

Guide to New York Evidence



Always check:

www.nycourts.gov/judges/evidence/index.shtml
for the latest updates.

Updated 6/15/2022

GUIDE TO NEW YORK EVIDENCE
ARTICLE 1: GENERAL RULES & COURT FUNCTION
TABLE OF CONTENTS

GENERAL RULES

1.00 TITLE

1.01 PURPOSE & CONSTRUCTION

1.03 SCOPE OF GUIDE

COURT'S ROLE

1.07 COURT CONTROL OF THE PRESENTATION OF EVIDENCE

1.09 COURT POWER TO CALL AND EXAMINE WITNESSES

1.11 COURT DETERMINATION OF PRELIMINARY QUESTIONS

1.13 COURT RECONSIDERATION OF AN EVIDENCE RULING

1.00. Title

This compilation of New York rules of evidence shall be cited as the Guide to New York Evidence.

Note

For the various citation forms, see:

http://www.nycourts.gov/judges/evidence/0-TITLE_PAGE/CITATION/guidecitation.shtml

1.01. Purpose and Construction

In recognition of the absence of a New York statutory code of evidence, the objective of this Guide is to bring together in one document, for the benefit of the bench and bar, New York’s existing rules of evidence, setting forth each rule with a note on the sources for that rule.

Given that most of New York’s evidentiary rules are not codified and that the New York Court of Appeals provides the controlling interpretation of the New York State constitution, statutes and common law, this Guide places particular emphasis on and adheres to the controlling precedents of the New York Court of Appeals.

The rules of evidence set forth in this Guide are not intended to alter the existing law of New York evidence and shall not be construed as doing so or as precluding change in the law when appropriate.

Note

It bears emphasis that this Guide sets forth the existing law of New York evidence at the moment of publication and that the law of evidence is continuously subject to change. Most notably, perhaps, because New York’s law of evidence relies primarily on the common law of evidence, it is best to remember, as former Chief Judge of the Court of Appeals Stanley Fuld explained:

“The common law of evidence is constantly being refashioned by the courts of this and other jurisdictions to meet the demands of modern litigation. . . . Absent some strong public policy or a clear act of pre-emption by the Legislature, rules of evidence should be fashioned to further, not frustrate, the truth-finding function of the courts”

(Fleury v Edwards, 14 NY2d 334, 341 [1964, Fuld, J., concurring]; *see People v Conyers*, 52 NY2d 454, 460 [1981] [“the rule announced in our decision today (dealing with pretrial silence) represents a simple recognition of our judicial

responsibility to formulate rules of evidence to protect the integrity of the truth-finding process”].)

As a result, the Committee on Evidence will periodically examine the state of the law of evidence and update this Guide as necessary. Any revision of a rule will be explained in the Note to the rule.

Finally, as set forth in the rule, “this Guide places particular emphasis on and adheres to the controlling precedents of the New York Court of Appeals.” To the extent possible, therefore, the Guide employs the language of the Court of Appeals. In the occasional instance where no controlling Court of Appeals precedent exists, Appellate Division precedent uniformly followed by the courts may form the basis for a rule. In instances where the law of New York converges with other evidence codes, such as the 1982 and 1991-92 Proposed Code of Evidence for New York prepared by the New York State Law Revision Commission, the Uniform Rules of Evidence, or the Federal Rules of Evidence, language from those rules may be used in this Guide.

1.03. Scope of the Guide

Unless a statute or decisional law prescribes a special rule of evidence for a particular civil or criminal proceeding, this Guide is intended to set forth the evidentiary rules applicable to proceedings in all courts of the State of New York.

Note

This rule sets forth the current practice in New York courts regarding the application of New York’s rules of evidence.

Statutes setting forth the governing procedures for various courts and proceedings include the following:

Civil Practice Law and Rules: CPLR 101 (“The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute”); CPLR 105 (d) (“[c]ivil judicial proceeding” is a “prosecution, other than a criminal action, of an independent application to a court for relief”); CPLR article 45 (“Evidence”).

Criminal Procedure Law: CPL 60.10 (“Unless otherwise provided by statute or by judicially established rules of evidence applicable to criminal cases, the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings”).

Surrogate’s Court Procedure Act: SCPA 102 (“The CPLR and other laws applicable to practice and procedure apply in the surrogate’s court except where other procedure is provided by this act”) (*see Matter of Martin*, 80 Misc 17, 26 [Sur Ct, NY County 1913] [“The rules of evidence applied in this court . . . are now uniform with the rules applied in other tribunals of the state”]).

Family Court Act: Family Court Act § 165 (a) (“Where the method of procedure in any proceeding in which the family court has jurisdiction is not prescribed by this act, the procedure shall be in accord with rules adopted by the administrative board of the judicial conference or, if none has been adopted, with the provisions of the civil practice act to the extent they are suitable to the proceeding involved”). (*See also Matter of Schwartz v Schwartz*, 23 AD2d 204, 206 [1st Dept 1965] [“the determination of when it is ‘appropriate’ to apply the provisions of the CPLR to the numerous and

unusual situations which will arise in the Family Court will depend upon the circumstances of the cases as they arise”].)

This Guide does not attempt to describe all proceedings in which a particular evidentiary rule may be inapplicable as a result of statutory law. Examples of some of the judicial proceedings in which the rules of evidence, in whole or part, are deemed inapplicable include: CPL 400.30 (4) (exclusionary rules of evidence inapplicable in hearings determining the amount of fines); CPL 710.60 (4) (hearsay admissible in suppression hearings); Correction Law § 168-n (3) (as set forth in *People v Mingo*, 12 NY3d 563 [2009], “reliable hearsay” is admissible when determining a sex offender registration level); Mental Hygiene Law § 81.12 (court may waive the rules of evidence for good cause in Mental Hygiene Law art 81 appointment of a guardian proceeding); UJCA 1804 (rules of evidence inapplicable in small claims hearings).

Some statutes set forth specific evidentiary rules to be applied in certain proceedings, including: CPL 180.60 (proceedings upon a felony complaint); CPL 400.21 (second felony offender hearing); CPL 410.70 (revocation of probation hearing); Domestic Relations Law § 144 (admissions in an action for annulment); Family Court Act § 531 (corroboration in paternity proceedings); Family Court Act § 624 (termination of parental rights); Family Court Act § 834 (proceedings involving family offenses); Family Court Act § 915 (confidentiality of statements made in conciliation proceedings); Family Court Act § 1046 (a) (vii) (specified privileges inapplicable in child protective proceeding).

Other statutes provide the rules of evidence are to apply to certain proceedings: CPL 190.30 (grand jury proceedings); Family Court Act § 439 (proceedings conducted by support magistrates); Mental Hygiene Law § 10.07 (c) (CPLR art 45 applies in Mental Hygiene Law art 10 proceedings).

It should also be noted that the Court of Appeals has held that in certain proceedings the constitutional due process requirement may affect the admission of evidence. (*E.g. Matter of State of New York v Floyd Y.*, 22 NY3d 95, 106 [2013] [“A requirement that evidence meet a test of reliability and substantial relevance is necessary to protect the important liberty interests at stake in (Mental Hygiene Law) article 10 proceedings”]; *People v Robinson*, 89 NY2d 648 [1997] [a defendant’s constitutional right to due process requires the admission of hearsay evidence consisting of grand jury testimony when the declarant has become unavailable to testify at trial and the hearsay is material, exculpatory and has sufficient indicia of reliability].)

1.07 Court Control Over Presentation of Evidence¹

(1) In the exercise of the court's responsibility to supervise and oversee the conduct of a hearing or trial, the mode and order of presenting evidence and examining witnesses is committed to the sound discretion of the court.

(2) The court in the exercise of its discretion may permit a party to:

(a) introduce rebuttal and surrebuttal evidence that normally addresses new matters raised by the opposing party on that party's case, albeit a court may, in its discretion, in the interests of justice, permit evidence that is not technically of a rebuttal or surrebuttal nature.

(b) recall a witness; and

(c) in an exceptional circumstance, reopen a party's case, provided, however, the court may not permit the People to reopen their case at a suppression hearing if they have been given a full and fair opportunity to be heard and the court has rendered its decision.

(3) Provided the court does not assume the function or appearance of an advocate for a party in the action or proceeding, the court in the sound exercise of its discretion may on its own, rule that a question, in form or substance, is not proper, or that a response to a question is not proper and is struck, or that proffered evidence is inadmissible.

¹ In August 2020, subdivisions (3) (a) and (b) were removed from this rule and set forth separately as rule 1.09 (Court Power to Call and Examine Witnesses).

In December 2020, subdivision (2) (a) and (c) were amended to include the reasons for allowing rebuttal and surrebuttal evidence and the reopening of a party's case.

(4) The court shall enforce a stipulation between opposing parties concerning an item of evidence, relevant fact, or claim unless the court rules in the sound exercise of its discretion in the furtherance of the interests of justice to relieve a party or parties, in whole or in part, from the stipulation, particularly where doing so would not significantly prejudice a party.

Note

Subdivision (1) is derived from a long line of Court of Appeals cases that follow the common law in defining a trial judge's traditional power (*e.g. People v Schwartzman*, 24 NY2d 241, 244 [1969] ["The nature and extent of cross-examination is subject to the sound discretion of the Trial Judge"]; *Feldsberg v Nitschke*, 49 NY2d 636, 643 [1980] ["(T)he order of introducing evidence and the time when it may be introduced are matters generally resting in the sound discretion of the trial court"]; *Bernstein v Bodean*, 53 NY2d 520, 529 [1981] ["(W)ith respect to the examination of all witnesses, the scope and manner of interrogation are committed to the Trial Judge in the exercise of his responsibility to supervise and to oversee the conduct of the trial"]).

The common law is embedded in or supplemented by statutory law. For example, CPLR 4011 empowers the court to "determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum." And CPL 260.30 and 320.20 (3) specify the order of criminal jury and non-jury trials, respectively.

Court of Appeals decisions have recognized that those statutes do not circumscribe the broad common-law power accorded trial judges in conducting civil trials (*Feldsberg*, 49 NY2d at 643) and criminal trials (*People v Washington*, 71 NY2d 916, 918 [1988] ["CPL 260.30 sets forth the order in which a jury trial is to proceed, but the common-law power of the trial court to alter the order of proof in its discretion and in furtherance of justice remains at least up to the time the case is submitted to the jury" (internal quotation marks omitted)]; *People v Smith*, 166 AD2d 385, 385-386 [1st Dept 1990], *aff'd for reasons stated in Appellate Division mem op* 79 NY2d 779 [1991] [where the People's expert witness was unavailable and the People had thus not rested, the court did not err in requiring the defendant, over his objection, to proceed with his case and, specifically, his testimony]; *People v Olsen*, 34 NY2d 349, 353 [1974]; *People v Benham*, 160 NY 402, 437 [1899]).

Subdivision (2) restates New York law allowing judicial discretion in conducting specific aspects of a trial.

Subdivision (2) (a) is derived both from CPL 260.30 (7), which gives the court discretion to allow the People to offer rebuttal evidence to the defendant's evidence and the defendant then to rebut the People's rebuttal evidence, and from Court of Appeals precedent reaching the same conclusion in civil cases (e.g. *Ankersmit v Tuch*, 114 NY 51, 55-56 [1889]; *Marshall v Davies*, 78 NY 414, 420 [1879]).

To be admissible, rebuttal and surrebuttal evidence must address new matters raised by the opposing party on that party's case (*People v Harris*, 98 NY2d 452, 489 [2002] ["The opportunity to present rebuttal, however, does not permit a party to hold back evidence properly part of the case-in-chief and then submit that evidence to bolster the direct case after the opponent has rested"]). A trial court may in its discretion, in the interest of justice, however, permit evidence on rebuttal that is not technically of a rebuttal nature (see *Marshall v Davies*, 78 NY at 420 ["These (rebuttal) rules may in special cases be departed from in the discretion of the trial judge, but a refusal to depart from them is no ground of exception"]; *People v Harris*, 98 NY2d at 489 ["Even where evidence is not technically of a rebuttal nature and more properly a part of the party's direct case, however, a court has discretion, in the interest of justice, to allow its admission on rebuttal pursuant to CPL 260.30 (7)"]).

Subdivision (2) (b), which concerns the power of a court to permit a witness to be recalled, is derived from *Feldsberg*. There, the Court stated:

"Nor can it be doubted that recall of a witness for redirect examination is subject to the discretion of the court. Generally, sound trial practice demands that every witness be questioned in the first instance on all relevant matters of which he has knowledge and be excused at the completion of this testimony. In this manner, the litigation is contained within reasonable limits, the adversary is aware of the evidence he will have to meet, and the jury is not unnecessarily confused. Recall at a later point in the trial not only may inject untoward administrative burdens into the litigation by reopening the whole range of prior testimony, but may also unfairly disadvantage the adversary in his ability to meet the proof or unnecessarily divert the jury's attention away from the material issues of the case. In certain situations, however, the trial court may find it necessary to depart from this general rule and may do so in its discretion" (49 NY2d at 643-644 [citations omitted]).

Consistent with *Feldsberg*, a court also has the discretion to allow a witness to be recalled for further cross-examination (cf. *People v Gibson*, 106 AD3d 834, 835 [2d Dept 2013] ["Supreme Court providently exercised its discretion, and did not deprive (the defendant) of the right to confront adverse witnesses against him, when it denied his request to recall a prosecution witness for further cross-examination"]; *People v Yu Weng*, 47 Misc 3d 138[A], 2015 NY Slip Op 50584[U],

*2 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015] [“We further find no error with respect to the court’s refusal to allow the defense to re-call the undercover officer the day after his cross-examination had concluded. The cross-examination had been completed without improper restriction and, other than stating that he had ‘additional questions,’ defense counsel articulated no basis for further questioning” (citations omitted)]; *see People v Montes*, 16 NY3d 250, 253 [2011] [“the inability to recall (an unavailable witness) did not violate defendant’s rights under the Confrontation Clause”]).

Subdivision (2) (c) states the general rule that a court has the “power to permit the introduction of evidence after the close of the [officer’s] case or prohibit the same” (*Feldsberg*, 49 NY2d at 643 [citations omitted]; *People v Ventura*, 35 NY2d 654, 655 [1974] [“The determinations as to whether to reopen the case for further testimony . . . rested in the reasonable discretion of the Trial Judge”]; *cf. People v Hecker*, 15 NY3d 625, 659-660 [2010] [the record on whether defense counsel gave a pretextual reason for excusing a juror “would have been more complete if Supreme Court agreed to defense counsel’s proposal” to further question the juror])).

A court’s sound exercise of discretion to permit a party to reopen its case may, however, be circumscribed by the nature or timing of the application. In *Olsen* (34 NY2d at 353), for example, the Court advised that a trial court should use “utmost caution” in determining whether to permit a party to reopen its case after the jury has retired to deliberate:

“There are obvious reasons why at this stage the power to reopen a case for additional proof must be exercised with utmost caution. One reason of course is that at some point the trial must come to an end. If requests to reopen were casually granted and became routine, the orderly trial process, fundamental to our jurisprudence, would soon erode away. Another consideration, apart from the merits of a predictable trial pattern, is that new evidence introduced during the jury’s deliberations is likely to be given ‘undue emphasis . . . with consequent distortion of the evidence as a whole’ giving rise to the real possibility of prejudice to the party against whom the evidence is offered” (*id.*).

On its facts, *Olsen* held that the trial court abused its discretion in permitting the prosecution to reopen its case after the jury started deliberations to address an alleged credibility issue involving a prosecution witness that had been prompted by a jury note. The “evidence submitted to the jury under these circumstances,” the Court held, “is bound to be given great weight even though it bears only indirectly on the main issue” (*id.* at 355). A similar rationale led the Court in *People v Escobar* (36 NY2d 883, 884 [1975]) to find no abuse of discretion in a trial court’s denial of a defendant’s request to permit its case to be reopened after the completion of

summations to permit the defense to introduce recantation testimony from a prosecution witness.

The Court of Appeals has also cautioned that there are “narrow circumstances” in which a trial court may reasonably exercise its discretion to permit a party to reopen its case to prove a missing element (*People v Whipple*, 97 NY2d 1, 8 [2001]). In *Whipple*, the trial court properly exercised its discretion to permit the People to reopen their case to prove a missing element, given that “the missing element is simple to prove and not seriously contested, and reopening the case does not unduly prejudice the defense” (*id.* at 3).

In the context of a suppression hearing, after the People have rested but before the court has rendered a decision, the Court of Appeals in *People v Cook* (34 NY3d 412, 422 [2019]) held that the trial court has discretion to reopen the suppression hearing and permit additional evidence. *Whipple* did not “so tightly cabin the hearing court’s discretion prior to rendering a decision” to only those circumstances where the issue to be presented after reopening is simple to prove and not seriously contested (*id.*). Once the decision has been rendered, however, absent a showing that the People were “deprived of a full and fair opportunity to be heard,” it would be an abuse of discretion to permit the hearing to be reopened (34 NY3d at 419; *People v Kevin W.*, 22 NY3d 287, 289 [2013]; *People v Havelka*, 45 NY2d 636 [1978]; see *People v Grant*, 159 AD3d 640, 640 [1st Dept 2018] [“The hearing court properly reopened the suppression hearing to permit the People to present evidence on the theory of inevitable discovery, because the People were not afforded a full and fair opportunity to litigate that issue during the initial hearing”]).

By statute, a trial court may permit the defense to reopen a pretrial determination and denial of a suppression motion if the “court is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion” (CPL 710.40 [4]; see *People v Clark*, 88 NY2d 552, 555 [1996] [“additional pertinent facts” requires “at least that the facts asserted be ‘pertinent’ to the issue of official suggestiveness such that they would materially affect or have affected” the earlier determination]; see also *People v Banach*, 80 NY2d 610, 618-619 [1992] [trial court erred in not reopening a suppression hearing when it was discovered at trial that the defense had not received the correct memo book of the officer who testified at the hearing]).

Subdivision (3). Although the parties have the basic responsibility to present evidence and make objection to offered evidence, the Court of Appeals has stated that “neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-finding process” (*People v Jamison*, 47 NY2d 882, 883 [1979]).

Importantly, however, the Court has cautioned that “[a]lthough the law will allow a certain degree of judicial intervention in the presentation of evidence, the

line is crossed when the judge takes on either the function or appearance of an advocate at trial” (*People v Arnold*, 98 NY2d 63, 67 [2002]).

The rule set forth in subdivision (3) relates to a trial court’s ruling to preclude the admission of evidence notwithstanding the failure of a party to object.

It is the attorney’s obligation to object to evidence offered against the attorney’s client (*People v Robinson*, 36 NY2d 224, 228 [1975] [“counsel for both sides are not without responsibility in protecting the substantial rights of the parties and that that responsibility extends to calling the attention of the court to errors of law which adversely affect a client *at a time when such errors are correctible*”]).

The trial court, however, retains the discretion to exclude offered evidence on its own when the evidence is irrelevant, or it is in the interests of a fair trial to exclude the evidence (*see People v De Jesus*, 42 NY2d 519, 524 [1977]; *Farmers’ & Manufacturers’ Bank v Whinfield*, 24 Wend 419, 425-426 [Sup Ct of Judicature of NY 1840]; *see* CJI2d[NY] Model Instructions, Preliminary Instructions [(T)he court has an obligation under the laws of New York to make sure that certain fundamental rules of law are followed even if one of the lawyers does not voice an objection. So, on occasion, you may hear me say sustained or words to that effect, even though one of the lawyers has not objected”]).

Subdivision (4) is derived from *People v Gary* (26 NY3d 1017, 1019 [2015]) and *Matter of New York, Lackawanna & W. R.R. Co.* (98 NY 447, 453 [1885]). The Court of Appeals has cautioned that while “courts are ordinarily bound to enforce party stipulations,” a court may exercise its discretion to relieve a party from a stipulation, “particularly where doing so would not significantly prejudice the other side” (*Gary*, 26 NY3d at 1019).

1.09. Court's Power to Call or Examine Witness

(1) Provided the court does not assume the function or appearance of an advocate for a party in the action or proceeding, the court in the sound exercise of its discretion may:

(a) in those unusual circumstances in which the court feels compelled to do so, call and examine a witness on its own. Before doing so, the court must, on the record, explain its reasons for calling the witness and afford the parties an opportunity to be heard outside the presence of the jury. All parties are entitled to cross-examine the witness called by the court.

(b) in limited circumstances, examine witnesses, whether called by the court or by a party, when necessary, for example, to clarify unclear answers from a witness with language difficulty, or to insure that a proper foundation is made for the admission of evidence, or, without assuming the role of an advocate, to elicit significant facts, clarify or enlighten an issue or facilitate the orderly and expeditious progress of the trial. A party may object to questions so asked and to evidence thus adduced.

Note

Subdivision (1). Although the parties have the basic responsibility to present evidence and make objection to offered evidence, the Court of Appeals has stated that “neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-finding process” (*People v Jamison*, 47 NY2d 882, 883 [1979]). Subdivision (1) sets forth two ways, recognized by the Court of Appeals, that a court may take such an active role.

Importantly, however, the Court has cautioned that “[a]lthough the law will allow a certain degree of judicial intervention in the presentation of evidence, the line is crossed when the judge takes on either the function or appearance of an advocate at trial” (*People v Arnold*, 98 NY2d 63, 67 [2002]).

Subdivision (1) (a) is derived from *Arnold* (98 NY2d 63) where the court's power to call a witness was directly in issue. In deciding that issue, the Court initially reviewed the general nature of a trial court's discretion in eliciting testimony, finding that

“[t]here is no absolute bar to a trial court asking a particular number of questions of a seated witness; or recalling a witness to the stand; or even allowing the People in narrow circumstances to re-open their case after a defense motion for a trial order of dismissal, when doing so advances the goals of truth and clarity. A court may not, however, assume the advocacy role traditionally reserved for counsel, and in order to avoid this, the court's discretion to intervene must be exercised sparingly” (*id.* at 67-68 [citations omitted]).

From that premise the Court then stated:

“We do not hold that a court may never call its own witness over the objection of a party. In those unusual circumstances in which a court feels compelled to do so, it should explain why, and invite comment from the parties. In that way, the court can consider what it aims to gain against any claims of possible prejudice. Moreover, an appellate court will have a basis on which to review the trial court's exercise of discretion” (*id.* at 68).

Subdivision (1) (b) concerning the court's power to examine witnesses, whether called by itself or by a party, is derived from Court of Appeals precedent that recognizes the court's role is “neither that of automaton nor advocate” (*People v Yut Wai Tom*, 53 NY2d 44, 56 [1981]). Rather, the court must assure the effective presentation of proof for the jury's consideration, “assuming an active role in the resolution of the truth” (*People v De Jesus*, 42 NY2d 519, 523 [1977]). Thus, a court “may, for example, if a witness has a language difficulty, intervene to clarify unclear answers. [It] may also properly question witnesses to insure that a proper foundation is made for the admission of evidence” (*People v Yut Wai Tom*, 53 NY2d 44, 58 [1981]), and a court may examine witnesses when “necessary to elicit significant facts, to clarify or enlighten an issue or merely to facilitate the orderly and expeditious progress of the trial” (*People v Mendes*, 3 NY2d 120, 121 [1957]). Both *Yut Wai Tom* and *Mendes*, however, cautioned that such examination must be conducted sparingly, and that care must be taken in examination lest the court assume the advocate's function. “In last analysis, however, [the court] should be guided by the principle that [the court's] function is to protect the record, not to make it” (*People v Yut Wai Tom*, 53 NY2d 44, 58 [1981] [While “some of the (court's 1300) questions were clearly appropriate by way of clarification or because of language difficulties, there can be no question that in his substantial examination of the witnesses the Trial Judge departed from his appropriate role in a number of respects”])).

1.11. Court Determination of Preliminary Questions

(1) The court shall decide any preliminary question as to the admissibility of evidence, including any factual or foundational question necessary for the admissibility of evidence.

(2) In a trial by jury, the court shall not inform the jury of the factual or foundational basis for the court's decision.

Note

This rule comes into play when an issue about the admissibility of offered evidence is raised under a rule of evidence. It recognizes that the applicability of the rule will depend upon the determination of whether the requirements of the rule have been satisfied, e.g. the determination of preliminary questions. This rule sets forth the role of the court in making that determination.

Subdivision (1). Subdivision (1) states the traditional and well established rule in New York that the trial court decides all questions regarding the admissibility of evidence. (*See e.g. People v Feldman*, 299 NY 153, 158, 169-170 [1949]; *People v Walker*, 198 NY 329, 334 [1910]; *Russell v Hudson Riv. R.R. Co.*, 17 NY 134, 140 [1858].) To the extent the applicability of a rule of evidence depends upon the existence of a condition(s), the court also determines the existence of the condition(s). (*See e.g. People v Parks*, 41 NY2d 36, 46-47 [1976]; *People v Marks*, 6 NY2d 67, 75 [1959]; *Poppe v Poppe*, 3 NY2d 312, 315 [1957]; *Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 398-399 [1941].) As explained by the Court of Appeals in *Marks* (6 NY2d at 75):

“This New York rule is not only well grounded in practice but is also sound in principle. The admissibility of evidence may depend upon complicated, collateral fact issues, which would be confusing in jury trials. If, in addition to the questions of fact which are directly involved, any number of collateral issues must be tried in order to determine the admissibility of evidence upon the principal issue, it would obstruct rather than facilitate the administration of justice.”

To the extent the determination involves a factual inquiry, the court acts as a trier of fact. (*See Kearney v Mayor of City of N.Y.*, 92 NY 617, 620 [1883].) The court need not accept the uncontradicted testimony of a witness. (*See People v Caprio*, 25 AD2d 145, 151 [2d Dept 1966], *affd* 18 NY2d 617 [1966].) Additionally, in determining a question of fact preliminary to the admissibility of

evidence, the court is not bound by the rules of evidence. (*See People v Lynes*, 64 AD2d 543, 543 [1st Dept 1978], citing 5 Wigmore, Evidence § 1385 [Chadbourn rev 1974]; Fed Rules Evid rule 104 (a) [“the authenticity of a telephone call testified to by the recipient is a preliminary question of fact, preliminary to the admissibility of evidence; and the determination of such preliminary questions of fact is not restricted by the ordinary exclusionary rules of evidence”], *affd* 49 NY2d 286 [1980]; *People v Cotto*, 169 Misc 2d 194, 197-198 [Sup Ct, NY County 1996] [hearsay relied upon in determining whether factual foundation for a hearsay exception has been satisfied], *affd* 240 AD2d 193 [1st Dept 1997], *affd* 92 NY2d 68 [1998].)

Whether the court may compel disclosure of privileged communications in the course of making its determination has not been addressed by the Court of Appeals. Other jurisdictions follow Uniform Rules of Evidence rule 104 (a) which provides that rules on privileged communications remain applicable in the course of determining preliminary questions. (Uniform Rules Evid rule 104 [a] [“In making its determination, the court is not bound by the rules of evidence except the rules with respect to privileges”]; *see also* Fed Rules Evid rule 104 [a] [“In so deciding, the court is not bound by evidence rules, except those on privilege”].)

Subdivision (2). This rule is derived from those cases which hold that a trial judge may not usurp the function of the jury in evaluating witnesses or evidence by, for example, inappropriate questioning of a witness, or commenting on the credibility of a witness or on the proof of an element of the crime. (*See People v Mendes*, 3 NY2d 120, 121 [1957] [“because of the ever present and serious threat that a jury's determination may be influenced by what it interprets to be the court's own opinion, this prerogative (of the trial judge to ask questions) should be exercised with caution”]; *People v Leavitt*, 301 NY 113, 117 [1950] [“the court usurped the function of the jury in commenting on the credibility of a witness for defendant saying, ‘And I will say another thing—that *I wasn't quite satisfied with (the defense witness's) story*’ ”]; *People v Kohn*, 251 NY 375, 379 [1929] [in a burglary case, the trial judge improperly instructed the jury that “ ‘the inference is irresistible that the person who was there wanted to steal’ ”].)

Informing the jury of a trial court's factual or foundational determination in the admission of evidence may equally usurp the jury's function and improperly convey or suggest to the jury that the court has an opinion about the significance of a witness or of certain evidence. Thus, for example, all four Departments of the Appellate Division have held that the court is not required to formally certify a witness as an expert when the court determines the witness is qualified to give expert opinion. (*E.g. People v Gordon*, 202 AD2d 166, 167 [1st Dept 1994]; *People v Wagner*, 27 AD3d 671, 672 [2d Dept 2006]; *People v Grajales*, 294 AD2d 657, 659 [3d Dept 2002]; *People v Eldridge*, 221 AD2d 966, 967 [4th Dept 1995].) As stated by the Appellate Division, Third Department, in *People v Lamont* (21 AD3d 1129, 1132 [3d Dept 2005] [citations omitted]): “The trial court has considerable

discretion in determining the admissibility of expert testimony. The court is not required to explicitly declare a witness an expert before permitting such testimony. In fact, there is legitimate criticism of that practice on the basis that making such a declaration in front of a jury improperly bolsters the witness and appears to grant the witness the imprimatur of the court.”

Other self-evident examples would include a court not telling a jury that it was admitting a confession because the court found it was voluntarily made; or that it was admitting an identification because it was not premised on a suggestive identification proceeding; or that it was admitting certain statements because it had found a prima facie case of conspiracy.

By contrast, a trial court may need to inform the jury of the law applicable to the consideration of certain types of evidence; e.g. a statement admitted not for its truth; the reason for the introduction of *Molineux* evidence and that it is not admitted to show propensity.

1.13. Court Reconsideration of an Evidence Ruling

(1) Absent undue prejudice to a party, a judge may revisit his or her own evidentiary rulings during trial.

(2) Except as provided in subdivisions three and four, in order to promote the efficient and orderly adjudication of cases in courts of coordinate jurisdiction, a judge should not ordinarily reconsider, disturb, or overrule an order of another judge of coordinate jurisdiction in the same proceeding.

(3) When it becomes necessary in the course of a trial to substitute a judge for the judge who was presiding over the trial, the substitute judge may revisit de novo an evidentiary ruling of the former presiding judge and issue a different ruling absent a showing of undue prejudice to a party. A mid-trial reversal in a criminal proceeding of an evidentiary ruling that impedes the defense strategy, for example, may result in undue prejudice to the defendant.

(4) On a retrial, a court may reconsider evidentiary rulings made in a prior trial.

Note

Subdivision (1) recites a rule set forth in *People v Cummings* (31 NY3d 204, 208 [2018]; see *People v Gonzalez*, 8 AD3d 210, 210-211 [1st Dept 2004] [“The court’s midtrial offer of a more favorable *Sandoval* ruling did not cause any prejudice to defendant”]).

Subdivision (2) is an outgrowth of the “law of the case” doctrine, “a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power. As such, law of the case is necessarily amorphous in that it directs a court’s discretion but does not restrict its authority” (*People v Evans*, 94 NY2d 499, 503 [2000] [internal quotation marks and citation omitted]). Its purpose is “to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case” (*id.* at 504). Thus, the Court “recognized as much in *Matter of Dondi v Jones* (40 NY2d 8, 15 [1976]), when it cautioned that ‘a court should not ordinarily reconsider, disturb or overrule an

order in the same action of another court of co-ordinate jurisdiction' ” (*Evans*, 94 NY2d at 504). There are, however, exceptions as set forth in subdivisions (3) and (4).

Subdivision (3) recites a rule also drawn from the holding in *Cummings*:

“Where, as here, the evidentiary ruling [with respect to an ‘excited utterance’] was reversed [by the substitute judge] before the jury was empaneled, absent a showing of prejudice resulting from, for example, a mid-trial reversal of an evidentiary ruling that impedes the defense strategy, we cannot say that an abuse of discretion occurred” (31 NY3d at 209).

Thus, *Cummings* treats a substitute judge’s authority to revisit an evidentiary ruling as being the same as the judge who originally made the ruling. As stated by the Court:

“The decision to admit hearsay as an excited utterance is an evidentiary decision, ‘left to the sound judgment of the trial court,’ and thus may be reconsidered on retrial. There is no reason to apply a different rule to a successor judge within the same trial and we, therefore, have no basis to adopt a per se rule prohibiting a substitute judge from exercising independent discretion concerning an evidentiary trial ruling” (*Cummings*, 31 NY3d at 208 [citations omitted]).

Subdivision (4) is drawn from various decisional law rulings (*see Cummings*, 31 NY3d at 208 [“On retrial, evidentiary rulings may be reconsidered”]; *Evans*, 94 NY2d at 500-501 [a *Sandoval* ruling may be revisited by the successor judge presiding over the retrial]; *People v Nieves*, 67 NY2d 125, 136-137 [1986] [noting an “excited utterance” decision at the first trial may be revisited at a retrial]; *People v Malizia*, 62 NY2d 755, 758 [1984] [“Evidentiary rulings made at one trial, however, are normally not binding in a subsequent trial”]).

Not all rulings on the admission of evidence at a trial are, however, necessarily evidentiary within the meaning of this rule. In addition to noting that on retrial “evidentiary rulings may be reconsidered,” *Cummings* added that “orders determining the result of a suppression hearing generally cannot” (*Cummings*, 31 NY3d at 208; *see Nieves*, 67 NY2d at 137 n 5 [“In contrast (to evidentiary rulings), the findings made pursuant to a hearing on an article 710 motion are ordinarily binding at any retrials of the same case, and where an appellate court concludes that the record of the hearing reveals that evidence must be suppressed, the People are not entitled to a new hearing to try to sustain a theory which they could have, but failed to raise at the first trial”]). By statutory law, however, as *Nieves* noted, the defense may be permitted to reopen a

suppression hearing on a showing of newly discovered evidence (CPL 710.40 [4]).

In *Evans* (94 NY2d at 504 [citations omitted]), the Court of Appeals cited with approval Appellate Division decisions holding that the following types of rulings may not be reconsidered on retrial: “*People v Leon*, 264 AD2d 784 [1999] [barring reconsideration of request for a *Mapp* hearing]; *People v Rodriguez*, 244 AD2d 364 [1997] [barring reconsideration of motion to dismiss indictment]; *People v Guin*, 243 AD2d 649 [1997] [barring reinspection of Grand Jury minutes]; *People v Broome*, 151 AD2d 995 [1989] [barring *Wade* hearing redetermination]).”

1.00. Title

This compilation of New York rules of evidence shall be cited as the Guide to New York Evidence.

Note

For the various citation forms, see:

http://www.nycourts.gov/judges/evidence/0-TITLE_PAGE/CITATION/guidecitation.shtml

1.01. Purpose and Construction

In recognition of the absence of a New York statutory code of evidence, the objective of this Guide is to bring together in one document, for the benefit of the bench and bar, New York’s existing rules of evidence, setting forth each rule with a note on the sources for that rule.

Given that most of New York’s evidentiary rules are not codified and that the New York Court of Appeals provides the controlling interpretation of the New York State constitution, statutes and common law, this Guide places particular emphasis on and adheres to the controlling precedents of the New York Court of Appeals.

The rules of evidence set forth in this Guide are not intended to alter the existing law of New York evidence and shall not be construed as doing so or as precluding change in the law when appropriate.

