GUIDE TO NEW YORK EVIDENCE
ARTICLE 9 AUTHENTICITY

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9.01. Authenticating or Identifying Evidence; In General

(1) When non-testimonial evidence or evidence of a conversation is offered into evidence, the proponent of that evidence must properly authenticate or identify it by showing that the proffered evidence is what the proponent claims it is.

(2) As set forth in rule 9.03, where the offered evidence is "self-authenticating," extrinsic evidence of authenticity as a condition precedent to admissibility is not required.

(3) When the offered evidence is not "self-authenticating," the proponent of the evidence must introduce evidence sufficient to support a finding that the offered evidence is what the proponent claims it is. Rule 9.07 sets forth examples, not a complete list, of evidence that satisfies the requirement of authentication or identification for offered evidence subject to this requirement.

Note

This rule serves as an introduction to the rules that relate to the authentication or identification of proffered evidence set forth in article 9 of the Guide to New York Evidence.

Authentication refers to the requirement that before a writing, a tangible object or other non-testimonial evidence is admitted, the offering party must establish that such evidence is what the party claims it to be. Identification refers to the requirement that before testimony concerning a conversation with another person is admitted, there must be identification of the speaker. (*See generally* Barker & Alexander, Evidence in New York State and Federal Courts § 9:1 [2d ed].) These rules are a specialized application of the requirement that offered evidence must be relevant to be admissible (Guide to NY Evid rule 4.01, Relevant Evidence). As stated by the Court of Appeals in *People v Price* (29 NY3d 472, 476 [2017]): "In order for a piece of evidence to be of probative value, there must be proof that it is what its proponent says it is. The requirement of authentication is thus a condition precedent to admitting evidence." (*People v Lynes*, 49 NY2d 286, 292 [1980] [voice identification]; *People v Dunbar Contr. Co.*, 215 NY 416, 422-423 [1915] [voice identification].)

There is no limitation on the kind of evidence by which authentication or identification may be established. (*See* CPLR 4543.) The foundation necessary to establish the required authentication or identification in a given situation will "differ according to the nature of the evidence sought to be admitted." (*People v McGee*, 49 NY2d 48, 59 [1979].) Thus, the proponent of the evidence may, depending upon the evidence being offered, rely upon a variety of proof, alone or in combination. (*See People v Ely*, 68 NY2d 520, 527 [1986].) Examples of foundation proof that can support a finding of authentication or identification are set forth in rule 9.05 (Methods of Authentication and Identification). In some instances, the offered evidence may be "self-authenticating" and will be admissible without the need for extrinsic evidence of authenticity, as set forth in rule 9.03 (Self-Authenticating Evidence).

When issues of authentication or identification are raised, the provisions of Guide to New York Evidence rule 1.11 (Preliminary Questions) become applicable. The court must make a determination as to whether the proponent of the evidence has made a sufficient evidentiary showing from which it can be found by a jury that the evidence is genuine. If the evidence is insufficient, then the evidence is excluded; and if the evidence is sufficient, the jury will then determine whether the evidence is in fact genuine. (*See People v Molineux*, 168 NY 264, 330 [1901]; Barker & Alexander, *supra* § 9:1.)

Authentication may be acknowledged either expressly, or impliedly by the failure to make a contemporaneous objection. (*See People v Parsons*, 84 AD2d 510, 511 [1981], *affd for reasons stated in App Div memorandum* 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. Thus office copies of letters are frequently received in evidence; certified but not exemplified copies of out-of-State documents and of notarial certificates, etc., are frequently received without objection. . . . In the absence of any hint that the documents were not genuine, we do not think it was an abuse of discretion for the court to refuse to permit the defendant to object to the documents or to refuse to strike them six weeks after they had been received in evidence without objection"].)

Authentication or identification is not necessary in instances where the offered evidence is relevant irrespective of whether it is genuine, or the speaker is identified. (*See People v Brown*, 80 NY2d 729 [1993] [911 call admitted where caller's identity was not established as events described were corroborated by other evidence]; *Price*, 29 NY3d at 477 n 2 ["fabricated or altered photographs found on a defendant's Internet profile page may, in some other cases, be relevant *regardless* of the photograph's authenticity—for example, if offered to show a defendant's state of mind"]; Prince, Richardson on Evidence § 9-101 [Farrell 11th ed 1995] [a "writing is relevant without regard to the identity of the person who executed it; e.g., where an anonymous letter is offered on a prosecution for murder to show circumstantially the state of mind of the defendant who read it"].)

Notwithstanding CPLR article 45 statutes on authentication, by virtue of CPLR 4543: "Nothing in [article 45] prevents the proof of a fact or a writing by any method authorized by any applicable statute or by the rules of evidence at common law."

Finally, it must be noted that a finding of authentication does not alone support the admissibility of the offered evidence. The evidence may still be inadmissible because it is not relevant or is barred by the hearsay rule or by another exclusionary evidence rule.

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].)

9.08. Self-Authenticating Evidence (CPLR 4532; 4538; 4540; 4540-a; 4542)[1]

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Official Record of Court or Government Office in United States (CPLR 4540).

