NOTICE

Adoption of Revisions to the Connecticut Code of Evidence

Notice is hereby given that on May 20, 2015, the justices of the Supreme Court adopted the revisions to the Connecticut Code of Evidence, contained herein, to become effective on August 1, 2015.

Attest:

Lori Petruzzelli

Counsel, Legal Services

INTRODUCTION

Contained herein are amendments to the Connecticut Code of Evidence. The amendments are indicated by brackets for deletions and underlines for added language, with the exception that the bracketed titles to the subsections in Section 8-4 are an editing convention and do not indicate an intention to delete language.

Supreme Court

AMENDMENTS TO THE CONNECTICUT CODE OF EVIDENCE

ARTICLE AND SECTION HEADINGS

ARTICLE I—GENERAL PROVISIONS

ARTICLE VIII—HEARSAY

ARTICLE IX—AUTHENTICATION

ARTICLE X—CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

AMENDMENTS TO THE CONNECTICUT CODE OF EVIDENCE

Sec. 1-2. Purposes and Construction

(a) Purposes of the Code. The purposes of the Code are to adopt Connecticut case law regarding rules of evidence as rules of court and to promote the growth and development of the law of evidence through interpretation of the Code and through judicial rule making to the end that the truth may be ascertained and proceedings justly determined.

(b) Saving clause. Where the Code does not prescribe a rule governing the admissibility of evidence, the court shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience, except as otherwise required by the constitution of the United States, the constitution of this state, the General Statutes or the Practice Book. The provisions of the Code shall not be construed as precluding any court from recognizing other evidentiary rules not inconsistent with such provisions.

(c) Writing. Any reference in the Code to a writing or any other medium of evidence includes electronically stored information.

COMMENTARY

(a) Purposes of the Code.

Subsection (a) provides a general statement of the purposes of the Code. Case-by-case adjudication is integral to the growth and development of evidentiary law and, thus, future definition of the Code will be effected primarily through interpretation of the Code and through judicial rule making.

One of the goals of drafting the Code was to place common-law rules of evidence and certain identified statutory rules of evidence into a readily accessible body of rules to which the legal profession conveniently may refer. The Code sometimes states common-law evidentiary principles in language different from that of the cases from which these principles were derived. Because the Code was intended to maintain the status quo, i.e., preserve the common-law rules of evidence as they existed prior to adoption of the Code, its adoption is not intended to modify any prior common-law interpretation of those rules. Nor is the Code intended to change the common-law interpretation of certain incorporated statutory rules of evidence as it existed prior to the Code's adoption.

In some instances, the Code embraces rules or principles for which no Connecticut case law presently exists, or for which the case law is indeterminate. In such instances, these rules or principles were formulated with due consideration of the recognized practice in Connecticut courts and the policies underlying existing common law, statutes and the Practice Book.

Although the Code follows the general format and sometimes the language of the Federal Rules of Evidence, the Code does not adopt the Federal Rules of Evidence or cases interpreting those rules. Cf. *State* v. *Vilalastra*, 207 Conn. 35, 39–40, 540 A.2d 42 (1988) (Federal Rules of Evidence influential in shaping Connecticut evidentiary rules, but not binding).

Unlike the Federal Rules of Evidence, which govern both the admissibility of evidence at trial and issues concerning the court's role in

administering and controlling the trial process, the Code was developed with the intention that it would address issues concerning the admissibility of evidence and competency of witnesses, leaving trial management issues to common law, the Practice Book and the discretion of the court.

(b) Saving clause.

Subsection (b) addresses the situation in which courts are faced with evidentiary issues not expressly covered by the Code. Although the Code will address most evidentiary matters, it cannot possibly address every evidentiary issue that might arise during trial. Subsection (b) sets forth the standard by which courts are to be guided in such instances.

Precisely because it cannot address every evidentiary issue, the Code is not intended to be the exclusive set of rules governing the admissibility of evidence. Thus, subsection (b) makes clear that a court is not precluded from recognizing other evidentiary rules not inconsistent with the Code's provisions.

(c) Writing.

The rules and principles in the Code are intended to govern evidence in any form or medium, including without limitation, written and printed material, photographs, video and sound recordings, and electronically stored information. As a result of advances in technology, the widespread availability and use of electronic devices for storage and communication, and the proliferation of social media, courts are frequently called upon to rule on the admissibility of electronically stored information. That term, as used in the Code, refers to information that is stored

in an electronic medium and is retrievable in perceivable form. See Practice Book § 13-1 (a) (5).

Sec. 1-3. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification and 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 conditioned on fact. When the admissibility of evidence depends upon connecting facts, the court may admit the evidence upon proof of the connecting facts or subject to later proof of the connecting facts.

COMMENTARY

(a) Questions of admissibility generally.

The admissibility of evidence, qualification of a witness, authentication of evidence **[**a document**]** or assertion of a privilege often is conditioned on a disputed fact. 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 will turn upon the answer to these questions of fact. Subsection (a) makes it the responsibility of the court to determine these types of preliminary questions of fact. 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); *State* v. *Colon*, 272 Conn. 106, 188–89, 864 A.2d 666 (2004); *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 preliminary questions of fact under subsection (a), except with respect to evidentiary privileges.

(b) Admissibility conditioned on fact.

Frequently, the admissibility of a particular fact or item of evidence depends upon proof of another fact or other facts, i.e., connecting facts. For example, the relevancy 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 of evidence

depends upon proof of connecting facts, subsection (b) authorizes the court to admit the evidence upon proof of the connecting facts or admit the evidence subject to later proof 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 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).

Sec. 8-1. Definitions

As used in this Article:

(1) ''Statement'' means (A) an oral or written assertion or (B) nonverbal conduct of a person, if it is intended by the person as an assertion.

