NOTICE

Public Comments on Revisions to the Connecticut Code of Evidence Being Considered by the Supreme Court

On November 16, 2021, the Supreme Court voted to submit for public comment the following proposed revisions to the Connecticut Code of Evidence.

Written comments may be submitted to the Code of Evidence Oversight Committee of the Supreme Court by email to Lori.Petruzzelli@jud.ct.gov. Comments should be received **no later than December 14, 2021.**

Attest:

Hon. Richard A. Robinson

Chief Justice, Supreme Court

INTRODUCTION

The following are amendments that are being considered to the Connecticut Code of Evidence, including revisions to the Commentaries. The amendments are indicated by brackets for deletions and underlines for added language. The designation ''New'' is printed with the title of each new rule.

Supreme Court

PROPOSED AMENDMENTS TO THE CONNECTICUT CODE OF EVIDENCE

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PROPOSED AMENDMENTS TO THE CONNECTICUT CODE OF EVIDENCE

ARTICLE I—GENERAL PROVISIONS

Sec. 1-1. Short Title; Application

(a) Short title. These rules shall be known and may be cited as the Code of Evidence. The Code of Evidence is hereinafter referred to as the "Code."

(b) Application of the Code. The Code and the commentary apply to all proceedings in the Superior Court in which facts in dispute are found, except as otherwise provided by the Code, the General Statutes or any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code.

(c) Rules of privilege. Privileges shall apply at all stages of all proceedings in the court.

(d) The Code inapplicable. The Code, other than with respect to privileges, does not apply in proceedings such as, but not limited to, the following:

(1) Proceedings before investigatory grand juries, as provided for in General Statutes §§ 54-47b through 54-47f.

(2) Proceedings involving questions of fact preliminary to <u>the determination of the</u> admissibility of evidence <u>as provided in</u> **[**pursuant to**]** Section 1-3 <u>(a)</u> of the Code.

(3) Proceedings involving sentencing.

(4) Proceedings involving probation.

(5) Proceedings involving small claims matters.

(6) Proceedings involving summary contempt.

(7) Certain pretrial criminal proceedings in which it has been determined as a matter of statute or decisional law that the rules of evidence do not apply.

COMMENTARY

(b) Application of the Code.

When the Code was initially adopted by the judges of the Superior Court in 1999 and then readopted by the Supreme Court in 2014, the adoption included both the rules and the commentary, thereby making both equally applicable. See *State* v. *Pierre*, 277 Conn. 42, 60, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006).

The Code is broadly applicable. The Code applies to all civil and criminal bench or jury trials in the Superior Court. The Probate Assembly adopted Probate Rule 62.1, effective July 1, 2013, making the Code applicable to all issues in which facts are in dispute. The Code applies, for example, to the following proceedings:

(1) court-ordered fact-finding proceedings conducted pursuant to General Statutes § 52-549n and Practice Book § 23-53; see General Statutes § 52-549r;

(2) probable cause hearings conducted pursuant to General Statutes § 54-46a, excepting certain matters exempted under General Statutes § 54-46a (b); see *State* v. *Conn*, 234 Conn. 97, 110, 662 A.2d 68 (1995); *In re Ralph M.*, 211 Conn. 289, 305–306, 559 A.2d 179 (1989);

(3) juvenile transfer hearings conducted pursuant to General Statutes § 46b-127 as provided in subsection (b) of that provision; *In re Michael B.*, 36 Conn. App. 364, 381, 650 A.2d 1251 (1994); *In re Jose M.*, 30 Conn. App. 381, 384–85, 620 A.2d 804, cert. denied, 225 Conn. 921, 625 A.2d 821 (1993);

(4) juvenile proceedings; however, adoption of subsection (b) is not intended to abrogate the well established rule that the court may relax

its strict application of the formal rules of evidence to reflect the informal nature of juvenile proceedings provided the fundamental rights of the parties are preserved; *In re Juvenile Appeal (85-2),* 3 Conn. App. 184, 190, 485 A.2d 1362 (1986); see *Anonymous* v. *Norton*, 168 Conn. 421, 425, 362 A.2d 532, cert. denied, 423 U.S. 925, 96 S. Ct. 294, 46 L. Ed. 2d 268 (1975); Practice Book § 32a-2 (a); and

(5) proceedings involving family relations matters enumerated under General Statutes § 46b-1.