(a) An official publication, or a copy attested as correct by an officer or a deputy of an officer having legal custody of an official record of the United States or of any state, territory or jurisdiction of the United States, or of any of its courts, legislature, offices, public bodies or boards is prima facie evidence of such record.

(b) Where the copy is attested by an officer of the state, it shall be accompanied by a certificate signed by, or with a facsimile of the signature of, the clerk of a court having legal custody of the record, and, except where the copy is used in the same court or before one of its officers, with the seal of the court affixed; or signed by, or with a facsimile of the signature of, the officer having legal custody of the original, or his deputy or clerk, with his official seal affixed; or signed by, or with a facsimile of the signature of, the presiding officer, secretary or clerk of the public body or board and, except where it is certified by the clerk or secretary of either house of the legislature, with the seal of the body or board affixed. If the certificate is made by a county clerk, the county seal shall be affixed.

(c) Where the copy is attested by an officer of another jurisdiction, it shall be accompanied by a certificate that such officer has legal custody of the record, and that his signature is believed to

be genuine, which certificate shall be made by a judge of a court of record of the district or political subdivision in which the record is kept, with the seal of the court affixed; or by any public officer having a seal of office and having official duties in that district or political subdivision with respect to the subject matter of the record, with the seal of his office affixed.

(2) Foreign Records and Documents (CPLR 4542).

(a) A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position [i] of the attesting person, or [ii] of any foreign official whose certificate of genuineness of signature and official position relates to the attestation, or is in a chain of certificates of genuineness of signature and official position relating to the attestation.

(b) A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, admit an attested copy without final certification, or permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(3) Acknowledged Documents (CPLR 4538).

Certification of the acknowledgment or proof of a writing, except a will, in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property within the state is prima facie evidence that it was executed by the person who purported to do so. A conveyance of real property, situated within another state, territory or jurisdiction of the United States, which has been duly authenticated, according to the laws of that state, territory or jurisdiction, so as to be read in evidence in the courts thereof, is admissible in evidence in the state.

(4) Newspapers and Periodicals of General Circulation (CPLR 4532).

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to printed materials purporting to be newspapers or periodicals of general circulation; provided however, nothing herein shall be deemed to preclude or limit the right of a party to challenge the authenticity of such printed material, by extrinsic evidence or otherwise, prior to admission by the court or to raise the issue of authenticity as an issue of fact.

(5) Trade Inscriptions and the Like.

A trademark, trade name, inscription, sign, tag, or label purporting to have been affixed to an item in the course of business and indicating origin, ownership or control of the item is evidence of the origin, ownership or control of the matter.

(6) Materials Authored or Otherwise Created by a Party and Produced by the Party (CPLR 4540-a).

Material produced by a party in response to a demand pursuant to article thirty-one of the Civil Practice Law and Rules for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility.

(7) Other Laws of self-authentication.

In addition to the foregoing subdivisions, the consolidated laws and decisional law provide for self-authentication of specific types of evidence. See Guide to New York Evidence article 3 (Prima Facie Evidence) and rule 8.08 (Business Records [CPLR 4518]).

Note

As set forth in this rule, certain documents and writings are "self-authenticating," meaning that their authenticity is established without the need to call a foundation witness. While compliance with a "self-authentication" statute bars a challenge to offered evidence for lack of authenticity, it does not bar a challenge on other grounds, such as to the genuineness of the offered "self-authenticating" document, the admissibility of aspects of its contents, or the weight to be accorded the evidence.

CPLR article 45 is the principal source of important evidentiary rules, including those setting forth methods of authentication of evidence. (*See generally* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4532, 4538, 4540, 4540-a, 4542; Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts § 9:24 [2d ed].)

Subdivision (1) provides for self-authentication of official publications or copies of public records of New York, other states and the United States. It restates verbatim CPLR 4540, with subdivision (1) (a) restating CPLR 4540 (a), subdivision (1) (b) restating CPLR 4540 (b), and subdivision (1) (c) restating CPLR 4540 (c).

CPLR 4540 (a) addresses when an "official publication" or a "copy attested as correct" of an "official record" of the United States or other non-foreign governmental bodies may constitute prima facie evidence of the record. By the

terms of CPLR 4540 (a), no attestation is required for an "official" document; however, to protect the integrity of an "official" document, a copy of the document is generally preferred. (*See* CPLR 8021 [e] [with exceptions, the statute prohibits the production of a record of a county clerk's office "in the interest of the safety and preservation thereof"]; Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4540.) A copy of an "official record" requires that it be properly attested to as "correct" by the officer or deputy having legal custody of the document.

CPLR 4540 (b) details the additional requirements necessary to verify the attestation by an officer of the state.

