Appendix B

ARTICLE X—CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

Sec. 10-1. General Rule

To prove the content of a writing, recording or photograph, the original writing, recording or photograph must be admitted in evidence, except as otherwise provided by the Code, the General Statutes or **[**the**]** any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code. An original of electronically stored information includes evidence in the form of a printout or other output, readable by sight or otherwise shown to reflect the data accurately.

COMMENTARY

Section 10-1 adopts Connecticut's best evidence rule. The rule embraces two interrelated concepts. First, the proponent must produce the original of a writing, as defined in Section 1-2 (c), recording or photograph when attempting to prove the contents thereof, unless production is excused. E.g., *Shelnitz* v. *Greenberg*, 200 Conn. 58, 78, 509 A.2d 1023 (1986). Second, to prove the contents of the proffer, the original must be admitted in evidence. Thus, for example, the contents of a document cannot be proved by the testimony of a witness referring to the document while testifying.

The cases generally have restricted the best evidence rule to writings or documents. See *Brookfield* v. *Candlewood Shores Estates, Inc.*, 201 Conn. 1, 11, 513 A.2d 1218 (1986). In extending the rule to recordings and photographs, Section 10-1 recognizes the growing reliance on modern technologies for the recording and storage of information.

Section 10-1 applies only when the proponent seeks to prove contents. E.g., *Hotchkiss* v. *Hotchkiss*, 143 Conn. 443, 447, 123 A.2d 174 (1956) (proving terms of contract); cf. *Dyer* v. *Smith*, 12 Conn. 384, 391 (1837) (proving fact about writing, such as its existence or delivery, is not proving contents).

The fact that a written record or recording of a transaction or event is made does not mean that the transaction or event must be proved by production of the written record or recording. When the transaction or event itself rather than the contents of the written record or recording is sought to be proved, the best evidence rule has no application. E.g., *State* v. *Moynahan*, 164 Conn. 560, 583, 325 A.2d 199, cert. denied,

414 U.S. 976, 94 S. Ct. 291, 38 L. Ed. 2d 219 (1973); *State* v. *Tomanelli*, 153 Conn. 365, 374, 216 A.2d 625 (1966).

What constitutes an "original" will be clear in most situations. "Duplicate originals," such as a contract executed in duplicate, that are intended by the contracting parties to have the same effect as the original, qualify as originals under the rule. **[**2 C. McCormick, Evidence (5th Ed. 1999) § 236, p. 73–74; C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 10.10, p. 305**]**; cf. *Lorch* v. *Page*, 97 Conn. 66, 69, 115 A. 681 (1921); *Colburn's Appeal*, 74 Conn. 463, 467, 51 A. 139 (1902).

The definition of "original" explicitly includes printouts or other forms of electronically stored information that are readable. The proponent must show only that the printed or readable version is an accurate (i.e., unaltered and unmodified) depiction of the electronically stored information. See *Lorraine* v. *Markel American Ins. Co.*, 241 F.R.D. 534, 577–78 (D. Md. 2007) (under federal rules, original of information stored in computer is "readable display of the information on the computer screen, the hard drive or other source where it is stored, as well as any printout or output that may be read, so long as it accurately reflects the data"). **[**A printout generated for litigation purposes may nevertheless be admissible if the computer stored information otherwise comports with the business entry rule.**]** Although a printout or other physical manifestation of computer data is considered the original for purposes of the best evidence rule, the underlying data itself is significant for assessing admissibility under exceptions to the hearsay rule. See *Ninth RMA Partners, L.P.* v. *Krass*, 57 Conn. App. 1, 10–11, 746 A.2d 826, cert. denied, 253 Conn. 918, 755 A.2d 215 (2000) (business entry exception to hearsay); see also *Federal Deposit Ins. Corp.* v. *Carabetta*, 55 Conn. App. 384, 398–99, 739 A.2d 311, cert. denied, 251 Conn. 928, 742 A.2d 362 (1999) (same).

The second sentence in Section 10-1 is modeled on rule 1001 of the Federal Rules of Evidence and on parallel provisions of numerous states' rules from around the country.

Sec. 10-2. Admissibility of Copies

A copy of a writing, recording or photograph, is admissible to the same extent as an original unless (A) a genuine question is raised as to the authenticity of the original or

the accuracy of the copy, or (B) under the circumstances it would be unfair to admit the copy in lieu of the original.

COMMENTARY

By permitting a copy of an original writing, recording or photograph to be admitted without requiring the proponent to account for the original, Section 10-2 represents a departure from common law. See, e.g., *British American Ins. Co.* v. *Wilson*, 77 Conn. 559, 564, 60 A. 293 (1905). Nevertheless, in light of the reliability of modern reproduction devices, this section recognizes that a copy derived therefrom often will serve equally as well as the original when proof of its contents is required.

"[C]opy," as used in Section 10-2, should be distinguished from a "duplicate original," such as a carbon copy of a contract, which the executing or issuing party intends to have the same effect as the original. See commentary to Section 10-1.

Sec. 10-3. Admissibility of Other Evidence of Contents

The original of a writing, recording or photograph is not required, and other evidence of the contents of such writing, recording or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent destroyed or otherwise failed to produce the originals for the purpose of avoiding production of an original; or

(2) Original not obtainable. No original can be obtained by any reasonably available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom it is offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the proceeding, and that party does not produce the original at the proceeding; or

(4) Collateral matters. The contents relate to a collateral matter.

