GUIDE TO NEW YORK EVIDENCE ARTICLE 11 REAL AND DEMONSTRATIVE EVIDENCE

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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 Mirenda* (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 *Mirenda* 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]).

11.03. Demonstrative Evidence

(1) Definition. "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.

(2) Admissibility. A visual or graphic aid proffered as demonstrative evidence may be exhibited to the trier of fact provided:

(a) it is a fair and accurate depiction or representation of what it purportedly depicts or represents; and

(b) it helps the factfinder to better understand the testimony of a witness or the presentation of a party's case.

(3) The court may, in the exercise of its discretion, exclude the offered demonstrative evidence pursuant to Guide to New York Evidence rule 4.07.

Note

Subdivision (1) broadly defines "demonstrative evidence." Any type of visual, graphic, or sound aid that is capable of explaining or illustrating oral testimony or the presentation of the proponent's case may constitute demonstrative evidence. In particular, New York has long approved the admission in evidence of a map, diagram, drawing, photograph, model and similar demonstrative evidence when the evidence is properly authenticated, is relevant to a particular issue, and would assist the finder of fact in understanding the case (*see People v Del Vermo*, 192 NY 470, 482-483 [1908] [model of knife]; *Hinlicky v Dreyfuss*, 6 NY3d 636, 645-647 [2006] [flow diagram]; *People v Russell*, 79 NY2d 1024, 1025 [1992] [bank surveillance photographs]; *People v Acevedo*, 40 NY2d 701, 704-705 [1976] [voice identification test]; *People v Mariner*, 147 AD2d 659 [2d Dept 1989] [in-court demonstration as to ability to observe drug transaction at a distance with binoculars]; *Norfleet v New York City Tr. Auth.*, 124 AD2d 715 [2d Dept 1986] [out-of-court reconstruction of accident]; *Feaster v New York City Tr. Auth.*, 172 AD2d 284, 285 [1st Dept 1991] [computer generated animation of accident]).

In *Del Vermo*, the Court of Appeals recognized the general usefulness of demonstrative evidence. The Court held that the trial court ruling allowing the People to place before the jury a knife as a "model" of the knife allegedly owned by the defendant was not error. The Court reasoned that the "district attorney was not restricted to verbal descriptions by the various witnesses in a case where the construction of the instrument was somewhat exceptional, and a much more accurate idea of its true character could be conveyed to the jury by means of a model than by word of mouth" (192 NY at 482). "It is a common practice in the courts of this state and probably throughout the Union to furnish such assistance to jurors by the employment of maps, diagrams, drawings and photographs as well as by models, the purpose being to enable the jury to use their eyes as well as their ears in order to gain an intelligent comprehension of the case" (*id*.).

Normally, "real evidence" is admitted for the truth of what it represents; on the other hand, "demonstrative evidence," while probative, is not necessarily admitted for its truth but rather as an "aid used to explain or illustrate a witness's testimony or the presentation of the proponent's case" (Guide to NY Evid rule 11.03 [1]; *see e.g. Hinlicky*, 6 NY3d at 645-646).

Subdivision (2) sets forth the foundation requirements for demonstrative evidence.

Subdivision (2) (a) requires authentication of the demonstrative evidence, that is, the proffered demonstrative evidence must fairly and accurately represent what its proponent claims it represent (*see People v Byrnes*, 33 NY2d 343, 347 [1974] [sufficient authentication shown where witness with personal knowledge identified the subjects and verified that the photographs accurately represented the subjects]; *People v Del Vermo*, 192 NY 470, 482-483 [1908] ["(I)t is enough to render a model receivable for purposes of illustration if it fairly represents the original object"]; *Archer v New York, New Haven & Hartford R.R. Co.*, 106 NY 589, 603 [1887] ["(D)rawings are uniformly received and are useful, if not indispensable, to enable courts and juries to comprehend readily the question in dispute as affected by evidence"]; *People v Kendall*, 254 AD2d 809 [4th Dept 1998] [expert witness was properly allowed to demonstrate mechanics of Shaken Baby Syndrome to explain how an infant could sustain massive brain injury with no apparent external body trauma]).

Notably, the offered demonstrative evidence need not be identical in all respects to what it illustrates or explains (*Del Vermo*, 192 NY at 482-483; *Flah's, Inc. v Rosette Elec.*, 155 AD2d 772, 773 [3d Dept 1989] ["In our view, the subject diagram was, at a minimum, a fair representation of the electrical system and was therefore admissible to explain or illustrate the testimony in order to aid the jury in comprehending the disputed issue"]; *Norfleet v New York City Tr. Auth.*, 124 AD2d 715, 716-717 [2d Dept 1986] ["The circumstances under which the (accident reconstruction) was conducted were sufficiently similar to those existing at the time of the incident to make the result achieved by the test relevant to the

issues"]). Variations or differences which are minor and inconsequential are not a basis for exclusion (*see Bolm v Triumph Corp.*, 71 AD2d 429, 438-439 [4th Dept 1979]).

Differences that cannot be explained or shown to be inconsequential, however, may preclude the proffered demonstrative evidence (*see People v Cohen*, 50 NY2d 908, 910 [1980] [trial court erred in admitting results of test-firing of a weapon at animal skins where there was no proof that the skins of the test subjects and that of the human victim were similar]; *but see Uss v Town of Oyster Bay*, 37 NY2d 639, 641 [1975] [the trial court "might have been justified in forbidding (defendants' counsel's) demonstration since it can be argued that the conditions in the courtroom were not substantially similar to those at the scene of the accident. On the other hand it was not error as a matter of law for the court, after the demonstration had taken place, to determine that plaintiffs' legitimate interests could be sufficiently protected by affording plaintiffs' counsel unrestricted opportunity for cross-examination. By effective exploitation of the dissimilarities between the model and the original it was thus open to counsel to minimize the significance to be attached to the demonstration"]).

Subdivision (2) (b) restates Court of Appeals precedent that requires a court to determine that the demonstrative evidence will be helpful to the trier of fact in better understanding the testimony of a witness or the presentation of the proponent's case (*People v Mirenda*, 23 NY2d 439, 453 [1969] [Court indicated that proffered demonstrative evidence is unnecessary where the trier of fact does not need its assistance in understanding the admitted evidence; thus, in the case before it, the Court noted "there was no need to offer a model because the particular object being discussed—to wit sunglasses—is not so difficult to visualize that a model is required to assist the jury in understanding the witness' testimony"]; *Archer v New York, New Haven & Hartford R.R. Co.*, 106 NY 589, 603 [1887] [maps, diagrams and drawing are "uniformly received . . . to enable courts and juries to comprehend readily the question in dispute"]; *Goldner v Kemper Ins. Co.*, 152 AD2d 936, 937 [4th Dept 1989] ["The trial court has broad discretion with respect to the admission of such evidence, especially with reference to the question of the similarity of conditions. The most broadly stated or recognized standard is whether the evidence tends to enlighten rather than to mislead the jury"]; *Kane v Triborough Bridge & Tunnel Auth.*, 8 AD3d 239, 242 [2d Dept 2004] [the Court held that the trial court erred "in failing to instruct the jury that the computer-generated animation was being admitted for the limited purpose of illustrating the expert's opinion as to the cause of the accident and that it was not to consider the computer-generated animation itself in determining what actually caused the accident"]).