(2) ''Declarant'' means a person who makes a statement.

(3) ''Hearsay'' means a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted.

COMMENTARY

(1) ''Statement''

The definition of ''statement'' takes on significance when read in conjunction with the definition of ''hearsay'' in subdivision (3). The definition of ''statement'' includes both oral and written assertions; see

Rompe v. *King*, 185 Conn. 426, 428, 441 A.2d 114 (1981); *Cherniske* v. *Jajer*, 171 Conn. 372, 376, 370 A.2d 981 (1976); and nonverbal conduct of a person intended as an assertion. *State* v. *Blades*, 225 Conn. 609, 632, 626 A.2d 273 (1993); *Heritage Village Master Assn., Inc.* v. *Heritage Village Water Co.*, 30 Conn. App. 693, 702, 622 A.2d 578 (1993); see also C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 11.2, p. 319 (person nodding or shaking head in response to question is form of nonverbal conduct intended as assertion). The effect of this definition is to exclude from the hearsay rule's purview nonassertive verbalizations and nonassertive, nonverbal conduct. See *State* v. *Hull*, 210 Conn. 481, 498–99, 556 A.2d 154 (1989) (''[i]f the statement is not an assertion . . . it is not hearsay'' [internal quotation marks omitted]); *State* v. *Thomas*, 205 Conn. 279, 285, 533 A.2d 553 (1987) (''[n]onassertive conduct such as running to hide, or shaking and trembling, is not hearsay'').

The definition of ''statement'' in Section 8-1 is used solely in conjunction with the definition of hearsay and the operation of the hearsay rule and its exceptions. See generally Art. VIII of the Code. The definition does not apply in other contexts or affect definitions of ''statement'' in other provisions of the General Statutes or Practice Book. See, e.g., General Statutes § 53-441 (a); Practice Book §§ 13-1 and 40-15.

(2) ''Declarant''

The definition of ''declarant'' is consistent with the longstanding common-law recognition of that term. See, e.g., *State* v. *Jarzbek*, 204 Conn. 683, 696 n.7, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988); *State* v. *Barlow*, 177

Conn. 391, 396, 418 A.2d 46 (1979). Numerous courts have held that data generated by a computer solely as a product of a computerized system or process are not made by a ''declarant'' and, therefore, not hearsay. See *State* v. *Gojcaj*, 151 Conn. App. 183, 195, 200–202, 92 A.3d 1056 (2014) (holding that there was no declarant making computer-generated log, which was created automatically to record date and time whenever any person entered passcode to activate or deactivate security system); see also *Lorraine* v. *Markel American Ins. Co.*, 241 F.R.D. 534, 564–65 (D. Md. 2007) (making same point, using fax ''header'' as example). In certain forms, this type of computer-generated information is known as ''metadata.'' The term ''metadata'' has been defined as ''data about data''; (internal quotation marks omitted) *Lorraine* v. *Markel American Ins. Co.,* supra, 547; and refers to computer-generated information describing the history, tracking or management of electronically stored information. See id. *Gojcaj* recognized that a party seeking to introduce computer-generated data and records, even if not hearsay, must establish that the computer system reliably and accurately produces records or data of the type that is being offered. *State* v. *Gojcaj*, supra, 202 n.12.

(3) ''Hearsay''

Subdivision (3)'s definition of ''hearsay'' finds support in the cases. E.g., *State* v. *Crafts*, 226 Conn. 237, 253, 627 A.2d 877 (1993); *State* v. *Esposito*, 223 Conn. 299, 315, 613 A.2d 242 (1992); *Obermeier* v. *Nielsen*, 158 Conn. 8, 11, 255 A.2d 819 (1969). The purpose for which the statement is offered is crucial; if it is offered for a purpose other than to establish the truth of the matter asserted, the statement is not

hearsay. E.g., *State* v. *Esposito*, supra, 315; *State* v. *Hull*, supra, 210 Conn. 498–99; *State* v. *Ober*, 24 Conn. App. 347, 357, 588 A.2d 1080, cert. denied, 219 Conn. 909, 593 A.2d 134, cert. denied, 502 U.S. 915, 112 S. Ct. 319, 116 L. Ed. 2d 26 (1991).

Sec. 8-3. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Statement by a party opponent. A statement that is being offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, (B) a statement that the party has adopted or approved, (C) a statement by a person authorized by the party to make a statement concerning the subject, (D) a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of the conspiracy, (E) in an action for a debt for which the party was surety, a statement by the party's principal relating to the principal's obligations, or (F) a statement made by a predecessor in title of the party, provided the declarant and the party are sufficiently in privity that the statement of the declarant would affect the party's interest in the property in question.

(2) Spontaneous utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Statement of then-existing physical condition. A statement of the declarant's then-existing physical condition provided that the

statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed.

(4) Statement of then-existing mental or emotional condition. A statement of the declarant's then-existing mental or emotional condition, including a statement indicating a present intention to do a particular act in the immediate future, provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed.

(5) Statement for purposes of obtaining medical diagnosis or treatment. A statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment.

(6) Recorded recollection. A memorandum or record concerning an event about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness at or about the time of the event recorded and to reflect that knowledge correctly.

(7) Public records and reports. Records, reports, statements or data compilations, in any form, of public offices or agencies, provided (A) the record, report, statement or data compilation was made by a public official under a duty to make it, (B) the record, report, statement or data compilation was made in the course of his or her official duties, and (C) the official or someone with a duty to transmit information to

the official had personal knowledge of the matters contained in the record, report, statement or data compilation.

