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Rule 901: Requirement of Authentication or Identification

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ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

RULE 901: REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

Federal Rule of Evidence 901 provides:

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, 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

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business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.[1]

Rule 901 provides the basis for the authentication or identification of non-testimonial evidence as a precondition to its admissibility, and is another aspect of relevancy.[2] The proponent of such evidence must lay a foundation of genuineness sufficient to support a finding of authenticity by the trier of fact.[3]

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1. FED. R. EVID. 901.

2. FED. R. EVID. 901(a) advisory committee's note. The advisory committee's note states that "[b]ecause this requirement is within the category of conditional relevancy, dependent upon the fulfillment of a condition of fact, [it] is governed by the procedure set forth in Rule 104(b)." *Id.*; FED. R. EVID. 104(b). Rule 104(b) provides: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." *Id.*

3. *See generally* 7 WIGMORE ON EVIDENCE §§ 2129, 2130 (3d ed. 1940); *see also* United States v. Sutton, 426 F.2d 1202, 1206 (D.C. Cir. 1969) (stating that documentary evidence must be established as genuine before it may be admitted into evidence).

The Second Circuit has examined Rule 901 in several cases, stating that "[a]uthentication is perhaps the purest example of a rule respecting relevance: evidence admitted as something can have no probative value unless that is what it really is."[4] The Second Circuit has indicated that the burden of proof in issues of authentication rests with the party seeking admission of the evidence.[5] In *United States v. Hon*,[6] the court stated that Rule 901 "requires that to meet the admissibility threshold the [party seeking admission] need only prove a rational basis for concluding that an exhibit is what it is claimed to be."[7] Similarly, in *United States v. Natale*,[8] the court stated that under Rule

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The Second Circuit addressed the issue of authentication prior to the promulgation of the Federal Rules of Evidence in Brandon v. Collins, 267 F.2d 731 (1959). In *Brandon*, the court addressed the issue of whether certain claimants should have received death benefits. *Id.* at 732-733. The court found that a beneficiary card, which was used to establish the identity of the beneficiary appointed by the deceased, was properly admitted. *Id.* The court held that the judge properly found the beneficiary card genuine by comparing it to an authentic signature on the decedent's previous separation agreement. *Id.* at 732-33. The court held that visual comparisons sufficiently satisfied preliminary authentication requirements for admission in evidence. *Id.* As support for its holding, the court quoted from the language of the controlling statute: "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person." *Id.* (quoting 28 U.S.C.A. § 1731 (YEAR)) (footnote omitted).

4. United States v. Sliker, 751 F.2d 477, 499 (1984), *cert. denied*, 470 U.S. 1058 (1985).

5. *See* United States v. Almonte, 956 F.2d 27, 30 (1992) (finding that attorney's notes were not an accurate statement of the witness' own words and, therefore, unable to be authenticated).

6. 904 F.2d 803 (2d Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991). In a prosecution for trafficking in stolen watches, defendant contended that the government's "chain of custody" proof was insufficient to allow various counterfeit watches into evidence. *Id.* at 809.

7. *Id.* at 809.

8. 526 F.2d 1160 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). The defendants, charged with conspiracy and extortion as a means to collect extensions of credit, argued that admission of a notebook containing numerous records of such transactions was improper. *Id.* at 1173. The court held that because the defendants were present at the time of seizure, the notebook

901(a) a proponent "need only prove a rational basis from which the jury may conclude that the exhibit did, in fact, belong to the appellants."[9] The court has held that this rational basis may be established by a witness who testifies that he is personally familiar with the exhibits.[10] In *United States v. Almonte*,[11] the court found that debriefing notes, written by an assistant United States attorney, did not reflect the witness' own words and were, therefore, inadmissible.[12] The court stated that the party seeking admission of the notes would bear the burden of proof in showing that the notes contained the witness' own thoughts.[13] In reaching this conclusion, the court applied the rational basis test as set forth in *Hon* and *Natale*.[14]

However, the Second Circuit has recognized that Rule 901 "does not definitely establish the nature or quantum of proof that is required."[15] Thus, in *United States v. Kahn*,[16] the court

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contained numerous incriminating records, and that the notebook was found in an office frequently used by the defendants, there were sufficient facts to establish authenticity. *Id.*

9. *Id.* at 1173.

10. United States v. Inserra, 34 F.3d 83 (2d Cir. 1994). The defendant was convicted of making a false statement to the United States Probation Office, and alleged error because the government was allowed to introduce his monthly probation reports, without specifically linking the reports to him. *Id.* at 86-87. The court held that since the Deputy Chief Probation Officer testified that he was personally familiar with the defendant and specifically connected the probation reports to him, "noting they had been retrieved from [defendant's] file," this testimony warranted the submission of the reports to the jury. *Id.* at 90.

11. 956 F.2d 27 (2d Cir. 1992).

12. *Id.* at 30.

13. *Id.* at 29.

14. *Id.* at 30.

15. Ricketts v. City of Hartford, No. 94-7422, 1996 WL 21170, at *12 (Jan. 17, 1996) (stating that "'[i]dentification of a voice, whether heard firsthand or through mechanical or electronic recording,' can be established 'by opinion based upon hearing the voice at any time under circumstances connecting it to the alleged speaker.'") (citations omitted).

