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Advocate's View: Authenticating evidence in federal and state courts

By: Jeremy M. Sher May 17, 2017 0

Trials are clashes of ideas and attitudes. Attorneys condense complex theories into characterizations and themes. Jurors consider what witnesses do on the stand in addition to what they say. But the jury's memory of arguments and testimony can be fleeting. Documents, materials from the scene of an accident, and other non-testimonial evidence may be more persuasive than an attorney's words or a witness's composure.

For example, Laurie Vahey and I tried a case that involved a person stepping onto a circular metal sheet that covered a hole in the floor. The sheet gave way and the person fell into the room below. As the party arguing that the owner of the premises was negligent, we had the flimsy, rusted sheet admitted into evidence and left it within the jurors' sight for as long as possible. When Laurie questioned witnesses about the sheet, I rolled it toward the jury box like a wheel. The jury could see how thin and light the sheet was, and hear it wobble like a saw.

Because real evidence has such figurative and literal weight, it must be authenticated before it can be admitted into evidence. In federal court, authentication requires showing by a preponderance of the evidence "that the item is what the proponent claims it is." Fed. R. Evid. 901(a); see *United States v. Gelzer,* 50 F.3d 1133, 1141 (2d Cir. 1995). Rule 901(b) lists several permissible methods of authentication, but allows courts to make "a context-specific determination" regarding particular items and the methods used to confirm their identity. *United States v. Vayner*, 769 F.3d 125, 130 (2d Cir. 2014). While the proponent of evidence must authenticate physical evidence before showing it to the jury, the opposing party may still challenge the evidence's reliability, and the jury may ultimately decide that the evidence is not what the proponent claims it to be. *Id.* at 131.

New York law does not codify an authentication requirement, but it certainly exists in state court. The Court of Appeals has held that authenticating real evidence requires "clear and convincing evidence … that the offered evidence is genuine and there has been no tampering with it." *People v. McGee*, 49 N.Y.2d 48, 59 (1979).

State courts sometimes conflate authentication with establishing an exception to the rule against hearsay. See *AQ Asset Mgmt. LLC v. Levine*, 128 A.D.3d 620, 621 (1st Dept. 2015) (finding that an email was not authenticated, and "was therefore inadmissible hearsay"). This is likely because the CPLR provides methods for admitting certain types of evidence that combine authentication with establishing a hearsay exception. See, e.g., CPLR 4518(a) (certified business records), 4518(c) (certified hospital, laboratory, municipal, or state records). Personal injury practitioners are familiar with New York's highly specific rule for admitting the results of medical and diagnostic procedures, such as x-ray films, which requires inscribing identifying information on the materials and giving pre-trial notice of the intent to offer them. CPLR 4532-a.

Federal and New York practice overlap with respect to certain commonly used types of evidence, such as business and medical records. Similar to CPLR 4518, Federal Rule of Evidence 803(6) provides for the admission of "Records of a regularly conducted activity" that meet various requirements, including authentication by "the custodian or another qualified witness, or by a certification." Both federal and New York law allow parties to authenticate business or medical records with a written certification instead of a live witness. See, e.g., Fed. R. Evid. 902(11)-(12); CPLR 3122-a. These rules permit the use of non-party records without the need to subpoena a records custodian.

When offering evidence that does not fall within an enumerated category in the Federal Rules of Evidence or CPLR, the proponent must prove that the evidence "is genuine and that there has been no tampering with it," a showing that "may differ according to the nature of the evidence sought to be admitted." *McGee*, 49 N.Y.2d at 59; see Fed. R. Evid. 901(a). The proponent must call a witness to lay a foundation or obtain the opposing party's stipulation not to contest authenticity.

The court might not appreciate a party's refusal to grant a reasonable stipulation and obviate the need to call a witness. See *Williams v. Arctic Cat, Inc.,* 2014 U.S. Dist. LEXIS 33090, at *23 (N.D.N.Y. Mar. 13, 2014) (overruling the plaintiffs' objection to calling an undisclosed witness whose "testimony [was] necessary only because of Plaintiffs' unwillingness to stipulate to the authenticity of photographs"). But in some situations, holding the proponent to its obligation to authenticate its evidence may cause its case to unravel. If the proponent has not obtained the correct certification or lined up a witness, it might have no way to establish a foundation at trial. Non-party records custodians may be uncooperative, unavailable, or outside of the court's subpoena power, rendering evidence inadmissible.

Authentication is an essential component of trial practice that can be overlooked by attorneys who assume that each side will stipulate to admitting the other's exhibits. It is a technical and rule-driven area that requires research and planning. It can make or break your adversary's case, or your own.

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