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New York Court of Appeals Holds for the First Time That an X-Ray Is a Writing Subject to the Best Evidence Rule, Thererby Admitting Secondary Evidence to Describe the Contents of a Lost X-Ray

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New York Court of Appeals holds for the first time that an x-ray is a writing subject to the best evidence rule, thereby admitting secondary evidence to describe the contents of a lost x-ray

The "'oft-mentioned and much misunderstood'" best evidence rule requires a party to produce the best attainable evidence to prove a disputed fact or issue.[1] Usually, the original document itself is the best evidence of its contents. A well recognized exception to this rule, however, is that when the absence of an original writing is explained to the satisfaction of

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[1] Schozer v. William Penn Life Ins. Co., 84 N.Y.2d 639, 643, 644 N.E.2d 1353, 1355, 620 N.Y.S.2d 797, 799 (1994) (citing Sirico v. Cotto, 67 Misc. 2d 636, 637, 324 N.Y.S.2d 483, 485 (N.Y. Civ. Ct. N.Y. County 1971); Trombley v. Seligman, 191 N.Y. 400, 84 N.E. 280 (1908)).

> One of the fundamental principles of evidence is that the best evidence of which a case is in its nature susceptible, and which is within the power of the party to produce or is capable of being produced, must be adduced in proof of a disputed fact or issue. Secondary evidence, or evidence which is substitutional in nature, may not be introduced over objection unless the primary evidence is unavailable to the party offering the secondary or substitutionary evidence. This rule is founded on the presumption that there may be something in the withheld better evidence which would be adverse to the party resorting to inferior evidence.
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> The rule is satisfied by the production of the best attainable evidence. The requirement of the best evidence applicable to each particular fact means that no evidence of a nature merely substitutionary is to be received where the primary evidence is producible. Therefore, the best evidence rule states in effect that a document is itself the best evidence of its contents and that a party who desires to produce evidence of the contents of a document upon an issue raised in reference thereto must produce the document if it is in existence and within his power to produce. In other words, the rule is that where proof is to be made of some fact which is recorded in a writing by what appears in the writing, the best evidence of the contents of the writing consists in the production of the document itself.

57 N.Y. JUR. 2D *Evidence & Witnesses* § 247 (1986) [hereinafter *Evidence & Witnesses*] (citations omitted); *see* 4 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1177-83, at 417 (1972) (stating early common law rationale for rule as "between . . . a literal copy and the original, the copy is always liable to errors on the part of the copyist"). With the reliability of modern copying processes, this rationale has been modified to protect against "testimony and other forms of secondary evidence offered to prove the content of an original rather than against the use of duplicates." CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE § 10.1, at 1579 (1995).

The best evidence rule in New York applies equally to civil and criminal actions. *See* Torr v. Torr, 18 A.D.2d 722, 236 N.Y.S.2d 252 (2d Dep't 1962) (civil actions); People v. Burgess, 244 N.Y. 472, 155 N.E. 745 (1927) (criminal actions).

the court, secondary evidence is admissible to establish the contents of the unproduced original.[2] Generally, the court will excuse the loss of an original where the party attempting to enter secondary evidence of the document: 1) makes a showing of a diligent search in the area where the document was last known to have existed;[3] and 2) produces testimony of the person who last possessed it.[4]

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[2] *See* Trombley v. Seligman, 191 N.Y. 400, 403, 84 N.E. 280, 281 (1908); EDITH L. FISCH, FISCH ON NEW YORK EVIDENCE §§ 81-82, 96-97 (1977). "The best evidence rule requires the production of an original writing whenever its contents must be proved, and prohibits the introduction of secondary evidence unless a satisfactory explanation is presented for the absence of the original." *Id.* § 81; *see* 4 WIGMORE, *supra* note 1. The exception to the best evidence rule seems to be predicated upon the infeasibility of producing the original because of such reasons as: loss of the document; detention of the document by the opponent or third party; detention by the law; and destruction of the document. *See id.* § 1192, at 436.

The Federal Rules of Evidence, however, depart from common law by allowing the use of duplicates. *See* FED. R. EVID. 1003 (permitting admission of duplicates unless there is question of authenticity of duplicate). In challenging the admissibility of the duplicate, the challenging party has the burden of explaining why the duplicate should not be admitted. *See* United States v. Garmany, 762 F.2d 929 (11th Cir. 1985) (shifting burden to party challenging admissibility of duplicate), *cert. denied*, 474 U.S. 1062 (1986); 3 SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1755 (6th ed. 1994). For a determination of whether x-rays are within the scope of Rule 1003 of the Federal Rules of Evidence, see United States v. Leight, 818 F.2d 1297 (7th Cir.), *cert. denied*, 484 U.S. 958 (1987), which answers in the affirmative.

[3] *Schozer*, 84 N.Y.2d at 644, 644 N.E.2d at 1355, 620 N.Y.S.2d at 799 (citing Cole v. Canno, 168 A.D. 178, 153 N.Y.S. 957 (3d Dep't 1915); Dan v. Brown, 4 Cow. 483, 491 (1825)); *Evidence and Witnesses*, *supra* note 1, § 262.