Note

It bears emphasis that this Guide sets forth the existing law of New York evidence at the moment of publication and that the law of evidence is continuously subject to change. Most notably, perhaps, because New York’s law of evidence relies primarily on the common law of evidence, it is best to remember, as former Chief Judge of the Court of Appeals Stanley Fuld explained:

“The common law of evidence is constantly being refashioned by the courts of this and other jurisdictions to meet the demands of modern litigation. . . . Absent some strong public policy or a clear act of pre-emption by the Legislature, rules of evidence should be fashioned to further, not frustrate, the truth-finding function of the courts”

(*Fleury v Edwards*, 14 NY2d 334, 341 [1964, Fuld, J., concurring]; see *People v Conyers*, 52 NY2d 454, 460 [1981] [“the rule announced in our decision today (dealing with pretrial silence) represents a simple recognition of our judicial

responsibility to formulate rules of evidence to protect the integrity of the truth-finding process”].)

As a result, the Committee on Evidence will periodically examine the state of the law of evidence and update this Guide as necessary. Any revision of a rule will be explained in the Note to the rule.

Finally, as set forth in the rule, “this Guide places particular emphasis on and adheres to the controlling precedents of the New York Court of Appeals.” To the extent possible, therefore, the Guide employs the language of the Court of Appeals. In the occasional instance where no controlling Court of Appeals precedent exists, Appellate Division precedent uniformly followed by the courts may form the basis for a rule. In instances where the law of New York converges with other evidence codes, such as the 1982 and 1991-92 Proposed Code of Evidence for New York prepared by the New York State Law Revision Commission, the Uniform Rules of Evidence, or the Federal Rules of Evidence, language from those rules may be used in this Guide.

1.03. Scope of the Guide

Unless a statute or decisional law prescribes a special rule of evidence for a particular civil or criminal proceeding, this Guide is intended to set forth the evidentiary rules applicable to proceedings in all courts of the State of New York.

Note

This rule sets forth the current practice in New York courts regarding the application of New York’s rules of evidence.

Statutes setting forth the governing procedures for various courts and proceedings include the following:

Civil Practice Law and Rules: CPLR 101 (“The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute”); CPLR 105 (d) (“[c]ivil judicial proceeding” is a “prosecution, other than a criminal action, of an independent application to a court for relief”); CPLR article 45 (“Evidence”).

Criminal Procedure Law: CPL 60.10 (“Unless otherwise provided by statute or by judicially established rules of evidence applicable to criminal cases, the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings”).

Surrogate’s Court Procedure Act: SCPA 102 (“The CPLR and other laws applicable to practice and procedure apply in the surrogate’s court except where other procedure is provided by this act”) (*see Matter of Martin*, 80 Misc 17, 26 [Sur Ct, NY County 1913] [“The rules of evidence applied in this court . . . are now uniform with the rules applied in other tribunals of the state”]).

Family Court Act: Family Court Act § 165 (a) (“Where the method of procedure in any proceeding in which the family court has jurisdiction is not prescribed by this act, the procedure shall be in accord with rules adopted by the administrative board of the judicial conference or, if none has been adopted, with the provisions of the civil practice act to the extent they are suitable to the proceeding involved”). (*See also Matter of Schwartz v Schwartz*, 23 AD2d 204, 206 [1st Dept 1965] [“the determination of when it is ‘appropriate’ to apply the provisions of the CPLR to the numerous and

unusual situations which will arise in the Family Court will depend upon the circumstances of the cases as they arise”].)

This Guide does not attempt to describe all proceedings in which a particular evidentiary rule may be inapplicable as a result of statutory law. Examples of some of the judicial proceedings in which the rules of evidence, in whole or part, are deemed inapplicable include: CPL 400.30 (4) (exclusionary rules of evidence inapplicable in hearings determining the amount of fines); CPL 710.60 (4) (hearsay admissible in suppression hearings); Correction Law § 168-n (3) (as set forth in *People v Mingo*, 12 NY3d 563 [2009], “reliable hearsay” is admissible when determining a sex offender registration level); Mental Hygiene Law § 81.12 (court may waive the rules of evidence for good cause in Mental Hygiene Law art 81 appointment of a guardian proceeding); UJCA 1804 (rules of evidence inapplicable in small claims hearings).

Some statutes set forth specific evidentiary rules to be applied in certain proceedings, including: CPL 180.60 (proceedings upon a felony complaint); CPL 400.21 (second felony offender hearing); CPL 410.70 (revocation of probation hearing); Domestic Relations Law § 144 (admissions in an action for annulment); Family Court Act § 531 (corroboration in paternity proceedings); Family Court Act § 624 (termination of parental rights); Family Court Act § 834 (proceedings involving family offenses); Family Court Act § 915 (confidentiality of statements made in conciliation proceedings); Family Court Act § 1046 (a) (vii) (specified privileges inapplicable in child protective proceeding).

Other statutes provide the rules of evidence are to apply to certain proceedings: CPL 190.30 (grand jury proceedings); Family Court Act § 439 (proceedings conducted by support magistrates); Mental Hygiene Law § 10.07 (c) (CPLR art 45 applies in Mental Hygiene Law art 10 proceedings).

It should also be noted that the Court of Appeals has held that in certain proceedings the constitutional due process requirement may affect the admission of evidence. (*E.g. Matter of State of New York v Floyd Y.*, 22 NY3d 95, 106 [2013] [“A requirement that evidence meet a test of reliability and substantial relevance is necessary to protect the important liberty interests at stake in (Mental Hygiene Law) article 10 proceedings”]; *People v Robinson*, 89 NY2d 648 [1997] [a defendant’s constitutional right to due process requires the admission of hearsay evidence consisting of grand jury testimony when the declarant has become unavailable to testify at trial and the hearsay is material, exculpatory and has sufficient indicia of reliability].)

1.07 Court Control Over Presentation of Evidence¹

(1) In the exercise of the court's responsibility to supervise and oversee the conduct of a hearing or trial, the mode and order of presenting evidence and examining witnesses is committed to the sound discretion of the court.

(2) The court in the exercise of its discretion may permit a party to:

(a) introduce rebuttal and surrebuttal evidence that normally addresses new matters raised by the opposing party on that party's case, albeit a court may, in its discretion, in the interests of justice, permit evidence that is not technically of a rebuttal or surrebuttal nature.

(b) recall a witness; and

(c) in an exceptional circumstance, reopen a party's case, provided, however, the court may not permit the People to reopen their case at a suppression hearing if they have been given a full and fair opportunity to be heard and the court has rendered its decision.

(3) Provided the court does not assume the function or appearance of an advocate for a party in the action or proceeding, the court in the sound exercise of its discretion may on its own, rule that a question, in form or substance, is not proper, or that a response to a question is not proper and is struck, or that proffered evidence is inadmissible.

¹ In August 2020, subdivisions (3) (a) and (b) were removed from this rule and set forth separately as rule 1.09 (Court Power to Call and Examine Witnesses).

In December 2020, subdivision (2) (a) and (c) were amended to include the reasons for allowing rebuttal and surrebuttal evidence and the reopening of a party's case.

(4) The court shall enforce a stipulation between opposing parties concerning an item of evidence, relevant fact, or claim unless the court rules in the sound exercise of its discretion in the furtherance of the interests of justice to relieve a party or parties, in whole or in part, from the stipulation, particularly where doing so would not significantly prejudice a party.

Note

Subdivision (1) is derived from a long line of Court of Appeals cases that follow the common law in defining a trial judge's traditional power (*e.g. People v Schwartzman*, 24 NY2d 241, 244 [1969] ["The nature and extent of cross-examination is subject to the sound discretion of the Trial Judge"]; *Feldsberg v Nitschke*, 49 NY2d 636, 643 [1980] ["(T)he order of introducing evidence and the time when it may be introduced are matters generally resting in the sound discretion of the trial court"]; *Bernstein v Bodean*, 53 NY2d 520, 529 [1981] ["(W)ith respect to the examination of all witnesses, the scope and manner of interrogation are committed to the Trial Judge in the exercise of his responsibility to supervise and to oversee the conduct of the trial"]).

The common law is embedded in or supplemented by statutory law. For example, CPLR 4011 empowers the court to "determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum." And CPL 260.30 and 320.20 (3) specify the order of criminal jury and non-jury trials, respectively.

Court of Appeals decisions have recognized that those statutes do not circumscribe the broad common-law power accorded trial judges in conducting civil trials (*Feldsberg*, 49 NY2d at 643) and criminal trials (*People v Washington*, 71 NY2d 916, 918 [1988] ["CPL 260.30 sets forth the order in which a jury trial is to proceed, but the common-law power of the trial court to alter the order of proof in its discretion and in furtherance of justice remains at least up to the time the case is submitted to the jury" (internal quotation marks omitted)]; *People v Smith*, 166 AD2d 385, 385-386 [1st Dept 1990], *affd for reasons stated in Appellate Division mem op* 79 NY2d 779 [1991] [where the People's expert witness was unavailable and the People had thus not rested, the court did not err in requiring the defendant, over his objection, to proceed with his case and, specifically, his testimony]; *People v Olsen*, 34 NY2d 349, 353 [1974]; *People v Benham*, 160 NY 402, 437 [1899]).

Subdivision (2) restates New York law allowing judicial discretion in conducting specific aspects of a trial.

Subdivision (2) (a) is derived both from CPL 260.30 (7), which gives the court discretion to allow the People to offer rebuttal evidence to the defendant's evidence and the defendant then to rebut the People's rebuttal evidence, and from Court of Appeals precedent reaching the same conclusion in civil cases (*e.g.* *Ankersmit v Tuch*, 114 NY 51, 55-56 [1889]; *Marshall v Davies*, 78 NY 414, 420 [1879]).

To be admissible, rebuttal and surrebuttal evidence must address new matters raised by the opposing party on that party's case (*People v Harris*, 98 NY2d 452, 489 [2002] ["The opportunity to present rebuttal, however, does not permit a party to hold back evidence properly part of the case-in-chief and then submit that evidence to bolster the direct case after the opponent has rested"]). A trial court may in its discretion, in the interest of justice, however, permit evidence on rebuttal that is not technically of a rebuttal nature (*see Marshall v Davies*, 78 NY at 420 ["These (rebuttal) rules may in special cases be departed from in the discretion of the trial judge, but a refusal to depart from them is no ground of exception"]; *People v Harris*, 98 NY2d at 489 ["Even where evidence is not technically of a rebuttal nature and more properly a part of the party's direct case, however, a court has discretion, in the interest of justice, to allow its admission on rebuttal pursuant to CPL 260.30 (7)"]).

Subdivision (2) (b), which concerns the power of a court to permit a witness to be recalled, is derived from *Feldsberg*. There, the Court stated:

"Nor can it be doubted that recall of a witness for redirect examination is subject to the discretion of the court. Generally, sound trial practice demands that every witness be questioned in the first instance on all relevant matters of which he has knowledge and be excused at the completion of this testimony. In this manner, the litigation is contained within reasonable limits, the adversary is aware of the evidence he will have to meet, and the jury is not unnecessarily confused. Recall at a later point in the trial not only may inject untoward administrative burdens into the litigation by reopening the whole range of prior testimony, but may also unfairly disadvantage the adversary in his ability to meet the proof or unnecessarily divert the jury's attention away from the material issues of the case. In certain situations, however, the trial court may find it necessary to depart from this general rule and may do so in its discretion" (49 NY2d at 643-644 [citations omitted]).

Consistent with *Feldsberg*, a court also has the discretion to allow a witness to be recalled for further cross-examination (*cf. People v Gibson*, 106 AD3d 834, 835 [2d Dept 2013] ["Supreme Court providently exercised its discretion, and did not deprive (the defendant) of the right to confront adverse witnesses against him, when it denied his request to recall a prosecution witness for further cross-examination"]; *People v Yu Weng*, 47 Misc 3d 138[A], 2015 NY Slip Op 50584[U],

*2 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015] [“We further find no error with respect to the court’s refusal to allow the defense to re-call the undercover officer the day after his cross-examination had concluded. The cross-examination had been completed without improper restriction and, other than stating that he had ‘additional questions,’ defense counsel articulated no basis for further questioning” (citations omitted)]; see *People v Montes*, 16 NY3d 250, 253 [2011] [“the inability to recall (an unavailable witness) did not violate defendant’s rights under the Confrontation Clause”]).

Subdivision (2) (c) states the general rule that a court has the “power to permit the introduction of evidence after the close of the [officer’s] case or prohibit the same” (*Feldsberg*, 49 NY2d at 643 [citations omitted]; *People v Ventura*, 35 NY2d 654, 655 [1974] [“The determinations as to whether to reopen the case for further testimony . . . rested in the reasonable discretion of the Trial Judge”]; cf. *People v Hecker*, 15 NY3d 625, 659-660 [2010] [the record on whether defense counsel gave a pretextual reason for excusing a juror “would have been more complete if Supreme Court agreed to defense counsel’s proposal” to further question the juror])).

A court’s sound exercise of discretion to permit a party to reopen its case may, however, be circumscribed by the nature or timing of the application. In *Olsen* (34 NY2d at 353), for example, the Court advised that a trial court should use “utmost caution” in determining whether to permit a party to reopen its case after the jury has retired to deliberate:

“There are obvious reasons why at this stage the power to reopen a case for additional proof must be exercised with utmost caution. One reason of course is that at some point the trial must come to an end. If requests to reopen were casually granted and became routine, the orderly trial process, fundamental to our jurisprudence, would soon erode away. Another consideration, apart from the merits of a predictable trial pattern, is that new evidence introduced during the jury’s deliberations is likely to be given ‘undue emphasis . . . with consequent distortion of the evidence as a whole’ giving rise to the real possibility of prejudice to the party against whom the evidence is offered” (*id.*).

On its facts, *Olsen* held that the trial court abused its discretion in permitting the prosecution to reopen its case after the jury started deliberations to address an alleged credibility issue involving a prosecution witness that had been prompted by a jury note. The “evidence submitted to the jury under these circumstances,” the Court held, “is bound to be given great weight even though it bears only indirectly on the main issue” (*id.* at 355). A similar rationale led the Court in *People v Escobar* (36 NY2d 883, 884 [1975]) to find no abuse of discretion in a trial court’s denial of a defendant’s request to permit its case to be reopened after the completion of

summations to permit the defense to introduce recantation testimony from a prosecution witness.

The Court of Appeals has also cautioned that there are “narrow circumstances” in which a trial court may reasonably exercise its discretion to permit a party to reopen its case to prove a missing element (*People v Whipple*, 97 NY2d 1, 8 [2001]). In *Whipple*, the trial court properly exercised its discretion to permit the People to reopen their case to prove a missing element, given that “the missing element is simple to prove and not seriously contested, and reopening the case does not unduly prejudice the defense” (*id.* at 3).

In the context of a suppression hearing, after the People have rested but before the court has rendered a decision, the Court of Appeals in *People v Cook* (34 NY3d 412, 422 [2019]) held that the trial court has discretion to reopen the suppression hearing and permit additional evidence. *Whipple* did not “so tightly cabin the hearing court’s discretion prior to rendering a decision” to only those circumstances where the issue to be presented after reopening is simple to prove and not seriously contested (*id.*). Once the decision has been rendered, however, absent a showing that the People were “deprived of a full and fair opportunity to be heard,” it would be an abuse of discretion to permit the hearing to be reopened (34 NY3d at 419; *People v Kevin W.*, 22 NY3d 287, 289 [2013]; *People v Havelka*, 45 NY2d 636 [1978]; see *People v Grant*, 159 AD3d 640, 640 [1st Dept 2018] [“The hearing court properly reopened the suppression hearing to permit the People to present evidence on the theory of inevitable discovery, because the People were not afforded a full and fair opportunity to litigate that issue during the initial hearing”]).

By statute, a trial court may permit the defense to reopen a pretrial determination and denial of a suppression motion if the “court is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion” (CPL 710.40 [4]; see *People v Clark*, 88 NY2d 552, 555 [1996] [“additional pertinent facts” requires “at least that the facts asserted be ‘pertinent’ to the issue of official suggestiveness such that they would materially affect or have affected” the earlier determination]; see also *People v Banch*, 80 NY2d 610, 618-619 [1992] [trial court erred in not reopening a suppression hearing when it was discovered at trial that the defense had not received the correct memo book of the officer who testified at the hearing]).

Subdivision (3). Although the parties have the basic responsibility to present evidence and make objection to offered evidence, the Court of Appeals has stated that “neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-finding process” (*People v Jamison*, 47 NY2d 882, 883 [1979]).

Importantly, however, the Court has cautioned that “[a]lthough the law will allow a certain degree of judicial intervention in the presentation of evidence, the

line is crossed when the judge takes on either the function or appearance of an advocate at trial” (*People v Arnold*, 98 NY2d 63, 67 [2002]).

The rule set forth in subdivision (3) relates to a trial court’s ruling to preclude the admission of evidence notwithstanding the failure of a party to object.

It is the attorney’s obligation to object to evidence offered against the attorney’s client (*People v Robinson*, 36 NY2d 224, 228 [1975] [“counsel for both sides are not without responsibility in protecting the substantial rights of the parties and that that responsibility extends to calling the attention of the court to errors of law which adversely affect a client *at a time when such errors are correctible*”]).

The trial court, however, retains the discretion to exclude offered evidence on its own when the evidence is irrelevant, or it is in the interests of a fair trial to exclude the evidence (*see People v De Jesus*, 42 NY2d 519, 524 [1977]; *Farmers’ & Manufacturers’ Bank v Whinfield*, 24 Wend 419, 425-426 [Sup Ct of Judicature of NY 1840]; *see* CJI2d[NY] Model Instructions, Preliminary Instructions [(T)he court has an obligation under the laws of New York to make sure that certain fundamental rules of law are followed even if one of the lawyers does not voice an objection. So, on occasion, you may hear me say sustained or words to that effect, even though one of the lawyers has not objected”]).

Subdivision (4) is derived from *People v Gary* (26 NY3d 1017, 1019 [2015]) and *Matter of New York, Lackawanna & W. R.R. Co.* (98 NY 447, 453 [1885]). The Court of Appeals has cautioned that while “courts are ordinarily bound to enforce party stipulations,” a court may exercise its discretion to relieve a party from a stipulation, “particularly where doing so would not significantly prejudice the other side” (*Gary*, 26 NY3d at 1019).

1.09. Court Determination of Preliminary Questions

(1) The court shall decide any preliminary question as to the admissibility of evidence, including any factual or foundational question necessary for the admissibility of evidence.

(2) In a trial by jury, the court shall not inform the jury of the factual or foundational basis for the court's decision.

Note

This rule comes into play when an issue about the admissibility of offered evidence is raised under a rule of evidence. It recognizes that the applicability of the rule will depend upon the determination of whether the requirements of the rule have been satisfied, e.g. the determination of preliminary questions. This rule sets forth the role of the court in making that determination.

Subdivision (1). Subdivision (1) states the traditional and well established rule in New York that the trial court decides all questions regarding the admissibility of evidence. (See e.g. *People v Feldman*, 299 NY 153, 158, 169-170 [1949]; *People v Walker*, 198 NY 329, 334 [1910]; *Russell v Hudson Riv. R.R. Co.*, 17 NY 134, 140 [1858].) To the extent the applicability of a rule of evidence depends upon the existence of a condition(s), the court also determines the existence of the condition(s). (See e.g. *People v Parks*, 41 NY2d 36, 46-47 [1976]; *People v Marks*, 6 NY2d 67, 75 [1959]; *Poppe v Poppe*, 3 NY2d 312, 315 [1957]; *Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 398-399 [1941].) As explained by the Court of Appeals in *Marks* (6 NY2d at 75):

“This New York rule is not only well grounded in practice but is also sound in principle. The admissibility of evidence may depend upon complicated, collateral fact issues, which would be confusing in jury trials. If, in addition to the questions of fact which are directly involved, any number of collateral issues must be tried in order to determine the admissibility of evidence upon the principal issue, it would obstruct rather than facilitate the administration of justice.”

To the extent the determination involves a factual inquiry, the court acts as a trier of fact. (See *Kearney v Mayor of City of N.Y.*, 92 NY 617, 620 [1883].) The court need not accept the uncontradicted testimony of a witness. (See *People v Caprio*, 25 AD2d 145, 151 [2d Dept 1966], *affd* 18 NY2d 617 [1966].) Additionally, in determining a question of fact preliminary to the admissibility of

evidence, the court is not bound by the rules of evidence. (See *People v Lynes*, 64 AD2d 543, 543 [1st Dept 1978], citing 5 Wigmore, Evidence § 1385 [Chadbourn rev 1974]; Fed Rules Evid rule 104 (a) [“the authenticity of a telephone call testified to by the recipient is a preliminary question of fact, preliminary to the admissibility of evidence; and the determination of such preliminary questions of fact is not restricted by the ordinary exclusionary rules of evidence”], *affd* 49 NY2d 286 [1980]; *People v Cotto*, 169 Misc 2d 194, 197-198 [Sup Ct, NY County 1996] [hearsay relied upon in determining whether factual foundation for a hearsay exception has been satisfied], *affd* 240 AD2d 193 [1st Dept 1997], *affd* 92 NY2d 68 [1998].)

Whether the court may compel disclosure of privileged communications in the course of making its determination has not been addressed by the Court of Appeals. Other jurisdictions follow Uniform Rules of Evidence rule 104 (a) which provides that rules on privileged communications remain applicable in the course of determining preliminary questions. (Uniform Rules Evid rule 104 [a] [“In making its determination, the court is not bound by the rules of evidence except the rules with respect to privileges”]; see also Fed Rules Evid rule 104 [a] [“In so deciding, the court is not bound by evidence rules, except those on privilege”].)

Subdivision (2). This rule is derived from those cases which hold that a trial judge may not usurp the function of the jury in evaluating witnesses or evidence by, for example, inappropriate questioning of a witness, or commenting on the credibility of a witness or on the proof of an element of the crime. (See *People v Mendes*, 3 NY2d 120, 121 [1957] [“because of the ever present and serious threat that a jury's determination may be influenced by what it interprets to be the court's own opinion, this prerogative (of the trial judge to ask questions) should be exercised with caution”]; *People v Leavitt*, 301 NY 113, 117 [1950] [“the court usurped the function of the jury in commenting on the credibility of a witness for defendant saying, ‘And I will say another thing—that *I wasn't quite satisfied with (the defense witness's) story*’ ”]; *People v Kohn*, 251 NY 375, 379 [1929] [in a burglary case, the trial judge improperly instructed the jury that “ ‘the inference is irresistible that the person who was there wanted to steal’ ”].)

Informing the jury of a trial court's factual or foundational determination in the admission of evidence may equally usurp the jury's function and improperly convey or suggest to the jury that the court has an opinion about the significance of a witness or of certain evidence. Thus, for example, all four Departments of the Appellate Division have held that the court is not required to formally certify a witness as an expert when the court determines the witness is qualified to give expert opinion. (E.g. *People v Gordon*, 202 AD2d 166, 167 [1st Dept 1994]; *People v Wagner*, 27 AD3d 671, 672 [2d Dept 2006]; *People v Grajales*, 294 AD2d 657, 659 [3d Dept 2002]; *People v Eldridge*, 221 AD2d 966, 967 [4th Dept 1995].) As stated by the Appellate Division, Third Department, in *People v Lamont* (21 AD3d 1129, 1132 [3d Dept 2005] [citations omitted]): “The trial court has considerable

discretion in determining the admissibility of expert testimony. The court is not required to explicitly declare a witness an expert before permitting such testimony. In fact, there is legitimate criticism of that practice on the basis that making such a declaration in front of a jury improperly bolsters the witness and appears to grant the witness the imprimatur of the court.”

Other self-evident examples would include a court not telling a jury that it was admitting a confession because the court found it was voluntarily made; or that it was admitting an identification because it was not premised on a suggestive identification proceeding; or that it was admitting certain statements because it had found a prima facie case of conspiracy.

By contrast, a trial court may need to inform the jury of the law applicable to the consideration of certain types of evidence; e.g. a statement admitted not for its truth; the reason for the introduction of *Molineux* evidence and that it is not admitted to show propensity.

1.11. Court's Power to Call or Examine Witness

(1) Provided the court does not assume the function or appearance of an advocate for a party in the action or proceeding, the court in the sound exercise of its discretion may:

(a) in those unusual circumstances in which the court feels compelled to do so, call and examine a witness on its own. Before doing so, the court must, on the record, explain its reasons for calling the witness and afford the parties an opportunity to be heard outside the presence of the jury. All parties are entitled to cross-examine the witness called by the court.

(b) in limited circumstances, examine witnesses, whether called by the court or by a party, when necessary, for example, to clarify unclear answers from a witness with language difficulty, or to insure that a proper foundation is made for the admission of evidence, or, without assuming the role of an advocate, to elicit significant facts, clarify or enlighten an issue, or facilitate the orderly and expeditious progress of the trial. A party may object to questions so asked and to evidence thus adduced.

Note

Subdivision (1). Although the parties have the basic responsibility to present evidence and make objection to offered evidence, the Court of Appeals has stated that “neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-finding process” (*People v Jamison*, 47 NY2d 882, 883 [1979]). Subdivision (1) sets forth two ways, recognized by the Court of Appeals, that a court may take such an active role.

Importantly, however, the Court has cautioned that: “Although the law will allow a certain degree of judicial intervention in the presentation of evidence, the line is crossed when the judge takes on either the function or appearance of an advocate at trial” (*People v Arnold*, 98 NY2d 63, 67 [2002]).

Subdivision (1) (a) is derived from *Arnold* (98 NY2d 63) where the court's power to call a witness was directly in issue. In deciding that issue, the Court initially reviewed the general nature of a trial court's discretion in eliciting testimony, finding that:

"There is no absolute bar to a trial court asking a particular number of questions of a seated witness; or recalling a witness to the stand; or even allowing the People in narrow circumstances to re-open their case after a defense motion for a trial order of dismissal, when doing so advances the goals of truth and clarity. A court may not, however, assume the advocacy role traditionally reserved for counsel, and in order to avoid this, the court's discretion to intervene must be exercised sparingly" (*id.* at 67-68 [citations omitted]).

From that premise the Court then stated:

"We do not hold that a court may never call its own witness over the objection of a party. In those unusual circumstances in which a court feels compelled to do so, it should explain why, and invite comment from the parties. In that way, the court can consider what it aims to gain against any claims of possible prejudice. Moreover, an appellate court will have a basis on which to review the trial court's exercise of discretion" (*id.* at 68).

Subdivision (1) (b) concerning the court's power to examine witnesses, whether called by itself or by a party, is derived from Court of Appeals precedent that recognizes the court's role is "neither that of automaton nor advocate" (*People v Yut Wai Tom*, 53 NY2d 44, 56 [1981]). Rather, the court must assure the effective presentation of proof for the jury's consideration, "assuming an active role in the resolution of the truth" (*People v De Jesus*, 42 NY2d 519, 523 [1977]). Thus, a court "may, for example, if a witness has a language difficulty, intervene to clarify unclear answers. [It] may also properly question witnesses to insure that a proper foundation is made for the admission of evidence" (*People v Yut Wai Tom*, 53 NY2d 44, 58 [1981]), and a court may examine witnesses when "necessary to elicit significant facts, to clarify or enlighten an issue or merely to facilitate the orderly and expeditious progress of the trial" (*People v Mendes*, 3 NY2d 120, 121 [1957]). Both *Yut Wai Tom* and *Mendes*, however, cautioned that such examination must be conducted sparingly, and that care must be taken in examination lest the court assume the advocate's function. "In last analysis, however, [the court] should be guided by the principle that [the court's] function is to protect the record, not to make it" (*People v Yut Wai Tom*, 53 NY2d 44, 58 [1981] [While "some of the (court's 1300) questions were clearly appropriate by way of clarification or because of language difficulties, there can be no question that in his substantial examination of the witnesses the Trial Judge departed from his appropriate role in a number of respects"]]).

1.13. Court Reconsideration of an Evidence Ruling

(1) Absent undue prejudice to a party, a judge may revisit his or her own evidentiary rulings during trial.

(2) Except as provided in subdivisions three and four, in order to promote the efficient and orderly adjudication of cases in courts of coordinate jurisdiction, a judge should not ordinarily reconsider, disturb, or overrule an order of another judge of coordinate jurisdiction in the same proceeding.

(3) When it becomes necessary in the course of a trial to substitute a judge for the judge who was presiding over the trial, the substitute judge may revisit de novo an evidentiary ruling of the former presiding judge and issue a different ruling absent a showing of undue prejudice to a party. A mid-trial reversal in a criminal proceeding of an evidentiary ruling that impedes the defense strategy, for example, may result in undue prejudice to the defendant.

(4) On a retrial, a court may reconsider evidentiary rulings made in a prior trial.

Note

Subdivision (1) recites a rule set forth in *People v Cummings* (31 NY3d 204, 208 [2018]; see *People v Gonzalez*, 8 AD3d 210, 210-211 [1st Dept 2004] [“The court’s midtrial offer of a more favorable *Sandoval* ruling did not cause any prejudice to defendant”]).

Subdivision (2) is an outgrowth of the “law of the case” doctrine, “a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power. As such, law of the case is necessarily amorphous in that it directs a court’s discretion but does not restrict its authority” (*People v Evans*, 94 NY2d 499, 503 [2000] [internal quotation marks and citation omitted]). Its purpose is “to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case” (*id.* at 504). Thus, the Court “recognized as much in *Matter of Dondi v Jones* (40 NY2d 8, 15 [1976]), when it cautioned that ‘a court should not ordinarily reconsider, disturb or overrule an

order in the same action of another court of co-ordinate jurisdiction' ” (*Evans*, 94 NY2d at 504). There are, however, exceptions as set forth in subdivisions (3) and (4).

Subdivision (3) recites a rule also drawn from the holding in *Cummings*:

“Where, as here, the evidentiary ruling [with respect to an ‘excited utterance’] was reversed [by the substitute judge] before the jury was empaneled, absent a showing of prejudice resulting from, for example, a mid-trial reversal of an evidentiary ruling that impedes the defense strategy, we cannot say that an abuse of discretion occurred” (31 NY3d at 209).

Thus, *Cummings* treats a substitute judge’s authority to revisit an evidentiary ruling as being the same as the judge who originally made the ruling. As stated by the Court:

“The decision to admit hearsay as an excited utterance is an evidentiary decision, ‘left to the sound judgment of the trial court,’ and thus may be reconsidered on retrial. There is no reason to apply a different rule to a successor judge within the same trial and we, therefore, have no basis to adopt a per se rule prohibiting a substitute judge from exercising independent discretion concerning an evidentiary trial ruling” (*Cummings*, 31 NY3d at 208 [citations omitted]).

Subdivision (4) is drawn from various decisional law rulings (see *Cummings*, 31 NY3d at 208 [“On retrial, evidentiary rulings may be reconsidered”]; *Evans*, 94 NY2d at 500-501 [a *Sandoval* ruling may be revisited by the successor judge presiding over the retrial]; *People v Nieves*, 67 NY2d 125, 136-137 [1986] [noting an “excited utterance” decision at the first trial may be revisited at a retrial]; *People v Malizia*, 62 NY2d 755, 758 [1984] [“Evidentiary rulings made at one trial, however, are normally not binding in a subsequent trial”]).

Not all rulings on the admission of evidence at a trial are, however, necessarily evidentiary within the meaning of this rule. In addition to noting that on retrial “evidentiary rulings may be reconsidered,” *Cummings* added that “orders determining the result of a suppression hearing generally cannot” (*Cummings*, 31 NY3d at 208; see *Nieves*, 67 NY2d at 137 n 5 [“In contrast (to evidentiary rulings), the findings made pursuant to a hearing on an article 710 motion are ordinarily binding at any retrials of the same case, and where an appellate court concludes that the record of the hearing reveals that evidence must be suppressed, the People are not entitled to a new hearing to try to sustain a theory which they could have, but failed to raise at the first trial”]). By statutory law, however, as *Nieves* noted, the defense may be permitted to reopen a

suppression hearing on a showing of newly discovered evidence (CPL 710.40 [4]).

In *Evans* (94 NY2d at 504 [citations omitted]), the Court of Appeals cited with approval Appellate Division decisions holding that the following types of rulings may not be reconsidered on retrial: “*People v Leon*, 264 AD2d 784 [1999] [barring reconsideration of request for a *Mapp* hearing]; *People v Rodriguez*, 244 AD2d 364 [1997] [barring reconsideration of motion to dismiss indictment]; *People v Guin*, 243 AD2d 649 [1997] [barring reinspection of Grand Jury minutes]; *People v Broome*, 151 AD2d 995 [1989] [barring *Wade* hearing redetermination]).”

GUIDE TO NY EVIDENCE

Article 2 Judicial Notice

Table of Contents

2.01 Judicial Notice of Facts

2.03 Judicial Notice of Law (CPLR 4511)

2.05 Judicial Notice of Map Information (CPLR 4532-b)

2.01 Judicial Notice of Facts

(1) Judicial notice of a fact as used in this rule means a court's declaration of the existence of a fact normally decided by the trier of fact, without requiring proof of that fact.

(2) Facts that may be judicially noticed are: (a) facts of such common knowledge within the community where the court sits that they cannot reasonably be the subject of dispute; (b) facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned; and (c) certain facts contained in undisputed records of a court, such as prior orders or kindred documents, which would not otherwise be inadmissible. A court may take judicial notice of a fact, whether requested or not.

(3) A party is entitled to an opportunity to be heard on whether a court should take judicial notice. In the absence of prior notification, a party shall, upon request, be given an opportunity to be heard after judicial notice has been taken.

(4) Judicial notice may be taken at any stage of a hearing, trial, or other proceeding.

(5) In determining the propriety of taking judicial notice of a fact, any source of relevant information may be consulted or used, whether or not furnished by a party, and the rules of evidence shall not apply except for privilege.

Note

The law governing judicial notice of facts has been developed exclusively under the common law. This rule collates the common law.

Subdivision (1). This subdivision governs only judicial notice of fact. Judicial notice of law is governed by rule 2.02.

The definition of judicial notice of fact is derived from *Wood v North W. Ins. Co.* (46 NY 421, 426 [1871] [“judicial notice comes in the place of proof. It is to be exercised by a tribunal, which has the power to pass upon the facts”]).

In a criminal trial, a trial court may not direct a verdict of guilty (*People v Green*, 35 NY2d 437, 442 [1974]; *People v Walker*, 198 NY 329, 334 [1910]; see also *Sandstrom v Montana*, 442 US 511, 516 n 5 [1979]). Therefore, a court may not employ judicial notice of a fact or facts to accomplish that result (*cf. People v McKenzie*, 67 NY2d 695 [1986] [statutory presumptions in criminal cases are permissive]).

Subdivision (2). This subdivision sets forth three categories of facts, recognized by the Court of Appeals, that may be judicially noticed.

Subdivision (2) (a) is derived from *People v Snyder* (41 NY 397, 398 [1869] [“courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction”]) and *Hunter v New York, Ontario & W. R.R. Co.* (116 NY 615, 621 [1889] [facts “which are generally known”]). (See also *People v De Lago*, 16 NY2d 289, 292 [1965] [in issuing a “no-knock” search warrant, “the court could take judicial notice that contraband (constituting of gambling paraphernalia) is easily secreted or destroyed if persons unlawfully in the possession thereof are notified in advance that the premises are about to be searched”].)