The Code is not intended to apply to matters to which the technical rules of evidence traditionally have not applied. Thus, for example, the Code would be inapplicable to hearings on the issuance of bench warrants of arrest or search warrants conducted pursuant to General Statutes §§ 54-2a and 54-33a, respectively; see *State* v. *DeNegris*, 153 Conn. 5, 9, 212 A.2d 894 (1965); *State* v. *Caponigro*, 4 Conn. Cir. Ct. 603, 609, 238 A.2d 434 (1967).

Matters to which the Code specifically is inapplicable are set forth in subsection (d).

(c) Rules of privilege.

Subsection (c) addresses the recognition of evidentiary privileges only with respect to proceedings in the court. See Article V—Privileges. It does not address the recognition of evidentiary privileges in any other proceedings outside the court, whether legislative, administrative or quasi-judicial, in which testimony may be compelled.

(d) The Code inapplicable.

Subsection (d) specifically states the proceedings to which the Code, other than with respect to evidentiary privileges, is inapplicable. The list is intended to be illustrative rather than exhaustive, and subsection

(d) should be read in conjunction with subsection (b) in determining the applicability or inapplicability of the Code. The removal of these matters from the purview of the Code generally is supported by case law, the General Statutes or the Practice Book. They include:

(1) proceedings before investigatory grand juries; e.g., *State* v. *Avcollie*, 188 Conn. 626, 630–31, 453 A.2d 418 (1982), cert. denied, 461 U.S. 928, 103 S. Ct. 2088, 77 L. Ed. 2d 299 (1983);

(2) preliminary determinations of questions of fact by the court made pursuant to Section 1-3 (a); although there is no Connecticut authority specifically stating this inapplicability, it is generally the prevailing view. E.g., Fed. R. Evid. 104 (a); Unif. R. Evid. 104 (a), 13A U.L.A. 16–17 (1999);

(3) sentencing proceedings following trial; e.g., *State* v. *Huey*, 199 Conn. 121, 126, 505 A.2d 1242 (1986); see also *State* v. *Pena*, 301 Conn. 669, 680–83, 22 A.3d 611 (2011) (in sentencing, trial court may rely on evidence bearing on crimes of which defendant was acquitted). The Code, however, does apply to sentencing proceedings that constitutionally require that a certain fact be found by the trier of fact beyond a reasonable doubt before the defendant is deemed eligible for a particular sentence. See, e.g., *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (''[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt''); *Bullington* v. *Missouri*, 451 U.S. 430, 446, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981) (''many

of the protections available to a defendant at a criminal trial also are available at a sentencing hearing . . . in a capital case'');

(4) hearings involving the violation of probation conducted pursuant to General Statutes § 53a-32 (a); *State* v. *White*, 169 Conn. 223, 239–40, 363 A.2d 143, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 399 (1975); *In re Marius M.*, 34 Conn. App. 535, 536, 642 A.2d 733 (1994);

(5) proceedings involving small claims matters; General Statutes § 52-549c (a); see Practice Book § 24-23;

(6) summary contempt proceedings; see generally Practice Book § 1-16; and

(7) certain criminal pretrial proceedings; see, e.g., *State* v. *Fernando A.*, 294 Conn. 1, 26–30, 981 A.2d 427 (2009); see also General Statutes § 54-64f (b) (hearing on revocation of release).

Nothing in subsection (d) (2) abrogates the common-law rule that in determining preliminary questions of fact upon which the application of certain exceptions to the hearsay rule depends, the court may not consider the declarant's out-of-court statements themselves in determining those preliminary questions. E.g., *State* v. *Vessichio*, 197 Conn. 644, 655, 500 A.2d 1311 (1985) (court may not consider coconspirator statements in determining preliminary questions of fact relating to admissibility of those statements under coconspirator statement exception to hearsay rule; see Section 8-3 [1] [E]), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986); *Robles* v. *Lavin*, 176 Conn. 281, 284, 407 A.2d 958 (1978) (in determining whether authorized admissions against party opponent exception to hearsay

rule applies, authority to speak must be established before alleged agent's declarations can be introduced; see Section 8-3 [1] [C]); *Ferguson* v. *Smazer*, 151 Conn. 226, 231, 196 A.2d 432 (1963) (in determining whether hearsay exception for statements of pedigree and family relationships applies, declarant's relationship to person to whom statement relates must be established without reference to declarant's statements; see Section 8-6 [7]).

Sec. 1-3. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification **[**and**]** <u>or</u> competence of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court.