> Where it becomes necessary to prove loss of the original of an instrument in order to give secondary evidence as to its contents, it should be shown that reasonable search was made and that the available sources of information and means of discovery suggested by the circumstances have not enabled the party to find and produce the original paper or record.
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> The contents of a lost instrument cannot be proved unless it appears that reasonable search has been made in the place where the document was last known to have been. If it is shown to have been in a particular place or in the custody of a particular person, that place should be searched or the person who had custody should be produced. . . . The testimony of the last custodian is usually required. The more important the document as proof, the stricter becomes the requirement of the evidentiary foundation for the admission of secondary evidence of the contents thereof. But the sufficiency of the proof of loss is a question of fact for the trial judge, rarely reviewed on appeal.

Id. (citations omitted).

[4] *Schozer*, 84 N.Y.2d at 644, 644 N.E.2d at 1355, 620 N.Y.S.2d at 799 (citing FISCH, *supra* note 2, §§ 88-89).

> Loss or destruction is frequently invoked to justify the use of secondary evidence to prove the contents of a document. Though provable by direct evidence, these facts are more often established by a circumstantial inference based upon the showing of an unsuccessful search that has encompassed all reasonable efforts to discover the writing. In some instances this may require the production as a witness of the person last known to have had possession of the document, or the introduction of his deposition if he is

Much difficulty has arisen concerning the definition of a "writing" in the context of the best evidence rule.[5] Modern technology has forced many states to expand their definitions of a "writing" to include documents such as x-rays.[6] In the past, New York courts confronted with the issue have disagreed as to whether an x-ray is a writing subject to the best evidence rule and, therefore, subject to the exception for unattainable originals.[7] Recently, in *Schozer v. William Penn Life Insurance Co.*,[8] the

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outside the jurisdiction.

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Destruction of the original by an adverse party regardless of his motive or reason for doing so, permits the use of secondary evidence by his opponent. Secondary evidence is also admissible even where the proponent himself has destroyed the original, provided he establishes that it was not done fraudulently or to create an excuse for its non-production. The evidence must be stronger where the circumstances are suspicious, or a motive or fraudulent design to evade production appears, than where such indications are absent. It appears that these rules also apply to the proponent of secondary evidence who has caused the identity of the original to be lost.

FISCH, *supra* note 2, § 89.

[5] *See* FISCH, *supra* note 2, § 85 (noting that "best evidence rule is applicable to all writings, even those inscribed on an object such as a painting, piece of sculpture or a building").

Under the Federal Rules of Evidence the scope of a writing has been enlarged to expressly include:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing . . . .

(2) Photographs. "Photographs" include still photographs, x-ray films, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself . . . . An "original" of a photograph includes the negative or any print therefrom.

FED. R. EVID. 1001. The rationale for the expansion of the scope was that "[p]resent day techniques have expanded methods of storing data." FED. R. EVID. 1001 advisory committee's notes.

[6] *See* Ivan E. Bodensteiner, *Indiana Rules of Evidence*, 27 IND. L. REV., 1063, 1091 (1994) (noting Indiana extends best evidence rule to include x-rays); Gregory S. Cusimano & Michael L. Roberts, *Proposed Alabama Rules of Evidence: What's The Same? What's Different?*, 45 ALA. L. REV. 109, 140 (1993) (noting expansion of Alabama law to include x-rays under best evidence rule); James J. Hippard, Sr., *Article X: Contents of Writings, Recordings, and Photographs*, 30 HOUS. L. REV. 1093, 1114-15 (1993) (noting applicability of Rule 703 concerning x-rays thereby limiting application of Rule 1002); Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 261 n. 173 (1988) (noting extension of applicability of best evidence rule to prove contents of x-rays); Olin Guy Wellborn III, *The "Best Evidence" Article of the Texas Rules of Evidence*, 18 ST. MARY'S L.J. 99, 105 (1986) (noting best evidence rule may be invoked to require production of x-ray where x-ray is central to diagnosis and controversy exists as to its meaning).

[7] *See Schozer*, 84 N.Y.2d at 644, 644 N.E.2d at 1356, 620 N.Y.S.2d at 800 (citing cases which have applied best evidence rule to x-rays); *see also id.* at 648-49, 644 N.E.2d at 1358, 620 N.Y.S.2d at 802 (Simons, J., dissenting) (citing cases which have precluded the application of best evidence rule to x-rays).

New York Court of Appeals held that an x-ray is a writing subject to the best evidence rule, and to the exception to the rule, thereby resolving this issue for purposes of New York evidence law.[9]

The New York Court of Appeals, reversing the order of the Appellate Division, Second Department,[10] expressly rejected the view that the best evidence rule creates "an absolute bar" to the admission of secondary evidence to establish the contents of a lost x-ray.[11] Writing for the majority in a 5-2 decision, Judge Titone examined the decisions of lower courts which confronted this issue and concluded that the best evidence rule and its exception for unproduced originals has been applied with equal weight to unavailable x-rays and the secondary evidence offered to describe their contents.[12] Additionally, the court found that its decision paralleled the standard formulation followed by the Federal Rules of Evidence and a

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[8] 84 N.Y.2d 639, 644 N.E.2d 1353, 620 N.Y.S.2d 797 (1994).

