

## **11.01. Real Evidence**

**(1) Definition.** “Real Evidence” refers to any tangible object or sound recording of a conversation that is offered in evidence.

**(2) Admissibility.** Real evidence is admissible upon a showing that it is relevant to an issue in the proceeding, is what it purports to be, and has not been tampered with. Proof that an object has not been tampered with and is what it purports to be depends on the nature of the object and, in particular, whether the object is “patently identifiable,” or “fungible.”

**(a) Patently identifiable evidence.** When real evidence possesses unique or distinctive characteristics or markings and is not subject to material alteration that is not readily apparent, evidence identifying the object normally will constitute the requisite proof.

**(b) Fungible evidence.** When real evidence is fungible, capable of being altered, contaminated, or replaced, or is a sound recording, in addition to testimony identifying the object, proof that the proffered evidence has not been tampered with is required and may be satisfied by:

**(i) a “chain of custody” (i.e. testimony of those persons who handled the object or recording from the time it was obtained or recorded to the time it is presented in court to identify the object or recording and attest to its unchanged condition); or**

**(ii) proof of circumstances that provide reasonable assurances of the identity and unchanged condition of the object or recording.**

**(c) Sound recording. A sound recording of a conversation is admissible:**

**(i) upon testimony of a participant in, or a witness to, the conversation that the recording is unaltered and completely and accurately reproduces the conversation at issue; or**

**(ii) by a combination of testimony of a participant and an expert establishing the completeness, accuracy, and absence of alteration of the recording; or**

**(iii) in addition to evidence concerning the making of the recording and identification of the speakers, by establishing a “chain of custody” (i.e. testimony of those who handled the recording from the time it was made to the time it is presented in court to identify the recording and attest to its custody and unaltered condition).**

**(3) The Court may, in the exercise of its discretion, pursuant to Guide to New York Evidence rule 4.07, exclude real evidence.**

### **Note**

**Subdivision (1)** sets forth the definition of “real evidence.” Often, the tangible object or sound recording referred to in the definition of “real evidence” will have “played an actual role in the occurrence that is the subject matter of the litigation” (Barker & Alexander, *Evidence in New York State and Federal Courts* § 11:2 [2d ed]) and is introduced in evidence as proof of what it depicts or represents (*see e.g. People v Damiano*, 87 NY2d 477, 487 [1996] [52-pound boulder as the murder weapon]; *People v McGee*, 49 NY2d 48, 58-60 [1979] [tape recordings of conversations between defendants and police officers]; *Uss v Town of Oyster Bay*, 37 NY2d 639 [1975] [street sign that fell on plaintiff’s head]; *People v Mirenda*, 23 NY2d 439, 452-454 [1969] [sunglasses connected to

defendant]; *People v Flanigan*, 174 NY 356, 368 [1903] [iron bar used in escape from prison]).

By contrast, demonstrative evidence refers to a visual, graphic, or sound aid used to explain or illustrate a witness's testimony or the presentation of the proponent's case, but which does not by itself prove a fact at issue (*see* Guide to NY Evid rule 11.3). Although decisional law draws a distinction between real and demonstrative evidence, in practice, an object may in one instance be real evidence and in another demonstrative evidence. For example, a photograph may in one instance depict the occurrence at issue and in another simply illustrate the scene of the occurrence; and in some instances, the photograph may both depict the occurrence and provide an illustration of a witness's testimony about the occurrence. The Guide seeks to accommodate the intersecting aspects of real and demonstrative evidence by setting forth separate rules for specific types of evidence, such as photographs.

**Subdivision (2)** sets forth the requirements for the admissibility of real evidence derived from Court of Appeals decisional law (*People v McGee*, 49 NY2d 48, 59 [1979]; *People v Julian*, 41 NY2d 340, 342-343 [1977]; *People v Connelly*, 35 NY2d 171, 174 [1974]).

The core requirements of admissibility of real evidence as set forth in the rule are: (1) a showing that it is relevant to an issue in the proceeding (*see* Guide to NY Evid rule 4.01, Relevant Evidence); (2) that it is what it purports to be (*see* Guide to NY Evid rule 9.01 [1]); and (3) that it has not been tampered with.

As explained by *Julian*:

“To be admissible, any piece of real evidence must be shown to accurately portray a relevant and material element of the case. When real evidence is purported to be the actual object associated with a crime, the proof of accuracy has two elements. The offering party must establish, first, that the evidence is identical to that involved in the crime; and, second, that it has not been tampered with. In *People v Flanigan* (174 NY 356, 368), our court held that an iron bar was admissible because ‘[a]ll the witnesses who spoke upon the subject testified that it was the same bar and in substantially the same condition.’ When an ‘object possesses unique characteristics or markings and is not subject to material alteration which is not readily apparent’, a simple identification is sufficient to warrant admission. (*People v Connelly*, 35 NY2d 171, 174.) While a fungible item, such as a package of white powder, presents special difficulties in proving the necessary authenticity, the offering party is required to establish only the same two elements, namely, that it is the identical evidence and has not been tampered with” (41 NY2d at 342-343).