CPLR 4540 (c) governs a copy of a document attested to by an officer of another jurisdiction within the United States. The added requirement of this provision is "obviously highly technical" and the "superfluity of this technicality is recognized in modern developments in the law of evidence." (*People v Parsons*, 84 AD2d 510, 511 [1st Dept 1981], *affd for reasons stated in App Div mem* 55 NY2d 858 [1982].) As a result, the authenticity of a document has been recognized where there was "substantial compliance" with CPLR 4540 (c). (*See Sparaco v Sparaco*, 309 AD2d 1029, 1030 [3d Dept 2003]; *Matter of Thomas v New York State Bd. of Parole*, 208 AD2d 460 [1st Dept 1994]; *Parsons*, 84 AD2d at 511; *cf. People v Wheeler*, 46 AD3d 1082, 1082 [3d Dept 2007] [where a statute authorized the consideration of "reliable hearsay," a document in substantial compliance with CPLR 4540 constituted "reliable hearsay"]; *but see Waingort v Waingort*, 203 AD2d 453 [2d Dept 1994] [final judgment and decree of divorce of another state was not properly authenticated pursuant to CPLR 4540 (c) and motion to vacate its filing was granted, albeit without prejudice to the filing of a properly authenticated copy]; *People v Acebedo*, 156 AD2d 369, 369 [2d Dept 1989] ["sentencing court erred at the second felony offender hearing, when, over the defendant's objection, it admitted into evidence certificates of conviction from Florida which were not accompanied by the certification required by CPLR 4540 (c)"].)

In some instances, judicial notice can be used to establish that a document is authentic. Thus, court and public records may be judicially noticed pursuant to Guide to New York Evidence article 2 (Judicial Notice), thereby making it unnecessary to resort to an authentication method. Additionally, where the original of a public document has attached to it the seal of the State of New York, of other states, or of the United States, or the seal of an officer of the State of New York, of its subdivisions, or of the federal government, the New York courts will take judicial notice of the authenticity of the document. (*See e.g. People v Reese*, 258 NY 89, 98 [1932].)

Subdivision (2) provides for self-authentication of foreign official records. It restates verbatim CPLR 4542.

This rule of self-authentication is subject to an international treaty to which the United States became a party on October 15, 1981 and is entitled: "Convention Abolishing the Requirement of Legalization for Foreign Public Documents" (https://assets.hcch.net/docs/b12ad529-5f75-411b-b523-8eebe86613c0.pdf; 33 UST 883, TIAS No. 10072). "In essence, the convention creates a standard certificate, the 'apostille', which requires only one signature to function as the effective certification of the foreign document sought to be authenticated. This is in marked contrast to the chain method of certification that is presently embodied in the provisions of CPLR 4542, which is based on the premise that it is necessary to insure that the individual who originally certified the document had the authority to do so"; thus, "to the extent that CPLR 4542 is inconsistent with the provisions of the convention, it is . . . inapplicable and its provisions must yield to the convention." (*Matter of McDermott*, 112 Misc 2d 308, 309-310 [Sur Ct, Bronx County 1982]; *see* US Const, art VI, cl 2 ["all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"].) While there are as of August 4, 2022, 122 parties to the convention (https://www.hcch.net/en/instruments/conventions/status-table/?cid=41), CPLR 4542 remains in effect for those foreign countries that are not a party to the convention. (*Matter of Eggers*, 122 Misc 2d 793, 795 [Sur Ct, Nassau County 1984].)

Subdivision (3) restates verbatim CPLR 4538.

The first sentence provides for authentication of a "[c]certification of the acknowledgement or proof of a writing" (except for a will) in the State of New York and adds that the certification is prima facie evidence "that it was executed by the person who purported to do so." (*See* Real Property Law § 309-a ["Uniform forms of certificates of acknowledgment or proof within this state"]; *see also Osborne v Zornberg*, 16 AD3d 643, 644 [2d Dept 2005] ["(A) certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing as to amount to a moral certainty"], citing *Albany County Sav. Bank v McCarty*, 149 NY 71, 80 [1896].)

The second sentence of CPLR 4538 addresses a "conveyance of real property, situated within another state, territory or jurisdiction of the United States." If that item "has been duly authenticated, according to the laws of that state, territory or jurisdiction, so as to be read in evidence in the courts thereof, [it] is admissible in evidence in the state."

Subdivision (4) restates verbatim CPLR 4532. It provides for self-authentication of newspapers and periodicals of general circulation. The proviso clause states the common rule generally which permits the opposing party to

controvert the claimed authenticity (i.e. the genuineness of the document) "by extrinsic evidence or otherwise" and "to raise the issue of authenticity as an issue of fact."