COMMENTARY

The best evidence rule evolved as a rule of preference rather than one of exclusion. E.g., *Brookfield* v. *Candlewood Shores Estates, Inc.*, 201 Conn. 1, 12, 513 A.2d 1218 (1986). If the proponent adequately explains the failure to produce the original, "secondary" evidence of its contents then may be admitted. Section 10-3

describes the situations under which production of the original is excused and the admission of secondary evidence is permissible.

Although the issue has yet to be directly addressed, the cases do not appear to recognize degrees of secondary evidence, such as a preference for handwritten copies over oral testimony. See *Sears* v. *Howe*, 80 Conn. 414, 416–17, 68 A. 983 (1908). **[**See generally C. Tait & J. LaPlante Connecticut Evidence (2d Ed. 1988) § 10.12, pp. 307–308.**]** Section 10-3 recognizes no degrees of secondary evidence and thus any available evidence otherwise admissible may be utilized in proving contents once production of the original is excused under Section 10-3.

(1) Originals lost or destroyed.

Subdivision (1) reflects the rule in *Woicicky* v. *Anderson*, 95 Conn. 534, 536, 111 A. 896 (1920). A proponent ordinarily proves loss or destruction by demonstrating a diligent but fruitless search for the lost item; see *State* v. *Castelli*, 92 Conn. 58, 69–70, 101 A. 476 (1917); *Elwell* v. *Mersick*, 50 Conn. 272, 275–76 (1882); see also *Host America Corp.* v. *Ramsey*, 107 Conn. App. 849, 855–56, 947 A.2d 957, cert. denied, 289 Conn. 904, 957 A.2d 870 (2008); or by producing a witness with personal knowledge of destruction. See *Richter* v. *Drenckhahn*, 147 Conn. 496, 502, 163 A.2d 109 (1960).

The proponent is not precluded from offering secondary evidence when the purpose in losing or destroying the original is not to avoid production thereof. *Mahoney* v. *Hartford Investment Corp.*, 82 Conn. 280, 287, 73 A. 766 (1909); *Bank of the United States* v. *Sill*, 5 Conn. 106, 111 (1823).

(2) Original not obtainable.

Subdivision (2) covers the situation in which a person not a party to the litigation possesses the original and is beyond reasonably available judicial process or procedure. See, e.g., *Shepard* v. *Giddings*, 22 Conn. 282, 283–84(1853); *Townsend* v. *Atwater*, 5 Day (Conn.) 298, 306 (1812).

(3) Original in possession of opponent.

Common law excuses the proponent from producing the original when an opposing party in possession of the original is put on notice and fails to produce the original at trial. See, e.g., *Richter* v. *Drenckhahn*, supra, 147 Conn. 501; *City Bank of New Haven* v. *Thorp*, 78 Conn. 211, 218, 61 A. 428 (1905). Notice need not compel the

opponent to produce the original, but merely provides the option to produce the original or face the prospect of the proponent's offer of secondary evidence. Whether notice is formal or informal, it must be reasonable. See *British American Ins. Co.* v. *Wilson*, 77 Conn. 559, 564, 60 A. 293 (1905).

(4) Collateral matters.

Subdivision (4) is consistent with Connecticut law. *Misisco* v. *LaMaita*, 150 Conn. 680, 685, 192 A.2d 891 (1963); *Farr* v. *Zoning Board of Appeals*, 139 Conn. 577, 582, 95 A.2d 792 (1953).

Sec. 10-5. Summaries

The contents of voluminous writings, recordings or photographs, otherwise admissible, that cannot be conveniently examined in court, may be admitted in the form of a chart, summary or calculation, provided that the originals or copies are available upon request for examination or copying, or both, by other parties at a reasonable time and place.

COMMENTARY

Case law permits the use of summaries to prove the contents of voluminous writings that cannot be conveniently examined in court. *Brookfield* v. *Candlewood Shores Estates, Inc.*, 201 Conn. 1, 12–13, 513 A.2d 1218 (1986); *McCann* v. *Gould*, 71 Conn. 629, 631–32, 42 A. 1002 (1899). Section 10-5 extends the rule to voluminous recordings and photographs in conformity with other provisions of Article X.

The summarized originals or copies must be made available to other parties upon request for examination or copying, or both, at a reasonable time and place. See *Customers Bank* v. *Tomonto Industries, LLC,* 156 Conn. App. 441, 445 n.3, 112 A.3d 853 (2015); see also *McCann* v. *Gould*, supra, 71 Conn. 632; cf. *Brookfield* v. *Candlewood Shores Estates, Inc.*, supra, 201 Conn. 13.

Sec. 10-6. Admissions of a Party

The contents of a writing, recording or photograph may be proved by the admission of a party against whom it is offered that relates to the contents of the writing, recording or photograph.

COMMENTARY

Section 10-6 recognizes the exception to the best evidence rule for admissions of a party relating to the contents of a writing when offered against the party to prove the contents thereof. *Morey* v. *Hoyt*, 62 Conn. 542, 557, 26 A. 127 (1893). Section 10-6 extends the exception to recordings and photographs in conformity with other provisions of Article X.