*McGee* followed *Julian*, adding that “the accuracy of the object itself is the focus of inquiry, which must be demonstrated by clear and convincing evidence” (*McGee* at 59). *McGee* reiterated *Julian*’s requirement that the “[a]ccuracy or authenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it,” explaining further that the foundation necessary to establish these elements “may differ according to the nature of the evidence sought to be admitted” (*id.* at 59-60; *see* Barker & Alexander, Evidence in New York State and Federal Courts § 11:2 [2d ed]). The differing methods of proof stem from whether the real evidence is patently identifiable or not, as explained in the note to subdivision (2) (a) and (b).

When the reason for offering the real evidence is to connect it to a party, included in the requirement of relevance is a showing that it is in fact connected to that party.

In *People v Mirinda* (23 NY2d 439 [1969]), for example, the People offered into evidence sunglasses found near the crime scene, arguing that they had been in the defendant’s possession. Admissibility of the sunglasses thus required “an evaluation of how close is the connection between the object and the defendant. If it is not so tenuous as to be improbable, it is admissible as is any other evidence which is relevant to an issue in the prosecution” (*id.* at 453; *see* Guide to NY Evid rule 4.01 [1]). The sunglasses were admissible in *Mirinda* because an accomplice testified that the glasses resembled ones he had once kept in his car, had offered to give to defendant prior to the crime while defendant was in the car, and had later discovered missing (*see People v Miller*, 17 NY2d 559, 560 [1966] [admission of a revolver was proper upon testimony that a revolver found on the person of one of three defendants “looks like” the revolver he held during the robbery]; *People v Neufeld*, 165 NY 43, 47 [1900] [a dark suit belonging to the defendant and found in his closet was properly admitted upon the testimony of witnesses that he wore a dark suit on the day of the crime]; *compare with People v Deverow*, 180 AD3d 1064, 1066 [2d Dept 2020] [“the Supreme Court should not have admitted into evidence a revolver that was recovered by the police from underneath a vehicle five to seven blocks away from the scene of the crime and approximately seven hours after the shooting”]; *People v Cherry*, 46 AD3d 1234, 1237 [3d Dept 2007] [error in a murder prosecution where the victims were killed by shotgun blasts to admit a bulletproof vest and ammunition seized from defendant’s grandmother’s house because those items “were not adequately connected to defendant”]).

**Subdivision (2) (a)** sets forth the foundational requirements of a patently identifiable tangible object. Again, *Julian* and *McGee* are the primary sources of the rule (*Julian*, 41 NY2d at 342-343 [“When an ‘object possesses unique characteristics or markings and is not subject to material alteration which is not readily apparent’, a simple identification is sufficient to warrant admission” (citation omitted)]; *McGee*, 49 NY2d at 59-60 [“Mere identification by one

familiar with the object, however, will be sufficient ‘when the object possesses unique characteristics or markings’ and any material alteration would be readily apparent” (citation omitted)]; *see People v Price*, 29 NY3d 472, 476 [2017] [“We have explained that ‘(t)he foundation necessary to establish (authenticity) may differ according to the nature of the evidence sought to be admitted’. For example, mere identification by one familiar with an item of evidence may suffice where the item is distinct or unique” (internal quotation marks and citations to *McGee* and *Julian* omitted)]; *Connelly* at 174 [“If the object was taken from the defendant or found at the scene of the crime, the foundation is laid once it is shown that the thing offered is the one recovered and that its condition is substantially unchanged”]; *Johnson v Michelin Tire Corp.*, 110 AD2d 824, 824 [2d Dept 1985] [a tire was admissible “ ‘merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition’ (McCormick, Evidence § 212, at 667 [3d ed])”].

When the offered evidence “possesses unique characteristics or markings and is not subject to material alteration which is not readily apparent,” the fact that it may have been possessed by several individuals who do not testify does not render it inadmissible if it has been sufficiently identified (*Connelly* at 174).

When the appellate courts refer to an object as being “substantially” in the same condition, they are undoubtedly referring to minor changes that do not affect the integrity and probative value of an object, e.g., a gun marked with police officer’s initials (*see People v Capers*, 105 AD2d 842 [2d Dept 1984]).

Examples of unique or distinctive items that have been admitted on the basis of a witness’s in-court identification include: 52-pound boulder that was alleged to be the murder weapon (*People v Damiano*, 87 NY2d 477 [1996]); a street sign that fell on plaintiff’s head (*Uss v Town of Oyster Bay*, 37 NY2d 639 [1975]); an iron bar (*Flanigan* at 358); a broken piece of machinery that caused plaintiff’s injury (*King v New York Cent. & Hudson Riv. R.R. Co.*, 72 NY 607 [1878]; *see Evidence in New York State and Federal Courts* § 11:2 [collecting cases]).

