materially altered, the opponent cannot raise a genuine question as to the authenticity of the original.

For instance, in *Morales v. State*,³³² Arturo Morales appealed his conviction for forgery and tampering with a government record.³³³ To be placed on the ballot in his campaign for Constable of Precinct 3 of El Paso County, Texas, Morales submitted a petition with voter signatures.³³⁴ The state, however, believed that some of the signatures on the petition were forgeries, and proved these allegations by presenting a photocopy of the petition at trial over Morales' Rule 1003(1) objection.³³⁵ On appeal, Morales acknowledged the existence of the original petition but argued that the photocopy was inauthentic and claimed that "because the authenticity of the copy [of the petition] was in question, that copy was not admissible in place of the original."³³⁶ The Court of Appeals of Texas rejected this claim, finding that Morales' "complaint [wa]s based upon a misunderstanding of Rule 1003 in that he [wa]s asserting that there was a question as to the authenticity of the *copy*. Rule 1003 provides that the copy is

328. Wellborn, *supra* note 19, at 114.

329. H.R. REP. NO. 93-650, at 17 (1973).

330. *United States v. Chang An-Lo*, 851 F.2d 547, 557 (2d Cir. 1988) (quoting *Georgalis*, 631 F.2d at 1205)).

331. *See supra* note 114 and accompanying text.

332. 11 S.W.3d 460 (Tex. App. 2000).

333. *Id.* at 462.

334. *Id.*

335. *Id.* at 462, 464.

336. *Id.* at 464.

inadmissible if there is a question regarding the authenticity of the *original*.”³³⁷

With due respect to this opinion, it was the court, not Morales, who was mistaken about the import of Rule 1003(1). As noted, pursuant to Rule 1001(4), “[a]uthentication [of a photocopy] requires proving two facts: the original from which the duplicate was copied is itself authentic and, again, the duplicate is an accurate reproduction of that original.”³³⁸ Thus, if the proponent of a duplicate, *B*, claims that it is an accurate reproduction of the original, *A*, he is claiming that $A = B$. If the opponent claims that the duplicate, *B*, was materially altered from the original, *A*, he is claiming that the duplicate, *B*, is inauthentic and that $A \neq B$. Because the proponent claims that $A = B$ while the opponent claims that $A \neq B$, a dispute exists as to the authenticity of both the duplicate and the original. Nonetheless, several courts have rendered opinions in line with the *Morales* opinion, constituting another manner in which courts have engaged in a restrictive reading of Rule 1003(1).³³⁹

E. Conclusion

While the legislative history behind Rule 1003 clearly supports a liberal construction of the exception contained in Rule 1003(1), courts have in fact read the exception in a manner that renders it meaningless. Moreover, courts have failed to acknowledge Professor Cleary’s words from the legislative history while rendering decisions which contradict his proclamation that the opponents of duplicates would find protection in Rule 1003’s exceptions. The question thus becomes whether changes in copying technology since 1975 justify the courts’ insouciance to Rule 1003’s legislative history.

IV. POST-1975 DEVELOPMENTS IN COPYING TECHNOLOGY SUPPORT TREATING DUPLICATE OPPONENTS THE SAME AS SUMMARY JUDGMENT OPPONENTS

Developments in copying technology since 1975 and the increasing ease with which nearly anyone can quickly create a fairly compelling forgery, provide further reasons why courts should treat parties

337. *Id.* at 465 (emphasis added).

338. *Dietrich v. Bauer*, 126 F. Supp. 2d 759, 763 (S.D.N.Y. 2001) (alteration in original) (quoting CHARLES ALAN WRIGHT & VICTOR GOLD, 31 FEDERAL PRACTICE AND PROCEDURE § 1004 (2000)).

339. *See, e.g.*, *State v. Wasava*, No. 41845-9-I, 1999 WL 169461, at *3 (Wash. Ct. App. Mar. 29, 1999) (“Wasava questioned the authenticity of the duplicates, not the original checks . . .”).

opposing the admission of duplicates under Rule 1003(1) in the same manner that they treat parties opposing motions for summary judgment. The case law reveals, however, that courts have rejected Rule 1003(1) challenges even when the opponents of duplicates have presented evidence making it extremely likely that either unintentional technological flaws or intentional manipulation resulted in proffered duplicates not accurately reproducing originals.

A. *History of Copying*

1. *Copying in the Pre-Digital Era*

Prior to 1780, “the only practical way to produce copies of original documents had been to write them over again by hand.”³⁴⁰ While a few “clever copying devices” existed, “labor was cheap, and the general practice for quite some time remained that of employing clerks (sometimes called scribes or ‘copyists’) to copy outgoing letters into bound books of blank pages.”³⁴¹ The problems attendant with the use of copy clerks, however, were the length of time required to write the document over again, the possibility of errors being made in the copy, and the lack of privacy.³⁴²

James Watt changed the copying landscape with his invention of the copying press or letterpress in 1780.³⁴³ Letterpress copies were made by writing or typing the original in copying ink or with a copying pencil.³⁴⁴ Watt’s device “was essentially a bed in which the original and . . . copy paper were laid and in which they were pressed together by means of a roller. The copy sheet was a thin paper which was dampened prior to being used in the device.”³⁴⁵ While the image of the copy was thus in reverse, it “could be read from the verso of the sheet Copying a document in this way would transfer some of the ink from the original to the copy.”³⁴⁶ Nonetheless, there were still many concerns about copies produced through this device, such as the flimsy copies it produced and the possibility that it could be used for producing forgeries by, *inter alia*, transferring ink twice.³⁴⁷ In addition to letterpress copies, there were concerns about copies pro-

340. BARBARA RHODES & WILLIAM WELLS STREETER, BEFORE PHOTOCOPYING: THE ART & HISTORY OF MECHANICAL COPYING, 1780–1938, at 7 (1999).