Subdivision (3) makes clear that the admission of demonstrative evidence is subject to the discretion of the court and that such discretion may be exercised to exclude the proffered demonstrative evidence when its probative value is outweighed by countervailing factors as set forth in Guide to New York Evidence

rule 4.07 (*People v Acevedo*, 40 NY2d 701, 704 [1976] ["(T)hough tests and demonstrations in the courtroom are not lightly to be rejected when they would 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. When there is such a threat, the trial court itself must decide in the exercise of a sound discretion . . . whether the value of the evidence outweighs its potential for prejudice"]; *Uss*, 37 NY2d at 641 [where the proffered demonstrative evidence is "deceptive, sensational, disruptive of the trial, or purely conjectural" it should be precluded]).

11.05. Anatomically Correct Dolls (CPL 60.44)

Any person who is less than 16 years old may, in the discretion of the court and where helpful and appropriate, use an anatomically correct doll in testifying in a criminal proceeding based upon conduct prohibited by article 130 (Sex Offenses), article 260 (Offenses Relating to Children, Disabled Persons and Vulnerable Elderly Persons), or sections 255.25, 255.26, or 255.27 (Incest) of the Penal Law.

Note

This section reproduces verbatim CPL 60.44, while adding the text in parentheses (*see People v McGuire*, 152 AD2d 945 [4th Dept 1989] [approving use of anatomically correct dolls]; *People v Guce*, 164 AD2d 946, 950 [2d Dept 1990] [same]).

The statute has been held not to preclude the use of anatomically correct dolls for persons more than 16 years of age (*People v Herring*, 135 Misc 2d 487 [Sup Ct, Queens County 1987] [73-year-old aphasic victim of a sex offense]; *People v Rich*, 137 Misc 2d 474, 480 [Sup Ct, Monroe County 1987] [a victim of a sex offense over 16 years old]).

Irrespective of the statute, New York has long approved the admission in evidence of a map, diagram, drawing, photograph, model and similar demonstrative evidence when the evidence is properly authenticated, is relevant to a particular issue, and would assist the finder of fact in understanding of the case. (Guide to NY Evid rule 11.03; *People v Del Vermo*, 192 NY 470, 482-483 [1908]; *see People v Feld*, 305 NY 322, 331-332 [1953] [although a recording is the best evidence of its contents, permitting the jurors to hold a transcript of the recording to assist their understanding "was no different than allowing them to have . . . a photograph, a drawing, a map or a mechanical model"]; *People v Acevedo*, 40 NY2d 701, 704-705 [1976] ["both courts and commentators have noted, with respect to demonstrative evidence, that, when validly and carefully used, there is no class of evidence so convincing and satisfactory to a court or a jury. However, though tests and demonstrations in the courtroom are not lightly to be rejected when they would 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" [internal citations omitted]).

11.07. Child's Age (CPLR 4516)

Whenever it becomes necessary to determine the age of a child, he (or she) may be produced and exhibited to enable the court or jury to determine his (or her) age by a personal inspection.

Note

This rule restates verbatim CPLR 4516 (*see People v Kaminsky*, 208 NY 389, 394 [1913] [the rule (formerly a Penal Law statute) "is the general rule prevailing in nearly all jurisdictions apart from any statutory provision on the subject"]). The CPLR provision applies to the determination of the age of a "child," not an "adult" (*People v Blodgett*, 160 AD2d 1105, 1106 [3d Dept 1990]).

Penal Law § 263.25 allows for other methods of determining the age of a child, but only applies to a determination of the age of a child for the purposes of Penal Law article 263 (Sexual Performance by a Child). That statute states:

> "Whenever it becomes necessary for the purposes of this article to determine whether a child who participated in a sexual performance was under an age specified in this article, the court or jury may make such determination by any of the following: personal inspection of the child; inspection of a photograph or motion picture which constituted the sexual performance; oral testimony by a witness to the sexual performance as to the age of the child based upon the child's appearance; expert medical testimony based upon the appearance of the child in the sexual performance; and any other method authorized by any applicable provision of law or by the rules of evidence at common law."

11.09. Demonstration or Experiment

An in-court demonstration or experiment may, in the discretion of the court, be authorized when the result of the demonstration or experiment will be probative of an issue in the case; can reasonably be conducted in court under conditions substantially similar to the conditions at the time of the occurrence at issue; will not unreasonably delay or disrupt the trial; and will be helpful to, and will not mislead or confuse, the jury.

Note

This section is derived from decisional law (*see People v Barnes*, 80 NY2d 867, 868 [1992] ["The trial court did not abuse its discretion in allowing a demonstration in which court officers portrayed the defendant and the victim for the limited purpose of illustrating their relative positions, according to the witness' testimony, at the time of the shooting"]; *Uss v Town of Oyster Bay*, 37 NY2d 639, 641 [1975] ["the principles of mechanics involved in this demonstration were well within the experience and comprehension of an average juror. Thus its probative worth could be independently weighed by the jurors themselves. Nor was the demonstration deceptive, sensational, disruptive of the trial, or purely conjectural"]; *People v Buchanan*, 145 NY 1, 26 [1895] ["As the theory of the prosecution was that morphine was then given (to kill the deceased), it was competent to show, by one experienced in the art, how the morphine could be combined with the prescription of the physician; that there would be no change in color; (and) that the taste would be bitter (accounting for the victim's reaction on taking the drug)"]; *see also* Barker & Alexander, Evidence in New York State and Federal Courts § 11:18, Experiments and Demonstrations (2d ed); Michael J. Hutter, *Admissibility of Demonstrations and Experiments*, NYLJ, Apr. 1, 2020).

In general, as *People v Acevedo* (40 NY2d 701, 704-705 [1976] [citations omitted]) explained, "though tests and demonstrations in the courtroom are not lightly to be rejected when they would 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. When there is such a threat, the trial court itself must decide in the exercise of a

sound discretion based on the nature of the proffered proof and the context in which it is offered, whether the value of the evidence outweighs its potential for prejudice."

In *Acevedo*, the identification of the defendant as a masked robber was based on the complainant's recognition of his voice on the day of the robbery, based on "her excellent prior knowledge of his voice but also on 20 to 25 minutes of conversation during the robbery itself" (40 NY2d at 705). The court properly denied a defense proposal for a voice identification "test" of the complainant's ability to identify the voice of the defendant's brother. The test "would not have duplicated the circumstances which surrounded [the complainant's] voice identification of the defendant" (*id*.). The test of the complainant's ability to recognize the voice of defendant's brother "was to take place two years after she had last heard it"; there was no proffer of the number of interchanges the complainant had with the brother; and the identification of the brother's voice was "to depend on the sound of two short sentences alone" (*id*.). *See also People v. Scarola*, 71 N.Y.2d 769 [1988] [voice exemplars were not admissible because "the foundation for the admission of the evidence, in each case did not rule out the possibility that defendants could feign the existence of a speech defect"].

