



## Family Court Defense Evidentiary Obstacle: Basic Foundations for Evidence

The purpose of this document is to provide an overview of how to properly lay a foundation for various forms of evidence in New York Family Court proceedings.

### *What is the Point of Laying a Foundation?*

- To “**authenticate**” the evidence or provide identification through extrinsic evidence, usually by presenting testimony of a competent witness with personal knowledge and/or familiarity. You are trying to convince the court that the evidence you are proffering is **reliable**: in other words, that it is what you are claiming it is (see [Article 9](#), [Article 10](#), and [Article 11](#) of the Guide to New York Evidence [GNYE]).

#### **CAUTION:**

*Failure to make a timely objection can result in an acknowledgment of authentication.*

- **Reliability** can be demonstrated “by proof that the offered evidence is genuine and that there has been no tampering with it” ([Matter of M.S. \(M.H.\)](#), --- N.E.3d ---, 2026 NY Slip Op 00825 [2026]).
- NOTE: Even properly authenticated evidence may be inadmissible because it is not relevant, or it is barred by some other exclusionary evidentiary rule.

### *Laying a Proper Foundation:*

- The Court of Appeals has held that the **proponent of evidence bears the burden** of demonstrating its authenticity ([Matter of M.S. \(M.H.\)](#); see also [GNYE 9.01](#)).
- The nature of the evidence itself will dictate how you lay the proper foundation. (see [GNYE 9.05](#)). Evidence is generally categorized as testimonial, real, or demonstrative.
- The purpose for which the evidence is being offered also influences the degree to which the court scrutinizes your foundation. This is especially true of commonly proffered **Electronically Stored Information (ESI)**, such as text messages, emails, contents from websites, and other digitally stored data.
  - Pursuant to [GNYE 4.07](#), it is within the court’s discretion to admit evidence for one purpose but not another, and to exclude it altogether.
- **Real Evidence**: The object itself; tangible items that can be collected and analyzed during an investigation. Includes sound recordings of a conversation, and can include physical objects, documents, photographs, and videos. (see [GNYE 11.01](#)).

- Key Words: Is this in the “**same or substantially the same condition**” as [when the witness first saw it at the relevant time]?

- Although the testifying witness need not be the person who created the document, took the photograph, recorded the video or audio, sent/received the text message or email – they *must* possess personal knowledge as to the accuracy of the evidence, *and* be able to aid you in establishing that the evidence being presented is exactly as it was at the time your witness initially came into contact with it.

- Regardless of whether the real evidence is “patently identifiable” by the witness or “fungible,” you will want your witness to testify as to the evidence’s unique, identifying features (such as the cracked screen on a cellular phone or a signature on a school admission form).
- Any changes or modifications to the proffered evidence go to its credibility, not to its admissibility, but must nevertheless be explained by your witness.

- **Patently Identifiable Evidence**: If the real evidence “possesses unique or distinctive characteristics or markings and is not subject to material alteration,” then it can be identified by a witness based on visual inspection alone (see [GNYE 11.01](#)).

- **Fungible Evidence**: If the real evidence is easily interchangeable (such as money and urine samples) or capable of being altered (like video footage or a sound recording of a conversation), in addition to testimony identifying the object, you will need to show a proper **chain of custody** to establish that it was not contaminated, tampered with, or replaced (see [GNYE 11.01](#)).

### ***Don’t Forget – The Best Evidence Rule!***

*Keep in mind that the **Best Evidence Rule** requires the production of the “documentary evidence” (a writing, recording, or photograph) in its original form if its contents are in dispute and sought to be proven, unless some exception to the rule applies (see [GNYE 10.03](#)).*

*A “writing” is defined broadly, and printouts of photos and electronically stored information will be treated as “original” if properly authenticated (see [GNYE 10.01](#)).*

### ***How Many Evidentiary Hoops?***

***Patently identifiable tangible evidence =  
simple identification by witness***

***Fungible or capable of being altered =  
stricter requirements:  
authentication via chain of custody***

- “Chain of Custody” authentication requires:
  - The testimony of those persons who handled the object or recording from the time it was obtained or recorded to the time it is presented in court to identify the object or recording and attest to its unchanged condition; or
  - Proof of circumstances that provide reasonable assurances of the identity and unchanged condition of the object or recording (see [GNYE 11.01](#)).

➤ **Audio Evidence – Sound Recordings, Taped Conversations, Phone Calls:**

- Key Words: *Is this an “unaltered, complete and accurate reproduction” of the conversation at issue?*
  - Sound recordings of a conversation are “fungible real evidence” and are admissible through:
    - The testimony of a participant or witness to the conversation that can attest to its complete accuracy and absence of alteration, or
    - Through a combination of testimony from a participant and expert that can attest to the recording’s accuracy, completeness, and absence of alteration; or
    - In addition to evidence concerning the making of recordings and identification of the speakers, there may be a requirement for evidence establishing a chain of custody as to those who handled the recording (see [GNYE 11.01](#)).
  - Audio recordings of communication may be authenticated the same way as you would authenticate a phone call (see [GNYE 9.05](#)).
    - It is well-settled in NY that a person’s voice, whether heard in person, over the phone, or by some other mechanical or electronic means, can be identified by a witness who is familiar with that voice (see [People v Strollo](#), 191 NY 42 [1908]).
- Burden of Proof: The Court of Appeals has held that the foundation requirement for the admissibility of sound recordings must be by “clear and convincing” proof (see [People v Ely](#), 68 NY2d 520 [1986] and [Grucci v Grucci](#), 20 NY3d 893 [2012]).
  - If any of your recordings are difficult to understand, consider preparing transcripts. However, the transcripts are not admissible into evidence.
  - Remember to mark it into evidence AND play any audio (or video) for the court!

