



## Committee for Public Counsel Services Youth Advocacy Division

### QUICK REFERENCE GUIDE TO INTRODUCING EVIDENCE

*This guide is intended to be used as a quick reference and is in no way intended to replace thorough trial preparation and research on anticipated evidentiary issues. For in-depth analysis please refer to: Massachusetts Guide to Evidence, 2018 Edition,\* <https://www.mass.gov/guides/massachusetts-guide-to-evidence>, and Evidentiary Foundations, Edward J. Imwinkleried.*

#### Prerequisites to Admissibility

**Authentic**– Is the item really what you say it is? Lay the foundation with the proper witness.

To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. *Mass. Guide to Evidence*, § 901 (a). See *Commonwealth v. Nardi*, 452 Mass. 379, 396 (2008)(judge must make determination that there is sufficient evidence to convince jury by preponderance of evidence the item is as claimed). Authenticity is usually proved by testimony of a witness either “(1) that the thing is what its proponent represents it to be or (2) that circumstances exist which imply that the thing is what its proponent represents it to be.” *Commonwealth v. LaCorte*, 373 Mass. 700, 704 (1977).

**Admissible**- relevant and admissible (not hearsay, privileged or otherwise inadmissible).

Relevant evidence is evidence having “any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action.” *Mass. Guide. to Evidence*, § 401.

#### General Guidelines for Admitting Evidence

- **MARK** exhibit for identification
- **SHOW** to opposing counsel
- Ask to **APPROACH** the witness
- **SHOW** to witness (then authenticate - ask proper foundational questions)
- Ask the court to **ADMIT** the evidence
- Ask the court to **PUBLISH** the evidence to the jury

#### How to Authenticate/Lay Foundation

The parties can stipulate to an item’s authenticity. If there is no stipulation, it must be authenticated through a qualified witness. See *Commonwealth v. La Corte*, 373 Mass. 700, 704 (1977).

Below are some examples of foundational requirements for common types of evidence.

#### PHOTOGRAPHS/DIAGRAMS /VIDEOTAPES

- 1) Witness is familiar with object or scene;
- 2) Witness explains basis of familiarity;
- 3) Witness recognizes object or scene depicted in picture/diagram; and
- 4) Ask witness if the item is a “fair and accurate,”” depiction of the object or scene. See *Commonwealth v. Heang*, 458 Mass. 827, 855 (2011).

## How to Authenticate/Lay Foundation (cont'd)

### BUSINESS RECORDS

- 1) Witness has personal knowledge of business's record keeping;
- 2) Witness removed the proper record from where it is kept;
- 3) Witness recognizes the exhibit as the record they removed; and
- 4) Witness specifies the basis on which they recognize the exhibit.

Business records are an exception to the **hearsay rule** if the following are established, see G.L. 233, § 78, *Mass. Guide to Evidence*, § 803(6) (Hearsay Exceptions):

- 1) Were made in good faith;
- 2) In the regular course of business;
- 3) Were made before the beginning of the proceeding; and
- 4) It was the regular course of such business to make such "memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter."

Business records produced pursuant to a Subpoena Duces Tecum, "shall be certified by the affidavit of the person in custody thereof to be a true and complete record and shall be delivered by such business to the clerk of such court who shall keep the same in [their] custody until its production is called for at the trial or hearing by the party requiring the said record." G.L. c. 233 § 79J.

### REAL EVIDENCE

There are two ways to introduce real evidence: the witness can particularly identify the item (unique characteristic) **or** by chain of custody.

#### Unique Characteristics

- 1) Object has unique characteristics. The characteristic can be a single peculiar feature or a unique feature or a combination of features;
- 2) Witness has observed the object on previous occasion;
- 3) Witness identifies the exhibit as the object;
- 4) The witness rests their identification on their present recognition of the characteristic; and
- 5) As best the witness can tell, the exhibit is in the same condition as it was when they last saw it.

#### Chain of Custody

- 1) The witness initially received the object at a certain time and place;
- 2) The witness safeguarded the object and testifies to the circumstances that makes substitution or tampering unlikely;
- 3) The witness ultimately disposed of the object (retention or transfer to another person);
- 4) As best as the witness can tell, the exhibit is the object they previously handled; and
- 5) As best the witness can tell, the exhibit is in the same condition as it was when they initially received the object.

## Self-Authenticating

Certain items do not need to be authenticated through a witness. See *Mass. Guide to Evidence*, §902 for a list of those items. The proponent still needs to establish relevancy. A common example is:

### MEDICAL RECORDS

A witness is not needed to authenticate certain medical records if the procedures set forth in *G.L. c. 233, § 79G* are followed:

- 1) Subscribed and sworn to under the pains and penalties of perjury by the provider;
- 2) The proponent gives the opposing party written notice of the intention to offer the evidence, along with a copy of the evidence, by mailing it by certified mail, return receipt, not less than ten days before the introduction of the evidence; and
- 3) The proponent files an affidavit of such notice and the return receipt is filed with the clerk of the court.