341. *Id.*

342. *Id.*

343. *Id.*

344. MCCORMICK ON EVIDENCE § 236 (John W. Strong ed., 4th ed. 1992).

345. James Grant Stroud, *Inks on Manuscripts and Documents - Part 2*, 4 J. FORENSIC DOCUMENT EXAMINATION 1, 5 (1991).

346. *Id.*

347. RHODES & STREETER, *supra* note 340, at 8, 110.

duced through other technologies such as polygraphs³⁴⁸ and copying papers.³⁴⁹ These concerns, as well as the exorbitant cost of these technologies, led to the continuing use of copyists through most of the nineteenth century.³⁵⁰ As a result of these concerns, neither a clerks' copy³⁵¹ nor a letterpress copy³⁵² were admissible at trial when the proponent could not explain his nonproduction of the original.

All of this changed in 1937 when attorney Chester Carlson invented the process of xerography.³⁵³ Xerography, now commonly used in photocopiers, is "a process of recording light and shadow on a plate by means of electrostatic energy."³⁵⁴ In response to emerging technologies such as the Xerox machine, states in the twentieth century began enacting exceptions to the Best Evidence Rule which allowed for the admission of "duplicates" created without manual transcription even when proponents could not account for the nonproduction of originals.³⁵⁵ When the Supreme Court initially proposed Article X of the Federal Rules of Evidence in 1972, the Advisory Committee included a note to Proposed Rule 1001(4) indicating that duplicates such as photocopies are largely treated like originals pursuant to Rule 1003 because they are "produced by methods possessing an accuracy which virtually eliminates the possibility of error."³⁵⁶

In addition to the judges, practitioners, and academics on the Advisory Committee concluding that mechanically produced copies were not plagued by human error, court decisions preceding the Federal Rules of Evidence largely found that mechanically produced copies were not susceptible to fraud. Of course, courts did note that some risk of fraud existed in mechanically produced copies, leading to the exception contained in Federal Rule of Evidence 1003(1). For instance, in *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*,³⁵⁷ an importer brought an action against a carrier-by-sea, seeking to re-

348. *Id.* at 17–18.

349. *Id.* at 46–47.

350. *Id.* at 7–8.

351. *See, e.g.*, *Fisk v. Tank*, 12 Wis. 276, 282, 300 (1860) ("The exhibit marked 'B,' being a copy of the original contract, the non-production of which was not sufficiently accounted for, was improperly admitted.").

352. *See, e.g.*, *Huntington v. United States*, 175 F. 950, 951 (8th Cir. 1909) (affirming the trial court's decision to exclude a press copy where the original's nonproduction was not explained).

353. *See supra* note 46 and accompanying text.

354. *Application of Middleton*, 319 F.2d 552, 552 (C.C.P.A. 1963).

355. *See Wellborn, supra* note 19, at 113 (noting that in 1959, Texas has already modified its evidence statutes to allow for the admissibility of duplicates).

356. FED. R. EVID. 1001 advisory committee's note.

357. 265 F.2d 418 (2d Cir. 1959).

cover money it paid on fraudulently issued bills of lading.³⁵⁸ The importer sought to prove its damages through photostats “prepared specially for the litigation” from accounting books.³⁵⁹ The trial court excluded these photostats, and the Second Circuit affirmed, concluding that “in cases such as this there are dangers of ‘fraud’ and ‘imposition’ in the use of photostats prepared specifically for trial and not made in the regular course of business.”³⁶⁰

For the most part, however, courts found that mechanically produced copies curbed the possibility of fraud inherent in the letterpress and similar technologies. For example, in *State v. White*,³⁶¹ the defendant appealed his conviction for knowingly uttering and publishing a forged money order at a Safeway store in Portland, Oregon.³⁶² Part of the evidence used to convict him consisted of photostatic copies of the money order inventory, money order receipts, and reports of stolen money orders.³⁶³ On his appeal to the Court of Appeals of Oregon, the defendant claimed that the trial court improperly allowed a witness to testify from these copies.³⁶⁴

The court rejected his argument, finding that the prosecution’s evidence consisted of “photographic copies, produced by a copying process commonly known as ‘xeroxing,’ or a similar process, which produces such accurate reproductions of the original writing as to preclude any reasonable challenge that they are facsimiles.”³⁶⁵ It then quoted a case from the Second Circuit, stating:

[T]he best evidence rule should not be pushed beyond the reason upon which it rests. It should be so applied, as the Supreme Court held in an early case, as to promote the ends of justice, and guard against fraud or imposition. The rule is not based upon the view that the so-called secondary evidence is not competent, since, if the best evidence is shown to be unobtainable, secondary evidence at once becomes admissible. And if it appear, as it does here, that what is called the secondary evidence is clearly equal in probative value to what is called the primary proof, and that fraud or imposition, reasonably, is not to be feared, the reason upon which the best evidence rule rests ceases, with the consequence that

358. *Id.* at 420.

