Appendix A

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-mails, Internet website postings, text messages and "chat room" content, computer-stored records**[**, and**]** 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 demonstrate that the proffer is what the proponent claims it to be, to authenticate any particular item of electronically stored information. *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); *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) **[**The trier of fact or an expert witness can authenticate a**]** A contested item of evidence may be authenticated by comparing it with a preauthenticated specimen**[**s**]**. See, e.g., *State* v. *Ralls*, 167 Conn. 408, 417, 356 A.2d 147 (1974) (fingerprints, experts), overruled on other grounds by *State* v. *Rutan,* 194 Conn. 438, 441, 479 A.2d 1209 (1984); *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 **[**(5th Ed. 1999) §

225, p. 50**]** (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, Tait's Handbook of Connecticut Evidence (5th Ed. 2014) § 9.7, pp. 694–95 (same); *Lorraine v. Markel American Ins. Co.*, supra, 241 F.R.D. 546–48 (electronically stored information); see also *State* v. *Jackson*, 150 Conn. App. 323, 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 (computer-stored letters), 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 **[**by the Connecticut Supreme Court**]** 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. 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 *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 held to be adequate); see also *State* v. *Melendez*, 291 Conn. 693, 709–710, 970 A.2d 64 (2009) (admission of unmodified footage of drug transaction on DVD

not subject to heightened *Swinton* standard)**[.]**; cf. *State* v. *Shah*, 134 Conn. App. 581, 39 A.3d 1165 (2012) (chat room transcripts 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. **[**See 2 C. McCormick, supra, § 228, p. 57**]** *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 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-1-202**]** 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. 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 Article IX of the Code.

Sec. 9-2. Authentication of Ancient Documents

The requirement of authentication as a condition precedent to admitting a document in any form into evidence shall be satisfied upon proof that the document (A) has been in existence for more than thirty years, (B) was produced from proper custody, and (C) is otherwise free from suspicion.

COMMENTARY

Section 9-2 embraces the common-law ancient document rule. See, e.g., *Jarboe*

v. *Home Bank & Trust Co.*, 91 Conn. 265, 269, 99 A. 563 (1917). Documents that satisfy the foundational requirements are authenticated without more. See id., 270. Thus, Section 9-2 dispenses with any requirement that the document's proponent produce attesting witnesses. *Borden* v. *Westport*, 112 Conn. 152, 161, 151 A. 512 (1930); *Jarboe* v. *Home Bank & Trust Co.*, supra, 269, 270.

Although common-law application of the rule mainly involved dispositive instruments, such as wills and deeds; e.g., *Jarboe* v. *Home Bank & Trust Co.*, supra, 91 Conn. 269 (will); *Borden* v. *Westport*, supra, 112 Conn. 161 (deed); but see, e.g., *Petroman* v. *Anderson*, 105 Conn. 366, 369–70, 135 A. 391 (1926) (ancient map); the current rule applies to all documents, in any form, including those stored electronically.

Ancient documents are the subject of a hearsay exception with foundational requirements identical to those found in Section 9-2. See Section 8-3 (9).

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, **[**or**]** (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

[The law in Connecticut with respect to the authentication of public records without a public official's certification or official seal is unclear. Cf., e.g., *Whalen* v. *Gleason*, 81 Conn. 638, 644, 71 A. 908 (1909); *Barber* v. *International Co. of Mexico*, 73 Conn. 587, 602, 48 A. 758 (1901). Nevertheless, i**]**It generally is recognized that **[**such**]** 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. **[**2 C. McCormick, Evidence (5th Ed. 1999) § 224, p. 47; C. Tait & J. LaPlante, Connecticut Evidence **(**2d

Ed. 1988) § 10.4.3, p. 294; 7 J. Wigmore, Evidence (4th Ed. 1978) § 2159, pp. 775–76.] See *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); *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.

Sec. 9-4. Subscribing Witness' Testimony

If a document is required by law to be attested to by witnesses to its execution, at least one subscribing witness must be called to authenticate the document. If no attesting witness is available, the document then may be authenticated in the same manner as any other document. Documents that are authenticated under Section 9-2 need not be authenticated by an attesting witness.

COMMENTARY

Certain documents, such as wills and deeds, are required by law to be attested to by witnesses. See General Statutes § 45a-251 (wills); § 47-5 (deeds). At common law, the proponent, in order to authenticate such a document, must have called at least one of the attesting witnesses or satisfactorily have explained the absence of all of the attesting witnesses.

Thereafter, the proponent could authenticate the document through the testimony of nonattesting witnesses. [2 C. McCormick, Evidence (5th Ed. 1999) § 220, p. 40; C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 10.3.1, p. 290;]. [s]See e.g., *Loewenberg* v. *Wallace*, 147 Conn. 689, 696, 166 A.2d 150 (1960); *Kelsey* v. *Hanmer*, 18 Conn. 311, 317–18 (1847).

The rule requiring attesting witnesses to be produced or accounted for applies only when proving the fact of valid execution, i.e., genuineness, not when proving other things such as the document's delivery or contents. 4 J. Wigmore, Evidence (4th Ed. 1972) § 1293, pp. 709–10.

Section 9-4 exempts ancient documents from the general rule on the theory that the genuineness of a document more than thirty years old is established simply by showing proper custody and suspicionless appearance; see Section 9-2; without more. **[**4 J. Wigmore, supra, § 1312, p. 742; s**]**See, e.g., *Borden* v. *Westport*, 112 Conn. 152, 161, 151 A. 512 (1930); *Jarboe* v. *Home Bank & Trust Co.*, 91 Conn. 265, 269, 99 A. 563 (1917).

Dicta in two Connecticut cases suggest that it is unnecessary to call subscribing witnesses or explain their absence when the document at issue is only collaterally involved in the case. *Great Hill Lake, Inc.* v. *Caswell*, 126 Conn. 364, 369, 11 A.2d 396 (1940); see *Pepe* v. *Aceto*, 119 Conn. 282, 287–88, 175 A. 775 (1934). **[**; 4 J. Wigmore, supra, § 1291, p. 705.**]** Another case suggests the same exemption for certified copies of recorded deeds. See *Loewenberg* v. *Wallace*, supra, 147 Conn. 696. Although these exemptions, unlike the one for ancient documents, were not included in the text of the rule, they are intended to survive adoption of Section 9-4.