New CPLR Section 4540-a: the Presumption of Authenticity of a Party's Own Documents

By Jarrett M. Behar

Each year, the Advisory Committee on Civil Practice makes recommendations to the Chief Administrative Judge as to legislative proposals in the area of civil procedure that may be incorporated into the Chief Administrative Judge's legislative program. The recommendations are posted on the New York Courts website[1] and it is a highly interesting read as to what improvements are being suggested for the practice of civil litigation in New York State. In 2018, among the recommendations from the 36 measures recommended by the Advisory Committee that were enacted by the Legislature was new CPLR Rule 4540-a entitled "Presumption of authenticity based on a party's production of material authored or otherwise created by the party," which states:

> 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.

This provision went into effect on Jan. 1, 2019 and, as far as my research uncovered, has not yet been cited in any reported decision.

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The Advisory Committee recommended 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." The committee felt that a party that has produced a document in the course of pretrial discovery that it authored or otherwise created has already implicitly acknowledged its authenticity. As a result, having to present additional evidence to authenticate such a document is "a waste of the court's time and an unnecessary burden on the proponent of the evidence."

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Finally, the committee also stated that this provision is, in sum and substance, codifying a specific application of the general rule that circumstantial evidence can be used to authenticate evidence. In this case, that circumstantial evidence is the opposing party's own production of the evidence.

The provision as recommended by the Advisory Committee and enacted by the Legislature does not, however, require authentication in all circumstances. The new rule merely creates a rebuttable presumption that allows the producing party to introduce evidence of forgery, fraud or some other authenticity defect, and prove that the document is not, in fact, authentic. The standard for rebutting this presumption would be by a preponderance of the evidence. In addition, the committee noted that this rule does not preclude authentication of evidence by any other statutory or common law method.

There is not a corresponding rule in the Federal Rules of Evidence. Federal Rule of Evidence 901 simply requires the proponent of evidence to "produce evidence sufficient to support a finding that the item is what the proponent claims it is" and then provides examples of what would satisfy this requirement. The committee did note that several recent federal court decisions have held that the opposing party's production of its own papers during pretrial discovery can establish the proposed evidence's authenticity.

I believe that there is the potential for an issue to develop as this rule is utilized going forward as to what it means to have material "authored or otherwise created by the party." For example, if the opposing party is responding to an email from a third-party and produces the entire email conversation as one document during pretrial discovery, is the entire email conversation authenticated for purposes of CPLR 4540-a or just the opposing party's reply? What if the opposing party produces a piece of correspondence that he or she authored that attaches documents from a third-party? How will text messages factor in under this rule? These are just some of the myriad questions that may need to be determined under CPLR 4540-a and they are not addressed in the Advisory Committee's report or the New York State Assembly's Memorandum in Support of Legislation (which is essentially just a copy of the section of the committee's report on this rule). One would hope that a common-sense approach will ultimately be used by the courts in making these determinations, but it will certainly be interesting to see what happens when decisions on the interpretation of this rule begin to be issued.

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1. http://ww2.nycourts.gov/ip/judiciaryslegislative/archive.shtml