(8) Statement in learned treatises. To the extent called to the attention of an expert witness on cross-examination or relied on by the expert witness in direct examination, a statement contained in a published treatise, periodical or pamphlet on a subject of history, medicine, or other science or art, recognized as a standard authority in the field by the witness, other expert witness or judicial notice.

(9) Statement in ancient documents. A statement in a document in existence for more than thirty years if it is produced from proper custody and otherwise free from suspicion.

(10) Published compilations. Market quotations, tabulations, lists, directories or other published compilations, that are recognized authority on the subject, or are otherwise trustworthy.

(11) Statement in family bible. A statement of fact concerning personal or family history contained in a family bible.

(12) Personal identification. Testimony by a witness of his or her own name or age.

COMMENTARY

(1) Statement by party opponent.

Section 8-3 (1) sets forth six categories of party opponent admissions that were excepted from the hearsay rule at common law: (A) The first category excepts from the hearsay rule a party's own statement when offered against him or her. E.g., *In re Zoarski*, 227 Conn. 784, 796, 632 A.2d 1114 (1993); *State* v. *Woodson*, 227 Conn. 1, 15, 629 A.2d 386 (1993). Under Section 8-3 (1) (A), a statement is admissible

against its maker, whether he or she was acting in an individual or representative capacity when the statement was made. Although there apparently are no Connecticut cases that support extending the exception to statements made by and offered against those serving in a representative capacity, the rule is in accord with the modern trend. E.g., Fed. R. Evid. 801 (d) (2) (A). Connecticut excepts party admissions from the usual requirement that the person making the statement have personal knowledge of the facts stated therein. *Dreir* v. *Upjohn Co.*, 196 Conn. 242, 249, 492 A.2d 164 (1985).

(B) The second category recognizes the common-law hearsay exception for ''adoptive admissions.'' See, e.g., *State* v. *John*, 210 Conn. 652, 682–83, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989); *Falker* v. *Samperi*, 190 Conn. 412, 426, 461 A.2d 681 (1983). Because adoption or approval may be implicit; see, e.g., *State* v. *Moye*, 199 Conn. 389, 393–94, 507 A.2d 1001 (1986); the common-law hearsay exception for tacit admissions, under which silence or a failure to respond to another person's statement may constitute an admission; e.g., *State* v. *Morrill*, 197 Conn. 507, 535, 498 A.2d 76 (1985); *Obermeier* v. *Nielsen*, 158 Conn. 8, 11–12, 255 A.2d 819 (1969); is carried forward in Section 8-3 (1) (B). The admissibility of tacit admissions in criminal cases is subject to the evidentiary limitations on the use of an accused's postarrest silence; see *State* v. *Ferrone*, 97 Conn. 258, 266, 116 A. 336 (1922); and the constitutional limitations on the use of the accused's post-*Miranda* warning silence. *Doyle* v. *Ohio*, 426 U.S. 610, 617–19, 96 S. Ct. 2240,

49 L. Ed. 2d 91 (1976); see, e.g., *State* v. *Zeko*, 177 Conn. 545, 554, 418 A.2d 917 (1977).

(C) The third category restates the common-law hearsay exception for ''authorized admissions.'' See, e.g., *Presta* v. *Monnier*, 145 Conn. 694, 699, 146 A.2d 404 (1958); *Collins* v. *Lewis*, 111 Conn. 299, 305–306, 149 A. 668 (1930). The speaker must have speaking authority concerning the subject upon which he or she speaks; a mere agency relationship e.g., employer-employee without more, is not enough to confer speaking authority. E.g., *Liebman* v. *Society of Our Lady of Mount St. Carmel, Inc.*, 151 Conn. 582, 586, 200 A.2d 721 (1964); *Munson* v. *United Technologies Corp.*, 28 Conn. App. 184, 188, 609 A.2d 1066, cert. denied, 200 Conn. 805, 510 A.2d 192 (1992); cf. *Graham* v. *Wilkins*, 145 Conn. 34, 40–41, 138 A.2d 705 (1958); *Haywood* v. *Hamm*, 77 Conn. 158, 159, 58 A. 695 (1904). The proponent need not, however, show that the speaker was authorized to make the particular statement sought to be introduced. The existence of speaking authority is to be determined by reference to the substantive law of agency. Although not expressly mentioned in the exception, the Code in no way abrogates the common-law rule that speaking authority must be established without reference to the purported agent's out-of-court statements, save when those statements are independently admissible. See Section 1-1 (d) (1). See generally *Robles* v. *Lavin*, 176 Conn. 281, 284, 407 A.2d 957 (1978). Because partners are considered agents of the partnership for the purpose of its business; General Statutes § 34-322 (1); a partner's declarations in furtherance of partnership business ordinarily are admissible against the

partnership under Section 8-3 (1) (C) principles. See 2 C. McCormick, Evidence (5th Ed. 1999) § 259, p. 156; cf. *Munson* v. *Wickwire*, 21 Conn. 513, 517 (1852).

(D) The fourth category encompasses the hearsay exception for statements of coconspirators. E.g., *State* v. *Couture*, 218 Conn. 309, 322, 589 A.2d 343 (1991); *State* v. *Pelletier*, 209 Conn. 564, 577, 552 A.2d 805 (1989); see also *State* v. *Vessichio*, 197 Conn. 644, 654–55, 500 A.2d 1311 (1985) (additional foundational elements include existence of conspiracy and participation therein by both declarant and party against whom statement is offered), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986). The exception is applicable in civil and criminal cases alike. See *Cooke* v. *Weed*, 90 Conn. 544, 548, 97 A. 765 (1916). The proponent must prove the foundational elements by a preponderance of the evidence and independently of the hearsay statements sought to be introduced. *State* v. *Vessichio*, supra, 655; *State* v. *Haggood*, 36 Conn. App. 753, 767, 653 A.2d 216, cert. denied, 233 Conn. 904, 657 A.2d 644 (1995).