Subdivision (5) is derived from decisional law which provides that any trade inscriptions and the like on items indicating origin, ownership or control are self-authenticating. (*See e.g. Lindsay v Academy Broadway Corp.*, 198 AD2d 641, 642 [3d Dept 1993] ["Plaintiff did not and does not controvert the fact that each of the tents depicted in the photographs has an attached label(s) identifying its manufacturer and, additionally, with respect to defendant's tent, a sewn-in patch displaying the company logo. These circumstantial facts are sufficient evidence of the photographs' authenticity and therefore they were properly considered"]; *Weiner v Mager & Throne, Inc.*, 167 Misc 338, 340 [Mun Ct, Bronx County 1938] ["This defendant's trade label, affixed to the loaf, is some evidence that it manufactured the bread; and unless rebutted, or at least contested by evidence, gives rise to a reasonable inference that the owner of the trade label manufactured the article to which it was affixed. No one except Mager & Throne, Inc., had the right to use its trade name or label. In the absence of any evidence tending to show that this defendant's trade name or label was being wrongfully used by others, the inference is drawn that the name and label were used by it, and that this defendant was the manufacturer of the bread"].) Statutes also provide self-authentication for specific trade inscriptions. (*See e.g.* General Business Law §§ 276, 277 [a certificate issued by the secretary of state to a person who has filed with the secretary of state a "name, mark or device to indicated ownership of vessels, receptacles or utensils" is "prima facie evidence of the ownership by the person filing hereunder of all vessels, receptacles and utensils upon which such name, mark or device is produced"].)

Subdivision (6) restates verbatim CPLR 4540-a. It is applicable to material produced by a party in the course of pretrial discovery in civil proceedings pursuant to a proper discovery request. Drawing on the concept that authenticity may be established by an admission, this section effectively finds an implied admission when a party in a civil proceeding in response to a discovery demand by an adversary discloses "material authored or otherwise created by such party." That material when offered in evidence by the recipient is "presumed authentic," albeit the presumption is subject to rebuttal. The Advisory Committee on Civil Practice to the Chief Administrative Judge recommended the statute, and the Legislative Memorandum in support of the legislation explained that the statute "creates a rebuttable presumption that accomplishes two goals. First, when the item at issue is one that has already been produced by a party in the course of pretrial disclosure, and such item purportedly was authored or created by that party, the opposing party is thereby relieved of the need, ab initio, to come forward with evidence of its authenticity. Second, the rebuttable nature of the presumption protects the ability of the producing party, if he or she has actual evidence of forgery, fraud, or some other defect in authenticity, to introduce such evidence and prove, by a preponderance, that the item is not authentic. A mere naked 'objection' based on

lack of authenticity, however, will not suffice. Shifting the burden of proof to the producing party makes sense because that party is most likely to have better access to the relevant evidence on the issue of forgery or fraud. Furthermore, the presumption recognized by the statute applies only to the issue of authenticity or genuineness of the item. A party is free to assert any and all other objections that might be pertinent in the case, such as lack of relevance or violation of the best evidence rule." (2018 Rep of Advisory Comm on Civ Prac at 86-87.)

Subdivision (7) references the existence of numerous statutes in the Consolidated Laws that provide for methods of self-authentication of certain types of writings and documents. See Guide to New York Evidence article 3 (Prima Facie Evidence); Guide to New York Evidence rule 8.08 (Business Records [CPLR 4518]); Business Corporation Law § 107 (corporate seal as authenticating execution and authority); CPLR 2105 (certification by attorney); CPLR 3122-a (certification of business records); CPLR 4540 (d) (tariff or classification of Public Service Commission or Commissioner of Transportation); CPLR 4541 (transcript of docket-book of a justice of the peace); Public Health Law § 11 (1) (published health regulations); Tax Law §§ 287, 429, 505, 653 (signature on tax return).

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[1] In 2022, subdivision (7) was amended to add appropriate cross-references. The Note to subdivision (7) was also amended to delete references to statutes that were subsequently included in a Guide to New York Evidence rule and to add instead the Guide references.

9.09 Admissibility of graphic, numerical, symbolic or pictorial representations of medical or diagnostic tests (CPLR 4532-a)

A graphic, numerical, symbolic or pictorial representation of the results of a medical or diagnostic procedure or test is admissible in evidence provided:

(1) the name of the injured party, the date when the information constituting the graphic, numerical, symbolic or pictorial representation was taken, and such additional identifying information as is customarily inscribed by the medical practitioner or medical facility is inserted on such graphic, numerical, symbolic or pictorial representation; and

(2) (a) the representation has been previously received or examined by the party or parties against whom it is being offered; or

(b) (i) at least ten days before the date of trial of the action, the party intending to offer such graphic, numerical, symbolic or pictorial representation as a proposed exhibit serves upon the party or parties against whom said proposed exhibit is to be offered, a notice of intention to offer such proposed exhibit in evidence during the trial and that the same is available for inspection; and

(ii) the notice aforesaid is accompanied by an affidavit or affirmation of such physician identifying such graphic, numerical, symbolic or pictorial representation and attesting to the identifying information inscribed thereon, attesting that the identifying information inscribed thereon is the same as is customarily inscribed by the medical practitioner or facility, and further attesting that, if called as a witness in the action, he or she would so testify.

Nothing contained in this rule, however, shall prohibit

the admissibility of a graphic, numerical, symbolic or pictorial representation in evidence where otherwise admissible.

Note

This rule restates verbatim CPLR 4532-a. That rule was substantially amended by the Laws of 2004, chapter 375, effective January 1, 2005, so judicial decisions under the rule before then may no longer be applicable.