Subdivision (2) (b) is derived from several Court of Appeals decisions, including *People v Jones* (73 NY2d 427, 431 [1989] [internal quotation marks omitted] [“facts which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy”]); and *People v Schreier* (22 NY3d 494, 498 [2014] [“we can take judicial notice that sunrise was at 7:41 a.m. that day (see United States Naval Observatory, Astronomical Applications Department, Complete Sun and Moon Data for One Day, Form A - U.S. Cities or Towns, Dec. 24, 2008, Rochester, New York, http://aa.usno.navy.mil/data/docs/RS_OneDay.php”]).

Subdivision (2) (c) is derived from several cases. See *Matter of Ordway* (196 NY 95, 97 [1909] [“We are judicially aware that the claim of the plaintiff in this action was contested by Mrs. Ordway, both individually and as administratrix,

until it was finally determined adversely to her in this court”]); *Long v State of New York* (7 NY3d 269, 275 [2006] [“Taking judicial notice of the court records demonstrating that the indictment was not dismissed until June 28, 2000, . . . we are satisfied that claimant sustained the timeliness of his claim”]); and *Ptasznik v Schultz* (247 AD2d 197, 199 [2d Dept 1998]).

Care must be taken in deciding whether an item in a court file is subject to judicial notice. As *Ptasznik* (at 199) explains,

“In some instances, and under certain circumstances, undisputed portions of court files or official records, such as prior orders or kindred documents, may be judicially noticed. No authoritative case has ever held, however, that an item may be considered and weighed by the finder of fact merely because the item, however unauthenticated and unreliable it may be, happened to repose in the court’s file. [Items] that are otherwise inadmissible are not rendered admissible merely because they happen to be part of the paperwork filed with the court. . . .

“Court files are often replete with letters, affidavits, legal briefs, privileged or confidential data, in camera materials, fingerprint records, probation reports, as well as depositions that may contain unredacted gossip and all manner of hearsay and opinion” (citations omitted).

(See *Sleasman v Sherwood*, 212 AD2d 868, 869 [3d Dept 1995] [the court did not err in refusing to take judicial notice of an administrative agency’s records, especially those involving a permit the agency issued that “contained [the agency’s] findings of fact”].)

Examples of the proper application of judicial notice, as set forth in *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.* (61 AD3d 13, 19 - 20 [2d Dept 2009]), include: census data; agency policies; certificates of corporate dissolution maintained by the Secretary of State; resignation of public officials; legislative proceedings; legislative journals; the consumer price index; the location of real property recorded with a clerk; death certificates maintained by the Department of Health; “undisputed” court records and files; and material derived from official government websites.

Subdivision (3). The rule set forth in this subdivision is derived from *Hunter* (116 NY at 621 [“Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved and the apparent justice of the case”]). While the Court of Appeals has not addressed the issue of whether a court may take judicial notice sua sponte, such action would appear to be within the court’s discretion, provided the parties are given notice and an opportunity to respond, as set forth in subdivision (4). (See *Matter of Justice v King*, 60 AD3d 1452, 1453 [4th Dept 2009].)

An appellate court, as well as a trial court, may take judicial notice of some official documents, albeit “it is simply improper to make wholesale presentation of factual data through the medium of addenda to a brief” (*Board of Educ. of Belmont Cent. School Dist. v Gootnick*, 49 NY2d 683, 687 [1980]).

Subdivision (4). Notice as to the taking of judicial notice, as well as the opportunity to be heard on the issue, is constitutionally required. (See e.g. *Garner v Louisiana*, 368 US 157, 173 [1961]; *Matter of Chasalow v Board of Assessors of County of Nassau*, 176 AD2d 800, 804 [2d Dept 1991] [“Should the Supreme Court find it appropriate to take judicial notice . . . , fundamental fairness dictates that it should provide the parties with advance notice of its intention to do so”].)

Subdivision (5). The rule set forth in this subdivision is derived from *Hunter* (116 NY at 621), which recognizes that the circumstances under which the taking of judicial notice may be appropriate are not limited to any particular stage of the proceeding. (See *Matter of Albano v Kirby*, 36 NY2d 526, 532 [1975].)

Subdivision (6). The rule set forth in this subdivision is derived from *Hunter* (116 NY at 621 - 624). A court may not take judicial notice of a fact based solely upon the court’s own personal knowledge. (See *People v Dow*, 3 AD2d 979, 979 [4th Dept 1957] [“There is a real distinction between a judge’s personal knowledge as a private person and his knowledge as a judge. As a judge he may have to ignore what he knows as an individual observer. . . . It is sometimes difficult to distinguish between knowledge of a fact by observation and knowledge of a fact by notoriety, that is, by common knowledge, but the distinction is an important one, for in the former case a judge may not take judicial notice of the fact, whereas in the latter he may” (citation omitted)].)

2.03. Judicial Notice of Law (CPLR 4511)¹

(a) When judicial notice shall be taken without request.

Every court shall take judicial notice without request of the common law, constitutions and public statutes of the United States and of every state, territory and jurisdiction of the United States and of the official compilation of codes, rules and regulations of the state except those that relate solely to the organization or internal management of an agency of the state and of all local laws and county acts.

(b) When judicial notice may be taken without request; when it shall be taken on request.

Every court may take judicial notice without request of private acts and resolutions of the congress of the United States and of the legislature of the state; ordinances and regulations of officers, agencies or governmental subdivisions of the state or of the United States; and the laws of foreign countries or their political subdivisions. Judicial notice shall be taken of matters specified in this subdivision if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it. Notice shall be given in the pleadings or prior to the presentation of any evidence at the trial, but a court may require or permit other notice.

¹ Effective December 28, 2018, CPLR 4511 was amended by the Laws of 2018, c. 516, to add a subdivision (c) and to relabel the remaining subdivisions. This rule was then amended accordingly. The added subdivision authorized “judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool.” Thereafter, however, the Legislature decided that admissibility of those items should not be by judicial notice and subdivision (c) was deleted and its contents sans judicial notice was enacted in a separate section, CPLR 4532-b, by the Laws of 2019, c. 223, signed on August 30, 2019 although effective on the same day (December 28, 2018) as its predecessor. This rule was then again revised to delete subdivision (c) and to relabel the remaining subdivisions.

(c) Determination by court; review as matter of law.

Whether a matter is judicially noticed or proof is taken, every matter specified in this section shall be determined by the judge or referee and included in his or her findings or charged to the jury. Such findings or charge shall be subject to review on appeal as a finding or charge on a matter of law.

(d) Evidence to be received on matter to be judicially noticed.

In considering whether a matter of law should be judicially noticed and in determining the matter of law to be judicially noticed, the court may consider any testimony, document, information or argument on the subject, whether offered by a party or discovered through its own research.

Whether or not judicial notice is taken, a printed copy of a statute or other written law or a proclamation, edict, decree or ordinance by an executive contained in a book or publication, purporting to have been published by a government or commonly admitted as evidence of the existing law in the judicial tribunals of the jurisdiction where it is in force, is prima facie evidence of that law and the unwritten or common law of a jurisdiction may be proved by witnesses or printed reports of cases of the courts of the jurisdiction.

Note

Rule 2.03 restates CPLR 4511. Its provisions are fairly self-explanatory. (*See generally* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4511.)

Two Court of Appeals decisions interpreting CPLR 4511 are especially noteworthy.

In *Hamilton v Miller* (23 NY3d 592 [2014]), the Court held that, for purposes of subdivision (a)'s reference to "public statutes of the United States," a prefatory statute containing congressional fact-findings about the dangers of lead-based paint to children is not such a "public statute."

In *Edwards v Erie Coach Lines Co.* (17 NY3d 306 [2011]), the Court held that subdivision (b) permits a court to take judicial notice of foreign law notwithstanding the failure of the party seeking judicial notice to comply with CPLR 3016's requirement that foreign law be pleaded by the party in the relevant pleading.

2.01 Judicial Notice of Facts

(1) Judicial notice of a fact as used in this rule means a court's declaration of the existence of a fact normally decided by the trier of fact, without requiring proof of that fact.

(2) Facts that may be judicially noticed are: (a) facts of such common knowledge within the community where the court sits that they cannot reasonably be the subject of dispute; (b) facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned; and (c) certain facts contained in undisputed records of a court, such as prior orders or kindred documents, which would not otherwise be inadmissible. A court may take judicial notice of a fact, whether requested or not.

(3) A party is entitled to an opportunity to be heard on whether a court should take judicial notice. In the absence of prior notification, a party shall, upon request, be given an opportunity to be heard after judicial notice has been taken.

(4) Judicial notice may be taken at any stage of a hearing, trial, or other proceeding.

(5) In determining the propriety of taking judicial notice of a fact, any source of relevant information may be consulted or used, whether or not furnished by a party, and the rules of evidence shall not apply except for privilege.

Note

The law governing judicial notice of facts has been developed exclusively under the common law. This rule collates the common law.

Subdivision (1). This subdivision governs only judicial notice of fact. Judicial notice of law is governed by rule 2.02.

The definition of judicial notice of fact is derived from *Wood v North W. Ins. Co.* (46 NY 421, 426 [1871] [“judicial notice comes in the place of proof. It is to be exercised by a tribunal, which has the power to pass upon the facts”]).

In a criminal trial, a trial court may not direct a verdict of guilty (*People v Green*, 35 NY2d 437, 442 [1974]; *People v Walker*, 198 NY 329, 334 [1910]; see also *Sandstrom v Montana*, 442 US 511, 516 n 5 [1979]). Therefore, a court may not employ judicial notice of a fact or facts to accomplish that result (*cf. People v McKenzie*, 67 NY2d 695 [1986] [statutory presumptions in criminal cases are permissive]).

Subdivision (2). This subdivision sets forth three categories of facts, recognized by the Court of Appeals, that may be judicially noticed.

Subdivision (2) (a) is derived from *People v Snyder* (41 NY 397, 398 [1869] [“courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction”]) and *Hunter v New York, Ontario & W. R.R. Co.* (116 NY 615, 621 [1889] [facts “which are generally known”]). (See also *People v De Lago*, 16 NY2d 289, 292 [1965] [in issuing a “no-knock” search warrant, “the court could take judicial notice that contraband (constituting of gambling paraphernalia) is easily secreted or destroyed if persons unlawfully in the possession thereof are notified in advance that the premises are about to be searched”].)

Subdivision (2) (b) is derived from several Court of Appeals decisions, including *People v Jones* (73 NY2d 427, 431 [1989] [internal quotation marks omitted] [“facts which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy”]); and *People v Schreier* (22 NY3d 494, 498 [2014] [“we can take judicial notice that sunrise was at 7:41 a.m. that day (see United States Naval Observatory, Astronomical Applications Department, Complete Sun and Moon Data for One Day, Form A - U.S. Cities or Towns, Dec. 24, 2008, Rochester, New York, http://aa.usno.navy.mil/data/docs/RS_OneDay.php”]).

Subdivision (2) (c) is derived from several cases. See *Matter of Ordway* (196 NY 95, 97 [1909] [“We are judicially aware that the claim of the plaintiff in this action was contested by Mrs. Ordway, both individually and as administratrix, until it was finally determined adversely to her in this court”]); *Long v State of New York* (7 NY3d 269, 275 [2006] [“Taking judicial notice of the court records demonstrating that the indictment was not dismissed until June 28, 2000, . . . we are satisfied that claimant sustained the timeliness of his claim”]); and *Ptasznik v Schultz* (247 AD2d 197, 199 [2d Dept 1998]).

Care must be taken in deciding whether an item in a court file is subject to judicial notice. As *Ptasznik* (at 199) explains,

“In some instances, and under certain circumstances, undisputed portions of court files or official records, such as prior orders or kindred documents, may be judicially noticed. No authoritative case has ever held, however, that an item may be considered and weighed by the finder of fact merely because the item, however unauthenticated and unreliable it may be, happened to repose in the court’s file. [Items] that are otherwise inadmissible are not rendered admissible merely because they happen to be part of the paperwork filed with the court. . . .

“Court files are often replete with letters, affidavits, legal briefs, privileged or confidential data, in camera materials, fingerprint records, probation reports, as well as depositions that may contain unredacted gossip and all manner of hearsay and opinion” (citations omitted).

(See *Sleasman v Sherwood*, 212 AD2d 868, 869 [3d Dept 1995] [the court did not err in refusing to take judicial notice of an administrative agency’s records, especially those involving a permit the agency issued that “contained [the agency’s] findings of fact”].)

Examples of the proper application of judicial notice, as set forth in *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.* (61 AD3d 13, 19 - 20 [2d Dept 2009]), include: census data; agency policies; certificates of corporate dissolution maintained by the Secretary of State; resignation of public officials; legislative proceedings; legislative journals; the consumer price index; the location of real property recorded with a clerk; death certificates maintained by the Department of Health; “undisputed” court records and files; and material derived from official government websites.

Subdivision (3). The rule set forth in this subdivision is derived from *Hunter* (116 NY at 621 [“Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved and the apparent justice of the case”]). While the Court of Appeals has not addressed the issue of whether a court may take judicial notice sua sponte, such action would appear to be within the court’s discretion, provided the parties are given notice and an opportunity to respond, as set forth in subdivision (4). (See *Matter of Justice v King*, 60 AD3d 1452, 1453 [4th Dept 2009].)

An appellate court, as well as a trial court, may take judicial notice of some official documents, albeit “it is simply improper to make wholesale presentation of factual data through the medium of addenda to a brief” (*Board of Educ. of Belmont Cent. School Dist. v Gootnick*, 49 NY2d 683, 687 [1980]).

Subdivision (4). Notice as to the taking of judicial notice, as well as the opportunity to be heard on the issue, is constitutionally required. (See *e.g. Garner v Louisiana*, 368 US 157, 173 [1961]; *Matter of Chasalow v Board of Assessors of*

County of Nassau, 176 AD2d 800, 804 [2d Dept 1991] [“Should the Supreme Court find it appropriate to take judicial notice . . . , fundamental fairness dictates that it should provide the parties with advance notice of its intention to do so”].)

Subdivision (5). The rule set forth in this subdivision is derived from *Hunter* (116 NY at 621), which recognizes that the circumstances under which the taking of judicial notice may be appropriate are not limited to any particular stage of the proceeding. (See *Matter of Albano v Kirby*, 36 NY2d 526, 532 [1975].)

Subdivision (6). The rule set forth in this subdivision is derived from *Hunter* (116 NY at 621 - 624). A court may not take judicial notice of a fact based solely upon the court’s own personal knowledge. (See *People v Dow*, 3 AD2d 979, 979 [4th Dept 1957] [“There is a real distinction between a judge’s personal knowledge as a private person and his knowledge as a judge. As a judge he may have to ignore what he knows as an individual observer. . . . It is sometimes difficult to distinguish between knowledge of a fact by observation and knowledge of a fact by notoriety, that is, by common knowledge, but the distinction is an important one, for in the former case a judge may not take judicial notice of the fact, whereas in the latter he may” (citation omitted)].)

2.03. Judicial Notice of Law (CPLR 4511)¹

(a) When judicial notice shall be taken without request.

Every court shall take judicial notice without request of the common law, constitutions and public statutes of the United States and of every state, territory and jurisdiction of the United States and of the official compilation of codes, rules and regulations of the state except those that relate solely to the organization or internal management of an agency of the state and of all local laws and county acts.

(b) When judicial notice may be taken without request; when it shall be taken on request.

Every court may take judicial notice without request of private acts and resolutions of the congress of the United States and of the legislature of the state; ordinances and regulations of officers, agencies or governmental subdivisions of the state or of the United States; and the laws of foreign countries or their political subdivisions. Judicial notice shall be taken of matters specified in this subdivision if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it. Notice shall be given in the pleadings or prior to the presentation of any evidence at the trial, but a court may require or permit other notice.

¹ Effective December 28, 2018, CPLR 4511 was amended by the Laws of 2018, c. 516, to add a subdivision (c) and to relabel the remaining subdivisions. This rule was then amended accordingly. The added subdivision authorized “judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool.” Thereafter, however, the Legislature decided that admissibility of those items should not be by judicial notice and subdivision (c) was deleted and its contents sans judicial notice was enacted in a separate section, CPLR 4532-b, by the Laws of 2019, c. 223, signed on August 30, 2019 although effective on the same day (December 28, 2018) as its predecessor. This rule was then again revised to delete subdivision (c) and to relabel the remaining subdivisions.

2.05 Judicial Notice of Map Information (CPLR 4532-b)

[1] An image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, is admissible in evidence if such image, map, location, distance, calculation, or other information indicates the date such material was created and subject to a challenge that the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool does not fairly and accurately portray that which it is being offered to prove.

[2] A party intending to offer such image or information in evidence at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected. No later than ten days before the trial or hearing, or later for good cause shown, a party upon whom such notice is served may object to the request to admit into evidence such image or information, stating the grounds for the objection.

[3] Unless objection is made pursuant to this [rule], the court shall take judicial notice and admit into evidence such image, map, location, distance, calculation or other information.

Note

This rule restates CPLR 4532-b, except for the addition of subdivision numbers and the substitution of “rule” for “subdivision” in subdivision (3). Also, because the statute was enacted without a section title, a title has been added.

CPLR 4532-b was enacted initially as subdivision (c) of CPLR 4511 (Judicial Notice of Law). (L 2018, ch 516 [eff Dec. 28, 2018].) The following year, however, the legislature deleted subdivision (c) and reenacted it with modifications

in CPLR 4532-b. (L 2019, ch 223 [signed on Aug. 30, 2019, although effective on the same day (Dec. 28, 2018) as its predecessor].)

This rule, as specified in CPLR 4532-b, authorizes a trial court to take “judicial notice” of an “image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool” that bears the date it was created, unless it “does not fairly and accurately portray that which it is being offered to prove.”

As set forth in subdivision (2) of this rule, CPLR 4532-b provides that a party intending to introduce an item specified in subdivision (1) “shall” notify the opposing party of that intent, and the opposing party “may” in turn register an objection. In the absence of actual prejudice, the time periods a party “shall” adhere to may be ruled “directory, not mandatory,” and thereby subject to modification by the trial court. (*Cf. Matter of Hendricks v Annucci*, 179 AD3d 1232, 1233 [3d Dept 2020]; *People v Coleman*, 58 AD2d 968 [4th Dept 1977]; *Matter of Moskal v State of N.Y., Executive Dept., Div. of Human Rights*, 36 AD2d 46, 49 [4th Dept 1971].) Absent an objection, the trial court “shall” take “judicial notice” of the proffered item.

GUIDE TO NY EVIDENCE
ARTICLE 3
PRESUMPTIONS & PRIMA FACIE EVIDENCE

Table of Contents

Presumptions

3.01 Presumptions in Civil Proceedings

3.03 Presumptions in Criminal Proceedings Accorded People

3.05 Presumptions in Criminal Proceedings Accorded Defendant

Prima Facie Evidence

3.07 Certificates of Judgments of Conviction & Fingerprints (CPL 60.60)

3.10 Inspection Certificate of US Dept of Agriculture (CPLR 4529)

3.12 Ancient Filed Maps, Surveys & Real Property Records (CPLR 4522)

3.14 Conveyance of Real Property Without the State (CPLR 4524)

3.16 Death or Other Status of a Missing Person (CPLR 4527)

3.18 Marriage Certificate (CPLR 4526; DRL 14-A)

3.20 Affidavit of Service or Posting Notice by Person Unavailable at Trial (CPLR 4531)

3.21 Lack of Record (CPLR 4521)

3.22 Standard of Measurement Used by Surveyor (CPLR 4534)

3.24 Search by Title Insurance or Abstract Company (CPLR 4523) 3.26

Copies of Statements Under UCC Article 9 (CPLR 4525)

3.28 Weather Conditions (CPLR 4528)

3.01. Presumptions in Civil Proceedings

(1) This rule applies in civil proceedings to a “presumption,” which as provided in subdivisions two and three is rebuttable; it does not apply to a “conclusive” presumption, that is, a “presumption” not subject to rebuttal, or to an “inference” which permits, but does not require, the trier of fact to draw a conclusion from a proven fact.

(2) A presumption is created by statute or decisional law, and requires that if one fact (the “basic fact”) is established, the trier of fact must find that another fact (the “presumed fact”) is thereby established unless rebutted as provided in subdivision three.

(3) Unless the court determines that a presumption is not applicable:

(a) The party against whom a presumption is invoked may rebut the presumption by disproof of the basic fact or presumed fact.

(b) Upon presentation of rebuttal evidence, the court shall as provided by the statute or decisional law establishing the presumption, either:

(i) itself determine that the presumption has been rebutted, in which event the court shall not submit the presumption to the finder of fact; or

(ii) instruct the trier of fact to find that the presumed fact exists unless the trier of fact is persuaded that the presumed fact does not exist; or

(iii) proceed as set forth in subparagraph (ii) when the statute or decisional law

establishing the presumption does not otherwise dictate.

(c) Unless the applicable statute or decisional law provides otherwise, the burden of persuasion necessary to rebut a presumption is “substantial evidence.”

Note

Subdivision (1) defines the scope of this rule. It begins by limiting the application of this rule to presumptions in civil proceedings.

(Presumptions in criminal proceedings are governed by a separate Guide to New York Evidence rule [3.03] because constitutional principles as developed by the United States Supreme Court and the Court of Appeals limit the operation of a presumption in a criminal proceeding.)

The rule further limits its application to a “rebuttable” or “true” presumption as defined in subdivision (2). It expressly excludes a “conclusive” presumption and an “inference” from its scope.

A conclusive presumption (also known as an “irrebuttable” presumption) requires the trier of fact to draw a particular conclusion after certain specified facts are established, regardless of proof to the contrary (*Cordua v Guggenheim*, 274 NY 51, 57 [1937]; *Brandt v Morning Journal Assn.*, 81 App Div 183, 185 [1st Dept 1903], *affd* 177 NY 544 [1904]). It is not a true evidentiary presumption but in reality “a rule of substantive law expressed in terms of rules of evidence” (Prince, Richardson on Evidence § 3-103 [Farrell 11th ed 1995]; *see Derby v Prewitt*, 12 NY2d 100, 106 [1962] [“Irrebuttable presumptions have their place in the law but only where public policy demands that inquiry cease”]). Conclusive presumptions have been created under the common law and by statute (*see e.g. Cordua v Guggenheim*, 274 NY 51, 57 [1937] [“There is a conclusive presumption that the parties intended to integrate in the deed every agreement relating to the nature or extent of the property to be conveyed”]; RPTL 1168 [2] [“After two years from the issuance of such certificate (of sale) or other written instrument, no evidence shall be admissible in any court to rebut such presumption unless the holder thereof shall have procured such certificate of sale or such other written instrument by fraud or had previous knowledge that it was fraudulently made or procured”])).

An inference permits, but does not require, the trier of fact to draw a conclusion from a proven fact (*see Foltis, Inc. v City of New York*, 287 NY 108, 119-120 [1941]; *Kilburn v Bush*, 223 AD2d 110, 116 [4th Dept 1996] [noting the difference between an inference, which “merely allows the trier of fact to draw a conclusion from a proven fact,” and a “true” presumption, which places a burden

upon the adversary to produce evidence to rebut the presumed fact]). In this connection, the Court of Appeals has noted that “[a] study of the opinions of the appellate courts of this state reveals that judges have used the terms ‘inference’ and ‘presumption’ indiscriminately and without recognition that an ‘inference’ and a ‘presumption’ are not identical in scope or effect” (*Foltis, Inc.*, 287 NY at 121).

Subdivision (2). Subdivision (2) sets forth the traditional definition of a presumption (*see e.g. Ulrich v Ulrich*, 136 NY 120, 123 [1892] [“A presumption has been defined to be a rule of law that courts and judges shall draw a particular inference from particular facts, or from particular evidence, unless and until the truth of the inference is disproved”]; *Platt v Elias*, 186 NY 374, 381 [1906] [a presumption is “a particular inference (that) *must* be drawn from an ascertained state of facts”]; *see Barker & Alexander, Evidence in New York State and Federal Courts* § 3:18 [2d ed]).

Present New York law recognizes the existence of dozens of rebuttable presumptions, created by decisional law or statute. Each presumption sets forth the “basic fact(s)” that will give rise to a “presumed fact,” which is then subject to rebuttal.

Decisional law presumptions include: presumption of mailing and delivery (*see Nassau Ins. Co. v Murray*, 46 NY2d 828, 829 [1978]); presumption of proper service of process (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *Wells Fargo Bank, N.A. v Leonardo*, 167 AD3d 816, 817 [2d Dept 2018]); presumption of negligence in rear-end collision (*see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]); presumption against suicide (*see Schelberger v Eastern Sav. Bank*, 60 NY2d 506, 509-510 [1983]); presumption of regularity (*see Matter of Driscoll v Troy Hous. Auth.*, 6 NY2d 513, 518 [1959]); presumption of the legitimacy of children (*see Matter of Matthews*, 153 NY 443, 448 [1897]).

Statutory presumptions include: CPLR 4540-a (presumption of authentication for records produced pursuant to discovery demand); Correction Law § 753 (presumption of rehabilitation); EPTL 2-1.7 (presumption of death after three years’ absence); Public Health Law § 10 (presumptions of fact from orders of Department of Health records and records of state and local health officials); Vehicle and Traffic Law § 388 (1) (presumption of permissive use of motor vehicle); Vehicle and Traffic Law § 2108 (certificate of title of vehicle is presumptive evidence of vehicle’s ownership). Some of the more important and frequently utilized presumptions are discussed in detail in Fisch on New York Evidence §§ 1122-1145 (2d ed); Martin, Capra & Rossi, NY Evidence Handbook § 3.2 (2d ed); and Prince, *supra* §§ 3-107, 3-138.

Subdivision (3). Subdivision (3) (a) restates the traditional view of a presumption, namely, that the party against whom a presumption is invoked may rebut the presumption by disproof of the basic fact or presumed fact (*see Barker & Alexander, Evidence in New York State and Federal Courts* § 3:18 [2d ed]).

Unfortunately, as various commentators have observed, New York does not have a uniform approach on the effect of a presumption once rebuttal evidence is introduced (*see* Proposed NY Code of Evidence § 302, Comment [1991], available at: [https://www.nycourts.gov/judges/evidence/0-](https://www.nycourts.gov/judges/evidence/0-TITLE_PAGE/RESOURCES/1991_PROPOSED_NY_CODE_OF_EVIDENCE.pdf)

[TITLE_PAGE/RESOURCES/1991_PROPOSED_NY_CODE_OF_EVIDENCE.pdf](https://www.nycourts.gov/judges/evidence/0-TITLE_PAGE/RESOURCES/1991_PROPOSED_NY_CODE_OF_EVIDENCE.pdf) [there are “notorious difficulties and disparities concerning the effect of presumptions”]; Barker & Alexander, *supra* § 3:16 [“Searching for consistency in the law of presumptions in New York can be a frustrating exercise”]; Martin, Capra & Rossi, *supra* § 3.1; Prince, *supra* § 3-104 [“The operation and effect in New York of a presumption . . . is not free from doubt. No one principle explains all the New York cases”]).

The lack of a uniform rule may be traced to the works of two professors of law who advanced different theories on the procedural effect of a presumption (*see* Thayer, A Preliminary Treatise on Evidence at the Common Law 346 [1898]; Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 Harv L Rev 909, 913 [1937]), as well as the public policy behind the different presumptions. As to the public policy issue, the Proposed New York Code of Evidence noted:

“Some presumptions, *e.g.*, receipt of a regularly mailed letter, are mainly authoritative embodiments of natural probabilities drawn from logic and experience. Others, such as the presumption that anyone driving an automobile had the owner’s permission to do so, reflect substantive social policies rather than, or in addition to, considerations of natural probability or probative worth. The presumption that fixes the time of death at the end of the [three] year death-from-unexp[er]ienced-absence period is actually contrary to natural probabilities, and is a purely arbitrary solution to an impasse in proof. Still, other presumptions, *e.g.*, that as between connecting carriers the damage occurred on the line of the last carrier, serve the interests of fairness by seeking to elicit evidence from the party who has superior means of access to it” (Proposed NY Code of Evidence § 302, Comment).

Thayer’s approach would remove a presumption from the case once the trial court finds that the party affected by the presumption produced evidence to support a finding of the presumed fact’s nonexistence (Barker & Alexander, *supra* § 3:21). The “classic” Thayer example is found in the presumption of receipt of a properly mailed letter: once the mailing of the letter is proved, the party affected by the presumption need only take the stand and deny receipt and the presumption would not be charged to the jury (*id.*; *see also* *People v Langan*, 303 NY 474, 480 [1952] [“A presumption of regularity exists only until contrary substantial evidence appears. It forces the opposing party . . . to go forward with proof but, once he does go forward, the presumption is out of the case. . . . (I)t will be for the Trial Judge to pass on all questions of fact, including the credibility of defendant and of any other

witnesses on either side” (citations omitted)]; *Fleming v Ponziani*, 24 NY2d 105, 111 [1969] [a presumption of a valid release from liability is “no longer in the case” once the party against whom the presumption is invoked puts in evidence to rebut, such as fraud or duress, in securing the release; then, the party claiming the release “must come forward with real evidence to sustain his burden as to the legality of the release or otherwise suffer a directed verdict”]). The Thayer approach is potentially unfair to the party for whom the presumption exists, and so appears ill-suited to the policy concerns behind various presumptions.

In moving away from the potential unfairness of the Thayer approach, the Court of Appeals explained, in a case involving the presumption that a driver operates with the consent of the owner, that statements by both the owner and the driver that the driver was operating without the owner’s consent, without more, did not automatically rebut the presumption and warrant summary judgement for the owner: “Where the disavowals are arguably suspect, as where there is evidence suggesting implausibility, collusion or implied permission, the issue of consent should go to a jury” (*Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 178 [2006]; *see also Bornhurst v Massachusetts Bonding & Ins. Co.*, 21 NY2d 581, 586 [1968] [“Where the evidence rebutting a presumption presents an issue of credibility, it is for the jury to determine whether the rebuttal evidence is to be believed and, consequently, for the jury to determine whether the presumption has been destroyed” (internal quotation marks and citation omitted)]). That view approaches the Morgan theory of presumptions.

For Morgan, it is “not enough that the opponent takes the stand and says she did not receive the letter. The jury will be instructed that, upon a finding that the letter was mailed, they must also find that it was received unless they are persuaded by the evidence favoring the opponent that it was not in fact received” (Barker & Alexander, *supra* § 3:22). Thus, the Morgan approach appears more suited to vindicate the policy considerations behind many presumptions, and its application “would be consistent in many cases with current practice” (*id.* § 3:23; *see e.g.* UCC 1-206, Presumptions [“Whenever this act creates a ‘presumption’ with respect to a fact, or provides that a fact is ‘presumed,’ the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence”])).

Subdivision (3) (a) and (b) recognizes that there is no uniform rule in New York on the effect of rebuttal evidence. Thus, subdivision (3) (a) and (b) (i) embodies the Thayer approach; subdivision (3) (a) and (b) (ii) encompasses the Morgan approach and the Thayer approach as modified by the Court of Appeals in *Country-Wide Ins. Co.* (6 NY3d at 178); and subdivision (3) (a) and (b) (iii) recognizes the Morgan approach so long as the law of the particular presumption does not set forth the procedure upon the presentation of rebuttal evidence (*see* Barker & Alexander, *supra* § 3:23 [“Across-the-board application of the Morgan rule would overcome the Thayer rule’s inadequate promotion of the policies underlying presumptions, would be consistent in many cases with current practice,

would be easy to apply by trial judges and ‘would abolish the prevailing confusion and complexities’ ”]; Proposed NY Code of Evidence § 302, Comment [commenting in favor of the uniform adoption of the Morgan approach]).

Subdivision (3) (c) recognizes that there is no uniform rule in New York with respect to the burden of proof necessary to rebut a presumption. In “most, but not all, of the presumptions in New York,” the burden of proof is by “substantial evidence” (see e.g. *Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst*, 23 NY3d 168, 174–175 [2014] [the presumption of validity of the assessment of property made by a taxing authority requires the person challenging that assessment to come forward with “substantial evidence” that the property was overvalued by the assessor]; *Murdza v Zimmerman*, 99 NY2d 375, 380 [2003] [“proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner’s permission, express or implied. Once the plaintiff meets its initial burden of establishing ownership, a logical inference of lawful operation with the owner’s consent may be drawn from the possession of the operator. This presumption may be rebutted, however, by substantial evidence sufficient to show that a vehicle was not operated with the owner’s consent” (internal quotation marks and citations omitted)]; *People v Langan*, 303 NY at 480 [“A presumption of regularity exists only until contrary substantial evidence appears”]; see generally Prince, *supra* § 3-120).

In some instances, a presumption is subject to rebuttal by a preponderance of the evidence (see e.g. *Matter of Granger v Misercola*, 21 NY3d 86, 92 [2013] [a presumption in favor of visitation of children has been held subject to rebuttal by a preponderance of the evidence]; UCC 1-201 [b] [8] [“ ‘Burden of establishing’ a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence”]; CPLR 4540-a [“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”]). Proposed New York Code of Evidence § 302 favored a uniform burden of persuasion of “a preponderance of evidence.”

In some instances, the law sets forth the “higher” standard of persuasion: “clear and convincing” evidence (Prince, *supra* § 3-104). “The clear and convincing evidence standard is satisfied when the party bearing the burden of proof has established that it is highly probable that what he or she has claimed is actually what happened” (*Home Ins. Co. of Ind. v Karantonis*, 156 AD2d 844, 845 [3d Dept 1989]; see *Green v William Penn Life Ins. Co. of N.Y.*, 12 NY3d 342, 347 [2009] [presumption against suicide requires evidence that shows suicide to be “highly probable”]; *Murtagh v Murtagh*, 217 AD2d 538, 539 [2d Dept 1995] [the presumption that a child born during marriage is presumed to be the biological product of the marriage may be rebutted by clear and convincing proof excluding

the husband as the father or otherwise tending to disprove legitimacy]; *Matter of Jean P. v Roger Warren J.*, 184 AD2d 1072, 1072 [4th Dept 1992] [same]; *Matter of Penny MM. v Bruce MM.*, 118 AD2d 979 [3d Dept 1986] [same]).

3.03. Presumptions in Criminal Proceedings Accorded the People

(1) A presumption is created by statute or decisional law and requires proof of a specified fact (the “basic fact”) from which another fact (the “presumed fact”) may be inferred.

(2) When the prosecution submits evidence from which the trier of fact finds that a basic fact is proven beyond a reasonable doubt, the trier of fact may, but is not required to, infer the presumed fact.

(3) When the prosecution presents evidence in support of a basic fact, the defendant may, but is not required to, present evidence in rebuttal of that fact and the presumed fact. Unless the court determines that the presumption is not applicable, or that there is insufficient evidence warranting a finding of the basic fact, and irrespective of whether the defendant presents rebuttal evidence, it remains for the trier of fact to consider whether the basic fact has been proven beyond a reasonable doubt and whether to infer the presumed fact.

Note

Subdivision (1) provides that this rule applies to a presumption when applied against the defendant in a criminal proceeding. It recognizes that constitutional principles, both federal and state, limit the operation of a presumption in a criminal proceeding against a defendant.

The definition of a presumption is derived from the decisional law of both the United States Supreme Court and the Court of Appeals. (*See County Court of Ulster Cty. v Allen*, 442 US 140, 156 [1979] [“Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an ‘ultimate’ or ‘elemental’ fact—from the existence of one or more ‘evidentiary’ or ‘basic’ facts”]; *People v Leyva*, 38 NY2d 160, 168 n 3 [1975] [a presumption is “a deduction or an inference which the trier of fact may draw from facts found or otherwise established during the course of the trial”].)