16. 53 F.3d 507 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 697 (1996). The defendants, charged with mail fraud and conspiring to defraud the New York State Medicaid system, argued that the admission of two telephone calls to the Department of Social Services into evidence was improper. *Id.* at 515. The

indicated that surrounding circumstances could provide a basis for authenticating the identity of a telephone caller.[17]

New York evidence law follows a similar approach to that of Rule 901 and "generally requires that the proponent of evidence prove authenticity as a condition to the admission of the evidence."[18] New York case law concerning authentication provides various illustrations which conform with the general rule of authentication.[19] For example, New York courts have upheld the authentication of handwriting comparisons made by lay witnesses.[20] In *People v. Molineux*,[21] the court of appeals held that genuineness of a handwriting sample can be established

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court held that "[w]hile a mere assertion of identity by a person talking on the telephone is not itself sufficient to authenticate that person's identity, some additional evidence, which 'need not fall in[to] any set pattern,' may provide the necessary foundation." *Id.* at 516 (citing FED. R. EVID. 901(b)(6) advisory committee's note).

17. *Id.* at 516.

18. *See* RANDOLPH N. JONAKAIT ET AL., NEW YORK EVIDENTIARY FOUNDATIONS 45 (1993). When "relevance depends on the existence of some other fact" the same analysis would apply to both proving authenticity and to establishing relevance. *Id.* Furthermore, in determining the sufficiency of evidence, the trial judge will ask if there is "sufficient evidence for a reasonable juror to conclude that the evidence is what its proponent claims it is . . . ." *Id.*

19. *See* People v. Dunbar Contracting Co., 215 N.Y. 416, 109 N.E. 554 (1915) (holding that a person's voice can be identified by a witness having some familiarity with the voice); People v. Molineux, 168 N.Y. 264, 320-21, 61 N.E. 286, 304-05 (1901) (holding that a lay witness may identify handwriting with which the witness is familiar).

20. *See* N.Y. CIV. PRAC. L. & R. 4536 (McKinney 1992). Section 4536 provides that "[c]omparison of a disputed writing with any writing proved to the satisfaction of the court to be the handwriting of the person claimed to have made the disputed writing shall be permitted." *Id.*; *see also* People v. Molineux, 168 N.Y. 264, 324, 61 N.E. 286, 305-06 (1901) (stating that a "disputed writing" may be any writing which a person "seeks to prove as the genuine handwriting of any person" and that such evidence will be admissible as long as it is not inadmissible under any other rules of evidence). *Id.* at 324, 61 N.E. at 306.

21. 168 N.Y. 264, 61 N.E. 286 (1901).

by testimony of a witness who is familiar with the author.[22] In addition, New York law recognizes that circumstantial evidence may serve to authenticate or identify the proffered evidence.[23]

Moreover, custodians of public records may testify to the authenticity of such records.[24] Finally, stipulation by the adverse party, as well as actual observation of the creation of the writing are also acceptable methods of authentication in New York.[25]

Although Rule 901 and New York law take similar approaches to authentication, there are two significant differences. First, with respect to authenticating telephone conversations, Rule 901(b)(6)(A) states that self-identification is sufficient identification of one to whom a telephone call was placed.[26] However, self-identification on the telephone is more restrictive under New York evidentiary rules than Rule 901(b)(6).[27] New York requires more than mere self-identification where the voice is unrecognizable to the caller.[28] Although the courts have not specified what "more than mere self identification" consists of, it has been stated that other circumstantial evidence may be needed to prove the identification.[29] In addition, the New York rule

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22. *Id.* at 328, 61 N.E. at 307.

23. *See* MCCORMICK ON EVIDENCE § 225, at 695 (Edward W. Cleary ed., 3d ed. 1984) (stating that circumstantial evidence may consist of evidence that a person has knowledge of facts which would only be known by the alleged signer of the writing or receipt of a reply letter).

24. *See* JEROME PRINCE, RICHARDSON ON EVIDENCE § 644, at 641-42 (10th ed. 1973) (stating that in order to authenticate a document various alternative means may be used such as testimony from the proper custodian or proof of removal from the care of an official custodian).

25. *Molineux*, 168 N.Y. at 328, 61 N.E. at 307.

26. *See* FED. R. EVID. 901(b)(6)(A).

27. *See* Mankes v. Fishman, 163 A.D. 789, 795-96, 149 N.Y.S.2d 228, 232-33 (3d Dep't 1914). In *Mankes*, the court held that the identity of a person answering the telephone can be proven using methods other than voice recognition and, similarly, a conversation which is otherwise admissible may be entered into evidence "when from all the circumstances the identity of the person answering the telephone has been established with reasonable certainty." *Id.*

28. *Id.*

29. *Id.* The *Mankes* court stated that:

distinguishes personal calls from business calls, allowing greater latitude for self-identification in business telephone conversations.[30]

Second, there is a difference between federal and New York law concerning the time period during which an ancient document can be authenticated and admitted into evidence. Under Rule 901(b)(8)(C), the document must be "in existence [for] 20 years or more at the time it is offered."[31] In New York, the ancient document rule requires a period of thirty years.[32]

> [T]he identity of a person speaking through a telephone may be established, not alone by the sound of his voice, but from other circumstances as well; as from the fact that he appeared at the telephone in response to a call for a person by his name at a place where he had been located as being, admitted that such was his name, and was familiar with the transactions inquired about . . . .

Id. at 796, 149 N.Y.S.2d at 223 (citing Cox v. Cline, 126 N.W. 330 (Iowa Sup. Ct. 1910)).

30. *See* People v. Lynes, 49 N.Y.2d 286, 401 N.E.2d 405, 425 N.Y.S.2d 295 (1980) (holding that in business situations self-identification without additional circumstantial evidence may be acceptable).

31. *See* FED. R. EVID. 901(b)(8)(C).

32. *See* Tillman v. Lincoln Warehouse Corp., 72 A.D.2d 40, 44, 423 N.Y.S.2d 151, 153 (1st Dep't 1979) (stating that pursuant to "the 'ancient document' rule a record or document which is found to be more than thirty years of age and which is proven to have come from proper custody and is itself free from any indication of fraud or invalidity 'proves itself'").