➤ Video Recordings - Camera System Recordings and Surveillance Footage:

- Key Words: Does this video “truly and accurately represent” what was before the camera (see [GNYE 9.14](#))?
- In [People v Patterson](#), the Court of Appeals “emphasiz[ed] that relevant videotapes and technologically generated documentation are ordinarily admissible under standard evidentiary rubrics. Some reliable authentication and foundation (including technically acceptable self-authentication techniques) are, however, also still necessary” (93 NY2d 80, 84 [1999]).
- In [Matter of M.S. \(M.H.\)](#), the Court of Appeals held that surveillance video footage obtained by a third-party child pornographer allegedly obtained by hacking into a family’s home security camera – the sole evidence in an Article 10 proceeding alleging child sexual abuse – was improperly authenticated. There was no testimony from a witness with personal knowledge to establish the video’s authenticity or complete chain of custody, nor was there any expert testimony to confirm that the video accurately depicted what was before the camera. Moreover, the testifying FBI agent who interviewed the child pornographer and viewed the videos and the police officer who investigated the family’s home failed to provide the court with “reasonable assurances” given the dubious origin of the videos.
- Video recordings of a scene, person(s), or an occurrence must be relevant and properly authenticated by any of the following means – (the first three methods constitute “the *Patterson* standard”, while the fourth method encompasses additional means of authentication):
  - The testimony of a witness to the recorded events (that the video accurately represents the subject matter depicted), or

***A.I. & Deepfakes: Matter of M.S. (M.H.)***

*In [Matter of M.S. \(M.H.\)](#), the Court of Appeals reaffirmed the strict **Patterson standard** for video authentication, holding that Family Court erroneously admitted a video allegedly depicting child sex abuse without a proper evidentiary foundation.*

*Given the prevalence of today’s advanced digital manipulation techniques – **deepfakes** and **AI-generated** photos and videos – it is becoming increasingly more difficult to distinguish between authentic and fabricated evidence.*

*While circumstantial evidence may be relevant to laying a proper foundation, it is unlikely that circumstantial evidence – standing alone – will be sufficient to authenticate video evidence.*

*Further, it is imperative that practitioners stay informed about the latest developments in how to effectively present or challenge digital evidence.*

- The testimony of an operator or installer or maintainer of the equipment, that the video accurately represents the subject matter depicted, or
- The testimony, expert or otherwise, that a video truly and accurately represents what was before the camera, or
- The testimony of a witness and other evidence that demonstrates that the video accurately represents the subject matter depicted (see [People v Goldman](#), 35 NY3d 582, 588 [2020])
- “Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering” ([Patterson](#), 93 NY2d at 84).
- Technical flaws in a video recording, such as image-overlap, that have no impact on the fairness of what the video depicts, go to the weight of the evidence and not its admissibility (see [People v Davis](#), 28 NY3d 294 [2016]).
- Remember to always ask yourself, “*what is the person’s basis of knowledge for this?*”
  - NOTE: If identity is a contested issue in your case (this especially comes up in JD petitions where the police witness is testifying as to the identity of the person depicted in the video, but they have no prior familiarity with said person), the witness might be able to testify that the equipment was in working order, but not as to the identity of the person in the video ([People v Mosley](#), 41 NY3d 640 [2024]).

➤ **Photographs – Includes Digital Photos, Social Media Posts, Screenshots, & Print Outs**

- Key Words: *Is this a “fair and accurate representation of what it purportedly depicts?”*
  - The witness authenticating the photograph must possess “knowledge of the matter, identified the subjects and verified that the photographs accurately represented the subject matter depicted” (see [GNYE 9.13](#)).
  - If there are no available witnesses “who have viewed the subject matter portrayed,” then the photograph may be authenticated by other “valid alternative grounds” – such as expert testimony that the photograph has not been altered (see [People v Byrnes](#), 33 NY2d 343 [1974]).
  - The Court of Appeals has held that digital photographs can be authenticated by the same methods as traditional photographs (see [GNYE 9.13](#); see also [People v Rodriguez](#), 38 NY3d 151 [2022] and [People v Price](#), 29 NY3d 472 [2017]).
  - Visual representations of communication, such as screenshots of text message or social media posts and printouts of emails, may be authenticated the same way as you would authenticate a photograph (*id.*).