(b) [Admissibility] <u>Relevance</u> conditioned on fact. [When the admissibility of evidence depends upon connecting facts,**]** <u>If the relevance of evidence depends upon whether a fact exists, evidence must be admitted sufficient to support a finding that the fact does exist.</u> **[**t**]**<u>T</u>he court may admit the <u>proffered</u> evidence **[**upon proof of**]** <u>on the condition that</u> the connecting **[**facts or subject to later proof of the connecting facts**]** <u>evidence be introduced subsequently</u>.

COMMENTARY

(a) Questions of admissibility generally.

The admissibility of evidence, qualification of a witness, **[**authentication of evidence**]** or **[**assertion**]** <u>applicability</u> of a privilege **[**often is conditioned on a disputed fact**]** <u>are preliminary questions to be determined by the court. Often, such a determination is dependent upon the existence of foundational facts</u>. Was the declarant's statement

made under the stress of excitement? Is the alleged expert a qualified social worker? Was a third party present during a conversation between husband and wife? In each of these examples, the [admissibility of evidence, qualification of the witness or assertion of a privilege] court's determination will turn upon the answer to these foundational questions of fact. In most instances, [S]subsection (a) makes it the responsibility of the court to [determine] find these [types of] preliminary [questions of] facts. E.g., *State* v. *Stange*, 212 Conn. 612, 617, 563 A.2d 681 (1989); *Manning* v. *Michael*, 188 Conn. 607, 610, 453 A.2d 1157 (1982); *D'Amato* v. *Johnston*, 140 Conn. 54, 61–62, 97 A.2d 893 (1953).

[As it relates to authentication, this Section operates in conjunction with Section 1-1 (d) (2) and Article IX of the Code. The preliminary issue, decided by the court, is whether the proponent has offered a satisfactory foundation from which the finder of fact could reasonably determine that the evidence is what it purports to be. The court makes this preliminary determination in light of the authentication requirements of Article IX. Once a prima facie showing of authenticity has been made to the court, the evidence, if otherwise admissible, goes to the fact finder, and it is for the fact finder ultimately to resolve whether evidence submitted for its consideration is what the proponent claims it to be. *State* v. *Carpenter*, 275 Conn. 785, 856–57, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006); *State* v. *Colon*, 272 Conn. 106, 188–89, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); *State* v. *Shah*, 134 Conn. App. 581, 593, 39 A.3d 1165 (2012).]

Pursuant to Section 1-1 (d) (2), courts are not bound by the Code in determining most preliminary questions of fact under subsection (a) **[**, except with respect to evidentiary privileges**]**. Accordingly, in finding these facts, the court may consider nonprivileged evidence that would otherwise be inadmissible under the Code. In such instances, the court acts as the fact finder in determining whether the foundational facts exist by a fair preponderance of the evidence. The court may assess the credibility of the foundational evidence, including any testimony offered by the proponent of the evidence.

The Code does apply, however, to factual determinations regarding the existence of an evidentiary privilege; see Section 1-1 (d); and questions of conditional relevance, including whether evidence has been sufficiently authenticated. See Section 1-3 (b).

(b) [Admissibility] Relevance conditioned on fact.

Frequently, the **[**admissibility**]** relevance of a particular fact or item of evidence depends upon **[**proof**]** evidence of another fact or other facts, i.e., connecting facts. For example, the **[**relevancy**]** relevance of a witness' testimony that the witness observed a truck swerving in and out of the designated lane at a given point depends upon other testimony identifying the truck the witness observed as the defendant's. Similarly, the probative value of evidence that *A* warned *B* that the machine *B* was using had a tendency to vibrate depends upon other evidence establishing that *B* actually heard the warning. When the **[**admissibility**]** relevance of evidence depends upon **[**proof**]** evidence of connecting facts, subsection (b) authorizes the court to admit the evidence upon **[**proof**]** admission of the connecting facts or **[**admit the

evidence] subject to later [proof] admission of the connecting facts. See, e.g., *State* v. *Anonymous (83-FG)*, 190 Conn. 715, 724–25, 463 A.2d 533 (1983); *Steiber* v. *Bridgeport*, 145 Conn. 363, 366–67, 143 A.2d 434 (1958) [; see also *Finch* v. *Weiner*, 109 Conn. 616, 618, 145 A. 31 (1929) (when admissibility of evidence depends upon connecting facts, order of proof is subject to discretion of court)].