The facts of the case are as follows: the defendant, William Penn Life Insurance Company of N.Y., believing that the claimant's medical history indicated a potential heart condition which would have disqualified him from the coverage he sought, requested that he complete a physical examination and have an x-ray taken. *Id.* at 642, 644 N.E.2d at 1354, 620 N.Y.S.2d at 798. Schozer complied with the insurance company's request and the x-ray taken was thereafter analyzed by the defendant's medical director, a radiologist. *Id.* The radiologist's written report concluded that Mr. Schozer had an enlarged heart. Less than one month later, before the defendant had rejected or accepted the claimant's application for insurance, Schozer died from a cause unrelated to a heart condition. *Id.* Thereafter, the defendant insurer rejected the claimant's application and returned the premium paid. *Id.* Roughly two years later, the plaintiff, who was the decedent's wife, commenced an action against the insurance company to recover the insurance proceeds available under the conditional receipt. *Schozer*, 84 N.Y.2d at 642, 644 N.E.2d at 1354, 620 N.Y.S.2d at 798. The defendant disclaimed liability based on the fact that Schozer had an enlarged heart at the time he applied for the life insurance policy, thus rendering him an unacceptable risk and uninsurable at the standard rate. *Id.* at 643, 644 N.E.2d at 1355, 620 N.Y.S.2d at 799. The defendant was unable to locate the x-ray and thus sought to introduce the testimony and written report of the radiologist to establish that Schozer's x-ray would have revealed an enlarged heart. *Id.* The plaintiff thereafter moved to preclude the evidence on the ground that the best evidence rule creates "an absolute bar" to the admission of secondary evidence in the absence of the original x-ray. *Id.*

[9] *Id.* at 647, 644 N.E.2d at 1357, 620 N.Y.S.2d at 801.

[10] Schozer v. William Penn Life Ins. Co., 197 A.D.2d 510, 602 N.Y.S.2d 203 (2d Dep't 1993), *rev'd*, 84 N.Y.2d 639, 644 N.E.2d 1353, 620 N.Y.S.2d 797 (1994).

[11] Schozer v. William Penn Life Ins. Co., 84 N.Y.2d 639, 646, 644 N.E.2d 1353, 1357, 620 N.Y.S.2d 797, 801 (1994).

[12] *Id.* at 644-45, 644 N.E.2d at 1356, 620 N.Y.S.2d at 800 (citing Chiu v. Garcia, 75 A.D.2d 594, 426 N.Y.S.2d 803 (2d Dep't 1980) (holding that trial court erred in permitting medical expert testimony based on x-rays which were not in evidence and absence of which was not explained); Sirico v. Cotto, 67 Misc. 2d 636, 324 N.Y.S.2d 483 (N.Y. Civ. Ct. N.Y. County 1971) (holding that radiologist's opinion based upon x-ray plates not in evidence was inadmissible where failure to produce x-ray plates was not explained)).

number of other states.[13]

Judge Titone reasoned that since the proponent of secondary evidence bears the heavy foundational burden of establishing to the court that the evidence is an accurate portrayal of the original, the dangers of fraud and prejudice normally associated with the admission of secondary evidence are reduced.[14] Judge Titone further noted that a degree of danger exists any time a witness is called upon to recount the terms of a lost document; thus, there is no greater danger of fraud and prejudice in permitting a witness to recount the contents of a lost x-ray than there is in allowing a witness to

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[13] *Schozer*, 84 N.Y.2d at 645, 644 N.E.2d at 1356, 620 N.Y.S.2d at 800.

The Federal Rules of Evidence expressly include x-rays in the definition of a "photograph," and thereafter define a photograph as a writing subject to the best evidence rule. *Id.* (citing FED. R. EVID. 1001(2)). Furthermore, the *Schozer* court noted that a number of other states have either included x-rays in their statutory definitions of a "writing" for best evidence rule purposes, *Schozer*, 84 N.Y.2d at 645, 644 N.E.2d at 1356, 620 N.Y.S.2d at 800 (citing N.J. R. EVID. § 801(e) & 1994 comment; N.C. GEN. STAT. § 8-45.1; OR. REV. STAT. EVID. R. 1001(3); Texas R. of Evid. § 1001(2)), or have "judicially applied the best evidence rule to x-rays." *Id.* (citing Hernandez v. Pino, 482 So. 2d 450 (Fla. Dist. Ct. App. 1986) (holding best evidence rule applicable to x-rays unintentionally lost or destroyed where experts had opportunity to examine them); Daniels v. Iowa City, 183 N.W. 415, 416 (Iowa 1921)). *But see* Fuller v. Lemmons, 434 P.2d 145, 147 (Okla. 1967) (holding that admission of medical testimony based on x-ray not in evidence was error).