Under the best evidence rule, a party seeking to prove the contents of an X ray, a magnetic resonance imaging (MRI), or an analogous pictorial, graphic, symbolic, or numerical representation must introduce the authenticated original image or offer a satisfactory excuse for the absence of the original that would allow for proof by secondary evidence. (Guide to NY Evid rule 10.03.) A physician witness may not prove the contents of an X ray or MRI, for example, that is not in evidence based on a reading of a report interpreting an X ray or MRI.

CPLR 4532-a facilitates admission of the image itself without calling the technician who conducted the imaging or testing, by providing a means to authenticate any "graphic, numerical, symbolic or pictorial representation of the results of a medical or diagnostic procedure or test" without foundation testimony.

The rule encompasses not only X rays and MRIs, but also computed axial tomographs (CAT scans), positron emission tomographs (PET scans), electromyograms (EMGs), sonograms, fetal heart monitor strips, and other diagnostic tests that are currently in use or may be developed. (*See e.g. Clevenger v Mitnick*, 38 AD3d 586, 587 [2d Dept 2007] [MRI scans and EMG test data].)

The rule does not encompass *reports* of tests. (*Ewanciw v Atlas*, 65 AD3d 1077, 1078 [2d Dept 2009] [the rule did not encompass a report of quantitative results of a nerve conduction study].)

The rule creates a self-authentication procedure and a hearsay exception for the identifying information on the image or other test results.

Subdivision (1) of the rule sets forth the required identifying information. The only specified requirements are the patient's name and the test's date. Subdivision (1) otherwise is flexible to conform to medical practitioners' and facilities' varying practices of imprinting identifying information on patients' test results: "and such additional identifying information as is customarily inscribed by the medical practitioner or medical facility."

The rule sets forth two alternative additional prerequisites to admissibility.

Subdivision (2) (a) requires the proponent of the exhibit to show that the

parties against whom the exhibit is introduced have received or examined the exhibit. Parties who received the exhibit thus are provided the opportunity to examine the exhibit and therefore are presumed to have examined it. Otherwise the proponent may provide the opportunity for examination, for example, at an attorney's or medical practitioner's office or at a deposition. Receipt or examination of the exhibit enables an opponent to challenge the exhibit's admissibility or develop rebuttal evidence.

Subdivision (2) (b) sets forth an alternative means for admissibility. At least 10 days before the trial, the proponent must serve the parties against whom the exhibit is to be introduced with notice of the proponent's intent to introduce the exhibit and its availability for inspection. (*See e.g. Trombin v City of New York*, 33 AD3d 564, 564 [1st Dept 2006].) This notice must be accompanied by a physician's affidavit identifying the exhibit and attesting (1) to the information inscribed on the exhibit, (2) that that information is what the practitioner or facility customarily inscribes, and (3) that the physician would so testify if called as a witness. Noncompliance with the notice requirements will result in the exhibit's exclusion (*Dwight v New York City Tr. Auth.*, 30 AD3d 270, 271 [1st Dept 2006]), or its erroneous admission. (*Wang v 161 Hudson, LLC*, 60 AD3d 668, 668-669 [2d Dept 2009]; *Lucian v Schwartz*, 55 AD3d 687, 689 [2d Dept 2008].)

In any event, a physician's testimony inevitably will be necessary to interpret the exhibit since this rule simply provides a shortcut to authenticating the exhibit. The witness, however, need not be the physician who conducted or supervised the imaging or diagnostic test as would be necessary to authenticate it.

CPLR 4532-a does not preclude the use of a witness to authenticate an image or other diagnostic test encompassed by the rule. The proponent of course may call the physician or technician who conducted the imaging or testing to authenticate it or may introduce at the trial a physician's authentication of the imaging or testing at a deposition. (CPLR 3101 [a] [3]; 3117 [a] [4].)

Finally, admission over objection of images or tests without strict adherence to the required authentication procedures may amount to harmless error where physicians testify regarding their review of the images or other test results or reports of them are admitted without objection. (*Lucian v Schwartz*, 55 AD3d at 689.)

9.13 Photographs[1]

(1) A photograph may be admitted in evidence upon a showing that it is relevant and properly identified and authenticated as a fair and accurate representation of what it purportedly depicts. Depending upon the circumstances, a photograph taken from a social media account may require an additional showing of a connection between the defendant and the social media account and the timing of the photograph's posting in relation to the event or reason for the photograph's admission in evidence.

(2) An authenticated photograph of a deceased or of an injury is admissible in the discretion of the court if it tends to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove other evidence offered or to be offered, and if its probative value outweighs the danger of undue prejudice.

Note

Subdivision (1) is derived from *People v Byrnes* (33 NY2d 343, 347 [1974]) where the photographs were authenticated and admitted into evidence because the "complainant, a competent witness possessing knowledge of the matter, identified the subjects and verified that the photographs accurately represented the subject matter depicted." Further, in a proper case, a photograph may constitute "independent probative evidence of what it shows" (*Byrnes* at 348, citing as an example *People v Webster*, 139 NY 73, 83 [1893] [photograph admitted to show physique of deceased where defendant pleaded self-defense]).