If the proponent fails to introduce evidence sufficient to [prove] support a finding of the connecting facts, the court may instruct the jury to disregard the evidence or order the earlier testimony stricken. *State* v. *Ferraro*, 160 Conn. 42, 45, 273 A.2d 694 (1970); *State* v. *Johnson*, 160 Conn. 28, 32–33, 273 A.2d 702 (1970).

The authentication of evidence is another example of an instance in which the relevance of evidence to the case depends upon the existence of another fact or facts. Evidence can be relevant for the purpose for which it is being offered only if it is what the proponent claims it to be. As a preliminary matter, the court must decide whether the proponent has offered a satisfactory foundation from which the finder of fact could reasonably determine that the evidence is what it purports to be. The court makes this preliminary determination in light of the authentication requirements of Article IX. In conducting its preliminary inquiry, the court does not assess the credibility of the evidence proffered in support of authentication but simply determines whether the evidence, if credited, is sufficient to support a finding that the proffered evidence is what the proponent claims it to be. *State* v. *Porfil*, 191 Conn. App. 494, 519–21, 215 A.3d 161 (2019), cert. granted on other grounds, 333 Conn. 923, 218 A.3d 67 (2019). If the court

determines that a prima facie showing of authenticity has been made, the evidence, if otherwise admissible, goes to the fact finder. It is for the fact finder ultimately to decide whether evidence submitted for its consideration is what the proponent claims it to be. *State* v. *Carpenter*, 275 Conn. 785, 856–57, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006); *State* v. *Colon*, 272 Conn. 106, 188–89, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); *State* v. *Shah*, 134 Conn. App. 581, 593, 39 A.3d 1165 (2012); see also commentary to Section 9-1.

The Code applies in making determinations required by Section 1-3 (b).

ARTICLE IV—RELEVANCY

Sec. 4-11. Admissibility of Evidence of Sexual Conduct in Criminal Prosecutions

"In any prosecution for sexual assault under sections 53a-70, 53a-70a, and 53a-71 to 53a-73a, inclusive, no evidence of the sexual conduct of the victim may be admissible unless such evidence is (1) offered by the defendant on the issue of whether the defendant was, with respect to the victim, the source of semen, disease, pregnancy or injury, or (2) offered by the defendant on the issue of credibility of the victim, provided the victim has testified on direct examination as to his or her sexual conduct, or (3) any evidence of sexual conduct with the defendant offered by the defendant on the issue of consent by the victim, when consent is raised as a defense by the defendant, or (4) otherwise so relevant and material to a critical issue in the case

that excluding it would violate the defendant's constitutional rights. Such evidence shall be admissible only after an in camera hearing on a motion to offer such evidence containing an offer of proof. If the proceeding is a trial with a jury, such hearing shall be held in the absence of the jury. If, after a hearing, the court finds that the evidence meets the requirements of this section and that the probative value of the evidence outweighs its prejudicial effect on the victim, the court may grant the motion. The testimony of the defendant during a hearing on a motion to offer evidence under this section may not be used against the defendant during the trial if such motion is denied, except that such testimony may be admissible to impeach the credibility of the defendant if the defendant elects to testify as part of the defense.'' General Statutes § 54- 86f (a)

COMMENTARY

Section 4-11 quotes General Statutes § 54-86f (a), which covers the admissibility of evidence of a victim's sexual conduct in prosecutions for sexual assault and includes a procedural framework for admitting such evidence. In 2015, § 54-86f was amended with the addition of subsections (b) through (d). Those subsections address procedural matters rather than admissibility and, therefore, are not included in Section 4-11. See General Statutes (Rev. to 2015) § 54-86f, as amended by Public Acts 2015, No. 15-207, § 2 (concerning, inter alia, sealing transcripts and motions filed in association with hearing under § 54-86f and limiting disclosure by defense of state disclosed evidence). Although Section 4-11, by its terms, is limited to criminal prosecutions for certain enumerated sexual assault offenses, the

Supreme Court has applied the exclusionary principles of § 54-86f to prosecutions for risk of injury to a child brought under General Statutes § 53-21, at least when the prosecution also presents sexual assault charges under one or more of the statutes enumerated in § 54-86f. See *State* v. *Kulmac*, 230 Conn. 43, 54, 644 A.2d 887 (1994). The court reasoned that the policies underlying the rape shield statute were equally applicable when allegations of sexual assault and abuse form the basis of both the risk of injury and sexual assault charges. See id., 53–54. Although the Code expresses no position on the issue, Section 4-11 does not preclude application of the rape shield statute's general precepts, as a matter of common law, to other situations in which the policies underlying the rape shield statute apply. See *State* v. *Rolon*, 257 Conn. 156, 183–85, 777 A.2d 604 (2001) (five part test for determining admissibility of evidence of child's previous sexual abuse to show alternative source of child's sexual knowledge).

