9.05. Methods of Authentication and Identification.

The requirement of authentication or identification is established by evidence that the offered evidence is what the proponent of the evidence claims it is and, where the offered evidence is fungible, that its condition is unchanged during the relevant period. The foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted. Examples of how to satisfy a requirement of authentication or identification when the proffered evidence is not self-authenticating include, but are not limited to:

(1) Admission of authenticity.

Evidence of an admission of authenticity made by the party against whom the evidence is being introduced.

(2) Testimony of witness.

Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.

(3) Subscribing witness.

Testimony of a subscribing witness to a writing may establish authenticity of the writing. Unless a writing requires a subscribing witness for its validity, however, it may be proved as if there were no subscribing witness.

(4) Nonexpert opinion on handwriting.

Nonexpert opinion that a handwriting is genuine, based on a familiarity with it that was not acquired for purposes of the litigation.

(5) Comparison of handwriting.

Comparison of a disputed handwriting by a qualified expert or the trier of fact with any handwriting proved to the satisfaction of the court to be the handwriting of the person claimed to have written the disputed handwriting.

(6) Circumstantial evidence.

The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(7) Voice identification.

Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon familiarity with the voice of the person identified as the speaker.

(8) Identification of recipient of telephone call.

Identification of a recipient of a telephone call, by evidence that a call was made to the number assigned at the time by a telephone company to a particular person or business, if: (a) in the case of a person, self-identification or other circumstances show the person answering to be the one called; or (b) in the case of a business, the call was made to a place of business and the conversation related to that business.

(9) Result of application of process, system, or scientific test or experiment.

Consistent with the requirements of rule 7.01, evidence that a process, system, or scientific test or experiment produces an accurate and reliable result and was properly employed or applied on the relevant occasion.

Note

The opening paragraph is derived from decisional law. (*See e.g. People v Price*, 29 NY3d 472, 476 [2017] [photograph]; *Zegarelli v Hughes*, 3 NY3d 64, 69 [2004] [surveillance videotape]; *People v Ely*, 68 NY2d 520, 527-528 [1986] [tape-recorded conversation]; *People v Julian*, 41 NY2d 340 [1977] [drugs]; *Amaro v City of New York*, 40 NY2d 30, 35 [1976] [blood sample]; *People v Flanigan*, 174 NY 356, 368 [1903] [iron bar and rope used in homicide].) It is applicable, as noted, to "chain of custody" cases, cases where it is necessary to account for custody of the offered evidence due to its fungible nature from the time it initially became relevant to the case and to show that its condition has not been changed. (*See People v Connelly*, 35 NY2d 171, 174 [1974].)

This rule includes examples of evidence that are not self-authenticating and thus require extrinsic evidence of the required authentication or identification. These examples are not intended to be exclusive or exhaustive.

Subdivision (1) is derived from decisional law which provides that a party's admission that evidence offered against the party is what it purports is sufficient to establish the evidence's authenticity. (*See People v Molineux*, 168 NY 264, 328 [1901].) An admission of authentication may be made: (1) expressly by the party (*see* Prince, Richardson on Evidence § 9-103 [b] at 703-704 [Farrell 11th ed 1995] ["an admission of authenticity made by the adversary to a witness, or in a writing proved or admitted to be (his or hers), or while testifying on another trial or hearing"]); (2) formally by admission pursuant to CPLR 3123; or (3) impliedly by reason of a failure to object on ground of lack of authentication. (*See People v Parsons*, 84 AD2d 510, 511 [1981], *affd for reasons stated in App Div mem* 55 NY2d 858 [1982] ["It is quite customary, even under New York's present rules, where there is no real question of authenticity of the documents, for attorneys to permit the use of documents not authenticated to the last iota of the statutory requirement"]; *see also* CPLR 4540-a [presumption of authenticity based on a party's production of material authored or otherwise created by the party].)

Subdivision (2), derived from substantial decisional law, describes perhaps the most common method of authentication or identification, i.e., the testimony of a witness with knowledge that the offered evidence is what it is represented to be. Examples of such testimonial authentication are endless. (*See* Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts § 9.3 [2d ed] [collecting cases].) For example, a witness may be the author of a writing in

question and testify to its authenticity; a witness may have sufficient knowledge to verify the accuracy of a photograph, a map, or diagram; and a witness may be able to identify an object in issue. (*Id*.).