The *Schozer* court contended that, as in the case of any missing original, once the court excuses the absence of an x-ray, there are "[n]o categorical limitations placed on the types of secondary evidence that are admissible." *Schozer*, 84 N.Y.2d at 645, 644 N.E.2d at 1356, 620 N.Y.S.2d at 800. Rather, "all competent secondary evidence is generally admissible to prove its contents," *id.* (citing American Nat'l Ins. Co. v. Points, 81 S.W.2d 762, 767 (Tex. Civ. App. 1935) (holding that expert testimony of contents of x-ray unproduced because located out of state is admissible)), as long as admission of the secondary evidence does not "offend any other exclusionary rule or policy." *Id.* (citing 5 J. WEINSTEIN, EVIDENCE ¶ 1001[2][01]).

[14] *Schozer*, 84 N.Y.2d at 646, 644 N.E.2d at 1356-57, 620 N.Y.S.2d at 800-01.

In order for the proffered evidence to be admissible, the trial court must be satisfied that the evidence is authentic and reflective of the original. *Id.* at 645, 644 N.E.2d at 1356, 620 N.Y.S.2d at 800 (citing United States v. Gerhart, 538 F.2d 807, 809 (8th Cir. 1976)). "[T]he [federal] rules allocate to the court preliminary questions such as authenticity, lack of an original and whether the proponent has presented a sufficient foundation so that a 'reasonable juror could be convinced' that the secondary evidence correctly reflects the contents of the original." *Gerhart*, 538 F.2d at 809 (citations omitted); *see also* Marion v. Coon Const. Co., 141 N.Y.S. 647 (3d Dep't 1913), *aff'd*, 216 N.Y. 178, 110 N.E. 444 (1915). When oral testimony is given to establish the contents of an unproduced writing, the proponent of the evidence must show that the witness has the ability to "recount or recite, from personal knowledge, 'substantially and with reasonable accuracy' all of its contents." *Schozer*, 84 N.Y.2d at 646, 644 N.E.2d at 1356, 620 N.Y.S.2d at 800 (quoting RICHARDSON ON EVIDENCE (10th ed) § 599, at 596). Finally, once the conditions for admission of the secondary evidence are met, the opponent may attack the sufficiency of the secondary evidence including the credibility of the witness "not as to admissibility but [as] to the weight to be given the evidence, with [the] final determination left to the trier of fact." *Id.* (quoting *Gerhart*, 538 F.2d at 809 n.2).

recount the terms of any unproduced document, such as a contract or lease.[15] Therefore, while Judge Titone recognized that an opponent is always at a disadvantage when cross-examining a witness about a lost document, he noted that there was no justification to warrant the application of a different rule in the case of an unproduced x-ray.[16] He reasoned that proponents of secondary evidence are discouraged from introducing inaccurate evidence since such misbehavior may result in the jury drawing unfavorable inferences.[17]

In arriving at its decision, the *Schozer* court rejected the conclusion drawn by Judge Simons in his dissent and lower courts that two earlier court of appeals cases, *Hambsch v. New York City Transit Authority*[18] and *Marion v. Coon Construction Co.*,[19] called for "an absolute best evidence rule bar" to the admission of secondary evidence to establish the contents of an unproduced original x-ray film.[20] The *Schozer* court distinguished *Hambsch*, where the court concluded that expert testimony was inadmissible without presentation of the underlying x-ray, concluding that the court had not addressed the issue since no best evidence rule objection had been made.[21] Similarly, the *Schozer* court distinguished *Marion*, determining that there the court of appeals based its holding that expert opinion testimony was inadmissible in the absence of the underlying x-ray on the fact that there was no proper foundation to ensure that the unproduced x-ray accurately portrayed the plaintiff's fracture.[22] Although the *Schozer* court concluded that the existing case law did not per se preclude the introduction of secondary evidence of a missing x-ray, where the necessary

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[15] *Schozer*, 84 N.Y.2d at 646, 644 N.E.2d at 1357, 620 N.Y.S.2d at 801.

[16] *Id.*

[17] *Id.* (citing James J. Hippard, Sr., *Article X: Contents of Writings, Recordings, and Photographs*, 20 HOUS. L. REV. 595, 611 (1983)).

[18] 63 N.Y.2d 723, 469 N.E.2d 516, 480 N.Y.S.2d 195 (1984).

[19] 216 N.Y. 178, 110 N.E. 444 (1915).

[20] *Schozer*, 84 N.Y.2d at 646, 644 N.E.2d at 1357, 620 N.Y.S.2d at 801.

[21] *Id.* (citing *Hambsch*, 63 N.Y.2d at 725, 469 N.E.2d at 518, 480 N.Y.S.2d at 197).