In 2021, "Criminal Prosecutions" was added to the title of this section for ease of reference, in light of the adoption of Section 4-12, Admissibility of Evidence of Victim's Sexual Behavior in Civil Proceedings Involving Alleged Sexual Misconduct.

(New) Sec. 4-12. Admissibility of Evidence of Victim's Sexual Behavior in Civil Proceedings Involving Alleged Sexual Misconduct

"(a) As used in this section: (1) 'Sexual misconduct' means any act that is prohibited by section 53a-70b of the general statutes, revision of 1958, revised to January 1, 2019, section 53a-70, 53a-70a, 53a-70c, 53a-71, 53a-72a, 53a-72b or 53a-73a, and any act that constitutes

sexual harassment, as defined in subdivision (8) of subsection (b) of section 46a-60; and (2) 'victim' includes an alleged victim.

''(b) The following evidence is not admissible in a civil proceeding involving alleged sexual misconduct: (1) Evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition.

''(c) Notwithstanding the provisions of subsection (b) of this section, the court may admit the evidence in a civil case if the probative value of such evidence substantially outweighs the danger of (1) harm to any victim; and (2) unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed the victim's reputation in controversy.'' General Statutes § 52-180c (a) through (c), as amended by Public Acts No. 21-40, § 50.

COMMENTARY

Section 4-12 quotes General Statutes § 52-180c (a) through (c), as amended by Public Acts No. 21-40, § 50, which covers the admissibility of evidence of a victim's alleged sexual behavior in a civil proceeding that involves allegations of sexual misconduct as defined in subsection (a). The term ''victim'' includes an alleged victim. See Section 4-11, commentary. Because § 52-180c (d) and (e) concern the procedural framework for admitting such evidence in civil proceedings, the text of those subsections is not included in Section 4-12.

ARTICLE IX—AUTHENTICATION

Sec. 9-1. Requirement of Authentication

(a) Requirement of authentication. The requirement of authentication as a condition precedent to admissibility is satisfied by evidence

sufficient to support a finding that the offered evidence is what its proponent claims it to be.

(b) Self-authentication. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required if the offered evidence is self-authenticating in accordance with applicable law.

COMMENTARY

(a) Requirement of authentication.

Before an item of evidence may be admitted, there must be a preliminary showing of its genuineness, i.e., that the proffered item of evidence is what its proponent claims it to be. The requirement of authentication applies to all types of evidence, including writings, sound recordings, electronically stored information, real evidence such as a weapon used in the commission of a crime, demonstrative evidence such as a photograph depicting an accident scene, and the like. E.g., *State* v. *Bruno*, 236 Conn. 514, 551, 673 A.2d 1117 (1996) (real evidence); *Shulman* v. *Shulman*, 150 Conn. 651, 657, 193 A.2d 525 (1963) (documentary evidence); *State* v. *Lorain*, 141 Conn. 694, 700–701, 109 A.2d 504 (1954) (sound recordings); *Hurlburt* v. *Bussemey*, 101 Conn. 406, 414, 126 A. 273 (1924) (demonstrative evidence). The category of evidence known as electronically stored information can take various forms. It includes, by way of example only, e-mail, Internet website postings, text messages and "chat room" content, computer-stored records, data, metadata and computer generated or enhanced animations and simulations. As with any other form of evidence, a party may use any appropriate method, or combination of methods, described in this commentary, or any other proof to demon-

strate that the proffer is what its proponent claims it to be, to authenticate any particular item of electronically stored information. See *Lorraine* v. *Markel American Ins. Co.*, 241 F.R.D. 534, 545–46 (D. Md. 2007).

The proponent need only advance ''evidence sufficient to support a finding'' that the proffered evidence is what it is claimed to be. Once this prima facie showing is made, the evidence may be admitted, and the ultimate determination of authenticity rests with the fact finder. See, e.g., *State* v. *Bruno*, supra, 236 Conn. 551–53; *Neil* v. *Miller*, 2 Root (Conn.) 117, 118 (1794); see also *Shulman* v. *Shulman*, supra, 150 Conn. 657. Consequently, compliance with Section 9-1 (a) does not automatically guarantee that the fact finder will accept the proffered evidence as genuine. The opposing party may still offer evidence to discredit the proponent's prima facie showing. *Shulman* v. *Shulman*, supra, 659–60.