(E) The fifth category of party opponent admissions is derived from *Agricultural Ins. Co.* v. *Keeler*, 44 Conn. 161, 162–64 (1876). See generally C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 11.5.6 (d), p. 347; 4 J. Wigmore, Evidence (4th Ed. 1972) § 1077.

(F) The final category incorporates the common-law hearsay exception applied in *Pierce* v. *Roberts*, 57 Conn. 31, 40–41, 17 A. 275 (1889), and *Ramsbottom* v. *Phelps*, 18 Conn. 278, 285 (1847).

(2) Spontaneous utterance.

The hearsay exception for spontaneous utterances is well established. See, e.g., *State* v. *Stange*, 212 Conn. 612, 616–17, 563 A.2d 681 (1989); *Cascella* v. *Jay James Camera Shop, Inc.*, 147 Conn. 337, 341–42, 160 A.2d 899 (1960); *Perry* v. *Haritos*, 100 Conn. 476, 483–84, 124 A. 44 (1924). Although Section 8-3 (2) states the exception in terms different from that of the case law on which the exception is based; cf. *State* v. *Stange*, supra, 616–17; *Rockhill* v. *White Line Bus Co.*, 109 Conn. 706, 709, 145 A. 504 (1929); *Perry* v. *Haritos*, supra, 484; *State* v. *Guess*, 44 Conn. App. 790, 803, 692 A.2d 849 (1997); the rule assumes incorporation of the case law principles underlying the exception.

The event or condition must be sufficiently startling, so ''as to produce nervous excitement in the declarant and render [the declarant's] utterances spontaneous and unreflective.'' *State* v. *Rinaldi*, 220 Conn. 345, 359, 599 A.2d 1 (1991), quoting C. Tait & J. LaPlante, supra, § 11.11.2, pp. 373–74; accord 2 C. McCormick, supra, § 272, p. 204.

(3) Statement of then-existing physical condition.

Section 8-3 (3) embraces the hearsay exception for statements of then-existing physical condition. *Martin* v. *Sherwood*, 74 Conn. 475, 481–82, 51 A. 526 (1902); *State* v. *Dart,* 29 Conn. 153, 155 (1860); see *McCarrick* v. *Kealy*, 70 Conn. 642, 645, 40 A. 603 (1898).

The exception is limited to statements of *then-existing* physical condition, whereby the declarant describes how the declarant feels as the declarant speaks. Statements concerning past physical condition; *Martin* v. *Sherwood*, supra, 74 Conn. 482; *State* v. *Dart*, supra, 29

Conn. 155; or the events leading up to or the cause of a present condition; *McCarrick* v. *Kealy*, supra, 70 Conn. 645; are not admissible under this exception. Cf. Section 8-3 (5) (exception for statements made to physician for purpose of obtaining medical treatment or advice and describing *past* or present bodily condition or cause thereof).

(4) Statement of then-existing mental or emotional condition.

Section 8-3 (4) embodies what is frequently referred to as the ''state-of-mind'' exception to the hearsay rule. See, e.g., *State* v. *Periere*, 186 Conn. 599, 605–606, 442 A.2d 1345 (1982).

The exception allows the admission of a declarant's statement describing his or her then-existing mental or emotional condition when the declarant's mental or emotional condition is a factual issue in the case. E.g., *State* v. *Periere*, supra, 186 Conn. 606–607 (to show declarant's fear); *Kearney* v. *Farrell*, 28 Conn. 317, 320–21 (1859) (to show declarant's ''mental feeling''). Only statements describing *then-existing* mental or emotional condition, i.e., that existing when the statement is made, are admissible.

The exception also covers a declarant's statement of present intention to perform a subsequent act as an inference that the subsequent act actually occurred. E.g., *State* v. *Rinaldi*, 220 Conn. 345, 358 n.7, 599 A.2d 1 (1991); *State* v. *Santangelo*, 205 Conn. 578, 592, 534 A.2d 1175 (1987); *State* v. *Journey*, 115 Conn. 344, 351, 161 A.2d 515 (1932). The inference drawn from the statement of present intention that the act actually occurred is a matter of relevancy rather than a hearsay concern.

When a statement describes the declarant's intention to do a future act in concert with another person, e.g., "I am going to meet Ralph at the store at ten," the case law does not prohibit admissibility. See *State* v. *Santangelo*, supra, 205 Conn. 592. But the declaration can be admitted only to prove the declarant's subsequent conduct, not to show what the other person ultimately did. *State* v. *Perelli*, 125 Conn. 321, 325, 5 A.2d 705 (1939). Thus, in the example above, the declarant's statement could be used to infer that the declarant actually did go to meet Ralph at the store at ten, but not to show that Ralph went to the store at ten to meet the declarant.

Placement of Section 8-3 (4) in the "availability of the declarant immaterial" category of hearsay exceptions confirms that the admissibility of statements of present intention to show future acts is not conditioned on any requirement that the declarant be unavailable. See *State* v. *Santangelo*, supra, 205 Conn. 592 (dictum suggesting that declarant's unavailability is precondition to admissibility).