As noted by subdivision (1), presumptions may be established by statute (*see e.g.* Penal Law § 220.25 [presumption of possession of a controlled substance]), as well as by decisional law (*see e.g. People v Kirkpatrick*, 32 NY2d 17, 23 [1973], *appeal dismissed for want of a substantial federal question* 414 US

948 [1973] [“Generally, possession suffices to permit the inference that the possessor knows what he possesses”]; *People v Hildebrandt*, 308 NY 397, 400 [1955] [“presumptions, in criminal law, need not necessarily be statutory”]). Whether created by statute or decisional law and whether specific to an element of a crime or of general application (such as the presumption of regularity) the finder of fact must be instructed as set forth in subdivision (3).

Before a presumption may be presented to a jury, there must be (or have been) a judicial determination that there is a reasonably high degree of probability that the presumed fact follows from those proved directly. As the Court of Appeals explained in *Leyva* (38 NY2d at 165-166), the United States Supreme Court held that

“a rational connection between facts proved directly and ones to be inferred from them requires a ‘substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend’. (*Leary v United States*, 395 US 6, 36; see, also, *Turner v United States*, 396 US 398, 407.) Our court has exacted an even higher standard of rational connection. As we said in *People v McCaleb* (25 NY2d 394, 404), the connection must assure ‘a reasonably high degree of probability’ that the presumed fact follows from those proved directly.”

Subdivision (2) sets forth the requirement that a presumption in a criminal case is in fact a permissive inference (*People v McKenzie*, 67 NY2d 695, 696 [1986]; *People v Leonard*, 62 NY2d 404, 411 [1984]; *People v Getch*, 50 NY2d 456, 466 [1980]). Thus, in the criminal law, the term “presumption” set forth by statute or decision law is used interchangeably with the term “inference” (*Leyva*, 38 NY2d at 168 n 3 [“Legislatures have been somewhat loose in their use of the word ‘presumption’ when an inference is clearly what is intended, thus leading to a good deal of unnecessary confusion”]; see CJI2d[NY] Penal Law § 220.25 [1] [instruction for the presumption of possession of a controlled substance: “What this (presumption) means is that, if the People have proven beyond a reasonable doubt (the ‘basic’ fact), then you may, but you are not required to, infer from that fact (the ‘presumed’ fact). Whether or not to draw that inference is for you (the jury) to decide and will depend entirely on your evaluation of the evidence”])).

The Court of Appeals has cautioned that a “ ‘mandatory’ or ‘conclusive’ presumption, which operates to *require* the finder of fact to hold against the defendant in the absence of some showing by the defendant to the contrary, may never be applied in a criminal case with respect to one of the elements of the crime being prosecuted” (*Leonard*, 62 NY2d at 411 [a conclusive presumption of regularity as to the conduct of a public official was held to be impermissible]).

Requiring the basic fact to be proved beyond a reasonable doubt is a due process safeguard. (*Barnes v United States*, 412 US 837, 843 [1973] [“if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due

process”]; see CJI2d[NY] Penal Law §§ 165.15 [4]; 165.55, 220.25, 265.15 [instructions for presumptions].)

Examples of the application of a presumption in a criminal case include:

- *Kirkpatrick* (32 NY2d at 23): “Generally, possession suffices to permit the inference that the possessor knows what he [or she] possesses, especially, but not exclusively, if it is in [the possessor’s] hands, on [the possessor’s] person, in [the possessor’s] vehicle, or on [the possessor’s] premises.”
- *People v Everett* (10 NY2d 500 [1962]): The recent and exclusive possession of the fruits of a crime, if unexplained or if falsely explained, permits the inference that the possessor participated in the theft of the property.
- Penal Law § 165.05 (1): A person who takes, operates, exercises control over, rides in, or otherwise uses a vehicle without the owner’s consent is presumed to know that he or she does not have such consent. (See *Matter of Raquel M.*, 99 NY2d 92, 94 [2002].)
- Penal Law § 220.25 (1): The presence of a controlled substance in an automobile is presumptive evidence of knowing possession of that substance by each and every person in the automobile at the time the controlled substance was found unless the controlled substance was concealed upon the person of one of the occupants. (See *Leyva*, 38 NY2d 160.)
- Penal Law § 220.25 (2): The presence of narcotic drugs in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully prepare same for sale is presumptive evidence of knowing possession of the drugs by each person in close proximity to them (see *People v Tirado*, 38 NY2d 955, 956 [1976] [the basic facts establishing that the premises constituted a “drug factory” were proved and permitted the inference that those found in the premises were engaged in the illicit enterprise]; compare *People v Kims*, 24 NY3d 422, 433 [2014] [a basic fact that was necessary to establish the presumption, i.e. that the defendant was “in close proximity” to the drugs, was not proved and thus the presumption was not applicable]).
- Penal Law § 265.15 (3): The presence in an automobile (other than a stolen one or a public omnibus) of contraband weapon is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon is found except if the weapon is found upon the person of one of the occupants therein. (See *People v Lemmons*, 40 NY2d 505 [1976] [whether a pistol found in the handbag of a woman passenger of a car was found “on her person” was a question of fact for the jury]; *County Court of Ulster Cty.*, 442 US 140 [Lemmons’

codefendant unsuccessfully challenged the constitutionality of the presumption].)

- Penal Law § 250.45 (3) (b): When a person uses or installs, or permits the utilization or installation of an imaging device in a bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a hotel, motel or inn, there is a rebuttable presumption that such person did so for no legitimate purpose.

Subdivision (3) is primarily drawn from *Leyva* (38 NY2d at 168-170):

“The purpose of the presumption was to prove the fact of possession [of drugs], inferential though such proof may be. As such, it formed part of the support for the prosecution’s prima facie case. No less than with any other proof of facts offered by a prosecution, contrary evidence from a defendant does not negate the existence of a prima facie case; rather it presents an alternate set of facts, or inferences from facts, to the jury. The jury then has the right to choose between the two versions. . . .

“It might be possible, of course, that a defendant’s evidence will prove the truth of his choice of inferences so conclusively that reasonable persons could no longer believe the inference authorized by the statute. There is nothing arcane about such a situation; where a defendant’s proof is conclusive and reasonable persons cannot disagree about the matter at issue, our courts always have the power to issue a trial order of dismissal (CPL 290.10) or direct the jury’s finding on an element of a crime. . . .

“In such a case, the fact that a jury is not given the opportunity to consider the inference authorized by the statute does not mean that the inference plays no role in the case. It merely means that, though the presumption suffices to enable the prosecution to make out a prima facie case, it is no longer sufficiently tenable to permit a jury, in the light of the defendant’s evidence, to consider it. It receives the same treatment that any other ‘fact’ so thoroughly controverted would receive.” (See *e.g. People v Adamkiewicz*, 298 NY 176, 181 [1948] [a statutory presumption of intent to possess a weapon unlawfully was rebutted]; *Kims*, 24 NY3d at 433 [a statutory presumption of criminal possession of drugs was inapplicable because the defendant was not in “close proximity” to the drugs].)

3.05 Presumptions Accorded Defendant in a Criminal Proceeding

(1) In a criminal proceeding, the defendant is presumed to be innocent. As a result, the People are required to prove a defendant's guilt of a charged offense beyond a reasonable doubt.

(2) (a) In a hearing to determine whether a pretrial identification procedure was unduly suggestive, a rebuttable presumption that the procedure was suggestive arises when the People either fail to preserve photographs, whether in physical form or computer-generated, that the identifying witness viewed or fail to preserve a photograph of a lineup that the identifying witness viewed.

(b) The People may rebut the presumption by proof of procedures used to safeguard against suggestiveness.

(3) (a) Where a defendant is successful on appeal in having a judgment of conviction reversed or in having the appellate court order a resentence, a rebuttable presumption of vindictiveness may arise when the defendant is subsequently sentenced for the same offense and given a greater sentence than was imposed after the defendant's initial conviction, irrespective of whether the same judge presided over both sentences. The presumption is inapplicable when the defendant is given the same sentence as was imposed on the initial conviction.

(b) The presumption may be rebutted where the trial court identifies reasons based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

Note

Subdivision (1) sets forth the bedrock principle of American criminal jurisprudence (CPL 300.10 [2]; *Estelle v Williams*, 425 US 501, 503 [1976] [“The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice” (citation omitted)]; *Taylor v Kentucky*, 436 US 478, 490 [1978] [“the trial court’s refusal to give petitioner’s requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment”]; *In re Winship*, 397 US 358, 363 [1970] [“The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence”]; *People v Antommarchi*, 80 NY2d 247, 252 [1992] [“Manifestly, the burden of proving guilt beyond a reasonable doubt in a criminal proceeding must always remain with the People”]).

Subdivision (2) is derived from *People v Holley* (26 NY3d 514 [2015] [computer-generated array of photographs]) and *People v Simmons* (158 AD2d 950 [4th Dept 1990] [lineup photograph]), cited with approval by *Holley*. As *Holley* explained:

“the People have the burden of producing evidence in support of the fairness of the identification procedure. If this burden is not sustained, a peremptory ruling against the People is justified. If the People meet their burden of production, the burden shifts to the defendant to persuade the hearing court that the procedure was improper. . . .

“[T]he failure of the police to preserve a photographic array [shown to an identifying witness] gives rise to a rebuttable presumption that the array was suggestive. The rebuttable presumption fits within the burden-shifting mechanism in the following manner. Failure to preserve a photo array creates a rebuttable presumption that the People have failed to meet their burden of going forward to establish the lack of suggestiveness. To the extent the People are silent about the nature of the photo array, they have not met their burden of production. On the other hand, the People may rebut the presumption by means of testimony detailing the procedures used to safeguard against suggestiveness, in which case they have met their burden, and the burden shifts to the defendant” (*Holley* at 521-522 [internal quotation marks and citations omitted]).

Holley noted that “Appellate Division cases have found that the People overcame the presumption when the detective’s testimony detailed ‘the sheer volume of the photographs viewed, as well as the fact that the police had not yet focused upon defendant as a particular suspect’ ” (*Holley* at 524). In the *Holley* case itself, the Court found that the presumption was rebutted, there being support for

the finding that the detective “entered enough information about the perpetrator’s physical features to ensure that the photo manager system would generate ‘a fair selection of photos,’ rather than an array in which defendant’s image would stand out as markedly different” (*Holley* at 525, quoting *People v Holley*, 116 AD3d 442, 442 [1st Dept 2014]; see *People v Busano*, 141 AD3d 538, 540-541 [2d Dept 2016] [presumption was rebutted where the officer who administered the identification procedure testified that the “complainant’s daughter was shown computer-generated photo arrays shortly after the attack occurred. The officer further testified as to the specific information that was entered into the photo manager system, which included the perpetrator’s race and approximate age, height, and weight. The officer testified that approximately 230 photographs fit the search criteria that was entered into the photo manager system and that these photographs were displayed in arrays consisting of six photographs at a time” (citations omitted)]; *People v Brennan*, 222 AD2d 445, 445 [2d Dept 1995] [presumption of suggestiveness from the failure to preserve a photograph of a lineup was rebutted where “photographs of the lineup fillers were taken approximately 10 months after the original lineup was held, and the police officer who was present at the lineup testified about the height and weight of the fillers, whether they had gained or lost any weight between the lineup and the reconstruction, and their positions in the lineup”]).

Subdivision (3) is derived from *People v Flowers* (28 NY3d 536 [2016]), *People v Young* (94 NY2d 171 [1999]) and *People v Van Pelt* (76 NY2d 156 [1990]). The rule has its origins in the Federal Constitution (*North Carolina v Pearce*, 395 US 711 [1969]).

The presumption was designed “to insure that trial courts do not impose longer sentences to punish defendants for taking an appeal” (*Young*, 94 NY2d at 176). As summarized by *Flowers*, “the presumption of vindictiveness applies only to ‘defendants who have won appellate reversals’ who are ‘given *greater* sentences . . . than were imposed after their initial convictions’ (*People v Young*, 94 NY2d 171, 176 [1999] [emphasis added]). The presumption is inapplicable where, as here, the same term of imprisonment is imposed upon resentencing” (*Flowers*, 28 NY3d at 541-542).

The presumption may be rebutted (*People v Young*, 94 NY2d at 182 [“Once the presumption arises, it can be rebutted only if the trial court identifies reasons ‘based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding’ (*North Carolina v Pearce*, *supra*, 395 US, at 726)”]; *People v Miller*, 65 NY2d 502, 508 [1985] [the presumption “may be overcome by evidence that the higher sentence rests upon a legitimate and reasoned basis”]; e.g. *People v Bludson*, 15 AD3d 912, 913 [4th Dept 2005] [“The retrial and sentencing thereon were before a different justice and, in enhancing defendant’s sentence following the retrial, the court noted that it was doing so because, in the court’s view, defendant had committed perjury at the retrial. Thus, the record before us does not support defendant’s contention

that there is a reasonable likelihood that the enhanced sentence was the result of vindictiveness” (citations omitted)).

What may trigger the presumption in other situations depends on “the opportunity which the particular situation presents for vindictiveness and the reasonable likelihood that the prosecutor or sentencing authority is improperly motivated by what has occurred” (*Miller*, 65 NY2d at 508).

The presumption therefore does not normally arise when a plea of guilty has been set aside and the defendant is then convicted after a trial (*Alabama v Smith*, 490 US 794, 795 [1989] [“no presumption of vindictiveness arises when the first sentence was based upon a guilty plea, and the second sentence follows a trial”]; *Miller*, 65 NY2d at 509 [“Having accepted the exercise of discretion to lower the original sentence in return for a plea in order to protect the victim, the defendant should not be heard to complain that a higher sentence is imposed after conviction following a retrial at which, by requiring that the victim testify, he has removed from consideration the element of discretion involved”])).

“Similarly,” *Young* explained, “the Supreme Court has held that the presumption does not arise in other instances where, although there was an ‘opportunity’ for vindictiveness, there was not a ‘realistic likelihood’ that the enhanced sentence was the result of impermissible vindictiveness (*United States v Goodwin* [457 US 368, 384 (1982)] [no presumption of vindictiveness where defendant was charged with a felony after refusing to plead guilty to misdemeanor charges]; see also, *Colten v Kentucky*, 407 US 104, 117-120 [1972] [no presumption of vindictiveness where, following conviction in inferior court, defendant sought trial de novo in superior court under Kentucky’s two-tiered system and received greater sentence]). Where there is no ‘reasonable likelihood’ of vindictiveness, ‘the burden remains upon the defendant to prove actual vindictiveness’ (*Alabama v Smith* [490 US at 799-800])” (*Young*, 94 NY2d at 177-178).

Where a defendant receives a “greater sentence on an individual count, but an equal or lesser over-all sentence, courts must examine the record to determine whether there is a reasonable likelihood that the enhanced sentence on the individual count was the result of vindictiveness” (*Young*, 94 NY2d at 179).

While the presumption of vindictiveness on resentencing “does not apply” under the Federal Constitution when “a different Judge imposes the longer sentence,” as a matter of State constitutional law, the presumption does apply (*Young*, 94 NY2d at 178). That “a different Judge imposes the second sentence is but a factor to be weighed with others in assaying whether the presumption has been overcome” (*Van Pelt*, 76 NY2d at 161).

A claim that the sentence imposed was presumptively vindictive must be preserved for appellate review as a question of law (*People v Olds*, 36 NY3d 1091 [2021]).

3.07 Certificates Concerning Judgments of Conviction and Fingerprints (CPL 60.60)

1. A certificate issued by a criminal court, or the clerk thereof, certifying that a judgment of conviction against a designated defendant has been entered in such court, constitutes presumptive evidence of the facts stated in such certificate.

2. A report of a public servant charged with the custody of official fingerprint records which contains a certification that the fingerprints of a designated person who has previously been convicted of an offense are identical with those of a defendant in a criminal action, constitutes presumptive evidence of the fact that such defendant has previously been convicted of such offense.

Note

This rule reproduces verbatim CPL 60.60. By making the specified certificate of a judgment of conviction and of an official fingerprint record “presumptive evidence” of the specified facts, the statute also provides an exception to the hearsay rule for the admission in evidence of those facts.

Subdivision (1) authorizes the introduction in evidence of a certificate of a judgment of conviction of a named person. If the purpose, however, is to provide presumptive evidence of the identity of a person as the one named in the certificate, the certificate, with only a name recorded on it, is insufficient (*People v Vollick*, 148 AD2d 950, 951 [4th Dept 1989] [“While the certificate here states that (a named person) was previously convicted, it does not otherwise state any facts demonstrating that the person named in the certificate is the defendant. The certificate proves only that a person by the same name as defendant was previously convicted” (citation omitted)], *affd for reasons stated below* 75 NY2d 877 [1990]). Additional evidence of identity, such as “date of birth and NYSID number,” is necessary (*People v Shaw*, 83 AD3d 1101, 1102-1103 [2d Dept 2011]).

Subdivision (2) allows for presumptive proof of identity by a comparison of the defendant’s fingerprints and the fingerprints of the person previously convicted of an offense (*People v Mathis*, 278 AD2d 803, 803 [4th Dept 2000] [“The certificates of conviction issued by the clerks of (the) Counties constitute presumptive evidence of defendant’s two prior violent felony convictions (*see*, CPL 60.60 [1]), and the testimony of a State Police investigator concerning defendant’s

fingerprints established that defendant is the person named in those certificates (*see*, CPL 60.60 [2]” (citation omitted)]).

While the Sixth Amendment right of confrontation does not apply in a grand jury or sentencing proceeding (*People v Leon*, 10 NY3d 122 [2008]), it applies at a trial. As a result, “fingerprint reports,” comparing unknown latent prints from a crime scene with fingerprints from a known individual, that are introduced in evidence at a trial are testimonial when prepared “solely for prosecutorial purposes and, most importantly, because they were accusatory and offered to establish defendant’s identity,” so the defendant is accordingly entitled to confront the author of the report (*People v Rawlins*, 10 NY3d 136, 157 [2008]).

3.10 Inspection Certificate Issued by United States Department of Agriculture (CPLR 4529)

An inspection certificate issued by the authorized agents of the United States department of agriculture on file with the United States secretary of agriculture is prima facie evidence of the facts stated.

Note

This rule restates verbatim CPLR 4529.

The statute provides that an inspection certificate issued by an authorized agent of the United States Department of Agriculture and on file with the Secretary of Agriculture of the United States is “prima facie evidence” of the “facts stated” therein.

CPLR 4529 thereby provides a hearsay exception for the inspection certificate. While the inspection certificate is thus admissible and is “prima facie evidence” of the facts stated, evidence may be introduced to rebut the accuracy of the facts stated or otherwise affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see*, CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.12 Ancient Filed Maps, Surveys and Real Property Records (CPLR 4522)

All maps, surveys and official records affecting real property, which have been on file in the state in the office of the register of any county, any county clerk, any court of record or any department of the city of New York for more than ten years, are prima facie evidence of their contents.

Note

This rule restates verbatim CPLR 4522. Compare Guide to New York Evidence rule 8.07 (Ancient Documents), which sets forth the common-law exception to the hearsay rule for a statement in a document that is proven to be in existence for more than 30 years; while that statement is admissible, unlike the present rule, it does not constitute prima facie evidence of the truth or accuracy of the statement.

CPLR 4522 provides that maps, surveys, and official records affecting real property, which have been on file in the state in an office specified in the rule for more than 10 years, are “prima facie evidence” of their contents. By making those items “prima facie evidence” of their contents, the rule thereby establishes a hearsay exception for those items.

The Appellate Division has held that the “prima facie” language creates a rebuttable presumption of the accuracy of the document (*Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (see, CPLR 4522 . . .)”]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [evidence was “insufficient to rebut the presumption of accuracy which attaches pursuant to CPLR 4522 to the description of the property conveyed by that deed”] See Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.14 Conveyance of Real Property Without the State (CPLR 4524)

A record of a conveyance of real property situated within another state, territory, or jurisdiction of the United States, recorded therein pursuant to its laws, is prima facie evidence of conveyance and of due execution.

Note

This rule restates verbatim CPLR 4524.

The statute makes a record of a conveyance of real property located outside New York and its due execution “prima facie evidence” of its contents when the real property is situated within another state, territory, or jurisdiction of the United States and the record was recorded in that jurisdiction in accordance with the jurisdiction’s laws.

By making that record “prima facie evidence” of the conveyance and its due execution, the statute provides a hearsay exception for that record. While the record is thus admissible and is “prima facie evidence” of conveyance and due execution, evidence may be introduced to rebut the accuracy of conveyance and due execution or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see*, CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.16 Death or Other Status of a Missing Person (CPLR 4527)

(a) Presumed death. A written finding of presumed death, made by any person authorized to make such findings by the federal missing persons act is prima facie evidence of the death, and the date, circumstances and place of disappearance. In the case of a merchant seaman, a written finding of presumed death, made by the maritime war emergency board or by the war shipping administration or the successors or assigns of such board or administration in connection with war risk insurance is prima facie evidence of the death, and the date, circumstances and place of disappearance.

(b) Death, internment, capture and other status. An official written report or record that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, made by an officer or employee of the United States authorized by law of the United States to make it is prima facie evidence of such fact.

Note

This rule restates verbatim CPLR 4527 (Death or other status of missing person). See also EPTL 2-1.7 (Presumption of death from absence; effect of exposure to specific peril) which sets forth a presumption of death of a person who is absent for a continuous period of three years.

Subdivision (a) sets forth a hearsay exception for (1) a written finding of presumed death of a person made by a person authorized to make such a finding by the “Federal Missing Persons Act,” and (2) a written finding of a presumed death of a merchant seaman made by the Maritime War Emergency Board or the war shipping administration or their successors, in connection with war risk insurance.

The “Federal Missing Persons Act” was, however, repealed in 1966. While relevant provisions of that act now appear to exist in 5 USC § 5565 (applicable to a federal employee) and 37 USC § 555 (applicable to a member of a uniformed service), it remains for the New York courts to determine the successor federal statute and whether to deem CPLR 4527 applicable to that statute(s).

The written finding of death is “prima facie evidence” of the “death, and the date, circumstances and place of disappearance.” Notably, the statute makes the finding of death “prima facie evidence,” not the date of death; the date of disappearance is given “prima facie” effect and the date of disappearance may not be the date of death. (*See Matter of Cuthell*, 193 Misc 226 [Sup Ct, Westchester County 1948].)

In making the requisite finding of death “prima facie evidence,” the statute establishes an exception for such documents to the rule against the admission of hearsay.

While those documents are thus admissible and are “prima facie evidence” as indicated, evidence may be introduced to rebut the accuracy of the evidence or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see*, CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

Subdivision (b) sets forth a hearsay exception for an official report or record made by an officer or employee of the United States authorized by federal law to make the report or record that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead or alive. When admitted, the record or report is prima facie evidence of the facts stated therein.

3.18 Marriage Certificate or Record of Registration

Part I (CPLR 4526)

An original certificate of a marriage made by the person by whom it was solemnized within the state, or the original entry thereof made pursuant to law in the office of the clerk of a city or a town within the state, is prima facie evidence of the marriage.

Part II (Domestic Relations Law § 14-a [4])

A copy of the record of marriage registration when properly certified by the city and town clerks or their duly authorized deputies, as . . . provided [in Domestic Relations Law § 14-a], shall be prima facie evidence of the facts therein stated and in all actions, proceedings or applications, judicial, administrative or otherwise, and any such certificate of registration of marriage shall be accepted with the same force and effect with respect to the facts therein stated as the original certificate of marriage or certified copy thereof.

Note

There are two separate statutes relating to documentary proof of a marriage.

Part I restates verbatim CPLR 4526. That statute provides that an “original certificate of a marriage” made by the person who solemnized the marriage in New York, or the “original entry” of the certificate made by a city or town clerk in New York is prima facie evidence “of the marriage” (and not of any other facts stated in the certificate), and thereby establishes an exception to the rule against the admission of hearsay.

Part II restates subdivision (4) of Domestic Relations Law § 14-a. That statute provides that the “record of marriage registration” is prima facie evidence “of the facts therein stated” and thereby establishes an exception to the rule against the admission of hearsay for the facts stated in the marriage registration.

While the “certificate” (CPLR 4526) or “registration” (Domestic Relations Law § 14-a [4]) of marriage is admissible and each is “prima facie evidence” as indicated, evidence may be introduced to rebut the “prima facie evidence” of

“marriage” or of the “facts” stated in the “registration,” as the case may be, or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see*, CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.20 Affidavit of Service or Posting Notice by Person Unavailable at Trial (CPLR 4531)

An affidavit by a person who served, posted or affixed a notice, showing such service, posting or affixing is prima facie evidence of the service, posting or affixing if the affiant is dead, mentally ill or cannot be compelled with due diligence to attend at the trial.

Note

This rule restates verbatim CPLR 4531.

The statute provides that an affidavit of a person who has served, posted, or affixed a notice, which shows such service, posting or affixing, is prima facie evidence of the service, posting, or affixing when that person is deceased, mentally ill or cannot be compelled with due diligence to testify at a trial.

The specified “notice” includes all forms of judicial process (*see Gordon v Nemeroff Realty Corp.*, 139 AD2d 492, 492 [2d Dept 1988] [“Pursuant to both statutory and decisional law, where a process server dies after service and prior to a hearing as to whether service was properly effected, his affidavit of service (in this case of a summons and complaint) shall be received as prima facie evidence of service provided it is not conclusory and devoid of sufficient detail”]; *Laurenzano v Laurenzano*, 222 AD2d 560, 561 [2d Dept 1995] [due diligence was established in an attempt to locate the process server, allowing for the use of the affidavit of service that “contained ‘sufficient factual detail’ ” to establish service of summons and complaint]).

By making the affidavit “prima facie” evidence of service, posting, or affixing, the statute thereby provides a hearsay exception for the admissibility of that affidavit. While the affidavit is thus admissible and is “prima facie evidence” of the accuracy of the affidavit of the service, posting, or affixing, evidence may be introduced to rebut the affidavit’s accuracy or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.22 Standard of Measurement Used by Surveyor (CPLR 4534)

An official certificate of any state, county, city, village or town sealer elected or appointed pursuant to the laws of the state, or the statement under oath of a surveyor, that the chain or measure used by him conformed to the state standard at the time a survey was made is prima facie evidence of conformity, and an official certificate made by any sealer that the implement used in measuring such chain or other measure was the one provided the sealer pursuant to the provisions of the laws of the state is prima facie evidence of that fact.

Note

This rule restates verbatim CPLR 4534.

The statute provides that certain documents related to the standard of measurement used by a surveyor are prima facie evidence of their contents and thereby establishes an exception to the rule against the admission of hearsay.

Those documents are:

1. an “official certificate” of a state or municipal “sealer” (i.e. “an official who attests or certifies conformity to a standard of correctness” [Merriam-Webster Online Dictionary, sealer (<https://www.merriam-webster.com/dictionary/sealer>)]), or a statement under oath of a surveyor, that the chain or measure used by the surveyor conformed to the then current applicable state standard, and
2. a certificate made by a sealer that the implement used in measuring the chain or measure was one provided by the sealer pursuant to law.

While those documents are admissible and are “prima facie evidence” of the accuracy of their contents, evidence may be introduced to rebut the accuracy of their contents or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see*, CPLR 4522 . . .)”]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real

property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.24 Search by Title Insurance or Abstract Company (CPLR 4523)

A search affecting real property, when made and certified to by a title insurance, abstract or searching company, organized under the laws of this state, may be used in place of, and with the same legal effect as, an official search.

Note

This rule restates verbatim CPLR 4523. It sets forth a hearsay exception for a certified title search made by a New York title insurance, abstract or searching company. The exception does not identify the person who should make the certification; the better practice, however, would be for an authorized officer of the company to issue the certified search.

When admitted, the certified title search has the “same legal effect” as an “official search.” A county clerk may conduct an “official search” and in that instance the clerk’s certified title search constitutes prima facie evidence of its contents (CPLR 4520). In turn, therefore, the certified title search by a title insurance, abstract or searching company pursuant to this rule should be prima facie evidence of its contents. (See Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR 4523.)

While the certified title search is thus admissible and should be “prima facie evidence” of its contents, evidence may be introduced to rebut its accuracy or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (see, CPLR 4522 . . .)”]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. See Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.26 Copy of Statement per UCC 9-523 (CPLR 4525)

A copy of a statement which is noted or certified by a filing officer pursuant to section 9-523 of the uniform commercial code and which states that the copy is a true copy is prima facie evidence of the facts stated in the notation or certification and that the copy is a true copy of a statement filed in the office of the filing officer.

Note

This rule restates verbatim CPLR 4525.

UCC article 9 relates to “Secured Transactions,” and part 5 thereof to “Filing.” Section 9-523 relates to the obligations of the “filing office” to acknowledge a filing. That acknowledgement may be done by a certification of an image of the record filed or by a notation on a copy of the record furnished by the person seeking the acknowledgement.

CPLR 4525 specifies that a copy of a statement noted or certified by a “filing officer,” which contains a statement that the copy is a “true copy” of a statement filed in the office of a “filing officer,” is prima facie evidence (1) of the facts stated in the notation or certification and (2) that the copy is a “true copy” of the filed statement.

By making that statement “prima facie” evidence of its stated facts, the statute provides a hearsay exception for the statement. While the statement is thus admissible and is “prima facie evidence” of the facts stated, evidence may be introduced to rebut the accuracy of the facts stated or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see*, CPLR 4522 . . .)”]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.28 Weather Conditions (CPLR 4528)

Any record of the observations of the weather, taken under the direction of the United States weather bureau, is prima facie evidence of the facts stated.

Note

This rule restates verbatim CPLR 4528.

The statute provides that a record of a weather observation made under the direction of the United States weather bureau is prima facie evidence of the facts stated therein and thereby establishes as well a hearsay exception for the admissibility of that record.

While those weather records are thus admissible and are “prima facie evidence” of the facts stated, evidence may be introduced to rebut the accuracy of those facts or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see*, CPLR 4522 . . .)”]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.01. Presumptions in Civil Proceedings

(1) This rule applies in civil proceedings to a “presumption,” which as provided in subdivisions two and three is rebuttable; it does not apply to a “conclusive” presumption, that is, a “presumption” not subject to rebuttal, or to an “inference” which permits, but does not require, the trier of fact to draw a conclusion from a proven fact.

(2) A presumption is created by statute or decisional law, and requires that if one fact (the “basic fact”) is established, the trier of fact must find that another fact (the “presumed fact”) is thereby established unless rebutted as provided in subdivision three.

(3) Unless the court determines that a presumption is not applicable:

(a) The party against whom a presumption is invoked may rebut the presumption by disproof of the basic fact or presumed fact.

(b) Upon presentation of rebuttal evidence, the court shall as provided by the statute or decisional law establishing the presumption, either:

(i) itself determine that the presumption has been rebutted, in which event the court shall not submit the presumption to the finder of fact; or

(ii) instruct the trier of fact to find that the presumed fact exists unless the trier of fact is persuaded that the presumed fact does not exist; or

(iii) proceed as set forth in subparagraph (ii) when the statute or decisional law

establishing the presumption does not otherwise dictate.

(c) Unless the applicable statute or decisional law provides otherwise, the burden of persuasion necessary to rebut a presumption is “substantial evidence.”

Note

Subdivision (1) defines the scope of this rule. It begins by limiting the application of this rule to presumptions in civil proceedings.

(Presumptions in criminal proceedings are governed by a separate Guide to New York Evidence rule [3.03] because constitutional principles as developed by the United States Supreme Court and the Court of Appeals limit the operation of a presumption in a criminal proceeding.)

The rule further limits its application to a “rebuttable” or “true” presumption as defined in subdivision (2). It expressly excludes a “conclusive” presumption and an “inference” from its scope.

A conclusive presumption (also known as an “irrebuttable” presumption) requires the trier of fact to draw a particular conclusion after certain specified facts are established, regardless of proof to the contrary (*Cordua v Guggenheim*, 274 NY 51, 57 [1937]; *Brandt v Morning Journal Assn.*, 81 App Div 183, 185 [1st Dept 1903], *affd* 177 NY 544 [1904]). It is not a true evidentiary presumption but in reality “a rule of substantive law expressed in terms of rules of evidence” (Prince, Richardson on Evidence § 3-103 [Farrell 11th ed 1995]; *see Derby v Prewitt*, 12 NY2d 100, 106 [1962] [“Irrebuttable presumptions have their place in the law but only where public policy demands that inquiry cease”]). Conclusive presumptions have been created under the common law and by statute (*see e.g. Cordua v Guggenheim*, 274 NY 51, 57 [1937] [“There is a conclusive presumption that the parties intended to integrate in the deed every agreement relating to the nature or extent of the property to be conveyed”]; RPTL 1168 [2] [“After two years from the issuance of such certificate (of sale) or other written instrument, no evidence shall be admissible in any court to rebut such presumption unless the holder thereof shall have procured such certificate of sale or such other written instrument by fraud or had previous knowledge that it was fraudulently made or procured”])).

An inference permits, but does not require, the trier of fact to draw a conclusion from a proven fact (*see Foltis, Inc. v City of New York*, 287 NY 108, 119-120 [1941]; *Kilburn v Bush*, 223 AD2d 110, 116 [4th Dept 1996] [noting the difference between an inference, which “merely allows the trier of fact to draw a conclusion from a proven fact,” and a “true” presumption, which places a burden

upon the adversary to produce evidence to rebut the presumed fact]). In this connection, the Court of Appeals has noted that “[a] study of the opinions of the appellate courts of this state reveals that judges have used the terms ‘inference’ and ‘presumption’ indiscriminately and without recognition that an ‘inference’ and a ‘presumption’ are not identical in scope or effect” (*Foltis, Inc.*, 287 NY at 121).

Subdivision (2). Subdivision (2) sets forth the traditional definition of a presumption (*see e.g. Ulrich v Ulrich*, 136 NY 120, 123 [1892] [“A presumption has been defined to be a rule of law that courts and judges shall draw a particular inference from particular facts, or from particular evidence, unless and until the truth of the inference is disproved”]; *Platt v Elias*, 186 NY 374, 381 [1906] [a presumption is “a particular inference (that) *must* be drawn from an ascertained state of facts”]; *see Barker & Alexander, Evidence in New York State and Federal Courts* § 3:18 [2d ed]).

Present New York law recognizes the existence of dozens of rebuttable presumptions, created by decisional law or statute. Each presumption sets forth the “basic fact(s)” that will give rise to a “presumed fact,” which is then subject to rebuttal.

Decisional law presumptions include: presumption of mailing and delivery (*see Nassau Ins. Co. v Murray*, 46 NY2d 828, 829 [1978]); presumption of proper service of process (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *Wells Fargo Bank, N.A. v Leonardo*, 167 AD3d 816, 817 [2d Dept 2018]); presumption of negligence in rear-end collision (*see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]); presumption against suicide (*see Schelberger v Eastern Sav. Bank*, 60 NY2d 506, 509-510 [1983]); presumption of regularity (*see Matter of Driscoll v Troy Hous. Auth.*, 6 NY2d 513, 518 [1959]); presumption of the legitimacy of children (*see Matter of Matthews*, 153 NY 443, 448 [1897]).