Evidence may be authenticated in a variety of ways. They include, but are not limited to, the following:

(1) A witness with personal knowledge may testify that the offered evidence is what its proponent claims it to be. See, e.g., *State* v. *Conroy*, 194 Conn. 623, 625–26, 484 A.2d 448 (1984) (establishing chain of custody); *Pepe* v. *Aceto*, 119 Conn. 282, 287–88, 175 A. 775 (1934) (authenticating documents); *Booker* v. *Stern*, 19 Conn. App. 322, 333, 563 A.2d 305 (1989) (authenticating photographs); see also *Lorraine* v. *Markel American Ins. Co.*, supra, 241 F.R.D. 544–45 (electronically stored information).

(2) A person with sufficient familiarity with the handwriting of another person may give an opinion concerning the genuineness of that other

person's purported writing or signature. E.g., *Lyon* v. *Lyman*, 9 Conn. 55, 59 (1831).

(3) A contested item of evidence may be authenticated by comparing it with a preauthenticated specimen. See, e.g., *State* v. *Ralls*, 167 Conn. 408, 417, 356 A.2d 147 (1974) (fingerprints, experts); see also *Tyler* v. *Todd*, 36 Conn. 218, 222 (1869) (handwriting, experts or triers of fact); *Lorraine* v. *Markel American Ins. Co.*, supra, 241 F.R.D. 546 (electronically stored information).

(4) The distinctive characteristics of an object, writing or other communication, when considered in conjunction with the surrounding circumstances, may provide sufficient circumstantial evidence of authenticity. See *International Brotherhood of Electrical Workers Local 35* v. *Commission on Civil Rights*, 140 Conn. 537, 547, 102 A.2d 366 (1953) (telephone conversations); 2 C. McCormick, Evidence (7th Ed. 2013) § 224, pp. 94–96 (''reply letter'' doctrine, under which letter *B* is authenticated merely by reference to its content and circumstances suggesting it was in reply to earlier letter *A* and sent by addressee of letter *A*); C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 9.7, pp. 694–95 (same); see also *Lorraine* v. *Markel American Ins. Co.*, supra, 241 F.R.D. 546–48 (electronically stored information); *State* v. *Jackson*, 150 Conn. App. 323, 329, 332–35, 90 A.3d 1031 (unsigned letter), cert. denied, 312 Conn. 919, 94 A.3d 641 (2014); *State* v. *John L.*, 85 Conn. App. 291, 302, 856 A.2d 1032 (letters stored in computer), cert. denied, 272 Conn. 903, 863 A.2d 695 (2004).

(5) Any person having sufficient familiarity with another person's voice, whether acquired from hearing the person's voice firsthand or

through mechanical or electronic means, can identify that person's voice or authenticate a conversation in which the person participated. See *State* v. *Jonas*, 169 Conn. 566, 576–77, 363 A.2d 1378 (1975), cert. denied, 424 U.S. 923, 96 S. Ct. 1132, 47 L. Ed. 2d 331 (1976); *State* v. *Marsala*, 43 Conn. App. 527, 531, 684 A.2d 1199 (1996), cert. denied, 239 Conn. 957, 688 A.2d 329 (1997).

(6) Evidence describing a process or a system used to produce a result and showing that the process or system produces an accurate result. This method of authentication, modeled on rule 901 (b) (9) of the Federal Rules of Evidence, was used in *State* v. *Swinton*, 268 Conn. 781, 811–13, 847 A.2d 921 (2004), to establish the standard used to determine the admissibility of computer simulations or animations. The particular requirements applied in *Swinton* were ''fairly stringent''; id., 818; because that case involved relatively sophisticated computer enhancements using specialized software. See id., 798–801. In other cases, when a proponent seeks to use this method to authenticate electronically stored information, the nature of the evidence establishing the accuracy of the system or process may be less demanding. See, e.g., *U-Haul International, Inc.* v. *Lubermens Mutual Casualty Co.*, 576 F.3d 1040, 1045 (9th Cir. 2009) (authentication of computer generated summaries of payments of insurance claims by manager familiar with process of how summaries were made were held to be adequate); see also *State* v. *Melendez*, 291 Conn. 693, 709–10, 970 A.2d 64 (2009) (admission of unmodified footage of drug transaction on DVD was not subject to heightened *Swinton* standard); *State* v. *Shah*, 134 Conn. App. 581, 595, 39 A.3d 1165 (2012) (chat

room transcripts were not computer generated evidence and therefore not subject to heightened *Swinton* standard).