While statements of present intention looking forward to the doing of some future act are admissible under the exception, backward looking statements of memory or belief offered to prove the act or event remembered or believed are inadmissible. See *Wade* v. *Yale University*, 129 Conn. 615, 618–19, 30 A.2d 545 (1943). But see *State* v. *Santangelo*, supra, 205 Conn. 592–93. As the advisory committee note to the corresponding federal rule suggests, "[t]he exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable

by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.'' Fed. R. Evid. 803 (3) advisory committee note, citing *Shepard* v. *United States*, 290 U.S. 96, 54 S. Ct. 22, 78 L. Ed. 196 (1933). For cases dealing with the admissibility of statements of memory or belief in will cases, see *Spencer's Appeal*, 77 Conn. 638, 643, 60 A. 289 (1905); *Vivian Appeal*, 74 Conn. 257, 260–62, 50 A. 797 (1901); *Comstock* v. *Hadlyme Ecclesiastical Society*, 8 Conn. 254, 263–64 (1830). Cf. *Babcock* v. *Johnson*, 127 Conn. 643, 644, 19 A.2d 416 (1941) (statements admissible only as circumstantial evidence of state of mind and not for truth of matter asserted); *In re Johnson's Will*, 40 Conn. 587, 588 (1873) (same).

(5) Statement for purposes of obtaining medical diagnosis or treatment.

Statements made in furtherance of obtaining a medical diagnosis or treatment are excepted from the hearsay rule. E.g., *State* v. *DePastino*, 228 Conn. 552, 565, 638 A.2d 578 (1994).

It is intended that the term ''medical'' be read broadly so that the exception would cover statements made for the purpose of obtaining diagnosis or treatment for both somatic and psychological maladies and conditions. See *State* v. *Wood*, 208 Conn. 125, 133–34, 545 A.2d 1026, cert. denied, 488 U.S. 895, 109 S. Ct. 235, 102 L. Ed. 2d 225 (1988).

Statements concerning the cause of an injury or condition traditionally were inadmissible under the exception. See *Smith* v. *Hausdorf*, 92 Conn. 579, 582, 103 A. 939 (1918). Recent cases recognize that,

in some instances, causation may be pertinent to medical diagnosis or treatment. See *State* v. *Daniels*, 13 Conn. App. 133, 135, 534 A.2d 1253 (1987); cf. *State* v. *DePastino*, supra, 228 Conn. 565. Section 8-3 (5), thus, excepts from the hearsay rule statements describing ''the inception or general character of the cause or external source'' of an injury or condition when reasonably pertinent to medical diagnosis or treatment.

Statements as to causation that include the identity of the person responsible for the injury or condition ordinarily are neither relevant to nor in furtherance of the patient's medical treatment. *State* v. *DePastino*, supra, 228 Conn. 565; *State* v. *Dollinger*, 20 Conn. App. 530, 534, 568 A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990). Both the Supreme and Appellate Courts have recognized an exception to this principle in cases of domestic child abuse. *State* v. *DePastino*, supra, 565; *State* v. *Dollinger*, supra, 534–35; *State* v. *Maldonado*, 13 Conn. App. 368, 372–74, 536 A.2d 600, cert. denied, 207 Conn. 808, 541 A.2d 1239 (1988); see C. Tait & J. LaPlante, supra, (Sup. 1999) § 11.12.3, p. 233. The courts reason that ''[i]n cases of sexual abuse in the home, hearsay statements made in the course of medical treatment which reveal the identity of the abuser, are reasonably pertinent to treatment and are admissible. . . . If the sexual abuser is a member of the child victim's immediate household, it is reasonable for a physician to ascertain the identity of the abuser to prevent recurrences and to facilitate the treatment of psychological and physical injuries.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Dollinger*,

supra, 535, quoting *State* v. *Maldonado*, supra, 374; accord *State* v. *DePastino*, supra, 565.

Traditionally, the exception seemingly required that the statement be made to a physician. See, e.g., *Wilson* v. *Granby*, 47 Conn. 59, 76 (1879). Statements qualifying under Section 8-3 (5), however, may be those made not only to a physician, but to other persons involved in the treatment of the patient, such as a nurse, a paramedic, an interpreter or even a family member. This approach is in accord with the modern trend. See *State* v. *Maldonado*, supra, 13 Conn. App. 369, 374 n.3 (statement by child abuse victim who spoke only Spanish made to Spanish speaking hospital security guard enlisted by treating physician as translator).

Common-law cases address the admissibility of statements made only by the patient. E.g., *Gilmore* v. *American Tube & Stamping Co.*, 79 Conn. 498, 504, 66 A. 4 (1907). Section 8-3 (5) does not, by its terms, restrict statements admissible under the exception to those made by the patient. For example, if a parent were to bring his or her unconscious child into an emergency room, statements made by the parent to a health care provider for the purpose of obtaining treatment and pertinent to that treatment fall within the scope of the exception.

Early common law distinguished between statements made to physicians consulted for the purpose of treatment and statements made to physicians consulted solely for the purpose of qualifying as an expert witness to testify at trial. Statements made to these so-called ''nontreating'' physicians were not accorded substantive effect. See, e.g., *Zawisza* v. *Quality Name Plate, Inc.*, 149 Conn. 115, 119, 176 A.2d 578

(1961); *Rowland* v. *Phila., Wilm. & Baltimore R. Co.*, 63 Conn. 415, 418–19, 28 A. 102 (1893). This distinction was virtually eliminated by the court in *George* v. *Ericson*, 250 Conn. 312, 324–25, 736 A.2d 889 (1999), which held that nontreating physicians could rely on such statements. The distinction between admission only as foundation for the expert's opinion and admission for all purposes was considered too inconsequential to maintain. Accordingly, the word ''diagnosis'' was added to, and the phrase ''advice pertaining thereto'' was deleted from, the phrase ''medical treatment or advice pertaining thereto'' in Section 8-3 (5) of the 2000 edition of the Code.

(6) Recorded recollection.