Statutory presumptions include: CPLR 4540-a (presumption of authentication for records produced pursuant to discovery demand); Correction Law § 753 (presumption of rehabilitation); EPTL 2-1.7 (presumption of death after three years’ absence); Public Health Law § 10 (presumptions of fact from orders of Department of Health records and records of state and local health officials); Vehicle and Traffic Law § 388 (1) (presumption of permissive use of motor vehicle); Vehicle and Traffic Law § 2108 (certificate of title of vehicle is presumptive evidence of vehicle’s ownership). Some of the more important and frequently utilized presumptions are discussed in detail in Fisch on New York Evidence §§ 1122-1145 (2d ed); Martin, Capra & Rossi, NY Evidence Handbook § 3.2 (2d ed); and Prince, *supra* §§ 3-107, 3-138.

Subdivision (3). Subdivision (3) (a) restates the traditional view of a presumption, namely, that the party against whom a presumption is invoked may rebut the presumption by disproof of the basic fact or presumed fact (*see Barker & Alexander, Evidence in New York State and Federal Courts* § 3:18 [2d ed]).

Unfortunately, as various commentators have observed, New York does not have a uniform approach on the effect of a presumption once rebuttal evidence is introduced (*see* Proposed NY Code of Evidence § 302, Comment [1991], available at:

[https://www.nycourts.gov/judges/evidence/0-TITLE PAGE/RESOURCES/1991 PROPOSED NY CODE OF EVIDENCE.pdf](https://www.nycourts.gov/judges/evidence/0-TITLE%20PAGE/RESOURCES/1991%20PROPOSED%20NY%20CODE%20OF%20EVIDENCE.pdf) [there are “notorious difficulties and disparities concerning the effect of presumptions”]; Barker & Alexander, *supra* § 3:16 [“Searching for consistency in the law of presumptions in New York can be a frustrating exercise”]; Martin, Capra & Rossi, *supra* § 3.1; Prince, *supra* § 3-104 [“The operation and effect in New York of a presumption . . . is not free from doubt. No one principle explains all the New York cases”]).

The lack of a uniform rule may be traced to the works of two professors of law who advanced different theories on the procedural effect of a presumption (*see* Thayer, A Preliminary Treatise on Evidence at the Common Law 346 [1898]; Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 Harv L Rev 909, 913 [1937]), as well as the public policy behind the different presumptions. As to the public policy issue, the Proposed New York Code of Evidence noted:

“Some presumptions, *e.g.*, receipt of a regularly mailed letter, are mainly authoritative embodiments of natural probabilities drawn from logic and experience. Others, such as the presumption that anyone driving an automobile had the owner’s permission to do so, reflect substantive social policies rather than, or in addition to, considerations of natural probability or probative worth. The presumption that fixes the time of death at the end of the [three] year death-from-unexp[er]ienced-absence period is actually contrary to natural probabilities, and is a purely arbitrary solution to an impasse in proof. Still, other presumptions, *e.g.*, that as between connecting carriers the damage occurred on the line of the last carrier, serve the interests of fairness by seeking to elicit evidence from the party who has superior means of access to it” (Proposed NY Code of Evidence § 302, Comment).

Thayer’s approach would remove a presumption from the case once the trial court finds that the party affected by the presumption produced evidence to support a finding of the presumed fact’s nonexistence (Barker & Alexander, *supra* § 3:21). The “classic” Thayer example is found in the presumption of receipt of a properly mailed letter: once the mailing of the letter is proved, the party affected by the presumption need only take the stand and deny receipt and the presumption would not be charged to the jury (*id.*; *see also* *People v Langan*, 303 NY 474, 480 [1952] [“A presumption of regularity exists only until contrary substantial evidence appears. It forces the opposing party . . . to go forward with proof but, once he does go forward, the presumption is out of the case. . . . (I)t will be for the Trial Judge to pass on all questions of fact, including the credibility of defendant and of any other

witnesses on either side” (citations omitted)]; *Fleming v Ponziani*, 24 NY2d 105, 111 [1969] [a presumption of a valid release from liability is “no longer in the case” once the party against whom the presumption is invoked puts in evidence to rebut, such as fraud or duress, in securing the release; then, the party claiming the release “must come forward with real evidence to sustain his burden as to the legality of the release or otherwise suffer a directed verdict”]). The Thayer approach is potentially unfair to the party for whom the presumption exists, and so appears ill-suited to the policy concerns behind various presumptions.

In moving away from the potential unfairness of the Thayer approach, the Court of Appeals explained, in a case involving the presumption that a driver operates with the consent of the owner, that statements by both the owner and the driver that the driver was operating without the owner’s consent, without more, did not automatically rebut the presumption and warrant summary judgement for the owner: “Where the disavowals are arguably suspect, as where there is evidence suggesting implausibility, collusion or implied permission, the issue of consent should go to a jury” (*Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 178 [2006]; *see also Bornhurst v Massachusetts Bonding & Ins. Co.*, 21 NY2d 581, 586 [1968] [“Where the evidence rebutting a presumption presents an issue of credibility, it is for the jury to determine whether the rebuttal evidence is to be believed and, consequently, for the jury to determine whether the presumption has been destroyed” (internal quotation marks and citation omitted)]). That view approaches the Morgan theory of presumptions.

For Morgan, it is “not enough that the opponent takes the stand and says she did not receive the letter. The jury will be instructed that, upon a finding that the letter was mailed, they must also find that it was received unless they are persuaded by the evidence favoring the opponent that it was not in fact received” (Barker & Alexander, *supra* § 3:22). Thus, the Morgan approach appears more suited to vindicate the policy considerations behind many presumptions, and its application “would be consistent in many cases with current practice” (*id.* § 3:23; *see e.g.* UCC 1-206, Presumptions [“Whenever this act creates a ‘presumption’ with respect to a fact, or provides that a fact is ‘presumed,’ the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence”])).

Subdivision (3) (a) and (b) recognizes that there is no uniform rule in New York on the effect of rebuttal evidence. Thus, subdivision (3) (a) and (b) (i) embodies the Thayer approach; subdivision (3) (a) and (b) (ii) encompasses the Morgan approach and the Thayer approach as modified by the Court of Appeals in *Country-Wide Ins. Co.* (6 NY3d at 178); and subdivision (3) (a) and (b) (iii) recognizes the Morgan approach so long as the law of the particular presumption does not set forth the procedure upon the presentation of rebuttal evidence (*see* Barker & Alexander, *supra* § 3:23 [“Across-the-board application of the Morgan rule would overcome the Thayer rule’s inadequate promotion of the policies underlying presumptions, would be consistent in many cases with current practice,

would be easy to apply by trial judges and ‘would abolish the prevailing confusion and complexities’ ”]; Proposed NY Code of Evidence § 302, Comment [commenting in favor of the uniform adoption of the Morgan approach]).

Subdivision (3) (c) recognizes that there is no uniform rule in New York with respect to the burden of proof necessary to rebut a presumption. In “most, but not all, of the presumptions in New York,” the burden of proof is by “substantial evidence” (see e.g. *Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst*, 23 NY3d 168, 174–175 [2014] [the presumption of validity of the assessment of property made by a taxing authority requires the person challenging that assessment to come forward with “substantial evidence” that the property was overvalued by the assessor]; *Murdza v Zimmerman*, 99 NY2d 375, 380 [2003] [“proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner’s permission, express or implied. Once the plaintiff meets its initial burden of establishing ownership, a logical inference of lawful operation with the owner’s consent may be drawn from the possession of the operator. This presumption may be rebutted, however, by substantial evidence sufficient to show that a vehicle was not operated with the owner’s consent” (internal quotation marks and citations omitted)]; *People v Langan*, 303 NY at 480 [“A presumption of regularity exists only until contrary substantial evidence appears”]; see generally Prince, *supra* § 3-120).

In some instances, a presumption is subject to rebuttal by a preponderance of the evidence (see e.g. *Matter of Granger v Misercola*, 21 NY3d 86, 92 [2013] [a presumption in favor of visitation of children has been held subject to rebuttal by a preponderance of the evidence]; UCC 1-201 [b] [8] [“ ‘Burden of establishing’ a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence”]; CPLR 4540-a [“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”]). Proposed New York Code of Evidence § 302 favored a uniform burden of persuasion of “a preponderance of evidence.”

In some instances, the law sets forth the “higher” standard of persuasion: “clear and convincing” evidence (Prince, *supra* § 3-104). “The clear and convincing evidence standard is satisfied when the party bearing the burden of proof has established that it is highly probable that what he or she has claimed is actually what happened” (*Home Ins. Co. of Ind. v Karantonis*, 156 AD2d 844, 845 [3d Dept 1989]; see *Green v William Penn Life Ins. Co. of N.Y.*, 12 NY3d 342, 347 [2009] [presumption against suicide requires evidence that shows suicide to be “highly probable”]; *Murtagh v Murtagh*, 217 AD2d 538, 539 [2d Dept 1995] [the presumption that a child born during marriage is presumed to be the biological product of the marriage may be rebutted by clear and convincing proof excluding

the husband as the father or otherwise tending to disprove legitimacy]; *Matter of Jean P. v Roger Warren J.*, 184 AD2d 1072, 1072 [4th Dept 1992] [same]; *Matter of Penny MM. v Bruce MM.*, 118 AD2d 979 [3d Dept 1986] [same]).

3.03. Presumptions in Criminal Proceedings Accorded the People

(1) A presumption is created by statute or decisional law and requires proof of a specified fact (the “basic fact”) from which another fact (the “presumed fact”) may be inferred.

(2) When the prosecution submits evidence from which the trier of fact finds that a basic fact is proven beyond a reasonable doubt, the trier of fact may, but is not required to, infer the presumed fact.

(3) When the prosecution presents evidence in support of a basic fact, the defendant may, but is not required to, present evidence in rebuttal of that fact and the presumed fact. Unless the court determines that the presumption is not applicable, or that there is insufficient evidence warranting a finding of the basic fact, and irrespective of whether the defendant presents rebuttal evidence, it remains for the trier of fact to consider whether the basic fact has been proven beyond a reasonable doubt and whether to infer the presumed fact.

Note

Subdivision (1) provides that this rule applies to a presumption when applied against the defendant in a criminal proceeding. It recognizes that constitutional principles, both federal and state, limit the operation of a presumption in a criminal proceeding against a defendant.

The definition of a presumption is derived from the decisional law of both the United States Supreme Court and the Court of Appeals. (*See County Court of Ulster Cty. v Allen*, 442 US 140, 156 [1979] [“Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an ‘ultimate’ or ‘elemental’ fact—from the existence of one or more ‘evidentiary’ or ‘basic’ facts”]; *People v Leyva*, 38 NY2d 160, 168 n 3 [1975] [a presumption is “a deduction or an inference which the trier of fact may draw from facts found or otherwise established during the course of the trial”].)

As noted by subdivision (1), presumptions may be established by statute (*see e.g.* Penal Law § 220.25 [presumption of possession of a controlled substance]), as well as by decisional law (*see e.g. People v Kirkpatrick*, 32 NY2d 17, 23 [1973], *appeal dismissed for want of a substantial federal question* 414 US

948 [1973] [“Generally, possession suffices to permit the inference that the possessor knows what he possesses”]; *People v Hildebrandt*, 308 NY 397, 400 [1955] [“presumptions, in criminal law, need not necessarily be statutory”]). Whether created by statute or decisional law and whether specific to an element of a crime or of general application (such as the presumption of regularity) the finder of fact must be instructed as set forth in subdivision (3).

Before a presumption may be presented to a jury, there must be (or have been) a judicial determination that there is a reasonably high degree of probability that the presumed fact follows from those proved directly. As the Court of Appeals explained in *Leyva* (38 NY2d at 165-166), the United States Supreme Court held that

“a rational connection between facts proved directly and ones to be inferred from them requires a ‘substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend’. (*Leary v United States*, 395 US 6, 36; see, also, *Turner v United States*, 396 US 398, 407.) Our court has exacted an even higher standard of rational connection. As we said in *People v McCaleb* (25 NY2d 394, 404), the connection must assure ‘a reasonably high degree of probability’ that the presumed fact follows from those proved directly.”

Subdivision (2) sets forth the requirement that a presumption in a criminal case is in fact a permissive inference (*People v McKenzie*, 67 NY2d 695, 696 [1986]; *People v Leonard*, 62 NY2d 404, 411 [1984]; *People v Getch*, 50 NY2d 456, 466 [1980]). Thus, in the criminal law, the term “presumption” set forth by statute or decision law is used interchangeably with the term “inference” (*Leyva*, 38 NY2d at 168 n 3 [“Legislatures have been somewhat loose in their use of the word ‘presumption’ when an inference is clearly what is intended, thus leading to a good deal of unnecessary confusion”]; see CJI2d[NY] Penal Law § 220.25 [1] [instruction for the presumption of possession of a controlled substance: “What this (presumption) means is that, if the People have proven beyond a reasonable doubt (the ‘basic’ fact), then you may, but you are not required to, infer from that fact (the ‘presumed’ fact). Whether or not to draw that inference is for you (the jury) to decide and will depend entirely on your evaluation of the evidence”])).

The Court of Appeals has cautioned that a “ ‘mandatory’ or ‘conclusive’ presumption, which operates to *require* the finder of fact to hold against the defendant in the absence of some showing by the defendant to the contrary, may never be applied in a criminal case with respect to one of the elements of the crime being prosecuted” (*Leonard*, 62 NY2d at 411 [a conclusive presumption of regularity as to the conduct of a public official was held to be impermissible]).

Requiring the basic fact to be proved beyond a reasonable doubt is a due process safeguard. (*Barnes v United States*, 412 US 837, 843 [1973] [“if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due

process”]; see CJI2d[NY] Penal Law §§ 165.15 [4]; 165.55, 220.25, 265.15 [instructions for presumptions].)

Examples of the application of a presumption in a criminal case include:

- *Kirkpatrick* (32 NY2d at 23): “Generally, possession suffices to permit the inference that the possessor knows what he [or she] possesses, especially, but not exclusively, if it is in [the possessor’s] hands, on [the possessor’s] person, in [the possessor’s] vehicle, or on [the possessor’s] premises.”
- *People v Everett* (10 NY2d 500 [1962]): The recent and exclusive possession of the fruits of a crime, if unexplained or if falsely explained, permits the inference that the possessor participated in the theft of the property.
- Penal Law § 165.05 (1): A person who takes, operates, exercises control over, rides in, or otherwise uses a vehicle without the owner’s consent is presumed to know that he or she does not have such consent. (See *Matter of Raquel M.*, 99 NY2d 92, 94 [2002].)
- Penal Law § 220.25 (1): The presence of a controlled substance in an automobile is presumptive evidence of knowing possession of that substance by each and every person in the automobile at the time the controlled substance was found unless the controlled substance was concealed upon the person of one of the occupants. (See *Leyva*, 38 NY2d 160.)
- Penal Law § 220.25 (2): The presence of narcotic drugs in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully prepare same for sale is presumptive evidence of knowing possession of the drugs by each person in close proximity to them (see *People v Tirado*, 38 NY2d 955, 956 [1976] [the basic facts establishing that the premises constituted a “drug factory” were proved and permitted the inference that those found in the premises were engaged in the illicit enterprise]; compare *People v Kims*, 24 NY3d 422, 433 [2014] [a basic fact that was necessary to establish the presumption, i.e. that the defendant was “in close proximity” to the drugs, was not proved and thus the presumption was not applicable]).
- Penal Law § 265.15 (3): The presence in an automobile (other than a stolen one or a public omnibus) of contraband weapon is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon is found except if the weapon is found upon the person of one of the occupants therein. (See *People v Lemmons*, 40 NY2d 505 [1976] [whether a pistol found in the handbag of a woman passenger of a car was found “on her person” was a question of fact for the jury]; *County Court of Ulster Cty.*, 442 US 140 [Lemmons’

codefendant unsuccessfully challenged the constitutionality of the presumption].)

- Penal Law § 250.45 (3) (b): When a person uses or installs, or permits the utilization or installation of an imaging device in a bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a hotel, motel or inn, there is a rebuttable presumption that such person did so for no legitimate purpose.

Subdivision (3) is primarily drawn from *Leyva* (38 NY2d at 168-170):

“The purpose of the presumption was to prove the fact of possession [of drugs], inferential though such proof may be. As such, it formed part of the support for the prosecution’s prima facie case. No less than with any other proof of facts offered by a prosecution, contrary evidence from a defendant does not negate the existence of a prima facie case; rather it presents an alternate set of facts, or inferences from facts, to the jury. The jury then has the right to choose between the two versions. . . .

“It might be possible, of course, that a defendant’s evidence will prove the truth of his choice of inferences so conclusively that reasonable persons could no longer believe the inference authorized by the statute. There is nothing arcane about such a situation; where a defendant’s proof is conclusive and reasonable persons cannot disagree about the matter at issue, our courts always have the power to issue a trial order of dismissal (CPL 290.10) or direct the jury’s finding on an element of a crime. . . .

“In such a case, the fact that a jury is not given the opportunity to consider the inference authorized by the statute does not mean that the inference plays no role in the case. It merely means that, though the presumption suffices to enable the prosecution to make out a prima facie case, it is no longer sufficiently tenable to permit a jury, in the light of the defendant’s evidence, to consider it. It receives the same treatment that any other ‘fact’ so thoroughly controverted would receive.” (See *e.g. People v Adamkiewicz*, 298 NY 176, 181 [1948] [a statutory presumption of intent to possess a weapon unlawfully was rebutted]; *Kims*, 24 NY3d at 433 [a statutory presumption of criminal possession of drugs was inapplicable because the defendant was not in “close proximity” to the drugs].)

3.05 Presumptions Accorded Defendant in a Criminal Proceeding

(1) In a criminal proceeding, the defendant is presumed to be innocent. As a result, the People are required to prove a defendant's guilt of a charged offense beyond a reasonable doubt.

(2) (a) In a hearing to determine whether a pretrial identification procedure was unduly suggestive, a rebuttable presumption that the procedure was suggestive arises when the People either fail to preserve photographs, whether in physical form or computer-generated, that the identifying witness viewed or fail to preserve a photograph of a lineup that the identifying witness viewed.

(b) The People may rebut the presumption by proof of procedures used to safeguard against suggestiveness.

(3) (a) Where a defendant is successful on appeal in having a judgment of conviction reversed or in having the appellate court order a resentence, a rebuttable presumption of vindictiveness may arise when the defendant is subsequently sentenced for the same offense and given a greater sentence than was imposed after the defendant's initial conviction, irrespective of whether the same judge presided over both sentences. The presumption is inapplicable when the defendant is given the same sentence as was imposed on the initial conviction.

(b) The presumption may be rebutted where the trial court identifies reasons based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

Note

Subdivision (1) sets forth the bedrock principle of American criminal jurisprudence (CPL 300.10 [2]; *Estelle v Williams*, 425 US 501, 503 [1976] [“The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice” (citation omitted)]; *Taylor v Kentucky*, 436 US 478, 490 [1978] [“the trial court’s refusal to give petitioner’s requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment”]; *In re Winship*, 397 US 358, 363 [1970] [“The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence”]; *People v Antommarchi*, 80 NY2d 247, 252 [1992] [“Manifestly, the burden of proving guilt beyond a reasonable doubt in a criminal proceeding must always remain with the People”]).

Subdivision (2) is derived from *People v Holley* (26 NY3d 514 [2015] [computer-generated array of photographs]) and *People v Simmons* (158 AD2d 950 [4th Dept 1990] [lineup photograph]), cited with approval by *Holley*. As *Holley* explained:

“the People have the burden of producing evidence in support of the fairness of the identification procedure. If this burden is not sustained, a peremptory ruling against the People is justified. If the People meet their burden of production, the burden shifts to the defendant to persuade the hearing court that the procedure was improper. . . .

“[T]he failure of the police to preserve a photographic array [shown to an identifying witness] gives rise to a rebuttable presumption that the array was suggestive. The rebuttable presumption fits within the burden-shifting mechanism in the following manner. Failure to preserve a photo array creates a rebuttable presumption that the People have failed to meet their burden of going forward to establish the lack of suggestiveness. To the extent the People are silent about the nature of the photo array, they have not met their burden of production. On the other hand, the People may rebut the presumption by means of testimony detailing the procedures used to safeguard against suggestiveness, in which case they have met their burden, and the burden shifts to the defendant” (*Holley* at 521-522 [internal quotation marks and citations omitted]).

Holley noted that “Appellate Division cases have found that the People overcame the presumption when the detective’s testimony detailed ‘the sheer volume of the photographs viewed, as well as the fact that the police had not yet focused upon defendant as a particular suspect’ ” (*Holley* at 524). In the *Holley* case itself, the Court found that the presumption was rebutted, there being support for

the finding that the detective “entered enough information about the perpetrator’s physical features to ensure that the photo manager system would generate ‘a fair selection of photos,’ rather than an array in which defendant’s image would stand out as markedly different” (*Holley* at 525, quoting *People v Holley*, 116 AD3d 442, 442 [1st Dept 2014]; see *People v Busano*, 141 AD3d 538, 540-541 [2d Dept 2016] [presumption was rebutted where the officer who administered the identification procedure testified that the “complainant’s daughter was shown computer-generated photo arrays shortly after the attack occurred. The officer further testified as to the specific information that was entered into the photo manager system, which included the perpetrator’s race and approximate age, height, and weight. The officer testified that approximately 230 photographs fit the search criteria that was entered into the photo manager system and that these photographs were displayed in arrays consisting of six photographs at a time” (citations omitted)]; *People v Brennan*, 222 AD2d 445, 445 [2d Dept 1995] [presumption of suggestiveness from the failure to preserve a photograph of a lineup was rebutted where “photographs of the lineup fillers were taken approximately 10 months after the original lineup was held, and the police officer who was present at the lineup testified about the height and weight of the fillers, whether they had gained or lost any weight between the lineup and the reconstruction, and their positions in the lineup”]).

Subdivision (3) is derived from *People v Flowers* (28 NY3d 536 [2016]), *People v Young* (94 NY2d 171 [1999]) and *People v Van Pelt* (76 NY2d 156 [1990]). The rule has its origins in the Federal Constitution (*North Carolina v Pearce*, 395 US 711 [1969]).

The presumption was designed “to insure that trial courts do not impose longer sentences to punish defendants for taking an appeal” (*Young*, 94 NY2d at 176). As summarized by *Flowers*, “the presumption of vindictiveness applies only to ‘defendants who have won appellate reversals’ who are ‘given *greater* sentences . . . than were imposed after their initial convictions’ (*People v Young*, 94 NY2d 171, 176 [1999] [emphasis added]). The presumption is inapplicable where, as here, the same term of imprisonment is imposed upon resentencing” (*Flowers*, 28 NY3d at 541-542).

The presumption may be rebutted (*People v Young*, 94 NY2d at 182 [“Once the presumption arises, it can be rebutted only if the trial court identifies reasons ‘based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding’ (*North Carolina v Pearce*, *supra*, 395 US, at 726)”]; *People v Miller*, 65 NY2d 502, 508 [1985] [the presumption “may be overcome by evidence that the higher sentence rests upon a legitimate and reasoned basis”]; e.g. *People v Bludson*, 15 AD3d 912, 913 [4th Dept 2005] [“The retrial and sentencing thereon were before a different justice and, in enhancing defendant’s sentence following the retrial, the court noted that it was doing so because, in the court’s view, defendant had committed perjury at the retrial. Thus, the record before us does not support defendant’s contention

that there is a reasonable likelihood that the enhanced sentence was the result of vindictiveness” (citations omitted)).

What may trigger the presumption in other situations depends on “the opportunity which the particular situation presents for vindictiveness and the reasonable likelihood that the prosecutor or sentencing authority is improperly motivated by what has occurred” (*Miller*, 65 NY2d at 508).

The presumption therefore does not normally arise when a plea of guilty has been set aside and the defendant is then convicted after a trial (*Alabama v Smith*, 490 US 794, 795 [1989] [“no presumption of vindictiveness arises when the first sentence was based upon a guilty plea, and the second sentence follows a trial”]; *Miller*, 65 NY2d at 509 [“Having accepted the exercise of discretion to lower the original sentence in return for a plea in order to protect the victim, the defendant should not be heard to complain that a higher sentence is imposed after conviction following a retrial at which, by requiring that the victim testify, he has removed from consideration the element of discretion involved”])).

“Similarly,” *Young* explained, “the Supreme Court has held that the presumption does not arise in other instances where, although there was an ‘opportunity’ for vindictiveness, there was not a ‘realistic likelihood’ that the enhanced sentence was the result of impermissible vindictiveness (*United States v Goodwin* [457 US 368, 384 (1982)] [no presumption of vindictiveness where defendant was charged with a felony after refusing to plead guilty to misdemeanor charges]; see also, *Colten v Kentucky*, 407 US 104, 117-120 [1972] [no presumption of vindictiveness where, following conviction in inferior court, defendant sought trial de novo in superior court under Kentucky’s two-tiered system and received greater sentence]). Where there is no ‘reasonable likelihood’ of vindictiveness, ‘the burden remains upon the defendant to prove actual vindictiveness’ (*Alabama v Smith* [490 US at 799-800])” (*Young*, 94 NY2d at 177-178).

Where a defendant receives a “greater sentence on an individual count, but an equal or lesser over-all sentence, courts must examine the record to determine whether there is a reasonable likelihood that the enhanced sentence on the individual count was the result of vindictiveness” (*Young*, 94 NY2d at 179).

While the presumption of vindictiveness on resentencing “does not apply” under the Federal Constitution when “a different Judge imposes the longer sentence,” as a matter of State constitutional law, the presumption does apply (*Young*, 94 NY2d at 178). That “a different Judge imposes the second sentence is but a factor to be weighed with others in assaying whether the presumption has been overcome” (*Van Pelt*, 76 NY2d at 161).

A claim that the sentence imposed was presumptively vindictive must be preserved for appellate review as a question of law (*People v Olds*, 36 NY3d 1091 [2021]).

3.07 Certificates Concerning Judgments of Conviction and Fingerprints (CPL 60.60)

1. A certificate issued by a criminal court, or the clerk thereof, certifying that a judgment of conviction against a designated defendant has been entered in such court, constitutes presumptive evidence of the facts stated in such certificate.

2. A report of a public servant charged with the custody of official fingerprint records which contains a certification that the fingerprints of a designated person who has previously been convicted of an offense are identical with those of a defendant in a criminal action, constitutes presumptive evidence of the fact that such defendant has previously been convicted of such offense.

Note

This rule reproduces verbatim CPL 60.60. By making the specified certificate of a judgment of conviction and of an official fingerprint record “presumptive evidence” of the specified facts, the statute also provides an exception to the hearsay rule for the admission in evidence of those facts.

Subdivision (1) authorizes the introduction in evidence of a certificate of a judgment of conviction of a named person. If the purpose, however, is to provide presumptive evidence of the identity of a person as the one named in the certificate, the certificate, with only a name recorded on it, is insufficient (*People v Vollick*, 148 AD2d 950, 951 [4th Dept 1989] [“While the certificate here states that (a named person) was previously convicted, it does not otherwise state any facts demonstrating that the person named in the certificate is the defendant. The certificate proves only that a person by the same name as defendant was previously convicted” (citation omitted)], *affd for reasons stated below* 75 NY2d 877 [1990]). Additional evidence of identity, such as “date of birth and NYSID number,” is necessary (*People v Shaw*, 83 AD3d 1101, 1102-1103 [2d Dept 2011]).

Subdivision (2) allows for presumptive proof of identity by a comparison of the defendant’s fingerprints and the fingerprints of the person previously convicted of an offense (*People v Mathis*, 278 AD2d 803, 803 [4th Dept 2000] [“The certificates of conviction issued by the clerks of (the) Counties constitute presumptive evidence of defendant’s two prior violent felony convictions (*see*, CPL 60.60 [1]), and the testimony of a State Police investigator concerning defendant’s

fingerprints established that defendant is the person named in those certificates (*see*, CPL 60.60 [2]” (citation omitted)]).

While the Sixth Amendment right of confrontation does not apply in a grand jury or sentencing proceeding (*People v Leon*, 10 NY3d 122 [2008]), it applies at a trial. As a result, “fingerprint reports,” comparing unknown latent prints from a crime scene with fingerprints from a known individual, that are introduced in evidence at a trial are testimonial when prepared “solely for prosecutorial purposes and, most importantly, because they were accusatory and offered to establish defendant’s identity,” so the defendant is accordingly entitled to confront the author of the report (*People v Rawlins*, 10 NY3d 136, 157 [2008]).

3.10 Inspection Certificate Issued by United States Department of Agriculture (CPLR 4529)

An inspection certificate issued by the authorized agents of the United States department of agriculture on file with the United States secretary of agriculture is prima facie evidence of the facts stated.

Note

This rule restates verbatim CPLR 4529.

The statute provides that an inspection certificate issued by an authorized agent of the United States Department of Agriculture and on file with the Secretary of Agriculture of the United States is “prima facie evidence” of the “facts stated” therein.

CPLR 4529 thereby provides a hearsay exception for the inspection certificate. While the inspection certificate is thus admissible and is “prima facie evidence” of the facts stated, evidence may be introduced to rebut the accuracy of the facts stated or otherwise affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see*, CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.12 Ancient Filed Maps, Surveys and Real Property Records (CPLR 4522)

All maps, surveys and official records affecting real property, which have been on file in the state in the office of the register of any county, any county clerk, any court of record or any department of the city of New York for more than ten years, are prima facie evidence of their contents.

Note

This rule restates verbatim CPLR 4522. Compare Guide to New York Evidence rule 8.07 (Ancient Documents), which sets forth the common-law exception to the hearsay rule for a statement in a document that is proven to be in existence for more than 30 years; while that statement is admissible, unlike the present rule, it does not constitute prima facie evidence of the truth or accuracy of the statement.

CPLR 4522 provides that maps, surveys, and official records affecting real property, which have been on file in the state in an office specified in the rule for more than 10 years, are “prima facie evidence” of their contents. By making those items “prima facie evidence” of their contents, the rule thereby establishes a hearsay exception for those items.

The Appellate Division has held that the “prima facie” language creates a rebuttable presumption of the accuracy of the document (*Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (see, CPLR 4522 . . .)”]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [evidence was “insufficient to rebut the presumption of accuracy which attaches pursuant to CPLR 4522 to the description of the property conveyed by that deed”] See Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.14 Conveyance of Real Property Without the State (CPLR 4524)

A record of a conveyance of real property situated within another state, territory, or jurisdiction of the United States, recorded therein pursuant to its laws, is prima facie evidence of conveyance and of due execution.

Note

This rule restates verbatim CPLR 4524.

The statute makes a record of a conveyance of real property located outside New York and its due execution “prima facie evidence” of its contents when the real property is situated within another state, territory, or jurisdiction of the United States and the record was recorded in that jurisdiction in accordance with the jurisdiction’s laws.

By making that record “prima facie evidence” of the conveyance and its due execution, the statute provides a hearsay exception for that record. While the record is thus admissible and is “prima facie evidence” of conveyance and due execution, evidence may be introduced to rebut the accuracy of conveyance and due execution or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see*, CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.16 Death or Other Status of a Missing Person (CPLR 4527)

(a) Presumed death. A written finding of presumed death, made by any person authorized to make such findings by the federal missing persons act is prima facie evidence of the death, and the date, circumstances and place of disappearance. In the case of a merchant seaman, a written finding of presumed death, made by the maritime war emergency board or by the war shipping administration or the successors or assigns of such board or administration in connection with war risk insurance is prima facie evidence of the death, and the date, circumstances and place of disappearance.

(b) Death, internment, capture and other status. An official written report or record that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, made by an officer or employee of the United States authorized by law of the United States to make it is prima facie evidence of such fact.

Note

This rule restates verbatim CPLR 4527 (Death or other status of missing person). See also EPTL 2-1.7 (Presumption of death from absence; effect of exposure to specific peril) which sets forth a presumption of death of a person who is absent for a continuous period of three years.

Subdivision (a) sets forth a hearsay exception for (1) a written finding of presumed death of a person made by a person authorized to make such a finding by the “Federal Missing Persons Act,” and (2) a written finding of a presumed death of a merchant seaman made by the Maritime War Emergency Board or the war shipping administration or their successors, in connection with war risk insurance.

The “Federal Missing Persons Act” was, however, repealed in 1966. While relevant provisions of that act now appear to exist in 5 USC § 5565 (applicable to a federal employee) and 37 USC § 555 (applicable to a member of a uniformed service), it remains for the New York courts to determine the successor federal statute and whether to deem CPLR 4527 applicable to that statute(s).

The written finding of death is “prima facie evidence” of the “death, and the date, circumstances and place of disappearance.” Notably, the statute makes the finding of death “prima facie evidence,” not the date of death; the date of disappearance is given “prima facie” effect and the date of disappearance may not be the date of death. (*See Matter of Cuthell*, 193 Misc 226 [Sup Ct, Westchester County 1948].)

In making the requisite finding of death “prima facie evidence,” the statute establishes an exception for such documents to the rule against the admission of hearsay.

While those documents are thus admissible and are “prima facie evidence” as indicated, evidence may be introduced to rebut the accuracy of the evidence or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see*, CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

Subdivision (b) sets forth a hearsay exception for an official report or record made by an officer or employee of the United States authorized by federal law to make the report or record that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead or alive. When admitted, the record or report is prima facie evidence of the facts stated therein.

3.18 Marriage Certificate or Record of Registration

Part I (CPLR 4526)

An original certificate of a marriage made by the person by whom it was solemnized within the state, or the original entry thereof made pursuant to law in the office of the clerk of a city or a town within the state, is prima facie evidence of the marriage.

Part II (Domestic Relations Law § 14-a [4])

A copy of the record of marriage registration when properly certified by the city and town clerks or their duly authorized deputies, as . . . provided [in Domestic Relations Law § 14-a], shall be prima facie evidence of the facts therein stated and in all actions, proceedings or applications, judicial, administrative or otherwise, and any such certificate of registration of marriage shall be accepted with the same force and effect with respect to the facts therein stated as the original certificate of marriage or certified copy thereof.

Note

There are two separate statutes relating to documentary proof of a marriage.

Part I restates verbatim CPLR 4526. That statute provides that an “original certificate of a marriage” made by the person who solemnized the marriage in New York, or the “original entry” of the certificate made by a city or town clerk in New York is prima facie evidence “of the marriage” (and not of any other facts stated in the certificate), and thereby establishes an exception to the rule against the admission of hearsay.

Part II restates subdivision (4) of Domestic Relations Law § 14-a. That statute provides that the “record of marriage registration” is prima facie evidence “of the facts therein stated” and thereby establishes an exception to the rule against the admission of hearsay for the facts stated in the marriage registration.

While the “certificate” (CPLR 4526) or “registration” (Domestic Relations Law § 14-a [4]) of marriage is admissible and each is “prima facie evidence” as indicated, evidence may be introduced to rebut the “prima facie evidence” of

“marriage” or of the “facts” stated in the “registration,” as the case may be, or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see*, CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.20 Affidavit of Service or Posting Notice by Person Unavailable at Trial (CPLR 4531)

An affidavit by a person who served, posted or affixed a notice, showing such service, posting or affixing is prima facie evidence of the service, posting or affixing if the affiant is dead, mentally ill or cannot be compelled with due diligence to attend at the trial.