While an appropriate witness's testimony normally will establish the foundation, where "no witnesses are available who have viewed the subject matter portrayed, valid alternative grounds may exist for authenticating the photograph and admitting it into evidence, such as testimony, especially that by an expert, tending to establish that the photograph truly and accurately represents what was before the camera." (*Byrnes* at 349; *see People v Price*, 29 NY3d 472, 477 [2017] [" 'since the ultimate object of the authentication requirement is to insure the accuracy of the photograph sought to be admitted into evidence, any person having the requisite knowledge of the facts may verify,' or an expert may testify that the photograph has not been altered" (citation omitted)].)

In *Price*, the People failed to authenticate a photograph "from an Internet profile page allegedly belonging to defendant" by any of the traditional methods, "as the victim was unable to identify the weapon as that which was used in the robbery, and no other witnesses testified that the photograph was a fair and accurate representation of the scene depicted or that it was unaltered" (*Price*, 29 NY3d at 474, 477-478 [citations omitted]). Instead, the People argued that the photograph's authenticity had been proved by evidence "that the printout of the web page is an accurate depiction thereof, and that the web page is attributable to and controlled by . . . the defendant" (*id.* at 478). The Court, however, held that "[a]ssuming without deciding that a photograph may be authenticated through the method proposed" or "some variation thereof," the People failed in their proof "of defendant's connection to the website or the particular profile." (*Id.* at 478-480.)

As *Price* illustrates, authentication of social media photographs is an evolving area of the law that presents some concerns. For example, in *People v Mayo* (202 AD3d 833, 834 [2d Dept 2022]), the Court held that the People failed to properly authenticate a photograph from a Facebook account "allegedly depicting the defendant wearing certain clothing similar to that worn by the perpetrator. . . . The People's only authentication evidence consisted of the testimony of a police witness who searched for the Facebook profile 1½ years after the crime. They did not proffer any evidence or testimony demonstrating that the photograph was 'a fair and accurate representation of the scene depicted or that it was unaltered'. . . . To the contrary, the police witness testified that he did not know whether the photograph had been altered. Furthermore, the People did not present any evidence 'to establish that the web page belonged to, and was controlled by, [the] defendant' or any evidence as to when the photograph was created or posted."

A visual representation of "text messages" may be authenticated, however, by the traditional method of authenticating photographs, that is, by evidence establishing that the visual representation of the "text messages" is a fair and accurate representation of the communication. In *People v Rodriguez* (38 NY3d 151 [2022]), for example, where the victim (a 15 year old) and the defendant (a 43 year old) were proved to communicate by text messages, the question was whether "screenshots" of the text messages taken by the victim's boyfriend before the victim deleted them from her phone were admissible. The Court held that upon the victim's identification of the "screenshots" as a fair and accurate representation of the content of the messages sent to her, they were properly authenticated and admitted in evidence.

Subdivision (2) is derived primarily from *People v Pobliner* (32 NY2d 356, 369-370 [1973]), and its progeny. In *Pobliner*, the Court held:

> "The general rule is that photographs of the deceased are admissible if they tend to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to

> corroborate or disprove some other evidence offered or to be offered. Admission of photographs of homicide victims is generally within the discretion of the trial court. Where they are otherwise properly admitted as having a tendency to prove or disprove some material fact in issue, photographs of a corpse are admissible even though they portray a gruesome spectacle and may tend to arouse passion and resentment against the defendant in the minds of the jury. There are many cases in which photographs of a homicide victim have been held admissible to show, for example, the position of the victim's body, the wounds of the victim, or to illustrate expert testimony. Photographic evidence should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant." (*Id.* at 369-370 [internal quotation marks and citations omitted].)

In *Pobliner*, the defendant told a friend that his wife was asleep when he shot her. Four photographs were properly admitted to show that the deceased "was in her bed, in a sleeping position, when shot, thus tending to confirm" the defendant's friend's testimony; and two photographs taken at the morgue were properly admitted to "show the three clustered bullet holes near the left temple, indicating marksmanship and deliberateness in the killing." (*Pobliner* at 370; *see People v Bell*, 63 NY2d 796, 797 [1984] [photographs of a victim being attended in the hospital were admissible given that "(t)hey were not gory, the lacerations they show having either been cleaned up or bandaged, and while the knife remaining imbedded in the victim's back was startling in the sense of being unusual, the picture it presented of the knife was less unnerving than the oral testimony concerning it"]; *People v Stevens*, 76 NY2d 833, 836 [1990] ["The photographs of the victim's body showed the nature of the injury and therefore tended to prove that the assailant acted with intent to inflict serious injury, an essential element of the manslaughter count. The People were not bound to rely entirely on the testimony of the medical expert to prove this point and the photographs were admissible to elucidate and corroborate that testimony"]; *People v Wood*, 79 NY2d 958, 960 [1992] ["The nature and manner of the killing were material and relevant to prosecution of the murder indictment and the defendant could not make it otherwise by admitting that he had killed the victim but contending that he had done so under the influence of an extreme emotional disturbance. The questioned exhibits illustrated the severity and calculated nature of the wounds and tended to disprove defendant's claim that he was totally out of control at the time of the killing"]; *Mazella v Beals*, 27 NY3d 694, 709 [2016] [in action for malpractice by a psychiatrist, a photograph of the deceased who committed suicide "was relevant to plaintiff's theory that the violent nature of the suicide—death by self-inflicted knife wounds—was a result of decedent's extreme mental and emotional condition, induced by the long-term use of prescription drugs," and its admission was not "unduly prejudicial" because there was testimony and the autopsy report describing the body's condition].)

