

RULE 3:11. RECORD OF AN OUT-OF-COURT IDENTIFICATION PROCEDURE

(a) Recordation. A law enforcement officer shall make a record of an out-of-court identification based upon a visual depiction or physical display of an individual. The visual depiction may consist of photographs or images fixed in any medium now known or later developed.

(b) Method of Recording. A law enforcement officer shall electronically record the out-of-court identification procedure in video or audio format, preferably in an audio-visual format. If it is not feasible to make an electronic recording, a law enforcement officer shall contemporaneously record the identification procedure in writing and include a verbatim account of all relevant verbal and non-verbal exchanges between the officer and the witness; in such instances, the officer shall explain in writing why an electronic recording was not feasible. If it is not feasible to prepare a contemporaneous, verbatim written record, the officer shall prepare a detailed written summary of the identification procedure as soon as practicable and without undue delay, and explain in writing why an electronic recording and a contemporaneous, verbatim written account were not feasible.

(c) Contents. The record of an out-of-court identification procedure is to include the relevant details of what occurred at the out-of-court identification, including but not limited to the following:

- (1) the place where the procedure was conducted;
- (2) the dialogue between the witness and the officer(s) who administered the procedure;
- (3) the results of the identification procedure, including any identifications that the witness made or was unable to make;
- (4) if a live lineup, then a picture of the lineup;
- (5) if a photographic array or sequential photo display, then the photos displayed;
- (6) if a digital database, then any photos the witness selected as the suspect, or as someone who resembled or looked similar to the suspect, along with all other photos on the same screen;
- (7) if a paper mug book, then any photos the witness selected as the suspect, or as someone who resembled or looked similar to the suspect, along with all other photos on the same page;
- (8) the identity of persons who were present at the out-of-court identification procedure;

(9) a witness' statement of confidence, in the witness' own words, once an identification has been made; and

(10) the identity of any individuals with whom the witness has spoken about the identification procedure, at any time before, during, or after the official identification procedure, and a detailed summary of what was said. This includes the identification of both law enforcement officials and private actors who are not associated with law enforcement.

(d) Remedy. If the record that is prepared is lacking in important details as to what occurred at the out-of-court identification procedure, and if it was feasible to obtain and preserve those details, the court may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of the identification testimony, and/or fashion an appropriate jury charge to be used in evaluating the reliability of the identification.

Note: Adopted July 19, 2012 to be effective September 4, 2012; paragraph (a) amended, paragraph (b) caption and text amended, and paragraph (c) amended May 26, 2020 to be effective June 8, 2020.

Rule 3:11-1. [Deleted]

Note: Source – R.R. 3:5-9(a) (b) (c); revised and redesignated R. 3:12-2(a) July 13, 1994 to be effective January 1, 1995.

Rule 3:11-2. [Deleted]

Note: Source – R.R. 3:5-9(d); revised and redesignated R. 3:12-2(b) July 13, 1994 to be effective January 1, 1995.