(7) Outgoing telephone calls may be authenticated by proof that (1) the caller properly placed the telephone call, and (2) the answering party identified himself or herself as the person to whom the conversation is to be linked. *Hartford National Bank & Trust Co.* v. *DiFazio*, 6 Conn. App. 576, 585, 506 A.2d 1069, cert. denied, 200 Conn. 805, 510 A.2d 192 (1986).

(8) Stipulations or admissions prior to or during trial provide two other means of authentication. See *Stanton* v. *Grigley*, 177 Conn. 558, 559, 418 A.2d 923 (1979); see also Practice Book §§ 13-22 through 13-24 (in requests for admission); Practice Book § 14-13 (4) (at pretrial session).

(9) Sections 9-2 and 9-3 (authentication of ancient documents and public records, respectively) provide additional methods of authentication.

(b) Self-authentication.

Both case law and statutes identify certain kinds of writings or documents as self-authenticating. A self-authenticating document's genuineness is taken as sufficiently established without resort to extrinsic evidence, such as a witness' foundational testimony. *State* v. *Howell*, 98 Conn. App. 369, 379–80, 908 A.2d 1145 (2006). Subsection (b) continues the principle of self-authentication but leaves the particular instances under which self-authentication is permitted to the dictates of common law and the General Statutes.

Self-authentication in no way precludes the opponent from coming forward with evidence contesting authenticity; see *Atlantic Industrial*

Bank v. *Centonze*, 130 Conn. 18, 19, 31 A.2d 392 (1943); *Griswold* v. *Pitcairn*, 2 Conn. 85, 91 (1816); as the fact finder ultimately decides whether a writing or document is authentic. In addition, self-authenticating evidence remains vulnerable to exclusion or admissibility for limited purposes under other provisions of the Code or the General Statutes.

Common-law examples of self-authenticating writings or documents include:

(1) writings or documents carrying the impression of certain official seals; e.g., *Atlantic Industrial Bank* v. *Centonze*, supra, 130 Conn. 19–20; *Barber* v. *International Co. of Mexico*, 73 Conn. 587, 602, 603, 48 A. 758 (1901); *Griswold* v. *Pitcairn*, supra, 2 Conn. 90–91; and

(2) marriage certificates signed by the person officiating the ceremony. E.g., *Northrop* v. *Knowles*, 52 Conn. 522, 525–26, 2 A. 395 (1885).

Familiar statutory examples of self-authenticating writings or documents include:

(1) acknowledgments made or taken in accordance with the Uniform Acknowledgment Act, General Statutes §§ 1-28 through 1-41; see General Statutes § 1-36; and the Uniform Recognition of Acknowledgments Act, General Statutes §§ 1-57 through 1-65; see General Statutes § 1-58;

(2) copies of records or documents required by law to be filed with the Secretary of the State and certified in accordance with General Statutes § 3-98;

(3) birth certificates certified in accordance with General Statutes § 7-55;

(4) certain third-party documents authorized or required by an existing contract and subject to the Uniform Commercial Code; General

Statutes § 42a-1-307; see also General Statutes § 42a-8-114 (2) (signatures on certain negotiable instruments);

(5) marriage certificates issued pursuant to General Statutes § 46b-34; see General Statutes § 46b-35; and

(6) copies of certificates filed by a corporation with the Secretary of the State in accordance with law and certified in accordance with General Statutes § 52-167.

It should be noted that the foregoing examples do not constitute an exhaustive list of self-authenticating writings or documents. Certified copies of many public records for example are self-authenticating pursuant to statute. See, e.g. General Statutes § 1-14. Of course, writings or documents that do not qualify under subsection (b) may be authenticated under the principles announced in subsection (a) or elsewhere in this article.

Sec. 9-3. Authentication of Public Records

The requirement of authentication as a condition precedent to admitting into evidence a record, report, statement or data compilation, in any form, is satisfied by evidence that (A) the record, report, statement or data compilation authorized by law to be recorded or filed in a public office has been recorded or filed in that public office, (B) the record, report, statement or data compilation, purporting to be a public record, report, statement or data compilation, is from the public office where items of this nature are maintained, or (C) the record, report, statement or data compilation, purporting to be a public record, report, statement or data compilation, is made available in electronic form by a public authority.