359. *Id.* at 422–23.

360. *Id.* at 424.

361. 477 P.2d 917 (Or. Ct. App. 1970).

362. *Id.* at 918.

363. *Id.*

364. *Id.*

365. *Id.* at 919.

in that situation the rule itself must cease to be applicable, in consonance with the well established maxim—*cessante ratione legis, cessat ipsa lex* [a law lacking rationality ceases to be law].³⁶⁶

The import of *White* and similar cases³⁶⁷ was clear: judges felt that they did not reasonably need to fear that mechanically produced copies were fraudulent.

2. Copying in the Digital Era

While the level of copying technology may have justified such idolatry of copies even through 1986, when Professor Wellborn indicated that most courts rejected challenges to the authenticity of originals brought under Rule 1003(1), today's technology presents a markedly different landscape. Dr. Hany Farid, head of the Image Science Laboratory at Dartmouth and the founder of digital forensics,³⁶⁸ noted in 2006 that “[t]oday's technology allows digital media to be altered and manipulated in ways that were simply impossible twenty years ago.”³⁶⁹ There is now an “ease with which digital material can be manipulated” based upon “the rapid increase in low-cost and sophisticated digital technology”³⁷⁰

For example, inexpensive and powerful digital cameras and photo-editing software make digital manipulation quite easy and often leave no visual evidence of such manipulation.³⁷¹ As Dr. Farid has noted, “[i]n today's world, anyone with a digital camera, a PC, Photoshop and an hour's worth of time can make fairly compelling digital forgeries.”³⁷² Furthermore, while it is impossible to determine with certainty whether the increased ease in which writings, record-

366. *Id.* (quoting *United States v. Manton*, 107 F.2d 834, 845 (2d Cir. 1939)) (internal citation and quotation marks omitted).

367. *See, e.g.*, *United States v. Sheehan*, 428 F.2d 67, 79 (8th Cir. 1970) (finding that the trial court properly admitted photostatic copies, noting that it was not feared that they were fraudulent).

368. Hany Farid Faculty Profile for Dartmouth College Research Page, <http://www.cs.dartmouth.edu/farid/research/> (last visited Nov. 17, 2008); Michael Coburn, *Farid Finds "Digital Forensics,"* THE DARTMOUTH, Mar. 27, 2008, <http://thedartmouth.com/2008/03/27/news/farid/>.

369. Hany Farid, *Digital Doctoring: How to tell the real from the fake*, 4, <http://www.ists.dartmouth.edu/library/315.pdf> (last visited Nov. 17, 2008) [hereinafter *Digital Doctoring*].

370. Hany Farid, *Detecting Digital Forgeries Using Bispectral Analysis*, 2, <ftp://publications.ai.mit.edu/ai-publications/pdf/AIM-1657.pdf> (last visited Nov. 17, 2008) [hereinafter *Detecting*].

371. Alin C. Popescu & Hany Farid, *Statistical Tools for Digital Forensics*, 1, <http://www.ists.dartmouth.edu/library/32.pdf> (last visited Nov. 17, 2008).

372. Claudia Dreifus, *A Conversation with Hany Farid: Proving that Seeing Shouldn't Always be Believing*, N.Y. TIMES, Oct. 2, 2007, at F2.

ings, and photographs can be manipulated or forged has resulted in an actual increase of alterations and fabrications, Dr. Farid also noted that one publication has estimated that 20 percent of accepted manuscripts contain at least one inappropriately manipulated image.³⁷³ Moreover, according to Dr. Farid, the Federal Office of Research Integrity has seen the number of fraud investigations for contested images rise from less than 3 percent in 1990 to 44.1 percent in 2006.³⁷⁴

These numbers are especially troubling because, “while the technology to manipulate digital media is developing at break-neck speeds, the technology to contend with its ramifications is lagging behind.”³⁷⁵ And just as “[t]oday’s technology allows digital media to be altered and manipulated in ways that were simply impossible twenty years ago[,] [t]omorrow’s technology will almost certainly allow for us to manipulate digital media in ways that today seem unimaginable.”³⁷⁶

Such concerns, however, have come not only from the digital forensics community, but also from the legal community. In its 1994 Federal Guidelines for Searching and Seizing Computers (“Federal Guidelines”), the Department of Justice Computer Crime and Intellectual Property Section (“CCIPS”) advocated the use of digital signatures to help authenticate electronic evidence.³⁷⁷ After this recommendation, CCIPS cautioned:

For the time being, however, most computer evidence can still be altered electronically—in dramatic ways or in imperceptible detail—without any sign of erasure. But this does not mean that electronic evidence, having become less distinctive, has become any less admissible. It simply may require us to authenticate it in other ways.³⁷⁸

This analysis not only supports a reading of Rule 1003(1) under which courts more readily find genuine questions raised as to the authenticity of originals but also the argument that courts should stop treating

373. *Id.*

374. *Id.*

375. Popescu & Farid, *supra* note 371, at 1.

376. Farid, *Digital Doctoring*, *supra* note 369, at 4.

377. DEPARTMENT OF JUSTICE COMPUTER CRIME AND INTELLECTUAL PROPERTY SECTION, FEDERAL GUIDELINES FOR SEARCHING AND SEIZING COMPUTERS 119 (July 1994), available at http://epic.org/security/computer_search_guidelines.txt [hereinafter 1994 FEDERAL GUIDELINES].