When evidence is fungible and not patently identifiable or is capable of being replaced or altered, authentication is done through a chain of custody (*Connelly*, 35 NY2d at 174; *People v Julian*, 41 NY2d at 342-343; *Amaro*, 40 NY2d at 36). Normally, the testimony of a witness or witnesses with personal knowledge both of the custody of an object from the time it initially became relevant to the action to the time of trial and that its condition has not been altered will suffice to authenticate the evidence (*Julian*, 41 NY2d 340).

The witness's knowledge need not be certain. (*See People v Mirenda*, 23 NY2d 439, 452 [1969] [sunglasses were admitted in evidence when the "driver's assistant testified that the glasses found by (another person) were similar to those he had noticed one of the suspects wearing"]; *People v Miller*, 17 NY2d 559, 560 [1966] [revolver found on a defendant's person was properly admitted when a witness testified that it looks like the revolver he saw in the defendant's hand]; *People v Martinez*, 115 AD2d 665, 665 [2d Dept 1985] [shotgun properly admitted when "three witnesses identified the gun recovered from defendant's possession as either the one with which defendant shot decedent or one that looked exactly like it"]; *People v Randolph*, 40 AD2d 806, 806 [1st Dept 1972] [gun was admissible where the "complainant testified the gun was like the one placed against his chest"].)

Subdivision (3) is derived from CPLR 4537, which reads: "Unless a writing requires a subscribing witness for its validity, it may be proved as if there was no subscribing witness." The statute abrogates the common-law rule that required a subscribing witness to testify to the authenticity of the document and permits authentication, even when there is a subscribing witness, "as if there was no subscribing witness" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4537). The "unless" clause, however, recognizes statutory exceptions, e.g., EPTL 3-2.1 and SCPA 1404, 1405 and 1406 (need subscribing witness to a will unless unavailable). Thus, absent a statutory requirement for the testimony of a subscribing witness, one or more of the ways of proving a writing set forth in this rule may be utilized.

Subdivision (4) sets forth the well-established rule that a lay witness may identify handwriting with which the witness is familiar, which familiarity was not acquired for purposes of litigation. (*See Molineux*, 168 NY at 320-321; *Hynes v McDermott*, 82 NY 41, 53-54 [1880] [a lay witness's identification of handwriting, however, based on familiarity acquired "*post litem motam*" is inadmissible]; *Matter of Collins v Wyman*, 38 AD2d 600, 601 [2d Dept 1971] ["Although a nonexpert may testify directly to the genuineness of the disputed writing, he must first establish his familiarity with the handwriting of the person claimed to have executed the disputed writing and how this familiarity came about"].)

Familiarity with a person's handwriting may be acquired in various ways (*see Hammond v Varian*, 54 NY 398, 400 [1873] [sufficient familiarity was found with "one witness who had seen the defendant write his name once, and another who had never seen him write, but who had held his (promissory) note, acknowledged and conceded to be genuine . . . . The extent of their knowledge, and the weight or effect to be given to their opinion, were proper matters for the consideration of the jury"]; *People v Stephenson*, 202 AD2d 280, 281 [4th Dept 1994] ["People's non-expert witnesses, who testified regarding their familiarity with the peculiar characteristics of defendant's handwriting, were entitled to demonstrate such through the use of both disputed documents and documents known to have been written by defendant"]; *Gross v Sormani*, 50 App Div 531, 534 [2d Dept 1900] [sufficient familiarity was shown when the witness testified that "he was acquainted with the handwriting of plaintiff's testator; that he had received numerous letters from him in the course of business dealings with him"]).Where the proof of familiarity is insufficient, the witness's testimony will be excluded. (*See People v Corey*, 148 NY 476, 481-482 [1896].)