Note

This rule restates verbatim CPLR 4531.

The statute provides that an affidavit of a person who has served, posted, or affixed a notice, which shows such service, posting or affixing, is prima facie evidence of the service, posting, or affixing when that person is deceased, mentally ill or cannot be compelled with due diligence to testify at a trial.

The specified “notice” includes all forms of judicial process (*see Gordon v Nemeroff Realty Corp.*, 139 AD2d 492, 492 [2d Dept 1988] [“Pursuant to both statutory and decisional law, where a process server dies after service and prior to a hearing as to whether service was properly effected, his affidavit of service (in this case of a summons and complaint) shall be received as prima facie evidence of service provided it is not conclusory and devoid of sufficient detail”]; *Laurenzano v Laurenzano*, 222 AD2d 560, 561 [2d Dept 1995] [due diligence was established in an attempt to locate the process server, allowing for the use of the affidavit of service that “contained ‘sufficient factual detail’ ” to establish service of summons and complaint]).

By making the affidavit “prima facie” evidence of service, posting, or affixing, the statute thereby provides a hearsay exception for the admissibility of that affidavit. While the affidavit is thus admissible and is “prima facie evidence” of the accuracy of the affidavit of the service, posting, or affixing, evidence may be introduced to rebut the affidavit’s accuracy or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.21 Lack of record (CPLR 4521)

A statement signed by an officer or a deputy of an officer having legal custody of specified official records of the United States or of any state, territory or jurisdiction of the United States, or of any court thereof, or kept in any public office thereof, that he [or she] has made diligent search of the records and has found no record or entry of a specified nature, is prima facie evidence that the records contain no such record or entry, provided that the statement is accompanied by a certificate that legal custody of the specified official records belongs to such person, which certificate shall be made by a person described in [CPLR] 4540.

Note

This rule restates CPLR 4521, which sets forth a hearsay exception for the admissibility, as prima facie evidence, of a certificate of the legal custodian of government records that after a “diligent search” (*see Briggs v Waldron*, 83 NY 582, 585 [1881]) “no record or entry” of the item searched for was found.

More than a century ago, the Court of Appeals in *Deshong v City of New York* (176 NY 475, 485 [1903]) stated the rationale for the statute:

“The law presumes that all officers intrusted with the custody of public files and records will perform their official duty by keeping the same safely in their offices, and if a paper is not found where, if in existence, it ought to be deposited or recorded, the presumption thereupon arises that no such document has ever been in existence, and until this presumption is rebutted it must stand as proof of such non-existence.”

The statute is limited to government records of the “United States or of any state, territory or jurisdiction of the United States, or of any court thereof.” In *Brill v Brill* (10 NY2d 308, 310 [1961]), however, the Court of Appeals, in accord with prior common law, on a motion for summary judgment, accepted certificates of officials of Mexican courts, “duly authenticated by the Vice-Consul of the U. S. A.,” stating that “they have searched the files of the court since the year 1954 but that no divorce action” between the parties in the New York action “has been registered.”

“CPLR 4521 and its predecessors have provided an expeditious method of proving such matters as the failure of a married couple to have obtained a divorce decree (*Matter of Brown’s Estate*, 1976, 40 N.Y.2d 938, 390 N.Y.S.2d 59, 358 N.E.2d 883), the failure of a landowner to have obtained a building permit (*Deshong v. City of New York*, 1903, 176 N.Y. 475, 68 N.E. 880), and the failure of a contractor to have obtained a license to do business (*Dartmouth Plan, Inc. v. Valle*, 1983, 117 Misc.2d 534, 458 N.Y.S.2d 848 (Sup. Ct. Kings Co.).” (Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4521.)

Although unresolved by an appellate court, CPLR 4521 “should not preclude recognition of a common law hearsay exception for testimony about the absence of a public record.” (*Id.*; *People v Niang*, 160 Misc 2d 500, 502 [Crim Ct, NY County 1994]; see CPLR 4543 [“Nothing in this article prevents the proof of a fact . . . by any method authorized . . . by the rules of evidence at common law”].)

In a criminal proceeding, with or without a certificate, if the lack of a record or entry constitutes testimonial evidence, the official may be required to testify, subject to cross-examination, for example, on what constituted a “due diligent” search. (See *Bullcoming v New Mexico*, 564 US 647 [2011]; *Crawford v Washington*, 541 US 36 [2004]; *People v Pacer*, 6 NY3d 504 [2006]; *People v Niene*, 8 Misc 3d 649, 651 [Crim Ct, NY County 2005] [the “affidavit” of a Department of Consumer Affairs “official who reported that her review of the Department’s records disclosed that the defendant did not have a general vendor’s license” was testimonial evidence; so the defendant was entitled to cross-examine its maker].)

3.22 Standard of Measurement Used by Surveyor (CPLR 4534)

An official certificate of any state, county, city, village or town sealer elected or appointed pursuant to the laws of the state, or the statement under oath of a surveyor, that the chain or measure used by him conformed to the state standard at the time a survey was made is prima facie evidence of conformity, and an official certificate made by any sealer that the implement used in measuring such chain or other measure was the one provided the sealer pursuant to the provisions of the laws of the state is prima facie evidence of that fact.

Note

This rule restates verbatim CPLR 4534.

The statute provides that certain documents related to the standard of measurement used by a surveyor are prima facie evidence of their contents and thereby establishes an exception to the rule against the admission of hearsay.

Those documents are:

1. an “official certificate” of a state or municipal “sealer” (i.e. “an official who attests or certifies conformity to a standard of correctness” [Merriam-Webster Online Dictionary, sealer (<https://www.merriam-webster.com/dictionary/sealer>)]), or a statement under oath of a surveyor, that the chain or measure used by the surveyor conformed to the then current applicable state standard, and
2. a certificate made by a sealer that the implement used in measuring the chain or measure was one provided by the sealer pursuant to law.

While those documents are admissible and are “prima facie evidence” of the accuracy of their contents, evidence may be introduced to rebut the accuracy of their contents or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see*, CPLR 4522 . . .)”]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real

property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.24 Search by Title Insurance or Abstract Company (CPLR 4523)

A search affecting real property, when made and certified to by a title insurance, abstract or searching company, organized under the laws of this state, may be used in place of, and with the same legal effect as, an official search.

Note

This rule restates verbatim CPLR 4523. It sets forth a hearsay exception for a certified title search made by a New York title insurance, abstract or searching company. The exception does not identify the person who should make the certification; the better practice, however, would be for an authorized officer of the company to issue the certified search.

When admitted, the certified title search has the “same legal effect” as an “official search.” A county clerk may conduct an “official search” and in that instance the clerk’s certified title search constitutes prima facie evidence of its contents (CPLR 4520). In turn, therefore, the certified title search by a title insurance, abstract or searching company pursuant to this rule should be prima facie evidence of its contents. (See Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR 4523.)

While the certified title search is thus admissible and should be “prima facie evidence” of its contents, evidence may be introduced to rebut its accuracy or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (see, CPLR 4522 . . .)”]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. See Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.26 Copy of Statement per UCC 9-523 (CPLR 4525)

A copy of a statement which is noted or certified by a filing officer pursuant to section 9-523 of the uniform commercial code and which states that the copy is a true copy is prima facie evidence of the facts stated in the notation or certification and that the copy is a true copy of a statement filed in the office of the filing officer.

Note

This rule restates verbatim CPLR 4525.

UCC article 9 relates to “Secured Transactions,” and part 5 thereof to “Filing.” Section 9-523 relates to the obligations of the “filing office” to acknowledge a filing. That acknowledgement may be done by a certification of an image of the record filed or by a notation on a copy of the record furnished by the person seeking the acknowledgement.

CPLR 4525 specifies that a copy of a statement noted or certified by a “filing officer,” which contains a statement that the copy is a “true copy” of a statement filed in the office of a “filing officer,” is prima facie evidence (1) of the facts stated in the notation or certification and (2) that the copy is a “true copy” of the filed statement.

By making that statement “prima facie” evidence of its stated facts, the statute provides a hearsay exception for the statement. While the statement is thus admissible and is “prima facie evidence” of the facts stated, evidence may be introduced to rebut the accuracy of the facts stated or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see*, CPLR 4522 . . .)”]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.28 Weather Conditions (CPLR 4528)

Any record of the observations of the weather, taken under the direction of the United States weather bureau, is prima facie evidence of the facts stated.

Note

This rule restates verbatim CPLR 4528.

The statute provides that a record of a weather observation made under the direction of the United States weather bureau is prima facie evidence of the facts stated therein and thereby establishes as well a hearsay exception for the admissibility of that record.

While those weather records are thus admissible and are “prima facie evidence” of the facts stated, evidence may be introduced to rebut the accuracy of those facts or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] [“the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see*, CPLR 4522 . . .)”]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology “prima facie evidence” in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4518:9.)

GUIDE TO NEW YORK EVIDENCE

ARTICLE 4: RELEVANCE AND ITS LIMITS

TABLE OF CONTENTS

RELEVANCE, IN GENERAL

- 4.01 RELEVANT EVIDENCE
- 4.02 DIRECT AND CIRCUMSTANTIAL EVIDENCE DEFINED
- 4.03 COMPLETING AND EXPLAINING RELEVANT EVIDENCE
- 4.05 CONDITIONAL RELEVANCE (SUBJECT TO CONNECTION)
- 4.07 EXCLUSION OF RELEVANT EVIDENCE
- 4.08 “OPEN DOOR” EVIDENCE
- 4.09 RESTRICTED ADMISSIBILITY OF RELEVANT EVIDENCE

RELEVANCE OF GENERIC TYPES OF EVIDENCE

- 4.11 CHARACTER EVIDENCE
- 4.13 HABIT

RELEVANCE OF SPECIFIC TYPES OF EVIDENCE

(A) PRINCIPALLY IN CIVIL PROCEEDINGS

- 4.15 LIABILITY INSURANCE
- 4.16 OFFERS TO COMPROMISE
- 4.17 PAYMENT BY JOINT TORTFEASOR
- 4.18 PAYMENT OF MEDICAL EXPENSES
- 4.19 SUBSEQUENT REMEDIAL MEASURE

(B) PRINCIPALLY IN CRIMINAL PROCEEDINGS

- 4.20 COMPLAINANT'S SEXUAL CONDUCT OR DRESS
 - 4.20.1 CONDOMS, POSSESSION OF
 - 4.20.2 CONSCIOUSNESS OF GUILT
- 4.21 CRIMES AND WRONGS (MOLINEUX)
 - 4.21.1 CULPABILITY OF A THIRD PARTY

4.22 DESTROYED DRUGS

4.23 DRUGS OR ALCOHOL IN BLOOD

4.24 IDENTIFICATION OF A DEFENDANT

4.24.1 INTOXICATION

4.24.2 MOTIVE TO COMMIT AN OFFENSE

4.24.3 POSSESSION OF OPIOID ANTAGONISTS (CPL 60.49, CPLR 4519-a)

4.25 PLEA AND ANCILLARY STATEMENTS

4.27 PROOF OF PREVIOUS CONVICTION

4.29 STATEMENT OF DEFENDANT, CORROBORATION

4.01. Relevant Evidence

(1) Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the proceeding more probable or less probable than it would be without the evidence.

(2) All relevant evidence is admissible except as otherwise provided or required by the Constitution of the United States or the Constitution, statutes, or common law of New York State.

Note

Subdivision (1). Subdivision (1) defines the term “relevant evidence.” It is derived from *People v Davis* (43 NY2d 17, 27 [1977]). As observed by the Court of Appeals, under this definition the evidence must tend to prove a fact that is material in the litigation. (*People v Stevens*, 76 NY2d 833, 835 [1990] [Evidence “should not be admitted unless relevant to a material fact to be proved at trial”]; *People v Scarola*, 71 NY2d 769, 777 [1988] [“Evidence is relevant if it has any tendency in reason to prove the existence of any material fact”]; *People v Yazum*, 13 NY2d 302, 304 [1963] [“all that is necessary is that the evidence have relevance, that it tend to convince that the fact sought to be established is so. That it is equivocal or that it is consistent with suppositions other than guilt does not render it inadmissible”].)

Subdivision (2). Subdivision (2) is derived from *Ando v Woodberry* (8 NY2d 165, 167 [1960] [“(I)t is well to recall the principle, basic to our law of evidence, that ‘(a)ll facts having rational probative value are admissible’ unless there is sound reason to exclude them, unless, that is, ‘some specific rule forbids’ (1 Wigmore, Evidence [3d ed., 1940], p. 293). It is this general principle which gives rationality, coherence and justification to our system of evidence and we may neglect it only at the risk of turning that system into a trackless morass of arbitrary and artificial rules”]). The Court of Appeals has repeatedly referred to this “principle.” (*E.g. Scarola*, 71 NY2d at 777 [“In New York, the general rule is that all relevant evidence is admissible unless its admission violates some exclusionary rule”]; *People v Alvino*, 71 NY2d 233, 241 [1987]; *People v Lewis*, 69 NY2d 321, 325 [1987].)

1.05 Direct and Circumstantial Evidence Defined

(1) Direct evidence is evidence of a fact based on a witness's personal knowledge of that fact acquired by means of the witness's senses. Direct evidence may prove guilt of a charged offense or liability for a civil wrong if, standing alone, that evidence satisfies a jury that guilt of the offense has been proved beyond a reasonable doubt or that liability for a civil wrong has been proven by a preponderance of the evidence or other applicable burden of proof.

(2) Circumstantial evidence is direct evidence of a fact from which a person may reasonably infer the existence or nonexistence of another fact. Circumstantial evidence may prove guilt of a charged offense or liability for a civil wrong, if that evidence, while not directly establishing guilt of the offense or liability for a civil wrong, gives rise to an inference of guilt beyond a reasonable doubt or of liability for the civil wrong by a preponderance of the evidence or other applicable burden of proof.

(3) The law draws no distinction between circumstantial evidence and direct evidence in terms of weight or importance. Either type of evidence or a combination of both may be enough to meet the applicable burden of proof, depending on the facts of the case as determined by the finder of fact.

(4) In a criminal proceeding, a defendant's confession of guilt constitutes direct evidence. A defendant's admission, not amounting to a confession because it does not directly acknowledge guilt but includes inculpatory statements from which a jury may infer guilt, is circumstantial evidence.

Note

Subdivisions (1) and (2) are derived from CJI2d(NY) Evidence—Circumstantial Evidence and PJI 1:70 (General Instruction—Circumstantial Evidence). Those definitions summarize the law of New York, beginning with *People v Bretagna* (298 NY 323, 325-326 [1949]):

“Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. * * * Circumstantial evidence . . . never proves directly the fact in question. In other words, direct . . . evidence, as the term is commonly used, means statements by witnesses, directly probative of one or more of the principal . . . facts of the case, while circumstantial evidence puts before the tribunal facts which, alone or with others, are in some degree but indirectly, probative of one or more of those principal . . . facts, and from which one or more of those principal facts may properly be inferred” (*id.* [internal quotation marks omitted]; see *People v Hardy*, 26 NY3d 245, 251 [2015] [“This Court has described circumstantial evidence as evidence that never proves directly the fact in question. (*People v Bretagna*, 298 NY 323, 325 [1949]). By contrast . . . direct evidence . . . requires no inference to establish (a particular fact)” (internal quotation marks and citations omitted)]; *Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986] [“To establish a prima facie case of negligence based wholly on circumstantial evidence, ‘(i)t is enough that (plaintiff) shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred.’ The law does not require that plaintiff’s proof ‘positively exclude every other possible cause’ of the accident but defendant’s negligence. Rather, her proof must render those other causes sufficiently ‘remote’ or ‘technical’ to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence” (citations omitted)]; *Markel v Spencer*, 5 AD2d 400 [4th Dept 1958], *affd without op* 5 NY2d 958 [1959]).

In *Hardy*, the defendant was charged with larceny of a purse. A surveillance video inside a club showed the defendant positioning himself between the complainant and her purse; putting the purse underneath him; and, when the complainant left, “rifling through its contents” and walking away with the purse in hand (26 NY3d at 248). The surveillance video therefore was direct evidence, proving the actus reus, that is, the “taking” element, of larceny. That the “defendant offered the jury an alternative explanation of his behavior, one that was inconsistent with [the element of] larcenous intent, does not change the character of the evidence from direct to circumstantial” (*id.* at 251). As *Hardy* explained, “a particular piece of evidence is not required to be wholly dispositive of guilt in order to constitute direct evidence, so long as it proves directly a disputed fact without requiring an inference to be made. In other words, even if a particular item of evidence does not

conclusively require a guilty verdict, so long as the evidence proves directly a fact in question [in *Hardy*, the actus reus], the evidence is direct evidence of guilt” (*id.* at 248, 250-251; *e.g. People v Daddona*, 81 NY2d 990, 992 [1993] [“The criminal possession counts charged were amply supported by direct evidence: there was eyewitness testimony that defendant directed the stolen vehicles in and out of the driveway, thereby establishing, with direct evidence, that he was in constructive possession of the stolen vehicles, or that he was acting in concert with those in physical possession of the stolen vehicles”]; *People v Roldan*, 88 NY2d 826, 827 [1996] [“This case involves direct evidence . . . Eyewitness testimony, if believed by the jury, established that defendant engaged in acts which directly proved that at the very least he acted as a lookout while the crime was being committed”])).

Perhaps the most important reason for distinguishing between direct and circumstantial evidence is that “a trial court must grant a defendant’s request for a circumstantial evidence charge when the proof of the defendant’s guilt rests solely on circumstantial evidence. By contrast, where there is both direct and circumstantial evidence of the defendant’s guilt, such a charge need not be given” (*Hardy* at 249 [citations omitted]; *see People v Silva*, 69 NY2d 858, 859 [1987] [The complainant “was unable to make an identification of defendant and there was no direct evidence linking him to the robbery. Thus, . . . the case against defendant on the robbery counts was wholly circumstantial. It was, therefore, error for the court to refuse to give a circumstantial evidence charge”])).

Each subdivision refers to the burden of proof in a civil case by the terminology “preponderance of the evidence or other applicable burden of proof.” The other applicable burdens of proof utilized in varying civil cases include “clear and convincing evidence” and “substantial evidence” (*see e.g. Guide to NY Evid rule 3.01 [3] [c] and the note thereto*).

Subdivision (3) is also derived from CJI2d(NY) Evidence—Circumstantial Evidence and PJI 1:70, which reflect the views expressed in *People v Benzinger* (36 NY2d 29, 32 [1974] [The reason for the rule on how to evaluate circumstantial evidence “is not that circumstantial evidence is thought to be weaker than direct evidence, since the reverse is frequently true. Rather, the rule draws attention to the fact that proof by circumstantial evidence may require careful reasoning by the trier of facts”]) and *People v Cleague* (22 NY2d 363, 367 [1968] [The rule on how to evaluate circumstantial evidence does not stem “from any distrust of circumstantial evidence or any vaunted favoring of direct evidence. The myth of innate superiority of direct testimonial evidence was exploded long ago. Indeed, circumstantial evidence is generally stronger, at least when it depends, as it often does, upon undisputed evidentiary facts about which human observers are less likely to err as a matter of accuracy or to distort as a matter of motivation, emotional shock, or external suggestion. On the other hand, direct evidence almost always, even in the instance of bystanders, is subject to one or more of these psychological infirmities. Hence, the occasional superior reliability of the evidentiary circumstances” (citation omitted)]).

Subdivision (4) is derived from *People v Bretagna* (298 NY 323, 326 [1949] [“a confession of guilt by a defendant in a criminal cause . . . is not circumstantial evidence” but an admission “not amounting to a confession because not directly acknowledging guilt, but including inculpatory acts from which a jury may or may not infer guilt, is circumstantial, not direct evidence”]) and *People v Hardy* (26 NY3d 245, 249-250 [2015]):

“[The defendant’s] statement to the prosecution witness that he did not have the purse but could get it was not direct evidence of his guilt. A defendant’s statement is direct evidence only if it constitutes a relevant admission of guilt. . . .

“By contrast, where the defendant makes an admission that merely includ[es] inculpatory acts from which a jury may or may not infer guilt, the statement is circumstantial and not direct evidence. . . .

“Here, defendant’s statement—that he did not have the purse but could get it—was not a direct admission of his guilt of larceny. Rather, defendant’s statement was also consistent with an inference that although he did not steal the purse, he knew where the purse was located and thought he could obtain it. Inasmuch as his statement merely included inculpatory facts from which the jury may or may not have inferred guilt, his statement was circumstantial rather than direct evidence” (internal quotation marks and citations omitted).

4.03. Completing and Explaining Writing, Recording, Conversation or Transaction

When part of a writing, conversation, recorded statement or testimony, or evidence of part of a transaction is admitted, any other part of that writing, conversation, recorded statement or testimony, or evidence of any other part of the transaction, may be admitted when necessary to complete, explain, or clarify the previously admitted part. The timing of the admission of such additional parts is subject to the court's discretion.

Note

This rule is derived from long-standing Court of Appeals precedent which recognizes that when evidence has been admitted, an adverse party may offer evidence necessary to complete, explain, or clarify the evidence that has been introduced. (*See e.g. Rouse v Whited*, 25 NY 170, 174-175 [1862] [“ ‘Where a statement, forming part of a conversation, is given in evidence, whatever was said by the same person in the same conversation, that would in any way qualify or explain that statement, is also admissible’ ” (citing *Prince v Samo*, 7 Adol & Ellis 627 [1838]; 1 Phillips' Evidence 416 [4th Am ed, from 10th Eng ed]]); *Grattan v Metropolitan Life Ins. Co.*, 92 NY 274, 284 [1883] [“The rule appears to be firmly settled, both as to a conversation or writing, that the introduction of a part renders admissible so much of the remainder as tends to explain or qualify what has been received and that is to be deemed a qualification which rebuts and destroys the inference to be derived from or the use to be made of the portion put in evidence”]; *Nay v Curley*, 113 NY 575, 578-579 [1889] [“where a party calls a witness and examines him as to a particular part of a communication or transaction, the other party may call out the whole of the communication or transaction bearing upon or tending to explain or qualify the particular part to which the examination of the other party was directed”].) The rule is founded upon “the plainest principles of equity.” (*Rouse*, 25 NY at 177 [“All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and therefore the plainest principles of equity require, that if one of the statements is to be used against the party, all the other statements tending to explain it or to qualify this use, should be shown and considered in connection with it”].)

The rule as stated reflects the limits on “completeness” imposed by the Court of Appeals, namely, “(a) No utterance irrelevant to the issue is receivable; (b) no more of the remainder of the utterance than concerns the same subject and is explanatory of the first part is receivable; (c) the remainder thus received merely

aids in the construction of the utterance as a whole, and is not in itself testimony.” (*People v Schlessel*, 196 NY 476, 481 [1909].)

Under the rule, when part of a party’s own statement is admitted against that party as an admission against the party’s interest, the party may offer into evidence any part of the statement which is exculpatory. (See e.g. *People v Dlugash*, 41 NY2d 725, 736 [1977]; *People v Gallo*, 12 NY2d 12, 15-16 [1962]; *Grattan*, 92 NY at 284-286[.] Similarly, when a witness has been impeached by a statement the witness previously made, other parts of the statement may be admitted to clarify or explain the statement. (See e.g. *People v Ochoa*, 14 NY3d 180, 187 [2010]; *Feblot v New York Times Co.*, 32 NY2d 486, 496-498 [1973]; see also *People v Ramos*, 70 NY2d 639, 640-641 [1987] [Court emphasized that parts of the statement used for impeachment purposes that concerned unrelated matters were not admissible].) This rule of “completeness” does not in any way modify rule 8.05 (Admission by Adopted Statement) as it relates to a defendant’s silence.

The rule also addresses a timing issue; that is, when the completion evidence may be admitted. The rule commits the timing determination to the discretion of the court. (See e.g. *People v Torre*, 42 NY2d 1036, 1037 [1977] [where part is admitted during cross-examination, other parts may be admitted on re-direct]; *Gallo*, 12 NY2d at 15-16 [where part of a written statement was read into the record on the People’s rebuttal, other parts which were exculpatory may be admitted at that time].)

While other jurisdictions’ codification of the completeness rule permits the use of other writings or recordings for explanatory and clarification purposes of the admitted writing or recording (see e.g. Fed Rules Evid rule 106), the Court of Appeals has not addressed the use of other writings or recordings.

It should also be noted that the rule of completeness has been expressly incorporated by the legislature in CPLR 3117 (b) (“If only part of a deposition is read at the trial by a party, any other party may read any other part of the deposition which ought in fairness to be considered in connection with the part read”) and in CPLR 4517 (b) (“If only part of the prior trial testimony of a witness is read at the trial by a party, any other party may read any other part of the prior testimony of that witness that ought in fairness to be considered in connection with the part read”).

4.05. Conditional Relevance (Evidence Offered “Subject to Connection”)

When the admissibility of offered evidence depends on the introduction of further evidence to fulfill the requirements of admissibility, the court may admit the offered evidence after, or subject to, receipt of that further evidence. Upon failure of a party to fulfill the requirements of further evidence, the offered evidence must be struck and the jury instructed to disregard it, or, if undue prejudice has resulted, the court may grant a mistrial.

Note

This rule governs the situation where the relevance of offered evidence depends upon the existence of an additional fact(s). It is derived from Court of Appeals precedent that in such a situation the court may admit the evidence “subject to connection”—later proof of that additional fact(s)—or require before admitting the evidence proof of that additional fact(s). (*See e.g. People v Caban*, 5 NY3d 143, 151 [2005]; *Cover v Cohen*, 61 NY2d 261, 269 n 2 [1984].) The order of proof is within the discretion of the court. (*See e.g. Caban*, 5 NY3d at 151.) However, the Court has cautioned that where the evidence is highly prejudicial in content, the “better practice would be for relevance to be established prior to admission, out of the presence of the jury.” (*Cover*, 61 NY2d at 269 n 2.) The second sentence sets forth judicial options when the promised connection does not occur. (*See People v Stone*, 29 NY3d 166, 171 [2017]; *United States Vinegar Co. v Schlegel*, 143 NY 537, 544 [1894].)

4.07. Exclusion of Relevant Evidence

A court may exclude relevant evidence if its probative value is outweighed by the danger that its admission would:

- (1) create undue prejudice to a party;**
- (2) confuse the issues and mislead the jury;**
- (3) prolong the proceeding to an unreasonable extent without any corresponding advantage to the offering party; or**
- (4) unfairly surprise a party and no remedy other than exclusion could cure the prejudice caused by the surprise.**

Note

The Court of Appeals has held that relevant evidence is admissible as set forth in rule 1.05. The Court of Appeals, however, has also made clear that relevant evidence may be excluded by the trial court in the exercise of its discretion upon a consideration of pragmatic factors. (*See generally People v Davis*, 43 NY2d 17, 27 [1977].) These factors are set forth in subdivisions (1) – (4).

Relevant evidence may be excluded when, for example, it:

- causes undue prejudice (*see Mazella v Beals*, 27 NY3d 694, 710 [2016] [in a medical malpractice action, “any possible relevance of the consent order's contents (concerning defendant's negligent treatment of other patients) was outweighed by the obvious undue prejudice of his repeated violations of accepted medical standards”]; *People v Hudy*, 73 NY2d 40, 68 [1988]; *Davis*, 43 NY2d at 27);
- confuses the issues and misleads the jury (*see People v Santarelli*, 49 NY2d 242, 250 [1980] [in insanity cases where a mass of evidence of prior criminal conduct is offered, “the danger is particularly great that the jury will become confused by the mass of evidence presented and will decide to convict the defendant not because they find he was legally sane at the time of the act, but rather because they are convinced that he

is a person of general criminal bent”]; *Radosh v Shipstad*, 20 NY2d 504, 508 [1967]; *People v Nitzberg*, 287 NY 183, 189 [1941]);

- creates unreasonable delay or is unnecessarily cumulative (*see People v Petty*, 7 NY3d 277, 286-287 [2006] [court properly exercised its discretion in excluding a witness’ testimony as to threats the victim made against the defendant as four defense witnesses, including the defendant, had already testified that victim made numerous threats against defendant]; *Hudy*, 73 NY2d at 67 [“Where the facts underlying a witness’s reason to fabricate are admitted by the witness, extrinsic proof of those facts may properly be excluded, in the court’s discretion, on the ground that it would be cumulative”]; *Davis*, 43 NY2d at 27 [court properly excluded the testimony as its “probative value . . . could be outweighed by dangers that the main issue would be obscured, by prolongation of trial”]; *People v Harris*, 209 NY 70, 82 [1913] [court excluded evidence “tending to obscure the main issue in the minds of the jury, to lead them away from the principal matters which require their attention and to protract trials to an unreasonable extent without any corresponding advantage to any one concerned”]); or
- unfairly surprises the opposing party (*Davis*, 43 NY2d at 27; *Nitzberg*, 287 NY at 189).

The Court of Appeals has stressed that these concerns and their presence in a given case do not mandate exclusion of offered evidence; rather, these concerns must be balanced against the probative value of the evidence (*see People v Brewer*, 28 NY3d 272, 277 [2016]; *Kish v Board of Educ. of City of N.Y.*, 76 NY2d 379, 385 [1990]).

While the Court of Appeals has consistently enumerated the factors that may lead to a discretionary exclusion of relevant and otherwise admissible evidence, the Court has described the standard in differing ways. The majority, and most recent, of the Court’s decisions state that relevant evidence may be excluded if its probative value is “outweighed” by one of the enumerated factors. (*People v Brewer*, 28 NY3d 271, 277 [2016]; *Mazella*, 27 NY3d at 709; *People v Smith*, 27 NY3d 652, 668 [2016]; *People v DiPippo*, 27 NY3d 127, 135-136 [2016]; *Hudy*, 73 NY2d at 68; *Davis*, 43 NY2d at 27.) Other decisions have stated that the probative value must be “substantially outweighed” by one of the enumerated concerns. (*E.g. People v Caban*, 14 NY3d 369, 374 [2010]; *People v Scarola*, 71 NY2d 769, 777 [1988]; *People v Santarelli*, 49 NY2d 241, 255 [1980].) No decision discusses the difference between “outweighed” and “substantially outweighed.” An analysis of the decisions suggests that the same result would have been reached regardless of the formulation utilized. A fair assumption, therefore, is that the differing formulations do not affect the required balance between probative value

and prejudice. The rule utilizes the formulation found in the majority of the Court's opinions.

The Court of Appeals has cautioned that exclusion under the rule may not be required when a cautionary instruction to the jury can obviate the potential for prejudice. (*See People v Mountain*, 66 NY2d 197, 203 [1985].) Decisional law, however, recognizes that in some situations a limiting instruction may not be sufficient to protect a party adequately from the jury's misuse of the evidence, and that in such situations the court may take other action, such as precluding or redacting the evidence or directing a severance. (*Bruton v United States*, 391 US 123, 135 [1968] ["(T)here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored"]; *People v Johnson*, 27 NY3d 60, 70 [2016] ["curative instructions could not avoid the substantial risk" that the jury would misuse the evidence]; *People v Ceden*, 27 NY3d 110, 120 [2016] [redaction as made was not effective to preclude misuse of the evidence by the jury]; *Cover v Cohen*, 61 NY2d 261, 270 [1984] [evidence should be excluded where there is "substantial risk that such evidence may be over-emphasized by the jury"].)

4.08 “Open Door” Evidence

(1) A party may “open the door” to the introduction by an opposing party of evidence that would otherwise be inadmissible when in the presentation of argument, cross-examination of a witness, or other presentation of evidence the party has given an incomplete and misleading impression on an issue.

(2) A trial court must exercise its discretion to decide whether a party has “opened the door” to otherwise inadmissible evidence. In so doing, the trial court should consider whether, and to what extent, the evidence or argument claimed to “open the door” is incomplete and misleading and what, if any, otherwise inadmissible evidence is reasonably necessary to explain, clarify, or otherwise correct an incomplete and misleading impression.

(3) To assure the proper exercise of the court’s discretion and avoid the introduction of otherwise inadmissible evidence, the recommended practice is for a party to apply to the trial court for a ruling on whether the door has been opened before proceeding forward, and the court should so advise the parties before taking evidence.

Note

Subdivisions (1) and (2) recite the long-settled “open door” principle in New York, as primarily explained in *People v Melendez* (55 NY2d 445 [1982]); *People v Rojas* (97 NY2d 32, 34 [2001]); *People v Massie* (2 NY3d 179 [2004]); and *People v Reid* (19 NY3d 382 [2012]).

Melendez dealt with the issue of whether the defense had opened the door to permit the prosecutor to explore an aspect of the investigation that would not otherwise have been admissible. The Court began by noting that, when an “opposing party ‘opens the door’ on cross-examination to matters not touched upon during the direct examination, a party has the right on redirect to explain, clarify and fully elicit [the] question only partially examined on cross-examination.” (*Melendez* at 451

[internal quotation marks and citation omitted].)

Argument to the jury or other presentation of evidence also may open the door to the admission of otherwise inadmissible evidence. (*Rojas* at 34 [“defendant opened the door” based “on the combination of his opening statement and cross-examination of a prosecution witness”]; *Massie* at 184 [noting that a door may be opened by “evidence or argument”].)

The “open door” principle, however, “does have its limitations. By simply broaching a new issue on cross-examination, a party does not thereby run the risk that all evidence, no matter how remote or tangential to the subject matter opened up, will be brought out on redirect. . . . [T]he court should only allow so much additional evidence to be introduced on redirect as is necessary to meet what has been brought out in the meantime upon the cross-examination. . . . The principle merely allows a party to explain or clarify on redirect matters that have been put in issue for the first time on cross-examination, and the trial court should normally exclude all evidence which has not been made necessary by the opponent’s case in reply.” (*Melendez* at 452 [internal quotation marks, citations, and italics omitted].)

On the facts of *Melendez*, the Court ruled that “although defense counsel may have partially ‘opened the door’ by asking whether [one of the People’s witnesses] was a suspect, the passageway thus created was not so wide as to admit the hearsay testimony directly implicating the defendant in the crimes charged.” (*Id.* at 453.)

Massie recognized *Melendez* as the leading case on the subject, while noting that the application of the “open door” principle was not limited to cross-examination questions. *Massie* therefore set forth the guiding rule included in subdivision (2) for dealing with any “open door” issue in any circumstance. (*Massie* at 184 [“a trial court should decide ‘door-opening’ issues in its discretion, by considering whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression”]; see e.g. Guide to NY Evid rule 4.03, Completing and Explaining Writing, Recording, Conversation or Transaction.)

Reid pointed out that the “open door” principle exists to “avoid . . . unfairness and to preserve the truth-seeking goals of our courts.” For that reason, *Reid* held that even “the admission of testimony that violates the Confrontation Clause may be proper if the defendant opened the door to its admission.” (*Id.* at 388.) That holding, *Reid* pointed out, was consistent with the rule permitting the use of voluntary statements taken in violation of *Miranda v Arizona* (384 US 436 [1966]) “if a defendant opens the door by presenting conflicting testimony.” (*Id.* at 388; see Guide to NY Evid rule 6.14, Impeachment by Evidence Improperly Obtained.)