378. *Id.*

printouts and outputs from data stored in computers as “originals” under Rule 1001(3),³⁷⁹ an argument beyond the scope of this article.

In its 1994 Federal Guidelines, the CCIPS also noted that when “evidence is not distinctive but fungible (whether little bags of cocaine, bullet shell casings, or electronic data), the ‘process or system’ . . . which authenticates the item is a hand-to-hand chain of accountability” referred to as “chain of custody.”³⁸⁰ Typically, proponents do not need to prove chain of custody to authenticate videotapes and photographs because they are considered “distinct recognizable physical object[s] that can be identified upon observation.”³⁸¹ This reasoning helps explain why the Court of Appeals of Idaho found the copy of the videotape in *Alderson* admissible even though, among other issues, the proponent failed to prove a complete chain of custody and who made the copy.³⁸²

The 1994 Federal Guidelines, however, cautioned that this loose authentication requirement might need to be tightened based upon the ease with which evidence can be digitally manipulated. They noted:

Although courts generally have allowed any witness with knowledge to authenticate a photograph without requiring the photographer to testify, that may not suffice for digital photos. Indeed, judges may now demand that the proponent of a digital picture be ready to establish a complete chain of custody—from the photographer to the person who produced the printout for trial. Even so, the printout itself may be a distinctive item when it bears the authenticator’s initials, or some other recognizable mark. If the photographer takes a picture, and then immediately prints and initials the image that becomes an exhibit, the chain of custody is just that simple. But if the exhibit was made by another person or at a later time, the proponent should be ready to show where the data has been stored and how it was protected from alteration.³⁸³

379. See Farid, *Detecting*, *supra* note 370, at 2 (“Given the ease with which digital material can be manipulated it is surprising that the courts have adopted such a broad definition of original.”).

380. 1994 FEDERAL GUIDELINES, *supra* note 377, at 119–20.

381. *Smith v. State*, 647 S.E.2d 346, 349 (Ga. Ct. App. 2007) (quoting *Gadson v. State*, 437 S.E.2d 313, 315 (Ga. 1993)).

382. See *supra* notes 317–324 and accompanying text.

383. 1994 FEDERAL GUIDELINES, *supra* note 377, at 119–20.

3. Copying in Popular Fiction

The history of copying has been tracked by the popular fiction of its respective eras, and, until the last several years, legal authorities and courts have responded either directly to these works of fiction or the sentiments they reflected. The classic example from the pre-Xerox era is Charles Dickens' *A Christmas Carol*.³⁸⁴ The *McCormick on Evidence* entry on the Best Evidence Rule notes:

[t]he treatment of copies under the rule requiring the production of the original document can only properly be understood when viewed in light of the technological history of copying itself. In its earliest stages, the rule appears to have developed against a background of copying performed by individuals of the Bob Cratchit sort, transcribing manually not always under the best of conditions.³⁸⁵

Furthermore, the Maryland Court of Special Appeals noted:

[Commentators have] vividly describe[d] the human frailty of a copier, as a Bob Cratchit, fingers numbed by the cold in the counting house and fraught with anxiety over the health of Tiny Tim, might distractedly misplace a decimal point, invert a pair of digits or drop a line. A Xerox machine, by way of contrast, does not worry about Tiny Tim and does not, therefore, misplace decimal points, invert digits, drop lines, or suffer any of the other mental lapses that flesh is heir to.³⁸⁶

Many cases have cited these passages in support of their findings that the opponents of duplicates failed to raise genuine questions as to the authenticity of originals.³⁸⁷

After the invention of xerography and other modern copying technologies, however, works of popular fiction represented and indeed forwarded the courts' belief that mechanically produced duplicates were immune from error and largely immune from fraud. The classic example of society's idolatry of the photocopy comes from 1982's Academy Award nominated film *The Verdict*, directed by Sidney Lumet and written by David Mamet.³⁸⁸ In the movie, Paul Newman's character, an alcoholic lawyer, represents the estate of a female pa-

384. CHARLES DICKENS, *A CHRISTMAS CAROL* (Chamberlain Bros. 2005) (1843).

385. MCCORMICK ON EVIDENCE § 236 (John W. Strong ed., 4th ed. 1992).

386. *Thompson v. State*, 488 A.2d 995, 1006 (Md. Ct. Spec. App. 1985).

387. *See, e.g., Equitable Life Assurance Soc'y v. Starr*, 489 N.W.2d 857, 862-63 (Neb. 1992) (quoting both of the preceding passages in support of its finding that the opponent of a duplicate failed to raise a genuine question as to the authenticity of the original).

388. *THE VERDICT* (20th Century Fox 1982).

tient who went into a coma during a C-section performed by famous anesthesiologist, Dr. Towler. The hospital introduces into evidence the patient's admission form with the number 9 written on it, which ostensibly indicated that the patient had eaten nine hours before admittance.