Subdivision (5) is derived from CPLR 4536 as interpreted by the Court of Appeals. (*See Molineux*, 168 NY at 330 ["(C)omparisons with standards produced in court, whether at common law or under the statutes, may be made by witnesses, or by the court or jury without the aid of witnesses"]; *People v Hunter*, 34 NY2d 432, 435-436 [1974] [Under CPLR 4536 "the jury in its deliberation, may make such a comparison whether or not an expert offers an opinion"]; *People v Fields*, 287 AD2d 577, 578 [2d Dept 2001] ["(A)n expert or a jury may compare a disputed writing to the known specimen, even in the absence of an expert opinion"].)

Under the rule only a handwriting specimen that has been proved to the satisfaction of the court to be genuine is permitted to be used for comparison purposes. (*See Molineux*, 168 NY at 328; *Clark v Douglass*, 5 App Div 547 [3d Dept 1896].) If the specimen is so proved, the genuineness of both the specimen and the offered handwriting are questions of fact for the jury. (*Molineux*, 168 NY at 330 ["If the court, having regard to the rules adverted to, adjudge the papers genuine, it then becomes the duty of the jury in its turn, at the proper time, before making comparison of a disputed writing with the standards, to examine the testimony respecting the genuineness of the latter and to decide for itself, under proper legal instructions from the court, whether their genuineness has been established"].)

A nonexpert witness "may not express an opinion as to handwriting based upon a comparison between a disputed writing and a writing conceded or proved to be the genuine handwriting of the person whose handwriting is in dispute" (*Matter of Collins v Wyman*, 38 AD2d 600, 601 [2d Dept 1971]). A nonexpert is limited to an opinion as to handwriting based upon a demonstrated familiarity with the handwriting of the person claimed to have written the disputed writing. (*Id.*; *see* subdivision [2].)

Subdivision (6) sets forth the rule that authentication of a document or physical evidence may be proved by circumstantial evidence derived from its distinctive facts and circumstances, such as appearance, contents, substance, internal patterns, or other identifying characteristics, and other circumstantial evidence derived from extrinsic evidence (*see Price*, 29 NY3d at 481 ["Authentication may be established by direct or circumstantial evidence, and 'reasonable inferential linkages can ordinarily supply foundational prerequisites' so long as the 'tie-in effort' is not 'too tenuous and amorphous' " (citation omitted)]; *People v Manganaro*, 218 NY 9, 13 [1916] ["genuineness may be proved by indirect or circumstantial evidence the same as many other facts"]; *People v Dunbar Contr. Co.*, 215 NY 416, 423 [1915] [where there was proof that an incriminating telephone message came from a defendant, "the internal evidence of the letter (referring to the same incriminating evidence) shows that it came from the same source. The letter refers to the conversation, repeats its substance, and confirms it. Unexplained and uncontradicted by any witness for the defendants, the evidence justified the inference that (the same defendant) was the author"]; *People v Curry*, 82 AD3d 1650, 1650 [4th Dept 2011] ["The People established the similarities between the letters in those cases and the ones at issue here, including their content, writing style, paper, and envelopes, and they also established that in all cases defendant had sent multiple, nearly identical letters on the same day"]; *People v Sanchez*, 54 AD3d 638, 639 [1st Dept 2008] ["The court properly admitted the victim's mother's testimony that she overheard, by speakerphone, a telephone call in which the speaker apologized for hitting the victim. Although the mother, who was not familiar with defendant's voice, did not hear the speaker identify himself, there was sufficient circumstantial evidence to establish that defendant was the speaker"]; *Anzalone v State Farm Mut. Ins. Co.*, 92 AD2d 238, 239 [2d Dept 1983] ["the authenticity of Steed's signature on the finance agreement may be reasonably inferred from the fact that she paid at least five premium installments"]).

Circumstantial evidence of the type stated in the subdivision can be used to authenticate or identify electronic communications such as emails, text messages and posts on social media. (*See e.g. People v Green*, 107 AD3d 915, 916 [2d Dept 2013] [text messages authenticated by their contents as they "made no sense unless (they were) sent by defendant"]; *People v Pierre*, 41 AD3d 289, 291 [1st Dept 2007] [instant message authenticated by proof of the defendant's screen name and proof of message sent to that screen name and a reply, "the content of which made no sense unless it was sent by defendant"]; *see also Price*, 29 NY3d 472 [photograph of the defendant holding a firearm was not authenticated, inter alia, because there was no testimony the internet page from which the photograph was obtained was controlled by the defendant].)