The probative value of the evidence may outweigh any potential for prejudice from inconsequential dissimilarities; in that instance the dissimilarities affect the weight of the evidence, not its admissibility (*see Uss v Town of Oyster Bay*, 37 NY2d 639, 641 [1975] [the trial court "might have been justified in forbidding (defendants' counsel's) demonstration since it can be argued that the conditions in the courtroom were not substantially similar to those at the scene of the accident. On the other hand it was not error as a matter of law for the court, after the demonstration had taken place, to determine that plaintiffs' legitimate interests could be sufficiently protected by affording plaintiffs' counsel unrestricted opportunity for cross-examination. By effective exploitation of the dissimilarities between the model and the original it was thus open to counsel to minimize the significance to be attached to the demonstration"]).

Care must be taken, however, in determining that the dissimilarities are inconsequential (*see Styles v General Motors Corp*., 20 AD3d 338, 341 [1st Dept 2005, concurring op] ["While the test conditions need not be identical, there must be sufficient similarity to permit the inference that the results of the experiment shed light on what occurred. . . . Where (the proponent of the test) fails to make the necessary showing of similarity, the experimental evidence must be excluded"]; *People v Cohen*, 50 NY2d 908, 910 [1980] ["If at the new trial the People offer

(again) to show the effects of a gun shot from this weapon on animal tissue, they must first establish that there is a substantial similarity between the skin and tissue of the test subject and that of a human victim"]).

11.10. Exhibits to the Jury (CPL 310.20 [1])

Upon retiring to deliberate, the jurors may take with them any exhibits received in evidence at the trial which the court, after according the parties an opportunity to be heard upon the matter, in its discretion permits them to take.

Note

This rule reproduces verbatim CPL 310.20 (1).

While there is no statute on the subject relating to civil proceedings, decisional law, albeit sparse, supports the application of the rule set forth in CPL 310.20 (1) in civil proceedings as well (*see Howland v Willetts*, 9 NY 170, 175 [1853] [when the jury retired to deliberate, it was not error for the trial court to allow them to take a "deposition" into the jury room]; *Levy v Corn*, 191 App Div 56, 57 [1st Dept 1920] ["Whether exhibits are to be taken by the jury rests in the sound discretion of the trial judge"; in this civil case, the consent of the defendant "was not necessary"]; *Raynolds v Vinier*, 125 App Div 18, 20 [4th Dept 1908] [The jury over the objection of the defendant was properly permitted to take to the jury room the pleadings in the action which were in evidence because "(w)here a document is in evidence it rests in the sound discretion of the court whether it is to be taken by the jurors when in their deliberations"]).

Rule 11.17 permits the trial court, in its discretion, to provide a deliberating jury with "any exhibits received in evidence." (*See People v Bouton*, 50 NY2d 130, 137 [1980] ["CPL 310.20 (subd 1) grants the trial court discretion to allow the jury to view any exhibit received in evidence at trial, but no provision authorizes submission of unadmitted exhibits. Departure from that rule affects important rights"]; *but see People v Martell*, 91 NY2d 782, 785 [1998] [no error in submitting to the jury, at its request, a list specifying which exhibit was relevant to each of the counts in the indictment].)

Although trial judges normally wait for a deliberating jury to request an exhibit before sending them any exhibit, there is no requirement that the court must do so. The only statutory predicate to giving exhibits to the jury is to provide the parties an opportunity to be heard as to whether it should be done.

A court's careful exercise of its discretion may be particularly warranted when one or more exhibits include a weapon or drugs. While either item may be given to a deliberating jury, with respect to a weapon, a trial court may consider whether, given the nature of the weapon and circumstances, a "safer alternative" would be appropriate, such as allowing the jurors to see the weapon in court, "with a court officer exhibiting the weapon to each juror, one at a time" (William

C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 310.20). The same alternative procedure may be appropriate when the exhibit contains drugs that "are not in a sealed container." (*Id.*)

Electronic evidence that needs equipment and an operator to view or listen to presents special issues. The Appellate Division approved "permitting the jury to view the store videotape in the jury room during deliberations with the technical assistance of court officers." (*People v Sampson*, 289 AD2d 1022, 1023 [4th Dept 2001].) An alternative, particularly if the evidence can be presented on a laptop and does not contain inadmissible portions, is to send the laptop into the jury room and designate one juror to operate it. "Using a juror to operate the laptop rather than a court officer avoids the potential error of an impermissible communication" (William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 310.20).

11.11 Person's Appearance, Condition, or Capability Exhibited[1]

When a person's appearance, condition, or capability is relevant to an issue in a proceeding, the appropriate aspect of the person's appearance, condition, or capability may be exhibited to the trier of fact, provided the proffered exhibition is probative and the probative value in exhibiting the person's appearance, condition, or capability is not outweighed by undue prejudice.

Note

This rule is derived from long-standing Court of Appeals precedent (*Harvey v Mazal Am. Partners*, 79 NY2d 218, 223-226 [1992] [exhibiting brain-damaged plaintiff, who was not sworn as witness, and asking him questions to show his condition]; *de Baillet-Latour v de Baillet-Latour*, 301 NY 428, 433-434 [1950] [in annulment action wife was allowed to exhibit conspicuous scars on her body, the existence of which her husband had denied]; *Clark v Brooklyn Hgts. R.R. Co.*, 177 NY 359 [1904] [no error present where trial court permitted the plaintiff, who had been injured in a collision, to leave the witness stand assisted and to exhibit himself to the jury in the act of writing his name and taking a drink of water as the display was designed to illustrate the plaintiff's testimony that he was afflicted by a tremor and could use his hands only with difficulty]; *Mulhado v Brooklyn City R.R. Co.*, 30 NY 370, 372 [1864] [exhibition of injured arm "tended to make the description of the injury more intelligible"]).

In *Harvey*, the Court was concerned that an exhibition of a party's injuries "when ill-designed or not properly relevant to the point at issue, instead of being helpful" could "mislead, confuse, divert or otherwise prejudice the purposes of the trial" (*Harvey* at 224). In that instance, the Court instructed that "the trial court itself must decide in the exercise of a sound discretion based on the nature of the proffered proof and the context in which it is offered, whether the value of the evidence outweighs its potential for prejudice" (*id.*). The trial court in *Harvey* permitted the plaintiff, who was not sworn, to appear before the jury and answer a series of questions that demonstrated the plaintiff's loss of cognitive abilities. In deciding to permit the questioning, the trial judge noted that she had balanced the value of showing the jury the plaintiff's injuries against the potential for prejudice and emotional response. The Court of Appeals held that this balancing was without question an exercise of judicial discretion, and there was no basis to disturb that decision. "Although . . . the preferred practice would have been for the Trial Judge to examine the plaintiff in camera, outside the presence of the jury, before

permitting the questioning," the failure to do so did not constitute an abuse of discretion in *Harvey* (*id.* at 224).

Critically, as stated in the rule, before a person's appearance, condition, or capability may be exhibited, that appearance, condition, or capability must be shown to be "relevant" to an issue in the proceeding (*see* Guide to NY Evid rule 4.01) and probative of the issue (*People v Rodriguez*, 64 NY2d 738, 741 [1984]).