During direct examination of the nurse who filled out the form, Newman's character asks her what the patient told her about when the patient had eaten. The nurse responds that the patient told her that she had a full meal one hour before coming to the hospital and that the nurse accordingly put the number 1 on the form. On cross-examination, defense counsel questions the nurse about her testimony because the original admittance form had the number 9, and the nurse responds by surprisingly producing a photocopy of the form with the number 1. The nurse claims:

[A]fter the operation, when that poor girl, she went into a coma, Dr. Towler called me in. He told me that he had five difficult deliveries in a row and he was tired and he never looked at the admittance form. He told me to change the 1 to a 9 or else, or else, he said he would fire me, he said I would never work again.³⁸⁹

She testifies that she made this change to the form, but not before she made a photocopy of the original.

Upon defense counsel's objection, the judge strikes the duplicate from the record on the ground that "we can't accept a copy in preference to the original."³⁹⁰ Despite the judge's action, however, and despite there being scant other evidence of liability, the jury finds for the plaintiff, in effect accepting the copy in preference to the original,³⁹¹ a decision of which the movie clearly approves.

The film created a potential issue, however, which legal authorities were quick to resolve. As noted, under Rule 1003(1), a duplicate is not admissible to the same extent as an original when there is a genuine question as to the authenticity of the original. Applied literally, Rule 1003(1) would mean that when the proponent actually produces an alleged original, and the opponent claims that the original was altered and seeks to prove the alteration by producing an alleged pre-alteration duplicate, the alleged duplicate would be inadmissible be-

389. *Id.*

390. *Id.*

391. See HILLEL SCHWARTZ, *THE CULTURE OF THE COPY: STRIKING LIKENESSES, UNREASONABLE FACSIMILES* 243 (1996) ("[T]o the jury in the film [*The Verdict*] . . . the intact copy takes precedence over originals.").

cause there would be a genuine question as to the authenticity of the original.

In the wake of *The Verdict*, evidence authorities thus argued that the Best Evidence Rule should be interpreted so that when the proponent actually produces an original writing, recording, or photograph, and the opponent seeks to introduce a duplicate to prove that the alleged original was altered, the duplicate is admissible, regardless of the fact that there will inevitably be questions as to the authenticity of the original in these circumstances. For instance, in his *Handbook of Federal Evidence*, Professor Graham noted in his discussion of Rule 1004(1) that “[a]n original that has been altered should be considered destroyed for the purpose of applying the Original Writing Rule. See the movie entitled ‘The Verdict.’”³⁹² In Mueller and Kirkpatrick’s *Evidence*, they wrote:

The literal wording of FRE 1003 creates a potential anomaly. If the Rule were interpreted to mean that a duplicate *must* be excluded whenever a genuine question has been raised concerning the authenticity of the original, the trier would be deprived of a category of evidence that could be critical in resolving the question of authenticity. For example, if an opponent claims that the original was altered, a duplicate made before the alleged alteration is likely to be the best available evidence to resolve such a challenge. The objective of the Best Evidence Doctrine is to restrict the introduction of secondary evidence *in lieu* of the original. That objective is not violated where one party has already offered what it claims to be the “original,” and the opposing party offers a “duplicate” to challenge the authenticity of the purported “original.” Even if FRE 1003(1) were interpreted to exclude the duplicate in this situation, it could nonetheless qualify for admission under FRE 1004(1) as “other evidence” of content in support of a claim that the original has been “destroyed” through alteration.³⁹³

As one commentator has noted, it is obvious that Mueller and Kirkpatrick “had ‘The Verdict’ in mind when discussing th[is] ‘potential anomaly’”³⁹⁴ Courts have fallen in line with these authorities,

392. 3 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 1004.2 n.1 (5th ed. 2001).

393. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 10.8 (1995).

394. Donald F. Paine, ‘The Verdict’: A fascinating issue concerning the best evidence rule, 32 TENN. B.J. 15, 16 n.1 (1996).

determining that duplicates are admissible to challenge the authenticity of previously admitted “originals.”³⁹⁵

Conversely, in recent years, popular fiction has reflected society’s growing concern regarding the ease with which nearly anyone can quickly and convincingly create forgeries, as can be seen in two of the most acclaimed television shows of all time.³⁹⁶ In the fourth season episode “Margin of Error” of HBO’s *The Wire*, things are coming to a head in the Baltimore mayoral election between incumbent Clarence Royce and Councilman Thomas “Tommy” Carcetti.³⁹⁷ After Carcetti greets potential voters outside Baltimore’s new African-American History Museum, Delegate Odell Watkins hands him a flyer with a photo depicting Carcetti on the courtroom steps representing a notorious slumlord in his days as an attorney in private practice. Carcetti claims that he has never even met the slumlord, and his campaign is eventually able to determine that Carcetti’s head was photoshopped onto someone else’s body, but not before some damage has been done to his campaign.³⁹⁸

Meanwhile, the 2003 relaunch of *Battlestar Galactica* follows a motley fleet of humans trying to find the mythical planet Earth after the “Cylons,” artificially intelligent robots, complete an attack on their home planet of Caprica.³⁹⁹ In the first season episode, “Six Degrees of Separation,” Commander Bill Adama, the military leader of the humans, is presented with an octagonal CD with a photo taken by Defense Ministry security cameras on Caprica the day before the attack.⁴⁰⁰ The photo depicts a man entering the Ministry with a bomb, and tactical officer Felix Gaeta is eventually able to determine that the man is future President Gaius Baltar. Over Baltar’s protestations that the photo is a fake he is sentenced to death. Before the axe falls, however, Gaeta takes it upon himself to re-run all the security checks

395. See, e.g., *John Beaudette, Inc. v. Sentry Ins. A Mut. Co.*, 94 F. Supp. 2d 77, 136–37 (D. Mass. 1999) (finding that the admission of alleged original insurance policies did not preclude the opponent from admitting “recreated policies as secondary evidence which [allegedly] more accurately reflect[ed] the contents of the actual policies”).