COMMENTARY

It generally is recognized that a public record may be authenticated simply by showing that the record purports to be a public record and

comes from the custody of the proper public office. *State* v. *Calderon*, 82 Conn. App. 315, 322, 844 A.2d 866, cert. denied, 270 Conn. 905, 853 A.2d 523, cert. denied, 543 U.S. 982, 125 S. Ct. 487, 160 L. Ed. 2d 361 (2004); see *Whalen* v. *Gleeson*, 81 Conn. 638, 644, 71 A. 908 (1909); *Barber* v. *International Co. of Mexico*, 73 Conn. 587, 602, 48 A. 758 (1901). Thus, although certified copies of most public records are "self-authenticating" in accordance with other provisions of the General Statutes**[**; see, e.g., General Statutes § 7-55 (birth certificates);**]**, certification is not the exclusive means by which to authenticate a public record. The rule extends the common-law principle to public records, including electronically stored information.

Proviso (A) assumes that documents authorized by law to be recorded or filed in a public office—e.g., tax returns, wills or deeds—are public records for purposes of authentication. Cf. *Kelsey* v. *Hanmer*, 18 Conn. 310, 319 (1847) (deed). Proviso (B) covers reports, records, statements or data compilations prepared and maintained by the public official or public office, whether local, state, federal or foreign.

(New) Sec. 9-3A. Authentication of Business Entries

(a) Authentication of business entries by certification. The requirement of authentication as a condition precedent to admitting into evidence a business entry under Section 8-4 may be satisfied by sworn certification of the custodian of the record or other qualified witness attesting to the following:

(1) The affiant is the duly authorized custodian of the records or another qualified witness who has and is acting with authority to make the certification;

(2) The record was made in the regular course of business, that it was the regular course of such business to make such a record, and

that it was made at the time of the act described in the report, or within a reasonable time thereafter, as required by General Statues § 52-180;

(3) The information contained in the record was based on the entrant's own observation or on information of others whose business duty it was to transmit it to the entrant; and

(4) To the best of the certifying person's knowledge, after reasonable inquiry, the record or copy thereof is an accurate version of the record that is in the possession, custody, or control of the certifying person.

(b) Certification admissible. A certification made in compliance with subsection (a) is admissible evidence of the matters set forth therein. A party opposing admissibility of a record offered through a proper certification under subsection (a) bears the burden of showing that the record is not what it purports to be.

(c) Notice and opportunity to contest. A party intending to offer a record into evidence under this section must provide written notice of that intention to all adverse parties and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

COMMENTARY

(a) Authentication of business entries by certification. This provision offers a procedure by which parties can authenticate certain business records other than through the testimony of a foundation witness. The procedure is intended to help the parties determine in advance of the evidentiary proceeding whether there is a real dispute as to authenticity, and to increase the efficiency of the authentication process when there is not. The certification process, which has been adopted in some form in many other jurisdictions, will increase effi-

ciency and reduce logistical burdens by limiting the need for a party to produce a witness at the evidentiary proceeding for the purpose of authenticating a business record. A proponent seeking to authenticate a business record under this section must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at the evidentiary proceeding. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then a sufficient showing of authenticity has not been made under this section.

Even without the certification procedure, parties often will stipulate to the authenticity of business records; use of that practice remains unaffected by this provision. More broadly, the certification process is provided as an alternative to other means of authentication, and nothing herein is intended to prevent a party from authenticating a business record through witness testimony, or through a combination of certification and witness testimony.

(b) Certification admissible. The court makes the preliminary determination of whether the proponent has made a sufficient showing of authenticity, but the fact finder ultimately determines whether the evidence is what its proponent claims it to be. See commentary to Section 1-3 (b). Consequently, when a record is authenticated by means of certification, the certification itself must be admissible for consideration by the fact finder as part of its determination.

(c) Notice and opportunity to contest. The certification procedure is intended to increase the efficiency of the authentication process with respect to business records, but the procedure must not be used to curtail or impair a party's ability to test or contest the authenticity of such record. Section 9-3A (c) ensures that a party will have the

opportunity to ascertain whether grounds exist to contest the accuracy or validity of a certification. Determining the precise timing and disclosure proceedings that are necessary to offer a fair opportunity to contest authentication will require balancing the efficiency sought to be achieved by the certification process with the rights of all parties to raise and litigate the issue when a good faith doubt may exist regarding the authenticity of a record.