The hearsay exception for past recollection recorded requires four foundational requirements. First, the witness must have had personal knowledge of the event recorded in the memorandum or record. *Papas* v. *Aetna Ins. Co.*, 111 Conn. 415, 420, 150 A. 310 (1930); *Jackiewicz* v. *United Illuminating Co.*, 106 Conn. 302, 309, 138 A. 147 (1927); *Neff* v. *Neff*, 96 Conn. 273, 278, 114 A. 126 (1921).

Second, the witness' present recollection must be insufficient to enable the witness to testify fully and accurately about the event recorded. *State* v. *Boucino*, 199 Conn. 207, 230, 506 A.2d 125 (1986). The rule thus does not require the witness' memory to be totally exhausted. See id. Earlier cases to the contrary, such as *Katsonas* v. *W.M. Sutherland Building & Contracting Co.*, 104 Conn. 54, 69, 132 A. 553 (1926), apparently have been rejected. See *State* v. *Boucino*, supra, 230. ''Insufficient recollection'' may be established by demonstrating that an attempt to refresh the witness' recollection pursuant

to Section 6-9 (a) was unsuccessful. See *Katsonas* v. *W.M. Sutherland Building & Contracting Co.*, supra, 69.

Third, the memorandum or record must have been made or adopted by the witness ''at or about the time'' the event was recorded. *Gigliotti* v. *United Illuminating Co.*, 151 Conn. 114, 124, 193 A.2d 718 (1963); *Neff* v. *Neff*, supra, 96 Conn. 278; *State* v. *Day*, 12 Conn. App. 129, 134, 529 A.2d 1333 (1987).

Finally, the memorandum or record must reflect correctly the witness' knowledge of the event as it existed at the time of the memorandum's or record's making or adoption. See *State* v. *Vennard*, 159 Conn. 385, 397, 270 A.2d 837 (1970), cert. denied, 400 U.S. 1011, 91 S. Ct. 576, 27 L. Ed. 2d 625 (1971); *Capone* v. *Sloan*, 149 Conn. 538, 543, 182 A.2d 414 (1962); *Hawken* v. *Dailey*, 85 Conn. 16, 19, 81 A. 1053 (1911).

A memorandum or record admissible under the exception may be read into evidence and received as an exhibit. *Katsonas* v. *W.M. Sutherland Building & Contracting Co.*, supra, 104 Conn. 69; see *Neff* v. *Neff*, supra, 96 Conn. 278–79. Because a memorandum or record introduced under the exception is being offered to prove its contents, the original must be produced pursuant to Section 10-1, unless its production is excused. See Sections 10-3 through 10-6; cf. *Neff* v. *Neff*, supra, 278.

Multiple person involvement in recordation and observation of the event recorded is contemplated by the exception. For example, *A* reports to *B* an event *A* has just observed. *B* immediately writes down what *A* reported to him. *A* then examines the writing and adopts it as accurate close to the time of its making. *A* is now testifying and has

forgotten the event. *A* may independently establish the foundational requirements for the admission of the writing under Section 8-3 (6). Cf. C. Tait & J. LaPlante, supra, § 11.21, p. 408, citing *Curtis* v. *Bradley*, 65 Conn. 99, 31 A. 591 (1894).

The past recollection recorded exception to the hearsay rule is to be distinguished from the procedure for refreshing recollection, which is covered in Section 6-9.

(7) Public records and reports.

Section 8-3 (7) sets forth a hearsay exception for certain public records and reports. The exception is derived primarily from common law although public records and reports remain the subject of numerous statutes. See, e.g., General Statutes §§ 12-39bb, 19a-412.

Although Connecticut has neither precisely nor consistently defined the elements comprising the common-law public records exception to the hearsay rule; cf. *Hing Wan Wong* v. *Liquor Control Commission*, 160 Conn. 1, 9, 273 A.2d 709 (1970), cert. denied, 401 U.S. 938, 91 S. Ct. 931, 28 L. Ed. 2d 218 (1971); Section 8-3 (7) gleans from case law three distinct requirements for substantive admissibility. Proviso (A) is found in cases such as *Hing Wan Wong* v. *Liquor Control Commission*, supra, 9, *Russo* v. *Metropolitan Life Ins. Co.*, 125 Conn. 132, 139, 3 A.2d 844 (1939), and *Ezzo* v. *Geremiah*, 107 Conn. 670, 679–80, 142 A. 461 (1928). Proviso (B) comes from cases such as *Gett* v. *Isaacson*, 98 Conn. 539, 543–44, 120 A. 156 (1923), and *Enfield* v. *Ellington*, 67 Conn. 459, 462, 34 A. 818 (1896). Proviso (C) is derived from *Heritage Village Master Assn., Inc.* v. *Heritage Village Water Co.*, 30 Conn. App. 693, 701, 622 A.2d 578 (1993), and from

cases in which public records had been admitted under the business records exception. See, e.g., *State* v. *Palozie*, 165 Conn. 288, 294–95, 334 A.2d 458 (1973); *Mucci* v. *LeMonte*, 157 Conn. 566, 569, 254 A.2d 879 (1969).

The ''duty'' under which public officials act, as contemplated by proviso (A), often is one imposed by statute. See, e.g., *Lawrence* v. *Kozlowski*, 171 Conn. 705, 717–18, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L. Ed. 2d 1066 (1977); *Hing Wan Wong* v. *Liquor Control Commission*, supra, 160 Conn. 8–10. Nevertheless, Section 8-3 (7) does not preclude the recognition of other sources of duties.

