NY CLS CPLR R 4540-a

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New York

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Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 45 Evidence (§§ 4501 — 4551)

R 4540-a. Presumption of authenticity based on a party's production of material authored or otherwise created by the party.

Material produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility.

History

L 2018, ch 219, § 1, effective January 1, 2019.

Annotations

Notes

Editor's Notes

Laws 2018, ch 219, § 2, eff January 1, 2019, provides:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

Commentary

2018 Recommendations of the Advisory Committee on Civil Practice.

The Committee recommends adoption of this proposal to eliminate the needless authentication burden often encountered by litigants who seek to introduce into evidence documents or other items authored or otherwise created by an adverse party who produced those materials in the course of pretrial disclosure.

It is fundamental, of course, that the genuineness of a document or other physical object must be established as a prerequisite to its admissibility when the relevance of the item depends upon its source or origin. *See* Barker & Alexander, *Evidence in New York State and Federal Courts* § 9:1 (2d ed. 2011). But evidence of such authenticity should not be required if the party who purportedly authored or otherwise created the documents at issue has already admitted their authenticity. And if a party has responded to a pretrial litigation demand for its documents by producing those documents, the party has indeed implicitly acknowledged their authenticity. Thus, in such cases, the presentation of evidence of authenticity is a waste of the court's time and an unnecessary burden on the proponent of the evidence. The producing party's simple objection to admissibility for "lack of authentication" in such cases should be summarily overruled. But often it is not, thus warranting remedial legislation. The proposed statute codifies and expands upon caselaw that has been overlooked by many New York courts, practitioners, and commentators.

The idea that a party's production of his or her own papers serves to authenticate them is a specific application of the general rule that the authenticity of a document may be established by circumstantial evidence. *See People v. Myers*, 87 A.D.3d 826, 828 (4th Dep't 2011), leave to appeal denied, 17 N.Y.3d 954 (2011). The New York Court of Appeals recognized the probative value of a party's production of its own documents in *Driscoll v. Troy Housing Auth.*, 6 N.Y.2d 513 (1959), where the issue was the authenticity of an unsigned, undated "roster card" describing the status of a civil service employee. The card was produced by the civil service

commission from its files, where it had been kept for eight years. The Court held that "its authenticity must be presumed, or we have presumed wrongdoing rather than honesty on the part of the public official." *Id.* at 519. The Court's ruling was bolstered by the presumption of regularity that attaches to the acts and records of public agencies, but the authentication-by-production doctrine was also recognized with respect to private documents in *Ruegg v. Fairfield Securities Corp.*, 308 N.Y. 313, 320 (1955). There, the Court observed that the authenticity of a copy of a letter "produced from defendant's own files" was "unquestioned."

Several recent federal cases have likewise held that a party can satisfy the requirement of authentication based on the opposing party's production of its own papers during discovery proceedings. For example, the court in *Bieda v. JCPenney Communications, Inc.*, 1995 WL 437689 n.2 (S.D.N.Y. 1995), held that "[t]he mere fact that Defendants here produced most of the documents in question is at least circumstantial, if not conclusive, evidence of authenticity." *See also* *Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1423 (10th Cir. 1991); *Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1089 (5th Cir. 1988); *FTC v. Hughes*, 710 F.Supp. 1520, 1522-23 (N.D.Tex. 1989).

The act-of-production doctrine in Fifth Amendment jurisprudence provides further support for the principle that a party who produces papers in response to a litigation demand for papers written by him or her implicitly authenticates those papers. For example, the Court of Appeals noted in *People v. Defore* that "a [criminal] defendant is protected [by the Fifth Amendment] from producing his documents in response to a subpoena *duces tecum*, for his production of them in court would be his voucher of their genuineness." 242 N.Y. 13, 27 (1926), cert. denied, 270 U.S. 657 (1926) (internal quotation marks and citation omitted) (italics added). *See also* *U.S. v. Hubbell*, 530 U.S. 27, 36 (2000) ("By producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic.") (internal quotation marks omitted); *Fisher v. United States*, 425 U.S. 391, 412 n.12 (1976) (collecting cases).

In furtherance of the foregoing principles, the proposed new CPLR 4540-a creates a rebuttable presumption that accomplishes two goals. First, when the item at issue is one that has already been produced by a party in the course of pretrial disclosure, and such item purportedly was authored or created by that party, the opposing party is thereby relieved of the need, *ab initio,* to come forward with evidence of its authenticity. Second, the rebuttable nature of the presumption protects the ability of the producing party, if he or she has actual evidence of forgery, fraud, or some other defect in authenticity, to introduce such evidence and prove, by a preponderance, that the item is not authentic. A mere naked "objection" based on lack of authenticity, however, will not suffice. Shifting the burden of proof to the producing party makes sense because that party is most likely to have better access to the relevant evidence on the issue of forgery or fraud. Furthermore, the presumption recognized by the statute applies only to the issue of authenticity or genuineness of the item. A party is free to assert any and all other objections that might be pertinent in the case, such as lack of relevance or violation of the best evidence rule.

The Committee notes that adoption of the proposed new CPLR 4540-a would not preclude establishing authenticity by any other statutory or common law means. *See* CPLR 4543 ("Nothing in this article prevents the proof of a fact or a writing by any method authorized by any applicable statute or by the rules of evidence at common law.").

Research References & Practice Aids

Hierarchy Notes:

NY CLS CPLR, Art. 45