396. *The Guardian* notes that “[t]he *Wire* is the most critically acclaimed TV programme in the history of the medium.” Ben Marshall, *Getting wired*, *THE GUARDIAN*, Feb. 10, 2007, available at <http://www.guardian.co.uk/media/2007/feb/10/broadcasting.tvandradio>. Many critics listed *Battlestar Galactica* as the best television show in 2005. See, e.g., James Poniewozik, *Best of 2005: Television*, *TIME*, Dec. 16, 2005, available at <http://www.time.com/time/arts/article/0,8599,1141640,00.html>.

397. *The Wire: Margin of Error* (HBO television broadcast Oct. 15, 2006).

398. *Id.*

399. *Battlestar Galactica*, <http://www.scifi.com/battlestar/about/index.php> (last visited Nov. 17, 2008).

400. *Battlestar Galactica: Six Degrees of Separation* (SciFi television broadcast Feb. 18, 2005).

on the photograph and detects markers that point to digital manipulation, leading to Baltar's exoneration.⁴⁰¹

Despite the fears reflected by these shows and the fears expressed by both the digital forensics community and the CCIPS, courts to this point have not been responsive and have failed to view challenged duplicates with any degree of increased skepticism. Indeed, even when the opponents of duplicates have presented evidence making it extremely likely that either unintentional technological flaws or intentional manipulation resulted in proffered duplicates not accurately reproducing originals, courts have rejected Rule 1003(1) challenges. Two clear examples are the *Amin* court rejecting a Rule 1003(1) challenge to the copy of Kucera's declaration despite the final page having printing across the top indicative of a fax while the remaining pages of the document did not,⁴⁰² and the *Alderson* court rejecting a Rule 1003(1) challenge to a copy of a videotape despite the copy being thirty-five minutes long while the authenticating officer's police report described the original videotape as forty-five minutes in length.⁴⁰³

By no means, however, are these the only cases where courts have rejected Rule 1003(1) challenges despite questionable copies of videotapes⁴⁰⁴ and facsimiles. For instance, in *United States v. Reich*,⁴⁰⁵ the defendant, Perry Reich was indicted on, *inter alia*, one count of forgery of a judge's signature based upon allegedly faxing a fraudulent judge's order to the plaintiff's attorney in a civil case.⁴⁰⁶ Over Reich's objection, the prosecution introduced into evidence an alleged copy of the facsimile.⁴⁰⁷ At the purported time of receipt of Reich's fax, the facsimile transmission log for the fax machine in the attorney's office recorded the receipt of a two-page fax, but the "copy" introduced at trial was four pages long.⁴⁰⁸

Reich argued under Rule 1003(1) "that because the fax log d[id] not contain an entry for a four-page fax within the relevant time period, the four-page document at issue could not possibly have been faxed to [the attorney's] fax machine."⁴⁰⁹ The court rejected this ar-

401. *Id.*

402. *See supra* note 16 and accompanying text.

403. *See supra* note 317-324 and accompanying text.

404. *See, e.g.,* *Sera v. State*, 17 S.W.3d 61, 81-82 (Ark. 2000) (rejecting a party's Rule 1003(1) challenge despite expert testimony that the copy of a tape had been edited from the original).

405. No. 04 CR 587 (NGG), 2005 WL 1388967 (E.D.N.Y. June 10, 2005).

406. *Id.* at *1.

407. *Id.* at *4.

408. *Id.* at *2.

409. *Id.* at *4.

gument, asserting that “page 3 of the forged order contains the header ‘Extended Page 2.1,’ providing a possible explanation for th[e] apparent inconsistency.”⁴¹⁰ Of course, if the *Reich* case were being decided under the summary judgment test, this apparent inconsistency would have been fatal, and the court’s “possible explanation” would have been woefully insufficient to refute the nonmoving party’s claim.⁴¹¹ Beyond this point, however, the court’s opinion is nonsensical on its own terms. Ostensibly, the court’s “Extended Page 2.1” theory possibly explains why the facsimile transmission log might have excised one page from the fax, but the alleged four-page fax was recorded as a two-page fax, not a three-page fax.⁴¹²

One might argue that parties like *Reich* opposing the admission of duplicates under Rule 1003(1) on the ground that they failed to accurately reproduce originals are using the wrong tactic. The argument would be that the proponent of an alleged duplicate must first prove that the proffered writing, recording, or photograph is an accurate reproduction of the original under Rule 1001(4), meaning that an opponent such as *Reich* should claim that the proffered evidence is not a duplicate, rather than contending that there is a genuine question as to the authenticity of the original under Rule 1003(1). The case law, however, does not bear out this argument.