Proviso (C) anticipates the likelihood that more than one individual may be involved in the making of the public record. By analogy to the personal knowledge requirement imposed in the business records context; e.g., *In re Barbara J.*, 215 Conn. 31, 40, 574 A.2d 203 (1990); proviso (C) demands that the public record be made upon the personal knowledge of either the public official who made the record or someone, such as a subordinate, whose duty it was to relay that information to the public official. See, e.g., *State* v. *Palozie*, supra, 165 Conn. 294–95 (public record introduced under business records exception).

(8) Statement in learned treatises.

Exception (8) explicitly permits the substantive use of statements contained in published treatises, periodicals or pamphlets on direct examination or cross-examination under the circumstances prescribed in the rule.

Although most of the earlier decisions concerned the use of medical treatises; e.g., *Cross* v. *Huttenlocher*, 185 Conn. 390, 395, 440 A.2d 952 (1981); *Perez* v. *Mount Sinai Hospital*, 7 Conn. App. 514, 520, 509 A.2d 552 (1986); Section 8-3 (8), by its terms, is not limited to that one subject matter or format. *Ames* v. *Sears, Roebuck & Co.*, 8 Conn. App. 642, 650–51, 514 A.2d 352 (1986) (published technical papers on design and operation of riding lawnmowers), cert. denied, 201 Conn. 809, 515 A.2d 378 (1986).

Connecticut allows the jury to receive the treatise, or portion thereof, as a full exhibit. *Cross* v. *Huttenlocher*, supra, 185 Conn. 395–96. If admitted, the excerpts from the published work may be read into evidence or received as an exhibit, as the court permits. See id.

(9) Statement in ancient documents.

The hearsay exception for statements in ancient documents is well established. *Jarboe* v. *Home Bank & Trust Co.*, 91 Conn. 265, 270–71, 99 A. 563 (1917); *New York, N.H. & H. R. Co.* v. *Cella*, 88 Conn. 515, 520, 91 A. 972 (1914); see *Clark* v. *Drska*, 1 Conn. App. 481, 489, 473 A.2d 325 (1984).

The exception, by its terms, applies to all kinds of documents, including documents produced by electronic means, and electronically stored information, and is not limited to documents affecting an interest in property. See *Petroman* v. *Anderson*, 105 Conn. 366, 369–70, 135 A. 391 (1926) (ancient map introduced under exception); C. Tait & J. LaPlante, supra, § 11.18, p. 405.

''[M]ore than thirty years'' means any instant of time beyond the point in time at which the document has been in existence for thirty years.

(10) Published compilations.

Connecticut cases have recognized an exception to the hearsay rule—or at least have assumed an exception exists for these items. *Henry* v. *Kopf*, 104 Conn. 73, 80–81, 131 A. 412 (1925) (market reports); see *State* v. *Pambianchi*, 139 Conn. 543, 548, 95 A.2d 695 (1953) (compilation of used automobile prices); *Donoghue* v. *Smith*, 114 Conn. 64, 66, 157 A. 415 (1931) (mortality tables).

(11) Statement in family bible.

Connecticut has recognized, at least in dictum, an exception to the hearsay rule for factual statements concerning personal or family history contained in family bibles. See *Eva* v. *Gough*, 93 Conn. 38, 46, 104 A. 238 (1918).

(12) Personal identification.

A witness' in-court statement of his or her own name or age is admissible, even though knowledge of this information often is based on hearsay. *Blanchard* v. *Bridgeport*, 190 Conn. 798, 806, 463 A.2d 553 (1983) (name); *Toletti* v. *Bidizcki*, 118 Conn. 531, 534, 173 A. 223 (1934) (name); *State* v. *Hyatt*, 9 Conn. App. 426, 429, 519 A.2d 612 (1987) (age); see *Creer* v. *Active Auto Exchange, Inc.*, 99 Conn. 266, 276, 121 A. 888 (1923) (age). It is unclear whether case law supports the admissibility of a declarant's out-of-court statement concerning his or her own name or age when offered independently of existing hearsay exceptions, such as the exception for statements made by a party opponent.

Sec. 8-4. Admissibility of Business Entries and Photographic Copies: Availability of Declarant Immaterial

"**(a) [Business records admissible.]** Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.

"**(b) [Witness need not be available.]** The writing or record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses. Either of such facts and all other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of the evidence, but not to affect its admissibility.

"**(c) [Reproductions admissible.]** Except as provided in the Freedom of Information Act, as defined in [General Statutes §] 1-200, if any person in the regular course of business has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of them to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard,

miniature photographic or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is otherwise required by statute. The reproduction, when satisfactorily identified, shall be as admissible in evidence as the original in any judicial or administrative proceeding, whether the original is in existence or not, and an enlargement or facsimile of the reproduction shall be likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile shall not preclude admission of the original.

''**(d) [Definition.]** The term 'business' shall include business, profession, occupation and calling of every kind.'' General Statutes § 52-180.

COMMENTARY

Section 8-4 sets forth what is commonly known as the business records or business entries exception to the hearsay rule. Section 8-4 quotes General Statutes § 52-180, which embraces modified versions of the 1927 Model Act for Proof of Business Transactions and the Photographic Copies of Business and Public Records as Evidence Act.

Subsection (a) describes the foundational elements a court must find for a business record to qualify under the exception. E.g., *River Dock & Pile, Inc.* v. *O & G Industries, Inc.*, 219 Conn. 787, 793–94, 595 A.2d 839 (1991); *Emhart Industries, Inc.* v. *Amalgamated Local Union 376, U.A.W.*, 190 Conn. 371, 383–84, 461 A.2d 442 (1983). The Supreme Court has interpreted § 52-180 to embrace an additional foundational requirement not found in the express terms of the excep-

tion: that the source of the information recorded be the entrant's own observations or the observations of an informant who had a business duty to furnish the information to the entrant. E.g., *In re Barbara J.*, 215 Conn. 31, 40, 574 A.2d 203 (1990); *State* v. *Milner*, 206 Conn. 512, 521, 539 A.2d 80 (1988); *Mucci* v. *LeMonte*, 157 Conn. 566, 569, 254 A.2d 879 (1969).