**Subdivision (2) (b)** is also derived from *Julian* where the Court of Appeals set forth a stricter foundation requirement for real evidence which is fungible and capable of being altered, contaminated, or replaced. In such a situation, the Court, concerned about the possibility of the condition of the object being changed to the prejudice of a party, required that the foundation be established by a chain of custody or other evidence providing “ ‘reasonable assurances of identity and unchanged condition’ ” (*Julian*, 41 NY2d at 343, quoting *People v Porter*, 46 AD2d 307, 311 [1974]; *Amaro v City of New York*, 40 NY2d 30, 35-36 [1976]; *People v Connelly* at 174 [a chain of custody is employed when “the evidence itself (such as drugs) is not patently identifiable or is capable of being replaced or altered”]).

The chain of custody requirement may be satisfied by testimony from all persons who have handled the object identifying the object and testifying to its custody and unchanged condition (*see Connelly*, 35 NY2d at 174). A complete chain of custody, however, is not always required. Gaps in the chain may be excused when “circumstances provide reasonable assurances of the identity and unchanged condition of the evidence” (*People v Hawkins*, 11 NY3d 484, 494 [2008]). Furthermore, any perceived weakness in the chain of custody goes to the weight of the evidence and not its admissibility (*People v Sarmiento*, 77 NY2d 976 [1991], *affg for reasons stated in mem at App Div* 168 AD2d 328 [1st Dept 1990]; *People v White*, 40 NY2d 797, 799-800 [1976]). “[R]easonable assurance[s] of the unchanged condition and identity of the [evidence]” can be established through expert testimony (*Palestrant v Garcia*, 244 AD2d 199, 200 [1st Dept 1997]) or circumstantial evidence (*see People v Beverly*, 5 AD3d 862 [3d Dept 2004] [seized bag of cocaine was sealed and seals remained intact]). Illustrative cases are collected in William C. Donnino, *New York Court of Appeals on Criminal Law § 17:3* (3d ed), *Evidence in New York State and Federal Courts § 11:2* and Martin, Capra & Rossi, *New York Evidence Handbook § 4.2* (chain of custody) (2d ed).

**Subdivision (2) (c)** is derived from *People v Ely* (68 NY2d 520 [1986]). There, the Court stated:

“The necessary foundation may be provided in a number of different ways. Testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered or of a witness to the conversation or to its recording, such as the machine operator, to the same effect are two well-recognized ways. Testimony of a participant in the conversation together with proof by an expert witness that after analysis of the tapes for splices or alterations there was, in his or her opinion, no indication of either is a third available method.

“A fourth, chain of custody, though not a requirement as to tape recordings, is also an available method. It requires, in addition to evidence concerning the making of the tapes and identification of the speakers, that within reasonable limits those who have handled the tape from its making to its production in court identify it and testify to its custody and unchanged condition” (*id.* at 527-528 [internal quotation marks and citations omitted]; *see People v Guidice*, 83 NY2d 630, 633-634 [1994] [“linesheet” entries (records related to intercepted phone conversations) made in the course of a police surveillance operation were admissible in evidence as business records to establish a “chain of custody” of the surveillance tapes]).

Any infirmity concerning a chain of custody goes to the weight of the evidence and not its admissibility (*McGee*, 49 NY2d at 60). Likewise, inaudibility

that is not so substantial that the accuracy of the recording is questionable goes to the weight to be given to the recording (*id.*).

Identification of the voices on the conversation is also required as part of the authentication process (*see* Guide to NY Evid rule 9.07 [2], [6], [7], [8]).

The Court of Appeals in *Ely* stated that the foundation requirement for the admissibility of sound recordings must be made by “clear and convincing” proof (68 NY2d at 522, 527). No rationale was provided for this stricter burden. In *Grucci v Grucci* (20 NY3d 893, 896-897 [2012]) the Court applied its rule in *Ely* to civil actions. At issue in *Grucci*, an action to recover damages for malicious prosecution, was the admissibility of an audiotape of a telephone conversation a witness had with the defendant. Quoting *Ely*, the Court stated: “The predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered” (*id.* at 897).

The admissibility of a recording of sounds, other than a conversation, such as noises, is not governed by subdivision (2) (c) but rather by subdivision (2) (b) (*see* Evidence in New York State and Federal Courts § 11:11 n 3).

**Subdivision (3)** makes clear that the admission of real evidence is subject to the discretion of the court and that such discretion may be exercised to exclude the proffered real evidence when its probative value is outweighed by countervailing factors as set forth in Guide to New York Evidence rule 4.07 (*see* *People v Acevedo*, 40 NY2d 701, 704 [1976] [observing that although non-testimonial proof may “play a positive and helpful role in the ascertainment of truth, courts must be alert to the danger that, when ill-designed or not properly relevant to the point at issue, instead of being helpful they may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial”]; *Hudson v Lansingburgh Cent. School Dist.*, 27 AD3d 1027, 1030 [3d Dept 2006] [admission of machine involved in accident in which portion of plaintiff’s finger was cut off was not error as there was no showing of prejudice to defendant]).