A portrait or photograph of a deceased taken when the deceased was alive may "arouse the jury's emotions, particularly when they are presented in a before-and-after format, and thus should not be admitted unless relevant to a material fact to be proved at trial. In addition, the relevance of the portraits must be independently established; the fact that photographs of the victim after death have been found to be relevant does not necessarily establish the relevance, and hence admissibility, of portraits of the victim while alive." (*People v Stevens*, 76 NY2d 833, 835-836 [1990]; *Smith v Lehigh Val. R.R. Co.*, 177 NY 379, 384 [1904] [in an action to recover for pecuniary damages resulting from the decedent's death, the introduction in evidence of the photograph of the deceased as a handsome woman when she was alive was improper]; *compare People v Ramsaran*, 154 AD3d 1051, 1053-1054 [3d Dept 2017] [photographs of the deceased prior to her murder "were relevant to and probative of the People's central theory that defendant disapproved of the victim's appearance and was motivated to kill her, in part, by his desire to be with (another woman), whose appearance he perceived as more attractive"].)

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[1] In December 2022, subdivision (1) was amended to add the second sentence and the accompanying Note was amended to add references to social media photographs.

9.14 Video Recording

(1) In general.

A video recording of a scene, person or persons, or an occurrence is admissible in the discretion of a trial judge provided it is shown to be relevant to an issue in the proceeding and is properly authenticated.

(2) Authentication.

(a) A video recording may be authenticated by any of the following:

(i) the testimony of a witness to the recorded events, or of an operator or installer or maintainer of the equipment, that the video accurately represents the subject matter depicted;

(ii) the testimony, expert or otherwise, that a video truly and accurately represents what was before the camera;

(iii) the testimony of a witness and other evidence that demonstrates that the video accurately represents the subject matter depicted.

(b) Evidence establishing the chain of custody of the video may buttress its authenticity and integrity and even allow for acceptable inferences of its reasonable accuracy and freedom from tampering.

Note

Subdivision (1) is derived from *People v Patterson* (93 NY2d 80, 84 [1999] ["At the outset, we emphasize that relevant videotapes . . . are ordinarily admissible under standard evidentiary rubrics. Some reliable authentication and foundation . .

. are, however, also still necessary. The decision to admit or exclude videotape evidence generally rests, to be sure, within a trial court's founded discretion"]).

In the exercise of its discretion, the trial court may consider whether the trial would be "unduly delayed by exhibiting" the video or whether the video is "sensational only and unnecessary," particularly where the evidence may be "submitted in another form"; or whether the video unfairly exaggerates any of the true features which are sought to be proved (*Boyarsky v Zimmerman Corp.*, 240 App Div 361, 365, 367 [1st Dept 1934]); or whether a photograph of a video image rather than the video with its audio should more properly be admitted. (*See People v Jin Cheng Lin*, 26 NY3d 701, 727 [2016] [a court properly exercised its discretion to authorize the admission of a photograph of the defendant to show his physical appearance after interrogation rather than a video with self-serving audio].)

A compilation of portions of footage drawn from numerous surveillance cameras is equally admissible when properly authenticated and the trial court is satisfied that there is no reason to believe the compilation was incomplete or otherwise unsatisfactory (*People v Cabrera*, 137 AD3d 707, 707-708 [1st Dept 2016] [the witness "explained that she viewed several hours of videotape and created a 30-minute disc that included all the footage that was relevant to the case, that is, all views of any persons involved in this case" and there was "no reason to believe that the compilation was incomplete or otherwise unsatisfactory"]).

A video recording may be relevant for what it does not show, as well as for what it does show (*e.g. People v Ruiz*, 7 AD3d 737, 737 [2d Dept 2004] [The Supreme Court properly admitted security videotapes from a certain hospital into evidence to rebut the defendant's claim that he was at that hospital during the time of the robbery]). In a criminal case, a surveillance video that plainly shows the defendant committing a criminal act is direct evidence and thus does not require a circumstantial evidence charge (*People v Hardy*, 26 NY3d 245 [2015]; *see People v Gee*, 99 NY2d 158, 162 [2002] [videotape of a robbery of a store clerk]).