In *Hambsch*, the plaintiff's doctor testified that, based on his reading of an x-ray of the plaintiff's lower back, the plaintiff was suffering from spondylolisthesis, a misalignment of the vertebra. *Hambsch*, 63 N.Y.2d at 725, 469 N.E.2d at 517, 480 N.Y.S.2d at 196. The court concluded that it was error to permit the doctor's testimony based on an x-ray without producing the x-ray and introducing it into evidence. *Id.* (citing Marion v. Coon Constr. Co., 216 N.Y. 178, 110 N.E. 444 (1915); Richter v. Trailways of New England, 28 A.D.2d 737, 738, 282 N.Y.S.2d 148 (2d Dep't 1967); Cellamare v. Third Ave. Tr. Corp., 273 A.D. 260, 77 N.Y.S.2d 91 (1st Dep't 1948)). The court, however, noted that since there was no objection to the doctor's testimony, the matter was not preserved for the court's review. *Id.*

[22] *Schozer*, 84 N.Y.2d at 645, 644 N.E.2d at 1356, 620 N.Y.S.2d at 800 (citing *Marion*, 216 N.Y. at 182, 110 N.E. at 446).

showing of unavailability had been made, it appears that the court's recent decision expands the law to a level not formerly accepted by the court of appeals.

Judge Simons proffered a highly critical dissent[23] in which he argued to affirm the Appellate Division's ruling that an x-ray report is inadmissible without the introduction of the underlying x-ray, reasoning that such a conclusion was consistent with "an unbroken line of New York decisions."[24] He contended that no New York case cited to the court of appeals had extended the best evidence rule and its exemption for unavailable documents to missing x-rays.[25] Judge Simons specifically

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[23] *Schozer*, 84 N.Y.2d at 647, 644 N.E.2d at 1357, 620 N.Y.S.2d at 801 (Simons, J., dissenting).

[24] *Id.* at 647-48, 644 N.E.2d at 1358, 620 N.Y.S.2d at 802 (Simons, J., dissenting) (citing *Hambsch*, 63 N.Y.2d at 725, 469 N.E.2d at 518, 480 N.Y.S.2d at 197; *Marion*, 216 N.Y. at 182, 110 N.E. at 446); Ebanks v. New York City Transit Auth., 118 A.D.2d 363, 504 N.Y.S.2d 640 (1st Dep't 1986) (holding testimony of medical expert inadmissible where x-ray on which testimony was based was not produced), *rev'd on other grounds*, 70 N.Y.2d 621, 512 N.E.2d 297, 518 N.Y.S.2d 776 (1987); Chiu v. Garcia, 75 A.D.2d 594, 426 N.Y.S.2d 803 (2d Dep't 1980) (concluding that it was error for trial court to permit medical expert to testify about x-rays not admitted into evidence); Richter v. Trailways of New England, 28 A.D.2d 737, 282 N.Y.S.2d 148 (2d Dep't 1967) (holding that it was prejudicial error to permit doctor's testimony, over objection, about matters depicted on x-rays which doctor had taken but which were not introduced into evidence); Cellamare v. Third Ave. Transit Corp., 273 A.D. 260, 77 N.Y.S.2d 91 (1st Dep't 1948) (finding prejudicial error where expert medical witness testified to contents of x-rays without producing x-rays and introducing them into evidence); Gursslin v. Helenboldt, 259 A.D. 1064, 21 N.Y.S.2d 269 (4th Dep't 1940) (determining that expert medical witness testifying to matters shown on x-ray without introducing x-ray in evidence was prejudicial error).

The dissent further noted that the rule has been applied to holdings based on other types of medical evidence. *Schozer*, 84 N.Y.2d at 648, 644 N.E.2d at 1358, 620 N.Y.S.2d at 802 (Simons, J., dissenting) (citing Kosiorek v. Bethlehem Steel Corp., 145 A.D.2d 935, 536 N.Y.S.2d 614 (4th Dep't 1988) (holding that expert medical testimony regarding tissue slides not in evidence was inadmissible); Whalen v. Avis Rent-a-Car System, 138 Misc. 2d 959, 961, 529 N.Y.S.2d 52, 54 (Sup. Ct. App. T. 2d Dep't 1988) (holding that doctor's testimony concerning report of non-testifying radiologist related to CAT scan which was not in evidence and, therefore was inadmissible)).

[25] *Schozer*, at 649, 644 N.E.2d at 1358, 620 N.Y.S.2d at 802 (Simons, J., dissenting).

The dissent noted that Congress has drafted its statutory definition of a writing to include a photograph or an x-ray. *Id.* (citing FED. R. EVID. 1001(2)). Judge Simons, however, argued that the photograph or x-ray is usually used only as an aid to the witness' testimony. *Id.* Testimony of what a photograph or an x-ray depicts, without production of the original is "most unusual." *Id.* (citing FED. R. EVID. 1002 advisory committee's notes). Judge Simons further noted that the Committee recognized that in the case of unproduced x-rays, "substantial authority" required the production of the original. *Id.* at 649, 644 N.E.2d at 1359, 620 N.Y.S.2d at 803 (citations omitted). Finally, the dissent distinguished New York law from the Federal Rules of Evidence by noting that the admission of an x-ray as secondary evidence in federal courts is partly justified by the fact that under the Federal Rules an expert may base his or her opinion on facts not in evidence. *Schozer*, 84 N.Y.2d at 649, 644 N.E.2d at 1359, 620 N.Y.S.2d at 803 (citing FED. R. EVID. 703).

