

A person purporting to be the defendant makes a threatening telephone call to the plaintiff.

In which instance is the telephone call MOST likely to be admitted against the defendant?

- A. The caller identified himself using the defendant's name.
- B. The plaintiff believes that the defendant is capable of making such threats.
- C. The plaintiff had given her unlisted number only to the defendant and a few other persons.
- D. The plaintiff had previously given damaging testimony against the defendant in another lawsuit.

## Explanation:

### Authenticating oral statements

(FRE 901(b)(5)–(6))

**Voice identification**     Authenticated by any person who:

has heard speaker's voice firsthand or through device at any time  
(including litigation) *and*  
can connect speaker's voice to oral statement at issue

### Telephone conversation

Authenticated by caller who testifies that:

caller recognized speaker's voice  
speaker knew facts only particular person would know  
caller dialed number believed to be speaker's & speaker identified him/herself upon answering *or*  
caller dialed business & spoke with person who answered about business regularly transacted by phone

**FRE** = Federal Rule of Evidence.

Before evidence of a **telephone call** may be admitted, it must be **authenticated by identifying the speaker** when that identity is important (as seen here). This can be accomplished by having a party to the telephone conversation testify that:

the party recognized the speaker's voice

the speaker knew facts that only certain persons would know

the party dialed a number believed to be the speaker's, and the speaker identified him/herself upon answering *or*

the party dialed a business and spoke to the person who answered about business regularly conducted over the phone.

Evidence that the plaintiff had given her unlisted number only to the defendant and a few other persons shows that the caller knew a fact that only certain persons would know. As a result, the telephone call would likely be admitted against the defendant in that instance.

**(Choice A)** A *caller* may authenticate the voice of the person who *answered* if the caller (1) dialed a number believed to be the speaker's and (2) the speaker identified him/herself upon answering. But since the plaintiff *received* the call, she cannot use this method to authenticate the caller's voice.

**(Choice B)** The plaintiff's mere belief that the defendant is capable of making such threats is irrelevant as to identifying the caller.

**(Choice D)** The plaintiff's prior damaging testimony against the defendant may show that the defendant had motive to make the threatening call, but this is very weak evidence of the caller's identity.

**Educational objective:**

A telephone call can be authenticated by having a party to the conversation testify that (1) the party recognized the speaker's voice, (2) the speaker knew facts only certain persons would know, (3) the party dialed a number believed to be the speaker's and the speaker confirmed that identity upon answering, or (4) the party dialed a business and they spoke about business regularly conducted over the phone.

**References**

Fed. R. Evid. 901(b)(5)-(6) (authentication of telephone call).

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