To wit, in *Federal Deposit Insurance Corp. v. Rodenberg*,⁴¹³ the Federal Deposit Insurance Corporation (“FDIC”) brought an action against Robert Rodenberg, guarantor of notes purchased by the FDIC.⁴¹⁴ The FDIC moved for summary judgment on its action, but it solely submitted photocopies of the guaranty and promissory note executed by Rodenberg.⁴¹⁵ Rodenberg responded that these photocopies were not “duplicates” under Rule 1001(4) because one was missing margins and the other contained “illegible portions,” including part of his signature.⁴¹⁶

The court rejected this argument, finding that “the submitted documents [we]re accurate copies of the originals.”⁴¹⁷ The court noted that “[d]espite the missing margins and deleted portions, the terms of the continuing guaranty [we]re clear, since only one, two, or at most three of the letters of the starting word on each line [we]re

410. *Id.*

411. *See supra* note 193 and accompanying text.

412. *Reich*, 2005 WL 1388967, at *2.

413. 571 F. Supp. 455 (D. Md. 1983).

414. *Id.* at 456.

415. *Id.* at 457.

416. *Id.* at 457–58.

417. *Id.* at 458.

omitted, and . . . only one reasonable interpretation c[ould] be given to the language used.”⁴¹⁸ Furthermore, the court concluded that only part of the defendant’s signature and witness’s name were illegible, negating the Rule 1001(4) challenge and precluding any challenge under Rule 1003(2) that the duplicate failed to reproduce *important* parts of the original.⁴¹⁹

Of course, the Maryland Court of Special Appeals indicated that scribe copies were inadmissible because of the *possibility* that an anxious Bob Cratchit “might distractedly misplace a decimal point, invert a pair of digits or drop a line.”⁴²⁰ The court contended that mechanically produced duplicates have been deemed admissible because “[a] Xerox machine, by way of contrast, does not worry about Tiny Tim and does not, therefore, misplace decimal points, invert digits, drop lines, or suffer any of the other mental lapses that flesh is heir to.”⁴²¹ The problem with this analysis is two-fold. First, despite the court’s claims, modern copying technologies such as fax machines, “sometimes skip lines, paragraphs, or even entire pages during the transmission process.”⁴²² Second, even with modern copying technologies, there is still a person performing the copying,⁴²³ leading to the possibility that the copy will be incomplete and misinterpreted. And yet, as the *Rodenberg* case makes clear, even when parties have presented courts with the *certainty* that copies missed margins and deleted portions of originals, courts have deemed the copies “duplicates” under Rule 1001(4).

Courts have largely fallen in line with *Rodenberg*, finding that alleged copies qualify as “duplicates,” even when proponents have acknowledged that proffered copies were altered versions of originals. For instance, in *Rojas v. State*,⁴²⁴ the Court of Appeals of Texas found that an “enhanced” copy of a surveillance tape was a “duplicate” under Texas Rule of Evidence 1001(d) (the identical version of Federal Rule of Evidence 1001(4)) despite the copy amplifying the voices from the original tape.⁴²⁵ As support for this conclusion, the court cited to two previous cases where the Texas Court of Criminal Appeals deemed copies of tapes “duplicates” under Rule 1001(d) despite the

418. *Id.*

419. *Id.*

420. *Thompson v. State*, 488 A.2d 995, 1006 (Md. Ct. Spec. App. 1985).

421. *See id.*

422. Thomas, *supra* note 35, at 1157.

423. *Cf.* John M. Burman, *High Tech Ethics, Part I*, 23 WYO. LAW. 14, 15 (2000) (“Because humans are involved in sending and receiving faxes, errors will occur . . .”).

424. No. 14-99-00190-CR, 2000 WL 703011 (Tex. App. June 1, 2000).

425. *Id.* at *2-3.

copies reducing and removing background noise from the originals.⁴²⁶ From these cases, the Court of Appeals of Texas drew the principle that Rule 1001(d) “does not necessarily require an identical reproduction . . . only an accurate one.”⁴²⁷

While *Rojas* and the cases cited therein involved government officials editing originals to create copies, courts have even found that alleged copies admittedly altered by private parties can constitute “duplicates” under Rule 1001(4). In *State v. Smith*,⁴²⁸ the Court of Appeals of Washington considered the appeal of Shawn Smith, who allegedly shot and killed his stepfather, and was recorded admitting to the murder on friend Robert Levitt’s telephone answering machine.⁴²⁹ Levitt admittedly transferred the conversation from the answering machine microcassette to another cassette.⁴³⁰ According to Levitt, he deliberately erased portions of the conversation “to protect other parties implicated by the conversation.”⁴³¹ Nonetheless, over Smith’s objection, the trial court found that the cassette copy was a “duplicate” under Rule 1001(4), and the Court of Appeals of Washington affirmed.⁴³²

The court noted that there were “character deficiencies in Mr. Levitt’s background that relate to his credibility,” yet it failed to list these deficiencies.⁴³³ The court also indicated that Levitt owed Smith money and that he was afraid of him.⁴³⁴ The court, however, noted that the trial court found that, “although Levitt was confused at times about some details, he was credible regarding this particular telephone conversation and his actions in recording it and re-recording it and his reasons for giving the tape to law enforcement.”⁴³⁵ The court then deferred to this credibility determination and found that the cassette was a “duplicate” despite the erased portions because (1) according to Levitt, the deleted portions were not *important* to the issue of Smith’s guilt, ostensibly eliminating any Rule 1003(2) challenge, and (2) because “the remaining segments of the tape were . . . accurate

426. *Id.* at *3 (citing *Angleton v. State*, 971 S.W.2d 65, 67–68 (Tex. Crim. App. 1998); *Narvaiz v. State*, 840 S.W.2d 415, 431 (Tex. Crim. App. 1992)).