Portions of certain medical records are an exception to the **hearsay** rule. See *G.L. 233, § 79G, Mass. Guide to Evidence § 803(6)(C)(i)*). These exceptions include: “evidence of the fair and reasonable charge for such services or the necessity of such services or treatments, the diagnosis of said physician or dentist, the prognosis of such physician or dentist, the opinion of such physician or dentist as to proximate cause of the condition so diagnosed, the opinion of such physician or dentist as to disability or incapacity, if any, proximately resulting from the condition so diagnosed.” *G.L. 233, § 79G*.

Statements as to liability do not fall within the hearsay exception and any reference thereto should be redacted from the records prior to their admission into evidence. *Commonwealth v. Dwyer*, 448 Mass. 122, 137 (2006)

## E-Mails and Computer Generated Evidence

Authenticating e-mails or other social media communications present issues such as who has access to the source. The admissibility of these types of communications has been addressed in number Massachusetts cases. The *Mass. Guide to Evidence § 901 (b)(11)* states “[e]lectronic or digital communication, by con-firming circumstances that would allow a reasonable fact finder to conclude that this evidence is what its proponent claims it to be. Neither expert testimony nor exclusive access is neces-sary to authenticate the source.”

- *Commonwealth v. Amaral*, 78 Mass. App. Ct. 671 (2011)(Yahoo! account met business records exception and 37 emails were properly authenticated by a combination of a document as to registered owner of email account with affidavit from Yahoo! records’ custodian, and the defendant’s actions);
- *Commonwealth v. Purdy*, 459 Mass. 442 (2011) (10 e-mails from defendant’s computer were admissible, even though other people had access to the computer, because a judge may look to “confirming circumstances” that the defendant was the author). *Commonwealth v. Foster F.*, 86 Mass. App. Ct. 734 (2014)(there were sufficient confirming circumstances to authenticate Facebook communications but judge should have instructed jury that “in order to consider the messages as evidence of the statements contained therein, they first needed to find by a fair preponderance of the evidence that the juvenile was the author”);
- *Commonwealth v. Siny Van Tran*, 460 Mass. 535 (2011)(passenger manifest and airplane ticket from twenty-years prior admissible as a business record where employee of company with extensive experience as a gate agent testified about the software that created the documents and that they recognized the documents); and
- *Commonwealth v. Williams*, 456 Mass. 857, 868-869 (2010)(messages on “MySpace” not properly authenticated because there was no testimony regarding how secure the site was and who can access the webpage, and there was no expert testimony that no one other than the alleged sender could communicate from the web page).

## Best Evidence Rule

The best evidence rule provides that, “where the contents of a document are to be proved, the party must either produce the original or show a sufficient excuse for its nonproduction.” *Commonwealth v. Ocasio*, 434 Mass. 1, 6 (2001). See *Mass. Guide to Evidence*, §1004 for exceptions (Original Lost or Destroyed, Original Not Obtainable, Original in Possession of Opponent, Collateral Matters). The “significance for the best evidence rule has declined appreciably in recent decades. The rule predates the invention of photocopy machines and computers, and also the modern discovery rules.” See *Commonwealth v. Amaral*, *supra* at 675.

## Preserving the Record for Appeal

Remember to preserve the record. Make sure excluded evidence has been **marked for identification** and make an **offer of proof** of what the evidence would be, why it is relevant, and why it is admissible. *Mass. Guide to Evidence*, § 103(a)(2). This can be done by making a statement at side bar or with a witness testifying outside the hearing of the jury. If necessary, ask for a voir dire.

## Common Objections

- Item not properly authenticated/foundation not properly made – be aware that court can rule that a deficiency here may go to the weight of the evidence not the admissibility.
- The wrong witness has been called to authenticate.
- Procedural flaws in the question.
- Hearsay.
- Totem Pole Hearsay in the document.
- Poor quality of the item could confuse the jury.
- Violation of Confrontation Clause. Some examples: *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009)(drug certifications); *Commonwealth v. Parenteau*, 460 Mass. 1, 8-10 (2011)(certain registry of motor vehicles certificate); *Commonwealth v. Bizanowicz*, 459 Mass. 400, 411 (2011) (substitute expert). For analysis on when Commonwealth can call a “substitute expert” see *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2713 (2011)(holding testimony of substitute analyst violated confrontation clause because certificate of blood analysis was “testimonial”). See also *Michigan v. Bryant*, 131 S.Ct. 1143, 1155 (2011)(a statement is testimonial if its “primary purpose is creating an out-of-court substitute for trial testimony”).
- Admission of evidence is more prejudicial than probative. *Mass Guide to Evidence*, § 403.
- Evidence would violate a privilege. See *Mass. Guide to Evidence*, §§ 502-526 for recognized privileges.

\*“The provisions contained in [the Massachusetts Guide to Evidence] may be cited by lawyers, parties, and judges, but are not to be construed as adopted rules of evidence or as changing the existing law of evidence.” *Mass. Guide to Evidence*, § 102.

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