Other examples of a properly admitted video recording include: *People v Edmonson* (75 NY2d 672, 674 [1990] ["evidence of a prior extrajudicial identification made by the complaining witness from a videotape taken by the police, canvassing a particular neighborhood and focusing on numerous passersby," is admissible]); *People v Tunstall* (63 NY2d 1, 10 [1984] [a videotape of the lineup in which a defendant was identified is admissible]); *People v Scullion* (137 AD3d 645 [1st Dept 2016] [video of the purportedly intoxicated defendant performing coordination tests was admissible]); *Matter of Burack* (201 AD2d 561, 561 [2d Dept 1994] [video of the execution of a will was properly admitted as evidence of the decedent's testamentary capacity]); *People v Fondal* (154 AD2d 476, 476-477 [2d Dept 1989] [video showing the defendant and accomplice "in the act of shoplifting" was admissible]); *Caprara v Chrysler Corp.* (71 AD2d 515, 522-523 [3d Dept 1979] [a video showing the "impact the injury has had on plaintiff's life" was admissible], *aff* 52 NY2d 114 [1981]); and *Boyarsky v Zimmerman Corp.*

(240 App Div 361, 365 [1st Dept 1934] [video of plaintiff conducting himself as a "perfectly well man instead of the invalid which he claimed to be" was admissible]).

Technical flaws in a video recording that do not impact on the fairness of what the video depicts go to the "weight" of the evidence, not its admissibility. In *People v Davis* (28 NY3d 294, 303 [2016]), for example, the "authenticating witness, who maintained the surveillance system, testified that during the computerized process of compressing and archiving the digital video files, certain images may overlap. However, he further testified that the process, which he personally conducted, does not conjure up persons that were not originally present in the camera shot. As such, the trial court did not abuse its discretion in concluding that the image-overlap issue went to weight, but not admissibility, of the video evidence." Other examples include: *People v Yanez* (180 AD3d 816, 816 [2d Dept 2020] [that a time stamp on a video differed from the time the videos were actually recorded went to "the weight of the evidence, not its admissibility"]) and *People v McEachern* (148 AD3d 565, 566 [1st Dept 2017] [the "alleged uncertainty about whether the videotape depicted the events at issue went to the weight to be accorded the evidence rather than its admissibility"]).

Once a video is properly admitted, a court may allow the jury to utilize an accurate, typewritten transcript of the audio portion, if necessary, to aid the jury in understanding the audio (*People v Dyla*, 169 AD2d 777, 778 [2d Dept 1991] [the court properly allowed the jury "to utilize typewritten transcripts as an aid to understanding the defendant's videotaped statement"]).

Subdivision (2) (a) (i) and (ii) and (b) is derived from the language of *Patterson* (93 NY2d 80, 84 [1999]), which stated:

> "a videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted. Testimony, expert or otherwise, may also establish that a videotape 'truly and accurately represents what was before the camera.' Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering" (citations omitted).

Patterson concluded, however, that "[t]hese illustratively noted methods of authentication are not exclusive" (*Patterson* at 84; *see* Barker & Alexander, Evidence in New York State and Federal Courts § 1104.1 [d] [2d ed West's NY Prac Series]; Guide to NY Evid rule 9:07, Methods of Authentication and Identification, subds [1] [Admission of authenticity], [2] [Testimony of witness], [6] [Circumstantial evidence], [7] [Voice identification]).

Subdivision (2) (iii) is thus designed to encompass those additional methods of authentication. For example, in *People v Goldman* (35 NY3d 582, 588 [2020]), a YouTube video that depicted the defendant rapping about " 'run[ning] up' into a rival crew's 'house' " was properly authenticated and admitted as evidence of the defendant's motive for driving with three others into a rival crew's territory and shooting and killing a teenage boy. The proof of authentication of the video included evidence that the defendant was the undisputed person in the video singing; that the video showed the defendant and two of the other individuals who were in the car with the defendant during the shooting "in similar attire to what they were wearing on the night of the homicide"; that the "background demonstrated that it was evidently filmed in defendant's neighborhood" (*id.* 595); and a fair inference from a prosecution witness's testimony and the uploading of the video after the homicide that the video was made after the homicide.

Other examples of properly authenticated video recording include: *Zegarelli v Hughes* (3 NY3d 64, 69 [2004] ["Testimony from the videographer that he took the video, that it correctly reflects what he saw, and that it has not been altered or edited is normally sufficient to authenticate a videotape"]) and *People v Scullion* (137 AD3d 645, 645 [1st Dept 2016] [Although the police officer who administered the coordination tests did not testify, "the videotape was authenticated by the arresting officer, who was a witness to the recorded events"]).

There is "no requirement that a video recording have audio to be admissible" (*Belton v Lal Chicken, Inc.*, 138 AD3d 609, 610 [1st Dept 2016]).

The "chain of custody" method of authentication requires, "in addition to evidence concerning the making of the [video]tape[ ] and identification of the [participants], that within reasonable limits those who have handled the [video]tape from its making to its production in court 'identify it and testify to its custody and unchanged condition' " (*People v Roberts*, 66 AD3d 1135, 1136 [3d Dept 2009]). Any "gaps in the chain of custody" go to the "weight that was to be accorded to the video recordings, not their admissibility" (*People v Edmonds*, 165 AD3d 1494, 1497 [3d Dept 2018]).