Business records increasingly are created, stored or produced by computer. Section 8-4 is applicable to electronically stored information, and, properly authenticated, such records are admissible if the elements of Section 8-4 (a) have been met. *See Federal Deposit Ins. Corp. v. Carabetta*, 55 Conn. App. 369, 376–77, 739 A.2d 301 (1999). In addition to satisfying the standard requirements of the business record exception to the hearsay rule, a proponent offering computerized business records will be required to establish that the computer system reliably and accurately produces records or data of the type that is being offered. See generally *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 116–18, 956 A.2d 1145 (2008) (computer printout and letter containing results of electricity meter testing); *American Oil Co.* v. *Valenti*, 179 Conn. 349, 360–61, 426 A.2d 305 (1979) (computer records of loan account); *Silicon Valley Bank v. Miracle Faith World Outreach, Inc.*, 140 Conn. App. 827, 836–37, 60 A.3d 343 (computer screenshots of loan transaction history), cert. denied, 308 Conn. 930, 64 A.3d 119 (2013). Depending on the circumstances, the court may also require evidence establishing that the system adequately protects the integrity of the records. See *Emigrant Mortgage*

Co. v. *D'Agostino*, 94 Conn. App. 793, 809–812, 896 A.2d 814, cert. denied, 278 Conn. 919, 901 A.2d 43 (2006).

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, 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 contested item of evidence by comparing it with preauthenticated specimens. See, e.g., *State* v. *Ralls*, 167 Conn. 408, 417, 356 A.2d 147 (1974) (fingerprints, experts); *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 (''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*); *Lorraine* v. *Markel American Ins. Co.*, supra, 241 F.R.D. 546–48 (electronically stored information);

(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).

[(6)**]** (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 (1986);

[(7)**]** (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);

[(8)**]** (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. 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; 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. 9-3. 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, it generally is recognized that such a 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. 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 **[**or data stored electronically**]**.

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. 10-1. General Rule

To prove the content of a writing, recording or photograph, the original writing, recording or photograph must be admitted in evidence, except as otherwise provided by the Code, the General Statutes or the Practice Book. An original of electronically stored information includes evidence in the form of a printout or other output, readable by sight or otherwise shown to reflect the data accurately.

COMMENTARY

Section 10-1 adopts Connecticut's best evidence rule. The rule embraces two interrelated concepts. First, the proponent must produce the original of a writing, as defined in Section 1-2 (c), recording or photograph when attempting to prove the contents thereof, unless production is excused. E.g., *Shelnitz* v. *Greenberg*, 200 Conn. 58, 78, 509 A.2d 1023 (1986). Second, to prove the contents of the proffer **[**writing, recording or photograph**]**, the original must be admitted in evidence. Thus, for example, the contents of a document cannot be proved by the testimony of a witness referring to the document while testifying.

The cases generally have restricted the best evidence rule to writings or documents. See *Brookfield* v. *Candlewood Shores Estates, Inc.*, 201 Conn. 1, 11, 513 A.2d 1218 (1986). In extending the rule to recordings and photographs, Section 10-1 recognizes the growing reliance on modern technologies for the recording and storage of information.

Section 10-1 applies only when the proponent seeks to prove contents. E.g., *Hotchkiss* v. *Hotchkiss*, 143 Conn. 443, 447, 123 A.2d 174

(1956) (proving terms of contract); cf. *Dyer* v. *Smith*, 12 Conn. 384, 391 (1837) (proving fact about writing, such as its existence or delivery, is not proving contents).

The fact that a written record or recording of a transaction or event is made does not mean that the transaction or event must be proved by production of the written record or recording. When the transaction or event itself rather than the contents of the written record or recording is sought to be proved, the best evidence rule has no application. E.g., *State* v. *Moynahan*, 164 Conn. 560, 583, 325 A.2d 199, cert. denied, 414 U.S. 976, 94 S. Ct. 291, 38 L. Ed. 2d 219 (1973); *State* v. *Tomanelli*, 153 Conn. 365, 374, 216 A.2d 625 (1966).

What constitutes an ''original'' will be clear in most situations. ''Duplicate originals,'' such as a contract executed in duplicate, that are intended by the contracting parties to have the same effect as the original, qualify as originals under the rule. 2 C. McCormick, Evidence (5th Ed. 1999) § 236, p. 73–74; C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 10.10, p. 305; cf. *Lorch* v. *Page*, 97 Conn. 66, 69, 115 A. 681 (1921); *Colburn's Appeal*, 74 Conn. 463, 467, 51 A. 139 (1902).

The definition of ''original'' explicitly includes printouts or other forms of electronically stored information that are readable. The proponent must show only that the printed or readable version is an accurate (i.e., unaltered and unmodified) depiction of the electronically stored information. A printout generated for litigation purposes may nevertheless be admissible if the computer stored information otherwise comports with the business entry rule. See *Ninth RMA Partners, L.P.* v.

Krass, 57 Conn. App. 1, 10–11, 746 A.2d 826, cert. denied, 253 Conn. 918, 755 A.2d 215 (2000); see also *Federal Deposit Ins. Corp.* v. *Carabetta*, 55 Conn. App. 384, 398–99, 739 A.2d 311, cert. denied, 251 Conn. 928, 742 A.2d 362 (1999).

The second sentence in Section 10-1 is modeled on rule 1001 of the Federal Rules of Evidence and on parallel provisions of numerous states' rules from around the country.