In *Rodriguez*, for example, the eyewitness apparently did not describe the perpetrator as having tattooed hands and the defendant requested to display his tattooed hands to the jury or to have his counsel testify to the appearance of his hands four days after the theft. The court properly denied the request "inasmuch as defendant offered no proof regarding the presence of the tattoos on the date in issue" (*id*. at 741). *Rodriguez* also held that the court properly refused "to allow defendant to testify on this point, which testimony clearly would implicate his credibility, without being subject to cross-examination concerning his past convictions" (*id*.; *see People v Robinson*, 100 AD3d 934, 935 [2d Dept 2012] [similarly holding that the defendant "failed to lay a proper foundation" to show scars on his torso and abdomen, "offering no proof that the scars on his torso and abdomen existed on the date of the alleged rape"; and that the court's denial of his application to testify about his scars was also properly denied "where he conditioned his application upon the ability to testify without being subject to cross-examination"]).

A defendant, however, is not required to lay a foundation to exhibit his or appearance or condition by personally testifying; the defendant may present a witness or exhibits that properly lay the foundation (*People v Shields*, 81 AD2d 870, 871 [2d Dept 1981] [where the rape victim did not mention a 14- to 16-inch scar on the defendant's abdominal region, the court erred in not permitting the defendant's sister to testify along with hospital records to prove that the defendant had been scarred prior to the date in question]). Once the proper foundation is laid, "it would be proper to permit the defendant to exhibit the [relevant condition, such as tattoos] to the jury without being subject to substantive cross-examination" (*People v Scarola*, 71 NY2d 769, 778 [1988]).

A defendant's request to provide a jury with a voice exemplar may raise concerns of "trustworthiness" (*Scarola*, 71 NY2d at 777). In *Scarola*, each defendant sought "to refute the complainant's identification by demonstrating to the jury that he had a speech impediment. . . . The relevance of the evidence they offered was not in what they would say, but in how they would say it" (*id*. at 776). The "trial courts did not abuse their discretion in denying defendants permission to give the proposed exemplars. . . . [T]he foundation for the admission of the evidence . . . did not rule out the possibility that defendants could feign the existence of a speech defect" (*id.* at 778).

Requiring a defendant to produce real evidence may raise a question about whether a defendant's Fifth Amendment privilege against compelled self-incrimination has been violated (*People v Havrish*, 8 NY3d 389, 391 [2007] [the Fifth Amendment privilege was violated by a court's order of protection that directed the defendant to surrender an unlicensed handgun]).

Normally, however, the Fifth Amendment "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. Similarly, a defendant can be ordered to participate in a lineup or to provide a handwriting exemplar [or to submit to] field sobriety tests conducted during a traffic stop [or to] display his upper body tattoos" (*id.* at 393 [internal quotation marks and citations omitted]; *see People v Hill*, 82 AD3d 1715, 1716 [4th Dept 2011] ["The Fifth Amendment privilege against self-incrimination does not preclude a defendant from being required to reveal the physical characteristics of his or her body"]).

Even where the People introduced photographs of a defendant's upper body tattoos that contained words evincing hate as evidence of the defendant's motive for committing a hate crime, there was no violation of the Fifth Amendment privilege (*People v Slavin*, 1 NY3d 392 [2004]). "The tattoos were physical characteristics, not testimony forced from his mouth (*see Schmerber v California*, 384 US 757, 764-765 [1966]; *People v Berg*, 92 NY2d 701, 704 [1999]). However much the tattoos may have reflected defendant's inner thoughts, the People did not compel him to create them in the first place" (*id.* at 394-395).

[1] In May 2023, the rule was amended to add the proviso and to amplify the Note.

11.15. Viewing of Premises (CPLR 4110-c; CPL 270.50)

(1) Civil proceeding.

When during the course of a trial the court is of the opinion that a viewing or observation by the jury of the premises or place where alleged injuries to person or property were sustained in an accident or occurrence claimed to have been the cause thereof or of any other premises or place involved in the case will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the commencement of the summations, order that the jury be conducted to such premises or place for such purpose in accordance with the provisions of this rule.

(2) Criminal proceeding.

When the court is of the opinion that a viewing or observation by the jury of the premises or place where an offense on trial was allegedly committed, or of any other premises or place involved in the case, will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the commencement of the summations, order that the jury be conducted to such premises or place for such purpose in accordance with the provisions of this rule.

(3) Common Procedural Requirements.

(a) The jury must be kept together throughout under the supervision of an appropriate public servant or servants appointed by the court, and the court itself must be present throughout. *In a civil proceeding,* the parties to the action and counsel for them may as a matter of right be present throughout, but such right may be waived. *In a criminal proceeding,* the

prosecutor, the defendant, and counsel for the defendant may as a matter of right be present throughout, but such right may be waived.

(b) The purpose of such an inspection is solely to permit visual observation by the jury of the premises or place in question, and neither the court, the parties, counsel nor the jurors may engage in discussion or argumentation concerning the significance or implications of anything under observation or concerning any issue in the case.

Note

This rule reproduces CPLR 4110-c and CPL 270.50. Subdivision (1) of each statute is reproduced in subdivisions (1) and (2) of this rule, except that the last word, "rule," in each subdivision is substituted for the word "section" in each statute. Subdivision (2) of each statute is reproduced in subdivision (3) (a) of this rule, with two minor exceptions: the opening words, "In such case," are omitted and the words in italics are added. Subdivision (3) of each statute is reproduced in subdivision (3) (b) of this rule.

Rule 11.15 authorizes the court in both civil and criminal proceedings to order in its discretion that the jury be taken to a physical site that is at issue in a case, and given the opportunity to observe that site, with parties and counsel present, but without discussion or argument at the site. The court may order an inspection upon a finding that it "will be helpful to the jury in determining any material factual issue." (*See People v Alston*, 24 AD3d 391, 391 [1st Dept 2005] [court properly exercised its discretion in denying defendant's request for a visit to the crime scene; "(p)hotographs of the scene, as well as the testimony of the eyewitnesses and defendant's investigator, permitted the jury to determine whether the eyewitnesses were able to make reliable identifications of defendant from their nearby vantage point"]; *People v Wilson*, 225 AD2d 497, 498 [1st Dept 1996] [the trial court properly denied a deliberating jury's request to see the apartment window through which an eyewitness viewed the crime scene when the court discovered that there had been a "substantial change" in the condition of the window by "the addition of an air conditioner and the partial destruction of the window bars"]; *People v Rao*, 107 AD2d 720, 720 [2d Dept 1985] [denial of a request to view the scene of the crime was not an abuse of discretion as the crime had occurred in late November and the trial took place in late June;

consequently, there were alterations in the natural light and artificial illumination from street lamps and store fronts, and the foliage on trees was substantially different]; *People v Hamel*, 96 AD2d 644, 645 [3d Dept 1983] [ordering a view of the apartment where murder occurred was a proper exercise of discretion as "layout of (shooting victim's) apartment was sufficiently uncommon that reconstruction of the location of each room from verbal descriptions and photographs alone would create a perplexing image for the jurors"].)