argued that none of the decisions cited by the majority established a New York rule that secondary evidence is admissible in the case of an unproduced x-ray.[26]

Judge Simons raised two important issues in his dissent: whether a doctor's report recounting the contents of an unproduced x-ray amounts to expert testimony and, if so, whether expert testimony must be based on facts before the court to be admissible.[27]

Judge Simons answered the first issue in the affirmative, arguing that the majority improperly permitted secondary evidence in the form of an expert witness' report to establish the contents of the x-ray films.[28] He distinguished x-rays from other documents, such as leases and contracts, and argued that a doctor's report or testimony recounting the contents of an x-ray is neither a copy of the x-ray nor an objective statement of what the x-ray portrays. Rather, it is an expert opinion interpreting the unproduced x-ray on the basis of the expert's training and experience.[29] His dissent supported the belief that such secondary evidence is expert testimony, reasoning that "[t]he value of [x]-ray evidence rests largely on the expert's interpretation of what it shows. . . . [and] reasonable medical experts can read [x]-rays differently and their readings can only be tested or verified by examining the picture they rely on."[30]

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[26] *Schozer*, 84 N.Y.2d at 649, 644 N.E.2d at 1358, 620 N.Y.S.2d at 802 (Simons, J., dissenting).

Judge Simons argued that the cases the majority cited do not support the proposition that New York courts have permitted secondary evidence in cases involving missing x-rays. *Id.* In fact, Judge Simons contended that such a holding is contrary to existing New York law. *Id.* He argued that the defendant's and the majority's reliance upon Chiu v. Garcia, 75 A.D.2d 594, 426 N.Y.S.2d 803 (2d Dep't 1980), is misplaced because that court's holding is ambiguous. In *Chiu*, the appellate division held that a doctor could not testify to the contents of x-rays not in evidence or "whose absence was not explained." *Schozer*, 84 N.Y.2d at 648-49, 644 N.E.2d at 1358, 620 N.Y.S.2d at 802 (quoting *Chiu*, 75 A.D.2d 594, 426 N.Y.S.2d 803). Furthermore, the dissent contended that the majority wrongly based its holding on Marion v. Coon Construction, 216 N.Y. 178, 110 N.E. 444 (1915), and Sirico v. Cotto, 67 Misc. 2d 636, 324 N.Y.S.2d 483 (N.Y. Civ. Ct. N.Y. County 1971), since in both cases the majority relied on dictum. *Schozer*, 84 N.Y.2d at 648-49, 644 N.E.2d at 1358, 620 N.Y.S.2d at 802 (Simons, J., dissenting).

[27] *Schozer*, 84 N.Y.2d at 647-51, 644 N.E.2d at 1357-60, 620 N.Y.S.2d at 801-04 (Simons, J., dissenting).

[28] *Id.* at 649, 644 N.E.2d at 1359, 620 N.Y.S.2d at 803 (Simons, J., dissenting).

[29] *Id.* at 649, 644 N.E.2d at 1358, 620 N.Y.S.2d at 802 (Simons, J., dissenting).

[30] *Schozer*, 84 N.Y.2d at 650, 644 N.E.2d at 1359, 620 N.Y.S.2d at 803 (Simons, J., dissenting).

In applying this theory, the dissent reasoned that an expert's opinion that a patient suffered from an enlarged heart, based on an unproduced x-ray, is "wholly insulated from contradiction" since an opposing expert cannot determine the value of the opinion without examining the x-ray. *Id.* 84 N.Y.2d at 650, 644 N.E.2d at 1359, 620 N.Y.S.2d at 803 (Simons, J., dissenting).

The dissent also rejected as impossible the majority's contention that the danger of receiving

Upon concluding that a doctor's testimony or report recounting the contents of an unproduced x-ray is equivalent to expert testimony, Judge Simons refuted the majority's view that there is no difference between admitting secondary evidence of a writing and admitting secondary evidence of an x-ray.[31] Judge Simons reasoned that expert testimony evidence involves a two-step evaluation process in which the jury must determine: 1) whether the facts upon which the expert is testifying have been established and 2) the weight which should be given to the expert's testimony based upon those facts.[32] The evaluation of the contents of a writing, however, entails only one step—the jury evaluating the reliability of the secondary evidence.[33] Therefore, if a doctor's testimony or report relating to the contents of a lost x-ray is deemed to be "expert testimony," it should be subjected to a stricter test than ordinary "writings" in order to be admissible.

Judge Simons also answered the second issue in the affirmative, arguing that expert testimony must be based on facts in evidence.[34] Judge Simons' basis for prohibiting the admission of expert testimony to establish the contents of an unproduced x-ray was that generally witnesses are permitted to testify only to facts, not opinions, and that expert opinions are allowed only where lay jurors are unable to intelligently evaluate the facts

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such secondary evidence can be avoided by the court ensuring that the doctor's report is "authentic and 'correctly reflects the contents' of the x-ray." *Id.* (quoting majority).