Other examples of situations where a party “open[s] the door” to otherwise inadmissible evidence include:

- “apparent inconsistencies or contradictions in a witness’ statements or acts brought out on cross-examination to discredit his testimony [which] may be reconciled on redirect by relating to the jury the relevant surrounding circumstances.” (*Melendez* at 451.)
- “where cross-examination raises the inference that the witness’ testimony was the product of a recent fabrication, a party on redirect can refute this allegation either by introducing consistent statements made by the witness at a time when there was no motive to lie or by having the witness explain why the information was not disclosed earlier.” (*Id.*)
- “where only a part of a statement has been brought out on cross-examination, the other parts may be introduced on redirect examination for the purpose of explaining or clarifying the statement.” (*Id.* at 451-452; see Guide to NY Evid rule 4.03, Completing and Explaining Writing, Recording, Conversation or Transaction.)
- Defense counsel’s question to a police officer witness for the People about whether there ever came a time when defendant “denied his involvement in this” opened the door to redirect examination about the defendant’s exact words, namely, “ ‘that he was there, but he didn’t rob the old lady.’ ” (*People v Goodson*, 57 NY2d 828, 829-830 [1982].)
- “evidence of a prior conviction [for robbery] that had been precluded by a pretrial [*Sandoval*] ruling . . . was nonetheless properly used by the prosecution on cross-examination to impeach” the testimony of defendant’s witness, a psychologist, who asserted that defendant had been nonviolent throughout his life. (*People v Fardan*, 82 NY2d 638, 641 [1993].)
- “Defendant’s claim that he had never seen or known [the codefendant] before his arrest on November 4, 1992 . . . opened the door to evidence . . . regarding [his] subsequent arrest with [the codefendant] on November 16, 1992 relevant for ‘contradiction and response’ with respect to the November 4, 1992 existence of their relationship and not simply to impeach his general credibility.” (*People v Blakeney*, 88 NY2d 1011, 1012 [1996].)
- The “[d]efendant opened the door to cross-examination regarding his motivation for prior guilty pleas and was subject to impeachment by the People’s use of the otherwise precluded evidence . . . where . . . defendant’s testimony was meant to elicit an incorrect jury inference that he had pleaded guilty and served prison terms in prior cases, but that he

would not plead guilty in this case because he was in fact innocent.” (*People v Cooper*, 92 NY2d 968, 969 [1998] [citations omitted].)

- When the People’s witnesses testified that the defendant “never denied” committing the crime, the trial court should have permitted the defense to introduce a taped telephone conversation between the defendant and the complainant prior to the defendant’s arrest, in which the defendant denied the allegations. (*People v Carroll*, 95 NY2d 375, 386 [2000].)

Subdivision (3) follows logically on the need for the trial court to make a ruling on whether the door has been opened before otherwise inadmissible evidence that may warrant a mistrial is admitted. (*See People v Rojas*, 97 NY2d 32, 40 [2001] [the “better practice” would have been for the People to ask for a “conference” to have the court decide whether the door had been opened to a question the prosecutor asked a witness]; *see also* Guide to NY Evid rule 1.07, Court Control Over Presentation of Evidence; rule 1.11, Court Determination of Preliminary Questions.)

4.09. Restricted Admissibility of Relevant Evidence

(1) Evidence may be admitted for one purpose but not for another, or as to one party but not as to another.

(2) In a trial by jury, the court shall provide an instruction on the scope of the evidence to the jury, as may be necessary or required by request of a party or by statute or decisional law.

Note

Subdivision (1). This rule is derived from Court of Appeals precedent holding that evidence is admissible as to any party or for any relevant purpose even though it may be inadmissible as to another party or for another purpose. In such circumstances, jury instructions as to the limited purpose for which the evidence may be considered are appropriate. (*Kish v Board of Educ. of City of N.Y.*, 76 NY2d 379, 385 [1990] [limited purpose]; *People v Williams*, 50 NY2d 996, 998 [1980] [limited purpose]; *People v Marshall*, 306 NY 223, 227 [1954] [admissible as to one defendant but not a codefendant].)

Subdivision (2). The request for a limiting instruction may be made when the evidence is admitted and at the close of trial for inclusion in the court's charge to the jury. (*Williams*, 50 NY2d at 998.)

4.11. Character Evidence

(1) Admissibility. Evidence of a person's character is not admissible to prove that the person acted in conformity therewith on a particular occasion except:

(a) In a civil or criminal proceeding, evidence of a person's character is admissible where that character is an essential element of a crime, charge, claim, or defense.

(b) In a criminal proceeding, a defendant may offer evidence of character that is relevant to prove the defendant acted in conformity therewith on a particular occasion, and, if the evidence is admitted, the People may rebut that evidence.

(c) In a criminal proceeding where the defendant interposes a defense of justification based on the defense of self or another: (i) evidence of the victim's reputation for violence and prior specific acts of violence by the victim against the defendant or others, if known to the defendant and reasonably related to the crime charged, is admissible on the issue of the defendant's belief of the necessity of defending himself or herself or another person from impending harm. Such evidence is not admissible to prove that the defendant was the "initial aggressor"; (ii) evidence of the victim's prior threats against the defendant, whether known to the defendant or not, is admissible to prove that the victim was the initial aggressor.

(d) In a civil or criminal proceeding, evidence of the character of a witness may be admissible to impeach the witness as provided in article six.

(2) Method of Proof. When evidence of a person's character is admissible, proof thereof may only be by testimony as to that person's reputation for the relevant character as set forth in rule 8.39 (1), except:

(a) If evidence of character is admissible under subdivision (1) (a) of this rule, the relevant character may be proved by testimony as to that person's reputation for the relevant character as set forth in rule 8.39 (1) and by proof of relevant specific acts.

(b) If a defendant in a criminal proceeding, through the testimony of a witness called by the defendant, offers evidence of his good character, the People may independently prove any previous conviction of the defendant for an offense that would tend to negate any character trait or quality attributed to the defendant in that witness' testimony.

(3) Cross-Examination. If a witness offers reputation evidence as to a person's character, that witness may be asked on cross-examination whether the witness has heard that the person has been convicted of a crime or engaged in conduct, other than the crime(s) or conduct with which the defendant is charged, that is inconsistent with that reputation.

Note

Subdivision (1). The general rule stated in subdivision (1) is derived from Court of Appeals precedent that has long recognized that in civil and criminal proceedings the character or a character trait of a person may not be proved to raise an inference that the person acted in conformity therewith on the occasion in issue. (See *e.g. People v Zackowitz*, 254 NY 192, 197 [1930]; *Noonan v Luther*, 206 NY 105, 108 [1912]; *McKane v Howard*, 202 NY 181, 186-187 [1911].) In the words of the Court of Appeals: “This court has declared that ‘[i]nflexibly the law has set its face against the endeavor to fasten guilt upon [a defendant] by proof of character or experience predisposing to an act of crime . . . The endeavor has been often made, but always it has failed.’ ” (*People v Mullin*, 41 NY2d 475, 479 [1977].) This exclusionary rule is “one, not of logic, but of policy.” (*Zackowitz*, 254 NY at 198.)

Evidence of a rape victim’s prior sexual conduct to prove conduct, *e.g.*, consent, is governed by CPL 60.42; and evidence of a victim’s sexual conduct in prosecutions for any offense is governed by CPL 60.43.

The remaining paragraphs of subdivision (1) set forth the exceptions to the rule’s bar to character evidence.

Subdivision (1) (a). Paragraph (a) of subdivision (1) sets forth the common-law rule that where the character or a trait of character of a person is, as a matter of substantive law, an essential element of a crime, charge, claim, or defense, that character or trait of character may be proved. (See *e.g. People v Mann*, 31 NY2d 253 [1972]; *Park v New York Cent. & Hudson Riv. R.R. Co.*, 155 NY 215, 219 [1898]; *Cleghorn v New York Cent. & Hudson Riv. R.R. Co.*, 56 NY 44, 46-47 [1874].)

Subdivision (1) (b). Paragraph (b) of subdivision (1) is derived from Court of Appeals precedent which gives a defendant in a criminal proceeding the option to introduce reputation evidence as to defendant’s own good character for the purpose of raising an inference that defendant would not be likely to commit the crime charged. (See *e.g. People v Aharonowicz*, 71 NY2d 678, 681 [1988] [“The principle has long been that in a criminal prosecution, the accused may introduce evidence as to his own good character to show that it is unlikely that he committed the particular offense charged”]; *People v Van Gaasbeck*, 189 NY 408, 413-414 [1907].) When the defendant opts to introduce evidence of good character, “such testimony must relate to the traits involved in the charge against him.” (*People v Miller*, 35 NY2d 65, 68 [1974].)

Additionally, the rule as stated recognizes that when the defendant puts his or her character in issue, the People may, in rebuttal, challenge the “good” character or character trait elicited by defendant. (*See e.g. People v Richardson*, 222 NY 103, 107 [1917]; *People v Hinksman*, 192 NY 421, 430-431 [1908].)

Subdivision (1) (c). Paragraph (c) of subdivision (1) is derived from Court of Appeals decisions that when the defendant interposes a justification defense of self-defense, evidence of the victim’s *reputation* for being a violent person and evidence of the victim’s prior violent acts against others, when known to the defendant, are admissible to show the defendant’s state of mind as to the necessity of defending himself or herself (*People v Rodawald*, 177 NY 408, 423 [1904]); and further, that evidence of the victim’s past violent *acts* against others, when known to the defendant, is admissible as to the reasonableness of defendant’s conduct, provided the evidence is reasonably related to the crime charged (*see e.g. Matter of Robert S.*, 52 NY2d 1046 [1981]; *People v Miller*, 39 NY2d 543, 551-552 [1976]).

On the question of who was the “initial aggressor,” *People v Petty* (7 NY3d 277 [2006]) permits evidence of the victim’s threats against the defendant, whether the defendant was aware of the threats or not. That evidence permits an inference of the victim’s “intent” to “act upon [the uttered threats]” and that he or she did so as the initial aggressor (*id.* at 285).

Subdivision (1) (d) notes that when character evidence is admitted for impeachment purposes, it may be admissible under the rules to be set forth in this Guide’s forthcoming article six.

Subdivision (2). This subdivision is derived from the well-established rule in New York that when a person’s character or character trait is admissible it must be proved by reputation testimony as set forth in rule 8.39 (1). Reputation testimony is the only form of proof permitted, and that reputation evidence must relate to the trait or traits involved in the charge against the defendant (*see e.g. People v Miller*, 35 NY2d 65, 68 [1974]; *People v Kuss*, 32 NY2d 436, 443 [1973]; *People v Van Gaasbeck*, 189 NY 408, 413-415 [1907]).

The witness may testify, upon an adequate foundation, that “I have heard the reputation for the relevant character or character trait is good,” or to the fact that since the witness has never heard anything contrary to the relevant character or character trait, defendant’s reputation must be “good.” (*Van Gaasbeck*, 189 NY at 420; *see also People v Bouton*, 50 NY2d 130, 140 [1980] [“And, the fact that the offer consisted solely of ‘negative evidence’—i.e., the absence of adverse comment

on the pertinent aspects of defendant’s character—could not in itself be the basis for an exclusionary ruling”].)

The opinions of those who know defendant personally and have firsthand knowledge of defendant’s character as well as proof of defendant’s commission of specific acts that may implicate the trait are inadmissible (*Van Gaasbeck*, 189 NY at 415-416). The basis for this limitation as stated by the Court of Appeals in *Van Gaasbeck* is that “its admission would lead to the introduction into the case of innumerable collateral issues which could not be tried out without introducing the utmost complication and confusion into the trial, tending to distract the minds of the jurymen and befog the chief issue in litigation” (*id.* at 418).

Additionally, the rule as stated in subdivision (2) recognizes that, when the defendant puts his or her character in issue pursuant to subdivision (1) (b), the People may now, in rebuttal, challenge the “good” character or character trait elicited by defendant. As derived from the common law, the People may introduce reputation evidence that defendant’s reputation for the relevant character or character trait placed in issue is “bad.” (*See e.g. Richardson*, 222 NY at 107; *Hinksman*, 192 NY at 430-431.)

The remaining paragraphs sets forth specific proof rules applicable in limited situations.

Subdivision (2) (a). Paragraph (a) of subdivision (2) is derived from Court of Appeals precedent that, where a person’s character is an element of a crime, charge, claim, or defense, the character may be proved by relevant specific acts. (*See e.g. Mann*, 31 NY2d at 259; *Park*, 155 NY at 219; *Cleghorn*, 56 NY at 46-47.) Although the case law is limited, courts have also permitted the character to be proved by reputation. (*See e.g. Wuensch v Morning Journal Assn.*, 4 App Div 110, 115-117 [1st Dept 1896].) However, the Court of Appeals has held to the contrary in an action where the defendant was alleged to have been negligent in hiring or retaining an incompetent employee. (*See Park*, 155 NY at 218-219 [“We are aware that in some states the courts have permitted incompetency of servants to be shown by general reputation, but we have never gone to that extent in this state. It appears to us that the safer and better rule is to require incompetency to be shown by the specific acts of the servant, and then, that the master knew or ought to have known of such incompetency. The latter may be shown by evidence tending to establish that such incompetency was generally known in the community”].)

It should also be noted that CPL 60.40 (3) states the rule that where a prior criminal conviction is an element of the charged crime, the prior conviction necessary to the proof of the charged crime may be independently proved unless the defendant has availed himself or herself of the procedural protections set forth in CPL 200.60 or CPL 200.63. (See William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, CPL 60.40, at subd three.)

Subdivision (2) (b). Paragraph (b) of subdivision (2) restates CPL 60.40 (2), which provides an additional avenue of proof to rebut the reputation evidence admitted when the defendant puts his or her character in issue pursuant to subdivision (1) (b). (See William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, CPL 60.40, at subd two.)

Subdivision (3). This subdivision is derived from Court of Appeals precedent which holds that the witness providing reputation testimony may be asked on cross-examination whether the witness has heard about particular events that are derogatory to the reputation testified to by the witness. (*People v Kuss*, 32 NY2d 436, 443 [1973] [(I)t is well established that they may be asked as to the existence of rumors or reports of particular acts allegedly committed by the defendant which are inconsistent with the reputation they have attributed to him"].) Specifically, the witness may only be asked whether the witness heard of the event and not whether the witness has personal knowledge of such an event. (*People v Kennedy*, 47 NY2d 196, 206 [1979] [“Assuming, *arguendo*, that Mrs. Kennedy did indeed serve as a character witness, any impeachment cross-examination should have been limited to her knowledge of defendant's reputation, and should not have extended to her personal knowledge of the underlying acts"].) In *Kuss*, the Court emphasized that there are certain limitations, namely, “[t]he inquiry cannot be used to prove the truth of the rumors, but only to show the ability of the witness to accurately reflect the defendant's reputation in the community. And the prosecutor must act in good faith; there must be some basis for his questions.” (*Kuss*, 32 NY2d at 443.)

And, if the witness is solely a character witness, he or she may not be questioned about the crimes or underlying conduct of the crimes of which the defendant is accused. (*People v Lopez*, 67 AD2d 624, 624 [1st Dept 1979] [“The district attorney also should not have asked defendant's character witness whether he would change his opinion of defendant's character if he heard that defendant had committed a cold-blooded murder, obviously referring to the case on trial. The question improperly assumed that the defendant was guilty of the crime with which he was charged, the very issue toward the determination of which the character

evidence was offered”]; *People v Lowery*, 214 AD2d 684, 685 [2d Dept 1995], *mod on other grounds* 88 NY2d 172 [1996] [“We agree with the defendant that the prosecutor’s cross-examination of a defense character witness exceeded the bounds of propriety insofar as the prosecutor utilized hypothetical questions which assumed the defendant’s guilt of the crimes for which he was on trial”]; *People v Gandy*, 152 AD2d 909, 909 [4th Dept 1989] [“The court erred in permitting the People to cross-examine defendant’s character witnesses concerning whether their opinions of defendant’s reputation would change if they knew that defendant had committed the crimes at issue”].)

4.13. Habit

Habit of a person or routine practice of an organization is a deliberate and repetitive practice by a person or organization in complete control of the circumstances under which the practice occurs (as opposed to conduct however frequent yet likely to vary from time to time depending on the circumstances). Evidence of a person’s habit or an organization’s routine practice is admissible to prove that the person or organization acted in conformity with that habit on a particular occasion.

Note

This rule sets forth New York’s habit and routine practice rule as established by Court of Appeals decisions.

The definition of habit of a person and regular practice of an organization contained in the first sentence is derived from *Halloran v Virginia Chems.* (41 NY2d 386, 389, 392 [1977] [mechanic’s practice of heating cans of Freon before transferring the gas to automobile air conditioning systems constituted admissible habit evidence as proof showed it was “a deliberate and repetitive practice” by a person “in complete control of the circumstances” as opposed to “conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstances”]); *Ferrer v Harris* (55 NY2d 285, 294 [1982] [evidence that mother had told her daughter not to cross the street without looking for cars was not admissible as habit evidence because the plaintiff made no showing of “a persistent habit or regular usage by one in control of the circumstances in which it is employed”]); and *Rivera v Anilesh* (8 NY3d 627, 635-636 [2007] [dentist’s pre-extraction injection procedure which would not vary from patient to patient constituted admissible habit evidence as the record established it was a “ ‘deliberate and repetitive practice’—the mundane administration of a local anesthetic prior to a relatively routine tooth extraction—by a trained, experienced professional ‘in complete control of the circumstances’ ”]).

The rule’s second sentence, as derived from several Court of Appeals decisions, provides that evidence of a person’s habit or an organization’s routine practice is admissible to prove that the habit or routine practice was followed on the occasion in issue. (*E.g. Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 508-509 [2015] [billing company’s regular office practices and procedures in handling no-fault claims to prove claims had been mailed]; *Rivera*, 8 NY3d at 635; *Halloran*, 41 NY2d at 392; *Beakes v DaCunha*, 126 NY 293, 298 [1891] [habit of being home on a specific day of the month to transact a specified

business]; *Matter of Kellum*, 52 NY 517, 519-520 [1873] [attorney's routine practice regarding execution of wills to prove proper execution of will].) As stated by the Court in *Halloran*: "[E]vidence of habit has, since the days of the common-law reports, generally been admissible to prove conformity on specified occasions" because "one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again" (41 NY2d at 391).

Of note, the Court of Appeals initially appeared disinclined to accept habit evidence in negligence cases. (See *Eppendorf v Brooklyn City & Newton R.R. Co.*, 69 NY 195, 197 [1877] [evidence of a plaintiff's habit of jumping on streetcars was not admissible to prove he was negligent on the day of the accident]; *Zucker v Whitridge*, 205 NY 50, 58-66 [1912] [proof that the deceased had usually looked both ways before crossing railroad tracks was not admissible to establish his care on the particular occasion].) *Halloran*, however, found that a "statement that evidence of habit or regular usage is never admissible to establish negligence is too broad" (41 NY2d at 392; see also *Ferrer v Harris*, 55 NY2d 285, 294 [1982] [acknowledging that *Halloran* "indicated support for less dogmatic adherence" to the exclusion of habit evidence in negligence cases]).

Rather, as explained in *Halloran*, "[W]here the issue involves proof of a deliberate and repetitive practice, a party should be able, by introducing evidence of such habit or regular usage, to allow the inference of its persistence, and hence negligence on a particular occasion. Far less likely to vary with the attendant circumstances, such repetitive conduct is more predictive than the frequency (or rarity) of jumping on streetcars or exercising stop-look-and-listen caution in crossing railroad tracks" (*Halloran*, 41 NY2d at 392 [citations omitted]; accord *Rivera v Anilesh*, 8 NY3d 627 [2007]).

Thus, in *Halloran*, a personal injury products liability action brought by a mechanic who sustained an injury in the use of the product, the Court authorized habit evidence of the plaintiff mechanic's habit in the use of that product which permitted an inference that he was negligent in its use. In *Rivera*, a patient sued her dentist in a malpractice action, and the Court allowed the dentist to offer habit evidence relating to her "routine procedure for administering injections of anesthesia" to show that she had not committed malpractice (8 NY3d at 635).

Before proof of habit or routine practice is admitted, the party offering the proof must "show on *voir dire* . . . that [the party] expects to prove a sufficient number of instances of the conduct in question" (*Halloran*, 41 NY2d at 392). In *Halloran*, for example, "[i]f defendant's witness was prepared to testify to seeing Halloran using an immersion coil [in servicing automobile air conditioner units] on only one occasion, exclusion was proper. If, on the other hand, plaintiff was seen a sufficient number of times, and it is preferable that defendant be able to fix, at least generally, the times and places of such occurrences, a finding of habit or regular usage would be warranted and the evidence admissible for the jury's consideration"

(*id.* at 392-393). And, while at one point decision law was unclear whether habit evidence was admissible only when there were no eyewitnesses to the conduct in issue (*see e.g. Zucker*, 205 NY at 58), recent decisions permit habit evidence regardless of whether eyewitnesses are available (*Rivera*, 8 NY3d at 635; *Halloran*, 41 NY2d at 390-391).

4.15. Liability Insurance

Evidence that a person was or was not insured against liability:

(1) is not admissible to prove that the person acted negligently or otherwise wrongfully or that the person should be held strictly liable, or to establish damages;

(2) is admissible to prove some other fact relevant to a material issue, such as agency, ownership or control over premises where the accident occurred or the instrumentality that caused the accident, or bias or prejudice of a witness.

Note

This rule is derived from well settled New York law governing the admissibility of evidence as to whether a person is or is not insured against liability.

As set forth in subdivision (1), such evidence is inadmissible when offered on the issue of whether an insured acted negligently or otherwise wrongfully or should be held strictly liable. (*See e.g. Salm v Moses*, 13 NY3d 816, 817 [2009] [“(e)vidence that a defendant carries liability insurance is generally inadmissible”]; *Leotta v Plessinger*, 8 NY2d 449, 461 [1960] [“(o)rdinarily whether a defendant has or has not obtained insurance is irrelevant to the issues, and, since highly prejudicial, therefore, inadmissible”]; *Simpson v Foundation Co.*, 201 NY 479, 490-491 [1911] [it was improper for plaintiff’s counsel to ask questions suggesting to the jury that the defendant was insured in order to induce the jury to give a larger verdict]; *see also Rendo v Schermerhorn*, 24 AD2d 773, 773 [3d Dept 1965] [“we cannot condone the obvious reference to the lack of defendants’ insurance coverage contained in defense counsel’s summation, a fact which in the circumstances here may very well have engendered sympathy in the jurors’ minds”].)

As stated by the Court of Appeals in *Salm*, excluding evidence of insurance coverage on the issue of liability is premised on two reasons:

“First, ‘it might make it much easier to find an adverse verdict if the jury understood that an insurance company would be compelled to pay the verdict.’ Second, evidence of liability insurance injects a collateral issue into the trial that is not relevant as to whether the insured acted negligently. Although we have acknowledged that liability insurance has increasingly become more prevalent and that, consequently, jurors are now more likely to be aware of the

possibility of insurance coverage, we have continued to recognize the potential for prejudice.” (*Salm*, 13 NY3d at 817-818 [citations excluded].)

Subdivision (2) recognizes that New York law does not exclude evidence of insurance coverage or lack of insurance when the evidence is offered for a purpose other than to establish liability or fault, such as to establish ownership or control over the premises where the accident occurred or the instrumentality that caused the accident (*see Leotta v Plessinger*, 8 NY2d 449, 462 [1960]), or to show bias or interest on the part of a witness. (*Salm*, 13 NY3d at 818.) The enumeration of potential admissible purposes is illustrative and not exclusive. When such evidence is admissible, however, the Court of Appeals has specifically cautioned that the trial court may exclude the evidence if it determines the risk of confusion or prejudice outweighs its probative value. (*Salm*, 13 NY3d at 818.)

4.16. Offers to Compromise (CPLR 4547)

Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages.

Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this rule shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations.

Furthermore, the exclusion established by this rule shall not limit the admissibility of such evidence when it is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proof of an effort to obstruct a criminal investigation or prosecution.

Note

This rule is verbatim from CPLR 4547. It governs the admissibility of evidence of compromise and settlement and offers to compromise or settle when offered to prove liability or lack thereof or the amount of damages.

CPLR 4547 was enacted in 1998 (L 1998, ch 317, §1). It tracks in large part the language of the original version of Federal Rules of Evidence rule 408 as the legislative intent was to make New York law consistent with that rule as it then existed (Senate Introducer's Mem in Support, Bill Jacket, L 1998, ch 317 at 4). In 2006, however, Federal Rules of Evidence rule 408 was amended to address issues that had split the federal courts regarding its applicability in criminal trials. The amended rule provides for the admissibility in criminal cases of statements made by a party in discussions regarding the compromise of a civil claim by a government agency acting in its regulatory, investigative, or enforcement capacity. However, Federal Rules of Evidence rule 408 makes evidence of a compromise or offers to

compromise civil litigation inadmissible in criminal actions involving the same facts.

The Court of Appeals has not addressed the issue of the applicability of CPLR 4547 in criminal actions. In *People v Newman* (107 AD3d 827 [1st Dept 2013]), the issue was raised but not resolved. In *Newman*, defendant was convicted of grand larceny in the first degree based on his embezzlement of money from the complainants. He argued that the trial court erred in admitting evidence of the written statement and the payments he made to the complainants as such evidence was barred by CPLR 4547. “Assuming, without deciding, that CPLR 4547 applies to criminal trials,” the Court concluded that the statute did not apply because defendant had admitted the embezzlements (*id.* at 828). In *People v Forbes-Haas* (32 Misc 3d 685 [Onondaga County Ct 2011]), a grand larceny in the third degree prosecution based on defendant’s alleged wrongful taking and withholding funds from an escrow account at a bank, the trial court allowed the prosecution to introduce into evidence statements made by the defendant during a settlement conference with employees of the bank, and the settlement agreement between the defendant and the bank. The court held that CPLR 4547 was inapplicable in a criminal action because “the public interest in prosecuting crime outweighs achieving a settlement of civil claims” (*id.* at 688).

4.17. Payment by Joint Tortfeasor [CPLR 4533-b]

(1) In an action for personal injury, injury to property or for wrongful death, any proof as to payment by or settlement with another joint tortfeasor, or one claimed to be a joint tortfeasor, offered by a defendant in mitigation of damages, shall be taken out of the hearing of the jury.

(2) The fact, but not the amount, of a settlement may, however, form a proper basis for impeachment of a testifying witness.

Note

Subdivision (1) restates verbatim CPLR 4533-b, except for the omission of the last sentence of that statute which reads: “The court shall deduct the proper amount, as determined pursuant to section 15-108 of the general obligations law, from the award made by the jury.”

CPLR 4533-b was designed to abrogate decisional law to the extent it was contrary. (*See Livant v Livant*, 18 AD2d 383 [1963], *lv dismissed* 13 NY2d 894 [1963].)

While subdivision (1) prohibits the introduction of evidence of a settlement with a tortfeasor when offered by a defendant in mitigation of damages, the statute does not prohibit, and decisional law allows, as set forth in subdivision (2), the use of such evidence when relevant to impeach a tortfeasor. (*See Maldonado v Cotter*, 256 AD2d 1073, 1075 [4th Dept 1998] [defendants properly cross-examined “the recovery room nurse concerning the fact but not the amount of plaintiff’s settlement with the Hospital, pursuant to which that nurse also was released from liability. ‘It has long been recognized that a prior settlement might well have an impact upon the credibility of a witness called to testify on behalf of a former adverse party’ (*Hill v Arnold*, 226 AD2d 232, 233)’”]; *compare Stevens v Atwal*, 30 AD3d 993, 994 [4th Dept 2006] [while recognizing that a prior settlement may be admissible to impeach a witness, held that on the facts of the case, “the settlements had no bearing on plaintiff’s credibility”].)

4.18. Payment of Medical and Other Expenses

Evidence of offering, promising, or making payment for medical, hospital, or other expenses, such as lost wages, resulting from an injury is not admissible as proof of liability for the injury, but is admissible to prove some other fact relevant to a material issue, such as agency, or ownership or control of an object or premises, or bias or prejudice of a witness.

Note

This rule is derived from established, albeit sparse, New York law governing the admissibility of evidence of a party's post-injury offer to pay the injured party's medical, hospital or other expenses, such as lost wages.

The first portion of the rule that precludes admissibility of the specified post-injury conduct is derived from *Grogan v Dooley* (211 NY 30 [1914, Cardozo, J.]). In *Grogan*, a personal injury action, the trial court permitted plaintiff to prove the defendant offered to pay his wages and medical expenses while he was disabled, viewing the offer as an admission of liability. The Court of Appeals rejected the ruling, holding the evidence had "no such significance." (*Id.* at 31.) Rather, the defendant's offer "should be treated as a humane recognition of an existing necessity" (*id.* at 32); and "[t]he law would be doing wrong to [persons making such offers] and scant service to [recipients of the offers] if it throttled the impulses of benevolence by distorting humane conduct into a confession of wrongdoing." (*Id.*)

While the rule excludes payment and offers of payment of medical and similar expenses, it does not encompass evidence of statements, e.g., opinions or admissions of fault or liability, when made in connection with the payment or offer. Such statements may, however, be inadmissible under Guide to New York Evidence rule 4.05 (Completing and Explaining Writing, Recording, Conversation or Transaction) when made in the context of settling or compromising a matter in dispute.

No New York case has addressed offers to pay property damage.

New York, however, in the second portion of the rule permits admissibility of the specified post-injury conduct when admissible for a purpose other than establishing liability. (See e.g. *Flieg v Levy*, 148 App Div 781, 783 [2d Dept 1912] [ownership of horse alleged to have struck or kicked plaintiff].) The non-liability purposes enumerated are suggested by *Flieg* and by comparable rules that statements or conduct of a party may not be admissible to establish liability for

reasons of policy, but may be admissible for non-liability purposes where such purposes are relevant.

4.19. Subsequent Remedial Measures

Evidence of measures taken after an event, that, if taken before the event, would have made injury or damage less likely to result:

(1) in civil proceedings, is not admissible when offered to prove negligence or culpable conduct in connection with the event or to prove negligent or culpable conduct with respect to a product alleged to be defective.

(2) in civil and criminal proceedings, is admissible to prove some other fact relevant to a material issue, such as ownership or control of an object or premises, feasibility of precautionary measures, or in a products liability proceeding to prove a manufacturing defect by a change in design.

Note

This rule governs the admissibility in civil proceedings of evidence of repairs or other measures, such as a modification, change, or precaution, taken by a party after an event, such as an accident, which if taken before the event would have made injury or damage less likely to result.

The exclusionary aspect of the rule does not necessarily apply in a criminal proceeding. As explained in *People v Thomas* (70 NY2d 823, 825 [1987]), where the defendant was prosecuted for a homicide arising out of the operation of a motor vehicle:

“defendant's proof of subsequent design modifications to his automobile offered in support of his defense that the accident was caused, not by his drinking, but by defects in his motor vehicle . . . should have been permitted. . . . Evidence of postaccident design changes is irrelevant in strict liability or negligence cases when offered to prove negligent design. Here, however, the conduct of the manufacturer or seller in designing the vehicle was not at issue. Rather, consistent with his explanation at the scene of the accident, defendant sought only to prove the existence of a ‘defect’ in his automobile, as part of his defense. Moreover, the policy reasons for not allowing evidence of postaccident repairs or improvements in the civil cases do not apply.” (Citations omitted.)

The rule is derived from well settled New York law. (See e.g. *Caprara v Chrysler Corp.*, 52 NY2d 114, 122 [1981]; *Getty v Town of Hamlin*, 127 NY 636, 638 [1891]; *Corcoran v Village of Peekskill*, 108 NY 151, 155 [1888].) The Court of Appeals in *Caprara* stated the rationale for this exclusionary rule:

“Now reaching the broader and more basic question of the role of postaccident change in this case, we start by reiterating the long accepted proposition that, in a negligence suit, proof of a defendant's postaccident repair or improvement ordinarily is not admissible. The reason for applying this rule of evidence to that kind of case is clear. Since at the heart of such an action is either affirmative conduct in creating a dangerous condition or a failure to perceive a foreseeable risk and take reasonable steps to avert its consequences, proof that goes to hindsight rather than foresight most often is entirely irrelevant and, at best, of low probative value.” (52 NY2d at 122.)

In strict product liability cases, Court of Appeals decisions make the exclusionary rule applicable in actions based on design defects or failure to warn, but inapplicable in actions based on a manufacturing defect. (See *Haran v Union Carbide Corp.*, 68 NY2d 710, 711-712 [1986] [in a failure to warn action, evidence of a subsequent change in warnings is inadmissible]; *Cover v Cohen*, 61 NY2d 261, 274-275 [1984] [in a *design defect* action, evidence of a subsequent change in design is inadmissible]; *Caprara*, 52 NY2d at 123-126 [in a *manufacturing defect* action, evidence of a subsequent design change is admissible as it tended to show a defect and that it was the cause of the accident].) The rationale for the distinction was explained by Justice Simons in *Rainbow v Elia Bldg. Co.* (79 AD2d 287, 292-293 [4th Dept 1981], *affd on op below* 56 NY2d 550 [1982]):

“Perhaps it is sufficient to note that in *Caprara* the court limited its decision to strict product liability cases involving manufacturing flaws, holding that the exclusionary rule did not apply to them because due care is not a defense in such cases. Clearly distinguishable under present New York law is a strict products liability claim of design defect, based as it is on a balancing of risk and utility factors, and involving considerations of reasonable care.” (Citation omitted.)

Finally, Court of Appeals decisions hold that the exclusionary rule is inapplicable where the evidence of subsequent remedial measures is offered for a non-liability purpose relevant in the action. (See e.g. *Scudero v Campbell*, 288 NY 328 [1942] [ownership]; *Caprara*, 52 NY2d at 122 [in dictum, noting impeachment of a witness would be a permissible purpose]; *Cover*, 61 NY2d at 270; *see also Stolowski v 234 E. 178th St. LLC*, 89 AD3d 549 [2011] [“The records of defendant's post-fire repairs and remedial measures do not fall within any of the recognized exceptions Contrary to plaintiffs' contentions, ‘general credibility

impeachment' is not an exception. Control is not at issue here since defendant concedes that it owns the premises"].)

4.20.1 Possession of Condoms; Receipt into Evidence (CPL 60.47)

Evidence that a person was in possession of one or more condoms may not be admitted at any trial, hearing, or other proceeding in a prosecution for section 230.00 [prostitution] of the Penal Law for the purpose of establishing probable cause for an arrest or proving any person's commission or attempted commission of such offense.

Note

This rule states verbatim (with the addition of the name of the offense in brackets) CPL 60.47.

The statute represents a policy determination that banning the use of condoms in prosecutions of prostitution will “obviate the public health risks attendant to the failure of a person engaged in prostitution to carry or use condoms out of fear that they would be seized and used as evidence” (William C. Donnino, Practice Commentaries, McKinney’s Cons Laws of NY, CPL 60.47).

4.20.3. Consciousness of Guilt

(1) Evidence of post-crime conduct that may in the context of a particular case evince a defendant's consciousness of guilt of the offense with which the defendant is charged is admissible. A consciousness of guilt may, for example, be evinced by a false alibi or explanation for one's actions, intimidation of a witness, destruction or concealment of evidence or flight.

(2) A defendant may introduce evidence of an innocent explanation for the conduct in order to rebut the inference of "consciousness of guilt."

(3) A jury should be advised of the limited probative value of "consciousness of guilt" evidence and must be so advised upon request of the defendant.