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 Mirenda* (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 *Mirenda* 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]).

11.03. Demonstrative Evidence

(1) Definition. "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.

(2) Admissibility. A visual or graphic aid proffered as demonstrative evidence may be exhibited to the trier of fact provided:

(a) it is a fair and accurate depiction or representation of what it purportedly depicts or represents; and

(b) it helps the factfinder to better understand the testimony of a witness or the presentation of a party's case.

(3) The court may, in the exercise of its discretion, exclude the offered demonstrative evidence pursuant to Guide to New York Evidence rule 4.07.

Note

Subdivision (1) broadly defines "demonstrative evidence." Any type of visual, graphic, or sound aid that is capable of explaining or illustrating oral testimony or the presentation of the proponent's case may constitute demonstrative evidence. In particular, New York has long approved the admission in evidence of a map, diagram, drawing, photograph, model and similar demonstrative evidence when the evidence is properly authenticated, is relevant to a particular issue, and would assist the finder of fact in understanding the case (*see People v Del Vermo*, 192 NY 470, 482-483 [1908] [model of knife]; *Hinlicky v Dreyfuss*, 6 NY3d 636, 645-647 [2006] [flow diagram]; *People v Russell*, 79 NY2d 1024, 1025 [1992] [bank surveillance photographs]; *People v Acevedo*, 40 NY2d 701, 704-705 [1976] [voice identification test]; *People v Mariner*, 147 AD2d 659 [2d Dept 1989] [in-court demonstration as to ability to observe drug transaction at a distance with binoculars]; *Norfleet v New York City Tr. Auth.*, 124 AD2d 715 [2d Dept 1986] [out-of-court reconstruction of accident]; *Feaster v New York City Tr. Auth.*, 172 AD2d 284, 285 [1st Dept 1991] [computer generated animation of accident]).

In *Del Vermo*, the Court of Appeals recognized the general usefulness of demonstrative evidence. The Court held that the trial court ruling allowing the People to place before the jury a knife as a "model" of the knife allegedly owned by the defendant was not error. The Court reasoned that the "district attorney was not restricted to verbal descriptions by the various witnesses in a case where the construction of the instrument was somewhat exceptional, and a much more accurate idea of its true character could be conveyed to the jury by means of a model than by word of mouth" (192 NY at 482). "It is a common practice in the courts of this state and probably throughout the Union to furnish such assistance to jurors by the employment of maps, diagrams, drawings and photographs as well as by models, the purpose being to enable the jury to use their eyes as well as their ears in order to gain an intelligent comprehension of the case" (*id*.).

Normally, "real evidence" is admitted for the truth of what it represents; on the other hand, "demonstrative evidence," while probative, is not necessarily admitted for its truth but rather as an "aid used to explain or illustrate a witness's testimony or the presentation of the proponent's case" (Guide to NY Evid rule 11.03 [1]; *see e.g. Hinlicky*, 6 NY3d at 645-646).

Subdivision (2) sets forth the foundation requirements for demonstrative evidence.

Subdivision (2) (a) requires authentication of the demonstrative evidence, that is, the proffered demonstrative evidence must fairly and accurately represent what its proponent claims it represent (*see People v Byrnes*, 33 NY2d 343, 347 [1974] [sufficient authentication shown where witness with personal knowledge identified the subjects and verified that the photographs accurately represented the subjects]; *People v Del Vermo*, 192 NY 470, 482-483 [1908] ["(I)t is enough to render a model receivable for purposes of illustration if it fairly represents the original object"]; *Archer v New York, New Haven & Hartford R.R. Co.*, 106 NY 589, 603 [1887] ["(D)rawings are uniformly received and are useful, if not indispensable, to enable courts and juries to comprehend readily the question in dispute as affected by evidence"]; *People v Kendall*, 254 AD2d 809 [4th Dept 1998] [expert witness was properly allowed to demonstrate mechanics of Shaken Baby Syndrome to explain how an infant could sustain massive brain injury with no apparent external body trauma]).

Notably, the offered demonstrative evidence need not be identical in all respects to what it illustrates or explains (*Del Vermo*, 192 NY at 482-483; *Flah's, Inc. v Rosette Elec.*, 155 AD2d 772, 773 [3d Dept 1989] ["In our view, the subject diagram was, at a minimum, a fair representation of the electrical system and was therefore admissible to explain or illustrate the testimony in order to aid the jury in comprehending the disputed issue"]; *Norfleet v New York City Tr. Auth.*, 124 AD2d 715, 716-717 [2d Dept 1986] ["The circumstances under which the (accident reconstruction) was conducted were sufficiently similar to those existing at the time of the incident to make the result achieved by the test relevant to the

issues"]). Variations or differences which are minor and inconsequential are not a basis for exclusion (*see Bolm v Triumph Corp.*, 71 AD2d 429, 438-439 [4th Dept 1979]).

Differences that cannot be explained or shown to be inconsequential, however, may preclude the proffered demonstrative evidence (*see People v Cohen*, 50 NY2d 908, 910 [1980] [trial court erred in admitting results of test-firing of a weapon at animal skins where there was no proof that the skins of the test subjects and that of the human victim were similar]; *but see Uss v Town of Oyster Bay*, 37 NY2d 639, 641 [1975] [the trial court "might have been justified in forbidding (defendants' counsel's) demonstration since it can be argued that the conditions in the courtroom were not substantially similar to those at the scene of the accident. On the other hand it was not error as a matter of law for the court, after the demonstration had taken place, to determine that plaintiffs' legitimate interests could be sufficiently protected by affording plaintiffs' counsel unrestricted opportunity for cross-examination. By effective exploitation of the dissimilarities between the model and the original it was thus open to counsel to minimize the significance to be attached to the demonstration"]).

Subdivision (2) (b) restates Court of Appeals precedent that requires a court to determine that the demonstrative evidence will be helpful to the trier of fact in better understanding the testimony of a witness or the presentation of the proponent's case (*People v Mirenda*, 23 NY2d 439, 453 [1969] [Court indicated that proffered demonstrative evidence is unnecessary where the trier of fact does not need its assistance in understanding the admitted evidence; thus, in the case before it, the Court noted "there was no need to offer a model because the particular object being discussed—to wit sunglasses—is not so difficult to visualize that a model is required to assist the jury in understanding the witness' testimony"]; *Archer v New York, New Haven & Hartford R.R. Co.*, 106 NY 589, 603 [1887] [maps, diagrams and drawing are "uniformly received . . . to enable courts and juries to comprehend readily the question in dispute"]; *Goldner v Kemper Ins. Co.*, 152 AD2d 936, 937 [4th Dept 1989] ["The trial court has broad discretion with respect to the admission of such evidence, especially with reference to the question of the similarity of conditions. The most broadly stated or recognized standard is whether the evidence tends to enlighten rather than to mislead the jury"]; *Kane v Triborough Bridge & Tunnel Auth.*, 8 AD3d 239, 242 [2d Dept 2004] [the Court held that the trial court erred "in failing to instruct the jury that the computer-generated animation was being admitted for the limited purpose of illustrating the expert's opinion as to the cause of the accident and that it was not to consider the computer-generated animation itself in determining what actually caused the accident"]).