427. *Id.* at *2.

428. No. 39746-0-I, 1999 WL 713838 (Wash. Ct. App. Sept. 13, 1999).

429. *Id.* at *1.

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.* at *2.

434. *Id.* at *1–2.

435. *Id.* at *2. Of course, if the court were applying the summary judgment standard, it would not have been entitled to make this credibility determination in favor of the proponent. See *supra* notes 222–223 and accompanying text.

reproductions of the original”⁴³⁶ It then concluded that although “the duplicate did not reproduce the original in its entirety,” it was still an accurate reproduction.⁴³⁷ Such reasoning is directly antithetical to Professor Cleary’s claim in Rule 1003’s legislative history that a duplicate’s apparent lack of completeness should be a factor making it more likely that there is a genuine question as to the authenticity of the original.⁴³⁸

B. Duplicates: Even Better Than the Real Thing

Courts’ reluctance to grant Rule 1003(1) challenges to the point of rendering the exception meaningless and their concurrent unwillingness to find that proffered copies failed to accurately reproduce originals under Rule 1001(4) has not merely rendered duplicates the equivalent of originals for authentication purposes; it has made them even better than the real thing. This is because, as Professors Cleary and Strong noted in 1981, “[a]s to authenticity . . . the original may possess physical characteristics of the highest importance which no copying process can reproduce.”⁴³⁹ And while such concerns about the opponents of duplicates being able to detect forgeries and alterations were undoubtedly present with the copying technology available in the 1980s, forgeries today can be produced that are indistinguishable from originals and leave no visual cues of having been tampered with, placing the opponents of duplicates at an even greater competitive disadvantage.⁴⁴⁰

There is, however, some hope on the horizon. Last October, in *State v. Brown*,⁴⁴¹ the Supreme Court of Minnesota rejected a Rule 1003(1) challenge to a digital copy of a surveillance tape, but it made some promising statements in dicta. It noted that it understood that when copies are made using modern technologies, “there is the risk of manipulation or distortion, particularly with digitization”⁴⁴² The court then echoed a CCIPS recommendation,⁴⁴³ contending:

[P]rosecutors should be on notice that the trial court has broad discretion to exclude digital copies if defense counsel is not provided with adequate notice and opportunity either

436. *Id.* at *5.

437. *Id.*

438. *See supra* note 279 and accompanying text.

439. EDWARD W. CLEARY & JOHN W. STRONG, FEDERAL EVIDENCE 388 (1981).

440. *See supra* note 371 and accompanying text.

441. 739 N.W.2d 716 (Minn. 2007).

442. *Id.* at 723.

443. *See supra* note 383 and accompanying text.

to observe the conversion process or retain an independent expert to make a similar conversion or, in the alternative, to allow the court to arrange for supervision of the process.⁴⁴⁴

C. Conclusion

At the time that the Supreme Court enacted Rule 1003 in 1975, courts thought that modern copying technologies eliminated the possibility of human error and largely obviated concerns about fraud in the duplication process. There is, however, a growing recognition of the ease with which material can be quickly and convincingly manipulated by nearly anyone. Yet, while both scientific and legal authorities have argued that we must change the way that duplicates are authenticated, courts have not yet taken heed.

V. CONCLUSION

When the Supreme Court decided to treat mechanically created duplicates as largely admissible to the same extent as originals under Rule 1003, it made sure to create a clear exception to that Rule when the opposing party raised a genuine question as to the authenticity of the original. Even though the language of Rule 1003 closely resembles the language used in Federal Rule of Civil Procedure 56(e)(2), courts have required a greater evidentiary showing by parties opposing duplicates than by parties opposing motions for summary judgment. Why, then, do courts almost never find that opponents raise genuine questions as to the authenticity of originals under Rule 1003(1) and yet frequently find that opponents raise genuine issues for trial under Rule 56(e)(2)?

Surely, it is not the legislative history behind Rule 1003, which indicates (1) that the House Committee on the Judiciary approved the Rule “with the expectation that the courts would be liberal in deciding that a ‘genuine question is raised as to the authenticity of the original,’”⁴⁴⁵ and (2) that Professor Edward Cleary, the Chief Reporter for the Advisory Committee on the Federal Rules of Evidence, claimed that “[t]he party complaining of lack of opportunity to see the original would . . . find in the exceptions of Rule 1003 any protection which the circumstances justified.”⁴⁴⁶ And just as surely, it is not the developments in copying technology since the Rule was enacted in

444. *Brown*, 739 N.W.2d at 723.

445. H.R. REP. NO. 93-650, at 17 (1973).

446. Cleary Letter, *supra* note 275.

1975, which have made it so that nearly anyone can quickly create a fairly compelling forgery.

Instead, everything about the way that duplicates are currently admitted points to the conclusion that courts need to be more liberal in finding genuine questions raised as to the authenticity of originals under Rule 1003(1) rather than interpreting this exception in a manner that renders it meaningless. Yet, while both scientific and legal authorities argue that we must change the way that duplicates are authenticated, courts have yet to act accordingly. Hopefully, courts will soon pay attention and more readily find duplicates inadmissible under Rule 1003(1) rather than treating them as even better than the real thing.