Subdivision (7) restates New York's well settled rule that a person's voice, whether heard in person, over the telephone, or by some other mechanical or electronic means, e.g., audio recording, can be identified by a witness who has familiarity with the voice. (*See e.g. People v Dunbar Contr. Co.*, 215 NY 416, 422-

423 [1915] ["A voice heard over the telephone may be compared with the voice of a speaker whom one meets for the first time thereafter as well as with the voice of a speaker whom one has known before. The difference affects the weight rather than the competency of the evidence. Whether the identity of the speaker had been sufficiently authenticated was a question of fact to be disposed of preliminarily by the trial judge . . . ." The witness "did not profess certainty, but certainty was not necessary" (citation omitted)]; *People v Dinan*, 15 AD2d 786, 787 [2d Dept 1962], *affd* 11 NY2d 350 [1962] [voice on audio-recording].)

The Court of Appeals has cautioned that testimony by a witness that the speaker identified himself/herself is insufficient foundation for admissibility of the speaker's statement (*People v Lynes*, 49 NY2d 286, 291 [1980], citing *Murphy v Jack*, 142 NY 215, 217-218 [1894]).

Subdivision (8) sets forth a method of establishing the identity of the recipient of a phone call made to a person or business as recognized by decisional law. (*See People v Lynes*, 49 NY2d at 292 ["in some instances the placing of a call to a number listed in a directory or other similarly responsible index of subscribers, coupled with an unforced acknowledgment by the one answering that he or she is the one so listed, has been held to constitute an adequate showing. In other cases, the substance of the conversation itself has furnished confirmation of the caller's identity, as, for example, when subsequent events indicated that the party whose identity is sought to be established had to have been a conversant in the telephone talk or when the caller makes reference to facts of which he alone is likely to have knowledge" (citations omitted). In *Lynes*, a reasonably prompt callback in response to a message to call, as well as the substance of a conversation disclosing facts known to the caller, authenticated the identity of the person calling]; *Orlando v Great E. Cas. Co.*, 91 Misc 539, 543 [App Term, 2d Dept 1915] ["While, in this state, a witness may not usually, at least, testify to a conversation with a particular person over the telephone, unless the voice of such person was recognized by the witness, yet when a person in the ordinary way calls up a city department, like the police department, to give notice of some fact, I think the giving of such notice may be proved by the testimony of the person giving it"].)

It should be noted that the rule stated in this subdivision can be utilized even where the witness has no familiarity with the recipient's voice, obviating reliance upon the rule stated in subdivision (7).

Subdivision (9) restates the rule that, when the offered evidence has been produced by a process, system, or scientific test or experiment, the proponent must establish that the process, system, or scientific test or experiment produces an accurate and reliable result and that the process, system, or scientific test or experiment was properly employed or applied on that particular occasion. (*See generally* Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts § 9:19 [2d ed] [collecting cases applying this rule to various processes and tests that produce results].)

The first part of the rule requires evidence that the process, system, or scientific test or experiment produces accurate results. (*See e.g. People v Campbell*, 73 NY2d 481, 484-486 [1989] [blood-alcohol analysis]; *People v Smith*, 63 NY2d 41, 62-64 [1984] [photo-to-photo comparison of bite marks]; *People v Magri*, 3 NY2d 562, 566 [1958] [radar speed detection].)

In some instances, as set forth in Guide to New York Evidence rule 7.01, the underlying methods and principles may be subject to the *Frye* standard. (*See e.g. People v Wesley*, 83 NY2d 417, 422-423 [1994] [DNA analysis]; *People v Middleton*, 54 NY2d 42, 49-50 [1981] [bite mark comparison].)

The second part of the rule requires evidence that the process, system, or scientific test or experiment was properly administered on the occasion in issue. (*See Wesley*, 83 NY2d at 428-429 ["After the *Frye* inquiry, the issue then shifts to a second phase, admissibility of the specific evidence—i.e., the trial foundation—and elements such as how the sample was acquired, whether the chain of custody was preserved and how the tests were made"]; *People v Mertz*, 68 NY2d 136, 148 [1986] [breathalyzers must be shown to have been properly calibrated, in working order and properly prepared and operated].)