Subdivision (3) makes clear that the admission of demonstrative evidence is subject to the discretion of the court and that such discretion may be exercised to exclude the proffered demonstrative evidence when its probative value is outweighed by countervailing factors as set forth in Guide to New York Evidence

rule 4.07 (*People v Acevedo*, 40 NY2d 701, 704 [1976] ["(T)hough tests and demonstrations in the courtroom are not lightly to be rejected when they would 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. When there is such a threat, the trial court itself must decide in the exercise of a sound discretion . . . whether the value of the evidence outweighs its potential for prejudice"]; *Uss*, 37 NY2d at 641 [where the proffered demonstrative evidence is "deceptive, sensational, disruptive of the trial, or purely conjectural" it should be precluded]).

11.05. Anatomically Correct Dolls (CPL 60.44)

Any person who is less than 16 years old may, in the discretion of the court and where helpful and appropriate, use an anatomically correct doll in testifying in a criminal proceeding based upon conduct prohibited by article 130 (Sex Offenses), article 260 (Offenses Relating to Children, Disabled Persons and Vulnerable Elderly Persons), or sections 255.25, 255.26, or 255.27 (Incest) of the Penal Law.

Note

This section reproduces verbatim CPL 60.44, while adding the text in parentheses (*see People v McGuire*, 152 AD2d 945 [4th Dept 1989] [approving use of anatomically correct dolls]; *People v Guce*, 164 AD2d 946, 950 [2d Dept 1990] [same]).

The statute has been held not to preclude the use of anatomically correct dolls for persons more than 16 years of age (*People v Herring*, 135 Misc 2d 487 [Sup Ct, Queens County 1987] [73-year-old aphasic victim of a sex offense]; *People v Rich*, 137 Misc 2d 474, 480 [Sup Ct, Monroe County 1987] [a victim of a sex offense over 16 years old]).

Irrespective of the statute, New York has long approved the admission in evidence of a map, diagram, drawing, photograph, model and similar demonstrative evidence when the evidence is properly authenticated, is relevant to a particular issue, and would assist the finder of fact in understanding of the case. (Guide to NY Evid rule 11.03; *People v Del Vermo*, 192 NY 470, 482-483 [1908]; *see People v Feld*, 305 NY 322, 331-332 [1953] [although a recording is the best evidence of its contents, permitting the jurors to hold a transcript of the recording to assist their understanding "was no different than allowing them to have . . . a photograph, a drawing, a map or a mechanical model"]; *People v Acevedo*, 40 NY2d 701, 704-705 [1976] ["both courts and commentators have noted, with respect to demonstrative evidence, that, when validly and carefully used, there is no class of evidence so convincing and satisfactory to a court or a jury. However, though tests and demonstrations in the courtroom are not lightly to be rejected when they would 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" [internal citations omitted]).

11.07. Child's Age (CPLR 4516)

Whenever it becomes necessary to determine the age of a child, he (or she) may be produced and exhibited to enable the court or jury to determine his (or her) age by a personal inspection.

Note

This rule restates verbatim CPLR 4516 (*see People v Kaminsky*, 208 NY 389, 394 [1913] [the rule (formerly a Penal Law statute) "is the general rule prevailing in nearly all jurisdictions apart from any statutory provision on the subject"]). The CPLR provision applies to the determination of the age of a "child," not an "adult" (*People v Blodgett*, 160 AD2d 1105, 1106 [3d Dept 1990]).

Penal Law § 263.25 allows for other methods of determining the age of a child, but only applies to a determination of the age of a child for the purposes of Penal Law article 263 (Sexual Performance by a Child). That statute states:

> "Whenever it becomes necessary for the purposes of this article to determine whether a child who participated in a sexual performance was under an age specified in this article, the court or jury may make such determination by any of the following: personal inspection of the child; inspection of a photograph or motion picture which constituted the sexual performance; oral testimony by a witness to the sexual performance as to the age of the child based upon the child's appearance; expert medical testimony based upon the appearance of the child in the sexual performance; and any other method authorized by any applicable provision of law or by the rules of evidence at common law."

11.09. Demonstration or Experiment

An in-court demonstration or experiment may, in the discretion of the court, be authorized when the result of the demonstration or experiment will be probative of an issue in the case; can reasonably be conducted in court under conditions substantially similar to the conditions at the time of the occurrence at issue; will not unreasonably delay or disrupt the trial; and will be helpful to, and will not mislead or confuse, the jury.

Note

This section is derived from decisional law (*see People v Barnes*, 80 NY2d 867, 868 [1992] ["The trial court did not abuse its discretion in allowing a demonstration in which court officers portrayed the defendant and the victim for the limited purpose of illustrating their relative positions, according to the witness' testimony, at the time of the shooting"]; *Uss v Town of Oyster Bay*, 37 NY2d 639, 641 [1975] ["the principles of mechanics involved in this demonstration were well within the experience and comprehension of an average juror. Thus its probative worth could be independently weighed by the jurors themselves. Nor was the demonstration deceptive, sensational, disruptive of the trial, or purely conjectural"]; *People v Buchanan*, 145 NY 1, 26 [1895] ["As the theory of the prosecution was that morphine was then given (to kill the deceased), it was competent to show, by one experienced in the art, how the morphine could be combined with the prescription of the physician; that there would be no change in color; (and) that the taste would be bitter (accounting for the victim's reaction on taking the drug)"]; *see also* Barker & Alexander, Evidence in New York State and Federal Courts § 11:18, Experiments and Demonstrations (2d ed); Michael J. Hutter, *Admissibility of Demonstrations and Experiments*, NYLJ, Apr. 1, 2020).

In general, as *People v Acevedo* (40 NY2d 701, 704-705 [1976] [citations omitted]) explained, "though tests and demonstrations in the courtroom are not lightly to be rejected when they would 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. When there is such a threat, the trial court itself must decide in the exercise of a

sound discretion based on the nature of the proffered proof and the context in which it is offered, whether the value of the evidence outweighs its potential for prejudice."

In *Acevedo*, the identification of the defendant as a masked robber was based on the complainant's recognition of his voice on the day of the robbery, based on "her excellent prior knowledge of his voice but also on 20 to 25 minutes of conversation during the robbery itself" (40 NY2d at 705). The court properly denied a defense proposal for a voice identification "test" of the complainant's ability to identify the voice of the defendant's brother. The test "would not have duplicated the circumstances which surrounded [the complainant's] voice identification of the defendant" (*id*.). The test of the complainant's ability to recognize the voice of defendant's brother "was to take place two years after she had last heard it"; there was no proffer of the number of interchanges the complainant had with the brother; and the identification of the brother's voice was "to depend on the sound of two short sentences alone" (*id*.). *See also People v. Scarola*, 71 N.Y.2d 769 [1988] [voice exemplars were not admissible because "the foundation for the admission of the evidence, in each case did not rule out the possibility that defendants could feign the existence of a speech defect"].