- For any social media communications, including photographs obtained from Internet profile pages, there must be some proffer or evidence or testimony demonstrating that those representations are unaltered, and you may need to provide proof establishing who controlled that particular social media profile. See [People v Price](#), 29 NY3d 472 [2017]).
- **Text Messages and Emails – A Reminder to Preserve Metadata:**
  - Considering the recent Court of Appeals decision in [Matter of M.S. \(M.H.\)](#) criticizing the admission of “hacked” digital camera footage without a clear chain of custody, and the relative ease with which a text message or email may be altered, it is best practice for the proponent of the evidence to provide proof as to the integrity of the electronic communication.
  - **Step 1:** Have your witness testify that the screenshots of text messages on their phone or the printouts of emails are a “fair and accurate representation of what was purportedly depicted” at the time these electronic communications were sent or received.
  - **Step 2:** You must also prove a continuous chain of custody from the time your witness received the text messages or emails to the time they were presented at the hearing to prove that they are genuine and untampered with. The best way to establish this second step is:
    - Make sure these electronic communications display as much information as possible – date/time stamps, contact names with phone numbers, full email addresses, full routing headers with IP addresses and server paths, signature blocks, any responses back, etc.
    - Be sure to include the full thread of the texts or emails to avoid any claims that the communications were taken out of context.
    - Have your witness (or a forensic computer expert) digitally export the communications via specialized software capable of preserving its **metadata** ( “data about data” or “electronic fingerprint” – is digitally created and usually hidden information about electronic data, such as who created it, where it is located, when it was created, whether it was modified, etc.) and converting it to some other court-friendly readable format.
    - Prepare your witness to explain how they obtained, stored, transferred, and/or printed those communications.
    - Your witness should be the one to print out the electronic communications you intend to proffer at trial. .

- Be cautious of forwarded emails and text messages received by your witness – you may need to call the original recipient as a witness to provide a clear chain of custody.
  - If your witness does not have access to these text messages or emails, you will need a judicial subpoena to obtain this evidence directly from the service provider.
- **Documentary Evidence:**
- Some documentary evidence may only be obtained via judicial subpoena.
  - For records that come in via the Business Records exception to hearsay, their reliability must be established by way of a “Business Records Certification” OR through witness testimony.
  - The testifying witness must have “personal knowledge of the record keeping practices of the business” (Bank of N.Y. Mellon v Gordon, 171 AD3d 197 [2d Dept 2019]; see GNYE 8.08; CPLR 2306, 2307, 4518, 4520, and 4540).
- **Self-Authenticating Evidence:** does not require extrinsic evidence of authenticity as a condition precedent to admissibility.
- See GNYE 9.08 (CPLR 4532, 4538, 4540, 4540-a, 4542) (regarding self-authenticating evidence and procedure).
  - See GNYE 9.09 (CPLR 4532-a) (regarding self-authentication procedure and hearsay exception for admitting medical imaging or other test results).

### ***Practice Tips & Pointers***

- ▶ *Know your court’s rules for pre-marking exhibits and procedures for getting digital documents submitted into evidence.*
- ▶ *Make requests for courtroom technology well in advance.*
- ▶ *Find an organization system that makes your evidence easily accessible to you.*
- ▶ *Remove your emailed client communications from any of your exhibits.*
- ▶ *Whenever possible, stipulate ahead of time which evidence will come in.*
- ▶ *Think about how to lay your foundations in advance of the hearing AND be sure to incorporate it into your witness prep!*
- ▶ *Make sure the witness has had a chance to review the entirety of the exhibit before testifying about it.*
- ▶ *If you anticipate objections from opposing counsel as to certain evidence, come armed with a memorandum of law or copies of case law supporting your argument.*
- ▶ *Do not forget to ask for the exhibit to be admitted into evidence (or to play the video or audio for the court!)*
- ▶ *If admission is denied, ask to have the exhibit marked as a court exhibit to ensure the record is adequate for appeal.*

- **Demonstrative Evidence:** a visual, graphic, or sound aid used to explain or illustrate a witness's testimony or the presentation of the proponent's case (see [GNYE 11.03](#)).
- Key words: *Is the exhibit a “fair and accurate depiction or representation” of what it purportedly depicts or represents?*
  - It must help the factfinder better understand testimony or party's case.
  - It can be tangible or intangible items, such as photographs, pictures, charts, graphs, enlargements of records, simulations, and other visuals and videos.
  - An object (such as a photograph) may be real evidence in one instance (e.g., photo of child's bedroom used to show its unsafe and unsanitary condition) and demonstrative evidence in another (e.g., photo of child's bedroom being used during the course of a witness's testimony to explain where they were standing in proximity to other persons and objects depicted in the photo).
  - As technology improves, these can create powerful tools of persuasion.
  - Some demonstrative evidence requires expert testimony for authentication. Be prepared for your adversary to conduct a *voir dire* of your witness.
  - The admissibility of demonstrative evidence is largely based on its relevancy, authentication, foundation, and potential to mislead, prejudice, or confuse.

#### *Additional Resources:*

- [New York Unified Court System Guide to NY Evidence](#)
- [Cornell Law School's Legal Information Institute \(LII\) – Federal Rules of Evidence](#)
- [New York State Defender's Association \(NYSDA\) – Family Defense Support](#)

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