> It is not a question of 'mistrusting' the doctor's report, as the majority seems to believe . . . ; it is a question of whether the doctor's report will supply a factual basis for his opinion. The expert's opinion[] has no greater probative force than the basis on which . . . it is founded[] . . . , and the expert's self-serving and unverifiable reading of the X-ray does not supply the necessary predicate to support an opinion. It would seem that in these circumstances the reception of secondary evidence, rather than preventing fraud or prejudice, would facilitate it.

Id. at 651, 644 N.E.2d at 1359-60, 620 N.Y.S.2d at 803-04 (Simons, J., dissenting).

[31] *Id.* 84 N.Y.2d at 650, 644 N.E.2d at 1359, 620 N.Y.S.2d at 803 (Simons, J., dissenting).

[32] *Id.* (Simons, J., dissenting).

[33] *Schozer*, 84 N.Y.2d at 650, 644 N.E.2d at 1359, 620 N.Y.S.2d at 803 (Simons, J., dissenting). "The evaluation of expert opinion evidence involves a two-step process: the jury must first determine whether the proponent has established the facts upon which the expert opinion rests and then determine the weight which should be accorded the expert's opinion based upon those facts." *Id.* (Simons, J., dissenting).

The dissent argued that since the doctor's report does not establish the facts, without the x-ray there in no evidence to support the doctor's opinion. *Id.* The dissent further contended that since the only factual foundation for the expert's opinion is the expert's own analysis of an unproduced x-ray, the opinion is merely speculative. *Id.* at 650-51, 644 N.E.2d at 1359, 620 N.Y.S.2d at 803 (Simons, J., dissenting).

[34] *Id.* at 648, 644 N.E.2d at 1358, 620 N.Y.S.2d at 802 (Simons, J., dissenting).

without the assistance and special knowledge of experts.[35] From this general proposition, Judge Simons determined that an expert opinion, to be admissible, must be based upon facts before the court—facts acquired either by evidence in the record or by personal observation.[36] Therefore, Judge Simons reasoned that since the doctor in the *Schozer* case did not personally examine the decedent's heart, his opinion should have been based solely on evidence in the record.[37] Since the x-ray upon which his opinion was based was not in evidence, Judge Simons concluded that "the record lacked the necessary factual predicate for admission of his opinion."[38]

According to one legal commentator, however, for over twenty years the New York Court of Appeals has allowed two exceptions to the general proposition that experts may not testify to material not in evidence.[39] In *People v. Sugden*,[40] the court held that experts may testify to out of court material where the material is either "accepted in the profession as reliable for forming a professional opinion," often referred to as the "professional reliability exception," or where the material "comes from a witness who is subject to full cross-examination at trial."[41] The proposition that expert testimony is inadmissible when based on facts not in evidence was addressed even more specifically by the court of appeals in *Hambsch*. There the court concluded that in order for the professional reliability

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[35] *Schozer*, 84 N.Y.2d at 648, 644 N.E.2d at 1357, 620 N.Y.S.2d at 801 (Simons, J., dissenting).

[36] *Id.* (Simons, J., dissenting).

[37] *Id.* (Simons, J., dissenting). "As a general rule, witnesses must testify to facts and not their opinions and conclusions drawn from the facts . . . . It is the sole province of the jury to draw inferences from the facts." RICHARD T. FARRELL, ET AL. ON EVIDENCE § 7-101 (11th ed. 1995)

[38] *Schozer*, 84 N.Y.2d at 650, 644 N.E.2d at 1359, 620 N.Y.S.2d at 803 (Simons, J., dissenting).

> A physician—whether testifying in person or submitting a written report—who states his opinion . . . is wholly insulated from contradiction if the x-ray on which that opinion is based is not before the court but appears only by the description in the report to the client. An opposing expert cannot judge the value of the opinion or contradict it if he or she has only the opponent's statements of what was in the x-ray.

Id.

[39] Michael Martin, *X-Rays and the Best Evidence Rule*, N.Y. L.J., Feb. 10, 1995, at 3, 4, col. 1, 5 (citing People v. Sugden, 35 N.Y.2d 453, 460-61, 323 N.E.2d 169, 172, 363 N.Y.S.2d 923, 929 (1974)); *see* People v. Jones, 73 N.Y.2d 427, 430, 539 N.E.2d 96, 97, 541 N.Y.S.2d 340, 342 (1989); Hambsch v. New York City Transit Auth., 63 N.Y.2d 723, 726, 469 N.E.2d 516, 518, 480 N.Y.S.2d 195, 196 (1984); People v. Stone, 35 N.Y.2d 69, 74, 315 N.E.2d 787, 790, 358 N.Y.S.2d 737, 741 (1974); People v. DiPiazza, 24 N.Y.2d 342, 351, 248 N.E.2d 412, 417, 300 N.Y.S.2d 545, 552 (1969). *See generally* D. Capra, *Permissible Bases of Expert Testimony*, N.Y. L.J., July 14, 1989, at 3.

[40] 35 N.Y.2d 453, 323 N.E.2d 169, 363 N.Y.S.2d 923 (1974).