The probative value of the evidence may outweigh any potential for prejudice from inconsequential dissimilarities; in that instance the dissimilarities affect the weight of the evidence, not its admissibility (*see Uss v Town of Oyster Bay*, 37 NY2d 639, 641 [1975] [the trial court "might have been justified in forbidding (defendants' counsel's) demonstration since it can be argued that the conditions in the courtroom were not substantially similar to those at the scene of the accident. On the other hand it was not error as a matter of law for the court, after the demonstration had taken place, to determine that plaintiffs' legitimate interests could be sufficiently protected by affording plaintiffs' counsel unrestricted opportunity for cross-examination. By effective exploitation of the dissimilarities between the model and the original it was thus open to counsel to minimize the significance to be attached to the demonstration"]).

Care must be taken, however, in determining that the dissimilarities are inconsequential (*see Styles v General Motors Corp*., 20 AD3d 338, 341 [1st Dept 2005, concurring op] ["While the test conditions need not be identical, there must be sufficient similarity to permit the inference that the results of the experiment shed light on what occurred. . . . Where (the proponent of the test) fails to make the necessary showing of similarity, the experimental evidence must be excluded"]; *People v Cohen*, 50 NY2d 908, 910 [1980] ["If at the new trial the People offer

(again) to show the effects of a gun shot from this weapon on animal tissue, they must first establish that there is a substantial similarity between the skin and tissue of the test subject and that of a human victim"]).

11.10. Exhibits to the Jury (CPL 310.20 [1])

Upon retiring to deliberate, the jurors may take with them any exhibits received in evidence at the trial which the court, after according the parties an opportunity to be heard upon the matter, in its discretion permits them to take.

Note

This rule reproduces verbatim CPL 310.20 (1).

While there is no statute on the subject relating to civil proceedings, decisional law, albeit sparse, supports the application of the rule set forth in CPL 310.20 (1) in civil proceedings as well (*see Howland v Willetts*, 9 NY 170, 175 [1853] [when the jury retired to deliberate, it was not error for the trial court to allow them to take a "deposition" into the jury room]; *Levy v Corn*, 191 App Div 56, 57 [1st Dept 1920] ["Whether exhibits are to be taken by the jury rests in the sound discretion of the trial judge"; in this civil case, the consent of the defendant "was not necessary"]; *Raynolds v Vinier*, 125 App Div 18, 20 [4th Dept 1908] [The jury over the objection of the defendant was properly permitted to take to the jury room the pleadings in the action which were in evidence because "(w)here a document is in evidence it rests in the sound discretion of the court whether it is to be taken by the jurors when in their deliberations"]).

Rule 11.17 permits the trial court, in its discretion, to provide a deliberating jury with "any exhibits received in evidence." (*See People v Bouton*, 50 NY2d 130, 137 [1980] ["CPL 310.20 (subd 1) grants the trial court discretion to allow the jury to view any exhibit received in evidence at trial, but no provision authorizes submission of unadmitted exhibits. Departure from that rule affects important rights"]; *but see People v Martell*, 91 NY2d 782, 785 [1998] [no error in submitting to the jury, at its request, a list specifying which exhibit was relevant to each of the counts in the indictment].)

Although trial judges normally wait for a deliberating jury to request an exhibit before sending them any exhibit, there is no requirement that the court must do so. The only statutory predicate to giving exhibits to the jury is to provide the parties an opportunity to be heard as to whether it should be done.

A court's careful exercise of its discretion may be particularly warranted when one or more exhibits include a weapon or drugs. While either item may be given to a deliberating jury, with respect to a weapon, a trial court may consider whether, given the nature of the weapon and circumstances, a "safer alternative" would be appropriate, such as allowing the jurors to see the weapon in court, "with a court officer exhibiting the weapon to each juror, one at a time" (William

C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 310.20). The same alternative procedure may be appropriate when the exhibit contains drugs that "are not in a sealed container." (*Id.*)

Electronic evidence that needs equipment and an operator to view or listen to presents special issues. The Appellate Division approved "permitting the jury to view the store videotape in the jury room during deliberations with the technical assistance of court officers." (*People v Sampson*, 289 AD2d 1022, 1023 [4th Dept 2001].) An alternative, particularly if the evidence can be presented on a laptop and does not contain inadmissible portions, is to send the laptop into the jury room and designate one juror to operate it. "Using a juror to operate the laptop rather than a court officer avoids the potential error of an impermissible communication" (William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 310.20).

11.11 Person's Appearance, Condition, or Capability Exhibited[1]

When a person's appearance, condition, or capability is relevant to an issue in a proceeding, the appropriate aspect of the person's appearance, condition, or capability may be exhibited to the trier of fact, provided the proffered exhibition is probative and the probative value in exhibiting the person's appearance, condition, or capability is not outweighed by undue prejudice.

Note

This rule is derived from long-standing Court of Appeals precedent (*Harvey v Mazal Am. Partners*, 79 NY2d 218, 223-226 [1992] [exhibiting brain-damaged plaintiff, who was not sworn as witness, and asking him questions to show his condition]; *de Baillet-Latour v de Baillet-Latour*, 301 NY 428, 433-434 [1950] [in annulment action wife was allowed to exhibit conspicuous scars on her body, the existence of which her husband had denied]; *Clark v Brooklyn Hgts. R.R. Co.*, 177 NY 359 [1904] [no error present where trial court permitted the plaintiff, who had been injured in a collision, to leave the witness stand assisted and to exhibit himself to the jury in the act of writing his name and taking a drink of water as the display was designed to illustrate the plaintiff's testimony that he was afflicted by a tremor and could use his hands only with difficulty]; *Mulhado v Brooklyn City R.R. Co.*, 30 NY 370, 372 [1864] [exhibition of injured arm "tended to make the description of the injury more intelligible"]).

In *Harvey*, the Court was concerned that an exhibition of a party's injuries "when ill-designed or not properly relevant to the point at issue, instead of being helpful" could "mislead, confuse, divert or otherwise prejudice the purposes of the trial" (*Harvey* at 224). In that instance, the Court instructed that "the trial court itself must decide in the exercise of a sound discretion based on the nature of the proffered proof and the context in which it is offered, whether the value of the evidence outweighs its potential for prejudice" (*id.*). The trial court in *Harvey* permitted the plaintiff, who was not sworn, to appear before the jury and answer a series of questions that demonstrated the plaintiff's loss of cognitive abilities. In deciding to permit the questioning, the trial judge noted that she had balanced the value of showing the jury the plaintiff's injuries against the potential for prejudice and emotional response. The Court of Appeals held that this balancing was without question an exercise of judicial discretion, and there was no basis to disturb that decision. "Although . . . the preferred practice would have been for the Trial Judge to examine the plaintiff in camera, outside the presence of the jury, before

permitting the questioning," the failure to do so did not constitute an abuse of discretion in *Harvey* (*id.* at 224).

Critically, as stated in the rule, before a person's appearance, condition, or capability may be exhibited, that appearance, condition, or capability must be shown to be "relevant" to an issue in the proceeding (*see* Guide to NY Evid rule 4.01) and probative of the issue (*People v Rodriguez*, 64 NY2d 738, 741 [1984]).

