

## **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.