[41] *Id.* at 460-61, 323 N.E.2d at 173, 363 N.Y.S.2d at 929.

exception to be implemented there "must be evidence establishing the reliability of the out-of-court material."[42] Therefore, contrary to Judge Simons' dissent, expert testimony based on out of court material is admissible where it has met the threshold reliability test. The *Schozer* majority's failure to address this issue, however, appears to leave unclear the applicability of the *Sugden* test to expert testimony regarding unproduced x-rays. According to one commentator, this only "adds to the continuing confusion in this area."[43]

In conclusion, it seems that the issue of whether an x-ray is a writing subject to the best evidence rule and whether secondary evidence is admissible to prove the contents of an unproduced x-ray had been unresolved in New York prior to the *Schozer* decision. The *Schozer* decision is worthy of praise since it recognized the purposes behind the best evidence rule. As the majority noted, imposing a strict requirement for production of the original writing would extinguish many valid legal claims and defenses, punishing parties who have, through no bad faith or mischief, lost or destroyed an original.[44] Such a rigid requirement would frustrate the purposes of the best evidence rule.

It is submitted, however, that the court's admission of the doctor's report of the lost x-ray, without addressing the two important issues raised by Judge Simons in his dissent, resulted in the creation of an ambiguous rule. It is unclear whether the Court of Appeals has left us with a standard form to apply when attempting to admit secondary evidence to prove the contents of a missing x-ray. The court asserts that the proponent of secondary evidence bears the heavy burden of establishing that the evidence is a "reliable and accurate portrayal of the original," but fails to identify a way this can be achieved without solely relying on the witness'

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[42] Martin, *supra* note 39, at 4 (citing Hambsch v. New York City Transit Auth., 63 N.Y.2d 723, 726, 469 N.E.2d 516, 518, 480 N.Y.S.2d 195, 197 (1984); Borden v. Brady, 92 A.D.2d 983, 984, 461 N.Y.S.2d 497, 498 (3d Dep't 1983) (Yesawich, J., concurring); People v. Gupta, 87 A.D.2d 991, 991, 450 N.Y.S.2d 124, 124 (4th Dep't 1982); People v. Branton, 67 A.D.2d 664, 665, 412 N.Y.S.2d 35, 36 (2d Dep't 1979); People v. Miller, 57 A.D.2d 668, 669, 393 N.Y.S.2d 679, 679 (3d Dep't 1977); People v. Borcsok, 114 Misc. 2d 810, 811-13, 452 N.Y.S.2d 814, 814-16 (Sup. Ct. Westchester County 1982); People v. De Zimm, 112 Misc. 2d 753, 760-62, 447 N.Y.S.2d 585, 590-91 (Sup. Ct. Tompkins County 1981)).

[43] Martin, *supra* note 39, at 4.

[44] *Schozer*, 84 N.Y.2d at 644, 644 N.E.2d at 1356, 620 N.Y.S.2d at 800. "[T]he failure to excuse the loss of an original 'would in many instances mean a return to the bygone and unlamented days in which to lose one's paper was to lose one's right.'" *Id.* (quoting MCCORMICK ON EVIDENCE § 237, at 76 (John W. Strong ed., 4th ed. 1992)).

expertise.[45] An x-ray and a writing differ significantly in that an x-ray is subject to interpretation whereas a written document is not.[46] Therefore, it is arguable that a doctor's testimony as to the contents of an unproduced x-ray is similar to expert testimony, as the dissent asserts. Consequently, admission of secondary evidence to prove the contents of a lost x-ray is more likely to result in fraud or prejudice to the opponent of that evidence than is the admission of secondary evidence to prove the contents of a missing written document. Moreover, it is likely that a jury will not recognize that an x-ray is subject to interpretation and will treat the secondary evidence as conclusive. The proponent's burden of establishing the reliability and accuracy of such secondary evidence to the satisfaction of the court is a vague and ambiguous standard. It is submitted that secondary evidence should be permitted to prove the contents of a lost x-ray, but that such evidence should be subjected to a stricter standard, perhaps the standard normally applied to expert testimony.

Anthony J. Albanese

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[45] *Schozer*, 84 N.Y.2d at 645, 644 N.E.2d at 1356, 620 N.Y.S.2d at 800. It is submitted that the majority's contention that the proponents of secondary evidence will "naturally be discouraged from introducing 'less convincing secondary evidence' because 'an opponent may cause the jury to draw an unfavorable inference from such a strategy,'" *id.* at 646, 644 N.E.2d at 1357, 620 N.Y.S.2d at 801, places too much faith in the trial process and neglects to formulate a workable standard.

[46] *Id.* 84 N.Y.2d at 650, 644 N.E.2d at 1359, 620 N.Y.S.2d at 803 (Simons, J., dissenting). Unlike a writing "[t]he value of X-ray evidence rests largely on the expert's interpretation of what it shows. Manifestly, reasonable medical experts can read X-rays differently and their readings can only be tested or verified by examining the picture they rely on." *Id.*