In *Rodriguez*, for example, the eyewitness apparently did not describe the perpetrator as having tattooed hands and the defendant requested to display his tattooed hands to the jury or to have his counsel testify to the appearance of his hands four days after the theft. The court properly denied the request "inasmuch as defendant offered no proof regarding the presence of the tattoos on the date in issue" (*id*. at 741). *Rodriguez* also held that the court properly refused "to allow defendant to testify on this point, which testimony clearly would implicate his credibility, without being subject to cross-examination concerning his past convictions" (*id*.; *see People v Robinson*, 100 AD3d 934, 935 [2d Dept 2012] [similarly holding that the defendant "failed to lay a proper foundation" to show scars on his torso and abdomen, "offering no proof that the scars on his torso and abdomen existed on the date of the alleged rape"; and that the court's denial of his application to testify about his scars was also properly denied "where he conditioned his application upon the ability to testify without being subject to cross-examination"]).

A defendant, however, is not required to lay a foundation to exhibit his or appearance or condition by personally testifying; the defendant may present a witness or exhibits that properly lay the foundation (*People v Shields*, 81 AD2d 870, 871 [2d Dept 1981] [where the rape victim did not mention a 14- to 16-inch scar on the defendant's abdominal region, the court erred in not permitting the defendant's sister to testify along with hospital records to prove that the defendant had been scarred prior to the date in question]). Once the proper foundation is laid, "it would be proper to permit the defendant to exhibit the [relevant condition, such as tattoos] to the jury without being subject to substantive cross-examination" (*People v Scarola*, 71 NY2d 769, 778 [1988]).

A defendant's request to provide a jury with a voice exemplar may raise concerns of "trustworthiness" (*Scarola*, 71 NY2d at 777). In *Scarola*, each defendant sought "to refute the complainant's identification by demonstrating to the jury that he had a speech impediment. . . . The relevance of the evidence they offered was not in what they would say, but in how they would say it" (*id*. at 776). The "trial courts did not abuse their discretion in denying defendants permission to give the proposed exemplars. . . . [T]he foundation for the admission of the evidence . . . did not rule out the possibility that defendants could feign the existence of a speech defect" (*id.* at 778).

Requiring a defendant to produce real evidence may raise a question about whether a defendant's Fifth Amendment privilege against compelled self-incrimination has been violated (*People v Havrish*, 8 NY3d 389, 391 [2007] [the Fifth Amendment privilege was violated by a court's order of protection that directed the defendant to surrender an unlicensed handgun]).

Normally, however, the Fifth Amendment "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. Similarly, a defendant can be ordered to participate in a lineup or to provide a handwriting exemplar [or to submit to] field sobriety tests conducted during a traffic stop [or to] display his upper body tattoos" (*id.* at 393 [internal quotation marks and citations omitted]; *see People v Hill*, 82 AD3d 1715, 1716 [4th Dept 2011] ["The Fifth Amendment privilege against self-incrimination does not preclude a defendant from being required to reveal the physical characteristics of his or her body"]).

Even where the People introduced photographs of a defendant's upper body tattoos that contained words evincing hate as evidence of the defendant's motive for committing a hate crime, there was no violation of the Fifth Amendment privilege (*People v Slavin*, 1 NY3d 392 [2004]). "The tattoos were physical characteristics, not testimony forced from his mouth (*see Schmerber v California*, 384 US 757, 764-765 [1966]; *People v Berg*, 92 NY2d 701, 704 [1999]). However much the tattoos may have reflected defendant's inner thoughts, the People did not compel him to create them in the first place" (*id.* at 394-395).

[1] In May 2023, the rule was amended to add the proviso and to amplify the Note.

11.15. Viewing of Premises (CPLR 4110-c; CPL 270.50)

(1) Civil proceeding.

When during the course of a trial the court is of the opinion that a viewing or observation by the jury of the premises or place where alleged injuries to person or property were sustained in an accident or occurrence claimed to have been the cause thereof or of any other premises or place involved in the case will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the commencement of the summations, order that the jury be conducted to such premises or place for such purpose in accordance with the provisions of this rule.

(2) Criminal proceeding.

When the court is of the opinion that a viewing or observation by the jury of the premises or place where an offense on trial was allegedly committed, or of any other premises or place involved in the case, will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the commencement of the summations, order that the jury be conducted to such premises or place for such purpose in accordance with the provisions of this rule.

(3) Common Procedural Requirements.

(a) The jury must be kept together throughout under the supervision of an appropriate public servant or servants appointed by the court, and the court itself must be present throughout. *In a civil proceeding,* the parties to the action and counsel for them may as a matter of right be present throughout, but such right may be waived. *In a criminal proceeding,* the

prosecutor, the defendant, and counsel for the defendant may as a matter of right be present throughout, but such right may be waived.

(b) The purpose of such an inspection is solely to permit visual observation by the jury of the premises or place in question, and neither the court, the parties, counsel nor the jurors may engage in discussion or argumentation concerning the significance or implications of anything under observation or concerning any issue in the case.

Note

This rule reproduces CPLR 4110-c and CPL 270.50. Subdivision (1) of each statute is reproduced in subdivisions (1) and (2) of this rule, except that the last word, "rule," in each subdivision is substituted for the word "section" in each statute. Subdivision (2) of each statute is reproduced in subdivision (3) (a) of this rule, with two minor exceptions: the opening words, "In such case," are omitted and the words in italics are added. Subdivision (3) of each statute is reproduced in subdivision (3) (b) of this rule.

Rule 11.15 authorizes the court in both civil and criminal proceedings to order in its discretion that the jury be taken to a physical site that is at issue in a case, and given the opportunity to observe that site, with parties and counsel present, but without discussion or argument at the site. The court may order an inspection upon a finding that it "will be helpful to the jury in determining any material factual issue." (*See People v Alston*, 24 AD3d 391, 391 [1st Dept 2005] [court properly exercised its discretion in denying defendant's request for a visit to the crime scene; "(p)hotographs of the scene, as well as the testimony of the eyewitnesses and defendant's investigator, permitted the jury to determine whether the eyewitnesses were able to make reliable identifications of defendant from their nearby vantage point"]; *People v Wilson*, 225 AD2d 497, 498 [1st Dept 1996] [the trial court properly denied a deliberating jury's request to see the apartment window through which an eyewitness viewed the crime scene when the court discovered that there had been a "substantial change" in the condition of the window by "the addition of an air conditioner and the partial destruction of the window bars"]; *People v Rao*, 107 AD2d 720, 720 [2d Dept 1985] [denial of a request to view the scene of the crime was not an abuse of discretion as the crime had occurred in late November and the trial took place in late June;

consequently, there were alterations in the natural light and artificial illumination from street lamps and store fronts, and the foliage on trees was substantially different]; *People v Hamel*, 96 AD2d 644, 645 [3d Dept 1983] [ordering a view of the apartment where murder occurred was a proper exercise of discretion as "layout of (shooting victim's) apartment was sufficiently uncommon that reconstruction of the location of each room from verbal descriptions and photographs alone would create a perplexing image for the jurors"].)