Note

Subdivision (1) is derived from a long line of Court of Appeals cases that have authorized the admission of relevant "consciousness of guilt" evidence. (*E.g. People v Bennett*, 79 NY2d 464, 469-470 [1992] ["Certain postcrime conduct is 'indicative of a consciousness of guilt, and hence of guilt itself.' . . . (C)onduct that has been recognized as revealing a guilty mind includes false statements or alibis; coercion or harassment of witnesses; and abandonment or concealment of evidence" (citations omitted)]; *People v Leyra*, 1 NY2d 199, 208 [1956] ["The assertion of false explanations or alibis as well as the destruction or concealment of evidence comes within the broad category of conduct evidencing a 'consciousness of guilt' and, therefore, admissible and relevant on the question of a defendant's guilt"].)

Although "consciousness of guilt" evidence may meet the relevancy test for admissibility in a particular case, New York courts have struggled with the weight a jury should be permitted to attribute to such evidence, and its value in determining the validity of a judgment of conviction. (*See Leyra*, 1 NY2d at 208-209 ["(I)t is difficult to determine from the decisions the precise weight or value to be assigned to (consciousness of guilt evidence) (T)he courts have consistently acknowledged the weakness of this type of evidence . . . where it is not supported by other proof of a truly substantial character"]; *Bennett*, 79 NY2d at 470 ["Consciousness of guilt evidence has consistently been viewed as weak because the connection between the conduct and a guilty mind often is tenuous. Even

innocent persons, fearing wrongful conviction, may flee or lie to extricate themselves from situations that look damning” (citations omitted)].)

“Consciousness of guilt” evidence therefore has been described as being of “slight value” (*People v Reddy*, 261 NY 479, 486 [1933]) and of “limited probative value,” with its probative weight “highly dependent upon the facts of each particular case.” (*People v Cintron*, 95 NY2d 329, 332-333 [2000]; *see* CJI2d[NY] General Applicability, Consciousness of Guilt [“(T)he weight and importance you (the jury) give to th(e) evidence (offered to show consciousness of guilt) depends on the facts of the case. Sometimes such evidence is only of slight value and, standing alone, it may never be the basis for a finding of guilt”].)

“Consciousness of guilt” evidence may provide the necessary corroboration of accomplice testimony. (*People v Ruberto*, 10 NY2d 428, 430 [1962].)

Examples of decisions relating to false statements as “consciousness of guilt” evidence are:

- The defendant’s false statement about finding the deceased’s credit card in a park after he had already used the card evinced a consciousness of guilt “of some crime” (*People v Levine*, 65 NY2d 845, 847 [1985]).
- Defendant’s statements “disclosing a pattern of inconsistent, and sometimes false, exculpatory stories” raised an inference of defendant’s consciousness of guilt (*People v Johnson*, 61 NY2d 932, 934 [1984]).
- The jury was “entitled to find consciousness of guilt if they disbelieved defendant’s explanation for his conduct” (*Cintron*, 95 NY2d at 332).

Before a jury may be charged to consider a consciousness of guilt emanating from a purportedly false alibi or explanation, there must be evidence independent of that offered to prove the defendant’s guilt, that the alibi or explanation is false. (*O’Donnell v State of New York*, 26 AD3d 59, 64 [2d Dept 2005]; *People v Sheiroad*, 124 AD2d 14, 18 [4th Dept 1987]; *People v Lawson*, 112 AD2d 457, 460 [3d Dept 1985]; *People v Abdul-Malik*, 61 AD2d 657, 661[1st Dept 1978].)

Examples of decisions relating to conduct as “consciousness of guilt” evidence are:

- A defendant’s attempt to flee from the police during a high-speed chase and his continued flight on foot after crashing his car allowed for a “reasonable inference that defendant knew that the vehicle was stolen and that he did not have the owner’s consent to operate it.” (*People v Cintron*, 95 NY2d 329, 333 [2000]; *see* *People v Yazum*, 13 NY2d 302, 304 [1963] [evidence of flight is admissible as “consciousness of guilt”

even though a defendant has reason to be in flight from the charged crime and some other crime].)

- “[T]estimony regarding defendant’s attempts to avoid giving an adequate breath sample for alco-sensor testing was properly admitted as evidence of consciousness of guilt” (*People v MacDonald*, 89 NY2d 908, 910 [1996]).
- “Evidence that defendant may have damaged the victim’s electronic devices to prevent her from preserving a record of defendant’s conduct is probative of his consciousness of guilt inasmuch as it is akin to evidence of tampering or witness intimidation” (*People v Cotton*, 184 AD3d 1145, 1146 [4th Dept 2020]).

Examples of evidence that did not warrant an inference of consciousness of guilt are:

- The defendant’s assertion, on being questioned by police, of his right to counsel, did not infer a consciousness of guilt. (*People v Al-Kanani*, 26 NY2d 473, 478 [1970].)
- It was error to introduce evidence of an attempted murder of an eyewitness to the crime as consciousness of guilt when the evidence did not connect the person who made the attempt to the defendant. (*People v McKnight*, 52 NY2d 760 [1980], *rev’d for reasons stated in dissent below* 71 AD2d 801, 802-804 [4th Dept 1979].)
- In an arson prosecution, the defendant’s false statements “regarding efforts to assist others are not inconsistent with his innocence. An innocent person in defendant’s position may have uttered such statements not because of knowledge of his own guilt but because of a misguided desire to gain praise and possibly save his job.” (*People v Marin*, 65 NY2d 741, 746 [1985].)
- Defendant’s attempt to obtain the complainant’s motor vehicle records by false representations did not constitute “consciousness of guilt” evidence in his prosecution for rape of the complainant. (*People v Bennett*, 79 NY2d 464, 470 [1992].)
- Admitting evidence of a “smile” as circumstantial evidence of consciousness of guilt is error. (*People v Harris*, 98 NY2d 452, 492 [2002].)
- The defendant’s resisting arrest six months after the alleged commission of an assault and after violating an order of protection was not admissible as evidence of consciousness of guilt in the assault trial. “The

defendant was not resisting arrest for the crimes charged at trial, and resisting arrest in this instance was too far removed from the underlying incident” and the probative value “was far outweighed by the potential prejudice of creating an inference that the defendant may have violent tendencies” (*People v Ramirez*, 180 AD3d 811, 813 [2d Dept 2020]).

Subdivision (2). New York law is well settled that a trial court not only must exercise care in determining whether proffered evidence constitutes relevant evidence of a “consciousness of guilt,” but also must permit the defense an opportunity to present evidence of an innocent explanation. (*People v Gilmore*, 66 NY2d 863, 867 [1985] [The court erred in preventing the defendant from testifying about what he had learned in his conversation with his mother-in-law that may have motivated his flight other than a consciousness of guilt].)

Subdivision (3). New York law is equally well settled that a court should and must, upon request of the defendant, charge the jury on the limited probative value of “consciousness of guilt” evidence. (E.g. *People v Limage*, 45 NY2d 845 [1978], *affg on mem below* 57 AD2d 906 [2d Dept 1977] [in this case, on request of the defendant, the trial court was required to instruct the jury as to the limited probative value of flight]; *People v Yazum*, 13 NY2d 302, 304 [1963] [“This court has always recognized the ambiguity of evidence of flight and insisted that the jury be closely instructed as to its weakness as an indication of guilt of the crime charged”]; *see* CJI2d[NY] General Applicability, Consciousness of Guilt.)

**4.20. Complainant's Sexual Conduct or Dress
(CPL 60.42; 60.43; 60.48)**

**(1) Admissibility of Evidence of Victim's Sexual
Conduct in Sex Offense Cases [CPL 60.42]**

**Evidence of a victim's sexual conduct shall not be
admissible in a prosecution for an offense or an
attempt to commit an offense defined in article one
hundred thirty of the Penal Law, unless such
evidence:**

**(a) proves or tends to prove specific instances of
the victim's prior sexual conduct with the
accused; or**

**(b) proves or tends to prove that the victim has
been convicted of an offense under section 230.00
of the Penal Law within three years prior to the
sex offense which is the subject of the
prosecution; or**

**(c) rebuts evidence introduced by the People of
the victim's failure to engage in sexual
intercourse, oral sexual conduct, anal sexual
conduct or sexual contact during a given period
of time; or**

**(d) rebuts evidence introduced by the People
which proves or tends to prove that the accused
is the cause of pregnancy or disease of the victim,
or the source of semen found in the victim; or**

**(e) is determined by the court after an offer of
proof by the accused outside the hearing of the
jury, or such hearing as the court may require,
and a statement by the court of its findings of fact
essential to its determination, to be relevant and
admissible in the interests of justice.**

(2) Admissibility of Evidence of Victim's Sexual Conduct in Non-Sex Offense Cases [CPL 60.43]

Evidence of the victim's sexual conduct, including the past sexual conduct of a deceased victim, may not be admitted in a prosecution for any offense, attempt to commit an offense or conspiracy to commit an offense defined in the Penal Law, unless such evidence is determined by the court to be relevant and admissible in the interests of justice, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination.

(3) Admissibility of Evidence of Victim's Manner of Dress in Sex Offense Cases [CPL 60.48]

Evidence of the manner in which the victim was dressed at the time of the commission of an offense may not be admitted in a prosecution for any offense, or an attempt to commit an offense, defined in article one hundred thirty of the Penal Law, unless such evidence is determined by the court to be relevant and admissible in the interests of justice, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination.

Note

Subdivision (1) restates verbatim CPL 60.42 ("Rules of evidence; admissibility of evidence of victim's sexual conduct in sex offense cases").

CPL 60.42, known as the "rape shield law," was enacted in 1975 (L 1975, ch 230, § 1) to address the "concerns that testimony about the sexual past of the victims of sex crimes often serves solely to harass the victim and confuse the jurors . . . At the same time, by providing exceptions to the general evidentiary prohibition of section 60.42, our Legislature acknowledged that there are instances where evidence of a complainant's sexual history might be relevant and admissible. The

exceptions also recognize that any law circumscribing the ability of the accused to defend against criminal charges remains subject to limitation by constitutional guarantees of due process and the right to confront the prosecution's witnesses." (*People v Williams*, 81 NY2d 303, 312 [1993]; *see Michigan v Lucas*, 500 US 145, 146 [1991]; *see also People v Scott*, 16 NY3d 589, 594 [2011] [evidence of a complainant's sexual conduct "must be precluded if it does not tend to establish a defense to the crime because it will only harass the victim and possibly confuse the jurors"]; *People v Halbert*, 80 NY2d 865 [1992] [example of a court appropriately balancing the prohibition and the defense]; *People v Halter*, 19 NY3d 1046 [2012] [same].)

Subdivision (2) restates verbatim CPL 60.43 ("Rules of evidence; admissibility of evidence of victim's sexual conduct in non-sex offense cases"). It was enacted in 1990 (L 1990, ch 832, § 1) and shares the same concerns as CPL 60.42.

Subdivision (3) restates verbatim CPL 60.48 ("Rules of evidence; admissibility of evidence of victim's manner of dress in sex offense cases"). It was enacted in 1994 (L 1994, ch 482, § 1) and also shares the same purpose as the other subdivisions.

4.21.1 Culpability of a Third Party

(1) Evidence of the culpability of a person other than the defendant for the offense for which the defendant is charged is admissible when the probative value of the proffered evidence outweighs any countervailing risks of delay, prejudice, and confusion and is not so remote and speculative that it does not sufficiently connect the third party to the offense.

(2) A defense application to present third-party culpability evidence should be made, in the court's discretion, in writing or orally, at the earliest reasonable opportunity and must include an offer of proof in support of the application and, in particular, explain what evidence the defense would introduce to implicate a third party's culpability for the offense. The People must then have an opportunity to be heard. The court may then conduct any hearing that may be necessary to assess the arguments and, with or without the hearing, render a decision that includes a clear directive as to what evidence, if any, the court will and will not allow.

Note

Subdivision (1) is derived from a series of Court of Appeals cases, the seminal case being *People v Primo* (96 NY2d 351 [2001]).

Primo held that the admissibility of evidence of third-party culpability should be addressed under the “general balancing analysis” of whether the proponent has demonstrated that the proffered evidence has a probative value that outweighs the “countervailing risks of delay, prejudice and confusion.” (*Primo* at 356-357.) “Courts thus have been careful to exclude evidence of third-party culpability that has slight probative value and strong potential for undue prejudice, delay and confusion (see, *Greenfield v People*, [85 NY 75, 89 (1881)] [excluding evidence of ‘(r)emote acts, disconnected and outside of the crime itself’ to prove that someone else is the guilty party] . . .). The admission of evidence of third-party culpability may not rest on mere suspicion or surmise.” (*Primo* at 357.)

That the application of the *Primo* standard may exclude a proffered defense “does not infringe upon a defendant’s constitutional right to present a complete defense as set forth in the Sixth and Fourteenth Amendments.” (*People v Powell*,

27 NY3d 523, 526 [2016].)

The proffered evidence of third-party culpability in *Primo* was a ballistics report that linked a third person to the gun used to shoot the complainant coupled with proof that the third party was at the scene of the shooting. On those facts, *Primo* determined that the “probative value” of the evidence of the culpability of a third party proffered in that case “plainly outweighs the dangers of delay, prejudice and confusion.” (*Primo* at 357.)

Powell (27 NY3d at 531) reinforced *Primo*, holding that “courts should ‘exclude evidence of third-party culpability that has slight probative value and strong potential for undue prejudice, delay and confusion’ or where the evidence is so remote and speculative that it does not sufficiently connect the third party to the crime” (citation omitted).

Given that the proffered evidence of third-party culpability in *Powell* was based on a speculative assertion that “others could have had access to [the deceased’s] home or might have had reason to kill her—the trial court did not abuse its discretion by precluding the proffered evidence (*see People v Gamble*, 18 NY3d 386, 398-399 [2012] [speculative assertions that other unidentified individuals had a motive to harm a victim are insufficient to support admission of third-party culpability evidence]).” (*Powell* at 531-532; *see People v King*, 27 NY3d 147, 158 [2016] [the court properly rejected a defense proffer of a witness to testify to hearsay statements by two unidentified individuals, not including the defendant, that they had a motive to harm the victim]; *cf. Gamble* at 399 [“That the People introduced evidence establishing defendant’s motive for the shootings does not . . . open the door to generalized, speculative evidence of possible motives by unidentifiable persons” (internal quotation marks omitted)].)

Powell made it clear, however, that a third-party culpability claim “does not necessarily require a specific accusation that an identified individual committed the crime. For example, a proffer of an unknown DNA profile may be sufficient.” (*Powell* at 532.)

People v DiPippo (27 NY3d 127, 136 [2016]) followed *Primo*, adding that the absence of “proof directly linking the third party to the *crime scene*” was not necessarily fatal to the introduction of third-party culpability evidence.

On its facts, *DiPippo* found that notwithstanding the absence of proof linking the third party to the “crime scene,” the evidence of a culpable third party was sufficient in that it included a declaration against penal interest by the third party that implicated him in the crime, as well as a showing that the third party had committed other crimes with a unique *modus operandi* that paralleled the crime charged.

With respect to the “modus operandi” evidence, *DiPippo* explained that

“[w]hile unlikely to be sufficient standing alone,” it “is relevant to, and can support, a third-party culpability proffer where the crimes reflect a ‘modus operandi’ connecting the third party to the charged crimes.” (*Id.* at 138; *cf. People v Schulz*, 4 NY3d 521, 528 [2005] [the defendant offered “no evidence which shows a modus operandi”; but only evidence that an identified third party committed the same type of crime in the area of the charged crime and around the time of its occurrence].)

In permitting evidence of third-party culpability, the trial court retains discretion to determine what evidence would be appropriate. (*See Primo* at 357 [the court will “make its determination (of an application to admit third-party culpability) followed by clear directives as to what it will and will not allow”]; *People v Boyd*, 31 NY3d 953, 955 [2018] [where the defense was permitted to pursue a third-party culpability defense, the court did not abuse its discretion by refusing to admit in evidence facts concerning the arrest of the third party (who had inculcated himself and later recanted)]; *People v Hemphill*, 35 NY3d 1035, 1036 [2020] [where the defense presented a third-party culpability defense, “the trial court did not abuse its discretion by admitting evidence that the allegedly culpable third party pleaded guilty to possessing a firearm other than the murder weapon”].)

Subdivision (2) is derived from *Primo* (at 357):

“In practice, the balancing [of whether the probative value outweighs the countervailing risks] is best performed by requiring the defense, at the earliest reasonable opportunity, to make an offer of proof outside the presence of the jury to explain how it would introduce evidence of third-party culpability. The court will then hear any counter-arguments from the prosecutor, weigh the considerations, and make its determination followed by clear directives as to what it will and will not allow.”

4.21. Evidence of Crimes and Wrongs (*Molineux*)

(1) Evidence of crimes, wrongs, or other acts committed by a person is not admissible to prove that the person acted in conformity therewith on a particular occasion or had a propensity to engage in a wrongful act or acts. This evidence may be admissible when it is more probative than prejudicial to prove, for example:

motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or conduct that is inextricably interwoven with the charged acts; or to provide necessary background information or explanation; or to complete the narrative of the subject event or matter.

(2) In a criminal proceeding, where the defendant interposes a defense, the People on rebuttal may prove the defendant's commission of other crimes or wrongs when such crimes or wrongs are relevant and probative to disprove the defense.

Note

Subdivision (1). This rule sets forth what is generally known as the *Molineux* rule, after the seminal case of *People v Molineux* (168 NY 264 [1901]).

The first sentence sets forth the general rule, applicable in both civil and criminal proceedings, that when evidence of other crimes, wrongs or acts committed by a person is offered for the purpose of raising an inference that the person is likely to have committed the crime charged or the act in issue, the evidence is inadmissible. (*Molineux*, 168 NY at 291-293; *People v Morris*, 21 NY3d 588, 594 [2013] [(E)vvidence of uncharged crimes is inadmissible where its purpose is only to show a defendant's bad character or propensity towards crime"]; *People v Bradley*, 20 NY3d 128, 135 [2012] ["Without some better developed theory of relevance," evidence of a stabbing incident more than 10 years before defendant fatally stabbed her estranged boyfriend was "resonant solely for what (it) seemed to disclose about defendant's violent propensity and the manner of its expression"]; *Matter of Brandon*, 55 NY2d 206, 210-211 [1982] ["A general rule of evidence, applicable in both civil and criminal cases, is that it is improper to

prove that a person did an act on a particular occasion by showing that he did a similar act on a different, unrelated occasion”]; *People v Vargas*, 88 NY2d 856 [1996] [Where only the credibility of the complainant and the credibility of the defendant were at issue on whether there was a forcible or consensual sex act, evidence of the defendant having engaged in sexual misconduct with others was impermissible evidence of propensity, not probative evidence of intent].)

As explained in *People v Frumusa* (29 NY3d 364, 369 [2017]):

“The *Molineux* rule ‘ “is based on policy and not on logic.” ’ ‘It may be logical to conclude from a defendant’s prior crimes that he is inclined to act criminally, but such evidence “is excluded for policy reasons because it may induce the jury to base a finding of guilt on collateral matters or to convict a defendant because of his past” ’ ” (citations omitted).

The second sentence sets forth exceptions to the exclusionary rule recognized by the Court of Appeals. The exceptions relate to circumstances where the evidence of other crimes, wrongs, or acts is offered for a non-conformity purpose that is relevant in the proceeding. These exceptions are available in both civil and criminal proceedings. (See *Matter of Brandon*, 55 NY2d at 210-211; *Mazella v Beals*, 27 NY3d 694, 709-710 [2016].)

In *Molineux*, the Court listed examples of uncharged crimes that may be relevant to show (1) intent, (2) motive, (3) knowledge, (4) common scheme or plan, or (5) identity of the defendant (168 NY at 293). This enumeration is “merely illustrative” (*People v Vails*, 43 NY2d 364, 368 [1977]) and not intended to be “exhaustive” of the possible range of relevancy (*People v Santarelli*, 49 NY2d 241, 248 [1980]). The Court has continued to add to this enumeration. (See *People v Stanard*, 32 NY2d 143, 146 [1973] [“background evidence”]; *People v Cook*, 42 NY2d 204, 208 [1977] [“ ‘to complete the narrative’ ”]; *People v Vails*, 43 NY2d 364, 368 [1977].)

Even when evidence of other crimes, wrongs, or acts is admissible for such a non-conformity purpose, the court must weigh the evidence’s probative value against its prejudicial impact before admitting the evidence and may exclude the evidence in its discretion. (See Guide to NY Evid rule 4.07; *People v Alvino*, 71 NY2d 233, 241-242 [1987]; *People v Ventimiglia*, 52 NY2d 350, 360 [1981].)

In *People v Robinson* (68 NY2d 541, 544-545 [1986]), the Court of Appeals held the People must show by clear and convincing evidence that the defendant committed the other crimes in order to admit evidence under the identity exception.

In its discretion, a trial court may conduct an inquiry or hearing, outside the presence of the jury, to determine admissibility, and in particular whether there is sufficient evidence of the *Molineux* exception. A defendant in a criminal

prosecution is entitled to pretrial discovery of any misconduct and criminal acts of the defendant which the prosecution intends to use at trial as “substantive proof” of any material issue in the case. (CPL 245.20[3].)

Preliminary evidence of a *Molineux* exception may be admitted pursuant to rule 4.05 of the Guide to New York Evidence (Conditional Relevance [Evidence Offered “Subject to Connection”]). (See *People v Small*, 12 NY3d 732, 733 [2009] [mid-trial grant of the People’s application to introduce *Molineux* evidence to rebut the defendant’s defense was proper]; *People v Ventimiglia*, 52 NY2d 350, 362 [1981] [prior to trial or the testimony of the *Molineux* witness “the prosecutor should ask for a ruling out of the presence of the jury at which the evidence to be produced can be detailed to the court, either as an offer of proof by counsel or, preferably, by presenting the live testimony of the witness”].) Nothing precludes a court from itself requiring a party to advise the court, orally or in writing, of a prospective trial application to admit *Molineux* evidence and conducting any necessary and appropriate proceeding to determine the matter.

It should be noted that in certain instances, a prior criminal conviction or conduct may be required proof of a criminal charge.

In instances where a prior criminal conviction must be proved, statutory law may permit a defendant to admit the prior criminal conviction outside the presence of the jury in order to preclude the People from offering proof of that conviction at trial (CPL 200.60, 200.63). The principles of *Molineux* set forth in this rule may, however, yet permit the People to prove the conviction (*People v Anderson*, 114 AD3d 1083, 1086 [3d Dept 2014]).

In a conspiracy case, an overt act must be alleged and proved to have been committed in furtherance of the conspiracy (Penal Law § 105.20). That overt act may constitute an uncharged crime. And, the Court of Appeals has held that an “indictment for conspiracy need not allege every overt act . . . If the indictment provides sufficient detail about the scope and nature of the conspiracy and the major overt acts committed in furtherance of it, then evidence may be offered at trial of related [non-enumerated] overt acts” (*People v Ribowsky*, 77 NY2d 284, 292-293 [1991] [citations omitted]), even if those overt acts include uncharged crimes (*People v Portis*, 129 AD3d 1300, 1302 [3d Dept 2015]; *People v Snagg*, 35 AD3d 1287, 1288 [4th Dept 2006]; *People v Morales*, 309 AD2d 1065 [3d Dept 2003]; *People v McKnight*, 281 AD2d 293 [1st Dept 2001]). While such overt acts are not subject to exclusion pursuant to the *Molineux* rule, their admissibility, as with all forms of evidence, may be subject to rule 1.07 of the Guide to New York Evidence (Exclusion of Relevant Evidence). It may therefore be advisable and the better practice (as it is for *Molineux* evidence) for a court to require that it be informed before the commencement of trial of any unenumerated overt acts the People intend to prove.

Subdivision (2). The rule in this subdivision is derived from several Court of Appeals decisions which permit evidence of a defendant's commission of other crimes or wrongs to rebut a defense raised by the defendant. (*See e.g. People v Israel*, 26 NY3d 236, 242-243 [2015] [rebuttal of extreme emotional distress disturbance]; *People v Santarelli*, 49 NY2d 241, 248 [1980] [rebuttal of insanity defense]; *People v Calvano*, 30 NY2d 199 [1972] [rebuttal of entrapment defense].)

Notably, in *People v Valentin* (29 NY3d 150 [2017]) where the defendant did not present evidence of an agency defense, but rather interposed the defense based on the People's evidence, the People were entitled to prove the defendant's prior conviction for a drug sale on the issue of his intent to sell.

4.22. Evidence of Destroyed Drugs (CPL 60.70)

(1) The destruction of dangerous drugs, pursuant to the provisions of CPL article 715, shall not preclude the admission on trial or in a proceeding in connection therewith of testimony or evidence where such testimony or evidence would otherwise have been admissible if such drugs had not been destroyed.

(2) Notwithstanding subdivision one, the failure to follow CPL article 715 does not preclude admission of testimony as to the nature and amount of the drugs seized if the prosecution has sufficiently explained the destruction, the drugs were not destroyed in bad faith, and the defendant is not prejudiced.

Note

Subdivision (1) restates verbatim CPL 60.70, except where the statutory language refers to “article seven hundred fifteen hereof,” this rule inserts the appropriate reference, namely, “CPL article 715.”

Subdivision (2) assumes that the normal prerequisites to the admissibility of drugs, such as chain of custody, can be met but that at some point the drugs themselves have been destroyed. In that instance, *People v Reed* (44 NY2d 799 [1978]) allows for testimony about the drugs if the criteria stated in the rule are fulfilled:

“[T]he destruction of the contraband by the police custodian was due to a clerical error which led him to reasonably believe that the case had been dismissed. The prosecution has thus sufficiently explained the destruction, and there is no indication and, indeed, no claim of bad faith. Additionally significant is the absence of any prejudice to the defendant as a result of the destruction of the substance prior to trial. . . . [T]he drugs were available to defendant for independent analysis or measurement for nearly two years, and were not destroyed until just prior to trial. At no time during this long period that the police had the substance did defendant seek to have the drugs examined; instead, he simply requested a copy of the police laboratory report. In light of these facts, the decision to allow testimony as to the nature and amount of the material seized did not constitute error” (*Reed* at 800-801).

4.23. Drugs or Alcohol in Blood (VTL 1195 & CPL 60.75)

(1) Upon the trial of any action or proceeding arising out of actions alleged to have been committed by any person arrested for a violation of any subdivision of section eleven hundred ninety-two of [the Vehicle and Traffic Law], the court shall admit evidence of the amount of alcohol or drugs in the defendant's blood as shown by a test administered pursuant to the provisions of section eleven hundred ninety-four of [the Vehicle and Traffic Law].

(2) In any prosecution where two or more offenses against the same defendant are properly joined in one indictment or charged in two accusatory instruments properly consolidated for trial purposes and where one such offense charges a violation of any subdivision of section eleven hundred ninety-two of the vehicle and traffic law [Operating a Motor Vehicle While Under the Influence of Alcohol or Drugs], chemical test evidence properly admissible as evidence of intoxication under subdivision one of section eleven hundred ninety-five of such law [Chemical Test Evidence] shall also, if relevant, be received in evidence with regard to the remaining charges in the indictments.

(3) This rule does not preclude the admission in any proceeding of evidence of the amount of alcohol or drugs in a person's blood, if legally obtained and relevant, notwithstanding the absence of any charge under the Vehicle and Traffic Law.

Note

Subdivision (1) restates Vehicle and Traffic Law § 1195 (1) except that the words “the Vehicle and Traffic Law” in brackets are substituted for “of this article.” By its terms, it applies to any “action or proceeding,” civil or criminal (*People v Ladd*, 89 NY2d 893, 896 [1996]).

Subdivision (2) restates Criminal Procedure Law § 60.75, except for the bracketed material. It applies to a criminal action, but as *Ladd* explains does not preempt application of the rule in subdivision (1):

“CPL 60.75 provides that when Vehicle and Traffic Law charges and Penal Law charges are tried together the evidence obtained pursuant to section 1194 of the Vehicle and Traffic Law is admissible as to both charges. The statute was enacted to remove any doubts arising from our holding in *People v Moselle* (57 NY2d 97 [1982]), that when charges from the two chapters were joined the test results were not admissible with respect to the Penal Law charges. Section 60.75 does not limit the use of blood test results to prosecutions under the Vehicle and Traffic Law or to prosecutions linking Vehicle and Traffic Law and Penal Law offenses. Indeed, section 1195 (1) of the Vehicle and Traffic Law provides that blood test results are admissible at the trial of ‘any action or proceeding’ arising out of a factual basis for a driving while intoxicated arrest. The evidence, if legally obtained and relevant, should be admissible in Penal Law prosecutions, notwithstanding the absence of any charge under the Vehicle and Traffic Law” (*Ladd*, 89 NY2d at 896).

Subdivision (3) is derived from the rule on “relevant evidence” (Guide to NY Evid rule 4.01 [2]) and *Ladd* (89 NY2d at 896).

4.24.1 Effect of Intoxication upon Liability [Penal Law §§ 15.25, 15.05 (3)]

In any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged except if the culpable mental state of the offense is “recklessly.” In that instance, a person who creates a substantial and unjustifiable risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

Note

The rule incorporates Penal Law § 15.25 (Effect of intoxication upon liability) and the exception set forth in Penal Law § 15.05 (3) (Culpability; definitions of culpable mental states).

Penal Law § 15.25 states the general rule that “[i]ntoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged.” Normally, the “element” that intoxication may negate is the actor’s culpable mental state (*see People v Newton*, 8 NY3d 460 [2007]).

The exception for the culpable mental state of “recklessly” is set forth in Penal Law § 15.05 (3) (*see People v Register*, 60 NY2d 270, 280 [1983], *overruled on other grounds People v Feingold*, 7 NY3d 288 [2006]).

The Court of Appeals has not decided whether intoxication may negate the element of “depraved indifference to human life,” declared a culpable mental state by *Feingold* and included in the definition of crimes that also require a defendant to act recklessly (*compare People v Wimes*, 49 AD3d 1286, 1287 [4th Dept 2008] [finding that intoxication could have negated the element of “depraved indifference” to human life], *and People v Coon*, 34 AD3d 869, 870 [3d Dept 2006] [finding that intoxication by crack cocaine negated “depraved indifference” to human life], *with People v Wells*, 53 AD3d 181, 193 [1st Dept 2008] [in dicta, the Court opined that intoxication was not a defense because in its view “culpability (for depraved indifference murder) is appropriately assessed at the time defendant made the conscious decision to embark on a course of conduct that inevitably resulted in his operation of a motor vehicle while in a state of extreme intoxication”]; *see also People v Lessey*, 40 Misc 3d 530 [Sup Ct, NY County 2013]).

Whether the evidence is sufficient to warrant an instruction to the finder of fact to consider the effect of intoxication on a defendant’s mental state depends on

such factors as: “the number of drinks, the period of time during which they were consumed, the lapse of time between consumption and the event at issue, whether the defendant consumed them on an empty stomach, whether the drinks were high in alcoholic content, and the specific impact of the alcohol upon the defendant’s behavior or mental state. *People v. Gaines*, 83 N.Y.2d 925, 615 N.Y.S.2d 309, 638 N.E.2d 954 (1994) (the defendant’s testimony that he had a couple of drinks and may have lost control, and the testimony of witnesses that the defendant was ‘high’ and had glassy eyes and alcohol on his breath was insufficient to warrant a charge on intoxication); *People v. Rodriguez*, 76 N.Y.2d 918, 563 N.Y.S.2d 48, 564 N.E.2d 658 (1990) (since there was no evidence as to when the defendant ingested the narcotics, the quantity ingested or the effect they had on him, a charge on intoxication was not warranted)” (William C. Donnino, Practice Commentary, McKinney’s Cons Laws of NY, Penal Law § 15.25).

Given the requisite showing, a defendant is entitled to the jury instruction: “[I]n determining whether the defendant had the (specify, e.g. intent and/or knowledge), necessary to commit a crime you may consider whether the defendant’s mind was affected by intoxicants to such a degree that he/she was incapable of forming the (specify, e.g. intent and/or knowledge) necessary for the commission of that crime” (CJI2d[NY] General Applicability, Defenses, Intoxication).

4.24. Identification of a Defendant

Part I. Definition of blind or blinded procedure [CPL 60.25 (1) (C)]

For purposes of this section, a “blind or blinded procedure” is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproduction under circumstances where, at the time the identification is made, the public servant administering such procedure: (i) does not know which person in the array is the suspect, or (ii) does not know where the suspect is in the array viewed by the witness.

Part II. Identification by means of previous recognition, in addition to present identification [CPL 60.30]

(1) In any criminal proceeding in which the defendant’s commission of an offense is in issue, a witness who testifies that (a) he or she observed the person claimed by the People to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case, and (b) on the basis of present recollection, the defendant is the person in question, and (c) on a subsequent occasion he or she observed the defendant, or, where the observation is made pursuant to a blind or blinded procedure as defined in [part I of this rule], a pictorial, photographic, electronic, filmed or video recorded reproduction of the defendant, under circumstances consistent with such rights as an accused person may derive under the Constitution of this State or of the United States, and then also recognized him or her (the defendant) or the pictorial, photographic, electronic, filmed or video recorded reproduction of him or her as the same

person whom he or she had observed on the first or incriminating occasion, may, in addition to making an identification of the defendant at the criminal proceeding on the basis of present recollection as the person whom he or she (the witness) observed on the first or incriminating occasion, also describe his or her previous recognition of the defendant and testify that the person whom he or she observed or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed on such second occasion is the same person whom he or she had observed on the first or incriminating occasion. Such testimony and such pictorial, photographic, electronic, filmed or video recorded reproduction constitutes evidence-in-chief.

Part III. Identification by means of previous recognition, in absence of present identification [CPL 60.25]

(1) In any criminal proceeding in which the defendant's commission of an offense is in issue, testimony as provided in subdivision two may be given by a witness when:

(a) Such witness testifies that:

(i) He or she observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case; and

(ii) On a subsequent occasion he or she observed, under circumstances consistent with such rights as an accused person may derive under

the Constitution of this State or of the United States, a person or, where the observation is made pursuant to a blind or blinded procedure as defined in [part I of this rule], a pictorial, photographic, electronic, filmed or video recorded reproduction of a person whom he or she recognized as the same person whom he or she had observed on the first or incriminating occasion; and

(iii) He or she is unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question; and

(b) It is established that the defendant is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction the witness observed and recognized on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his or her recognition on such occasion and by such pictorial, photographic, electronic, filmed or video recorded reproduction.

(2) Under circumstances prescribed in subdivision one of this section, such witness may testify at the criminal proceeding that the person whom he or she observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion is the same person whom he or she observed on the first or incriminating occasion. Such

testimony, together with the evidence that the defendant is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion, constitutes evidence-in-chief.

Note

Part I is a verbatim reproduction of CPL 60.25 (1) (c), which applies to that section and by a cross-reference to CPL 60.30. At the end of the definition of “blind or blinded procedure,” the statute continues as follows:

“The failure of a public servant to follow such a procedure shall be assessed solely for purposes of this article and shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not constitute a legal basis to suppress evidence made pursuant to subdivision six of section 710.20 of this chapter. This article neither limits nor expands subdivision six of section 710.20 of this chapter.” (CPL 60.25 [1] [c].)

Part II is a verbatim reproduction of CPL 60.30.

Part III is a verbatim reproduction of CPL 60.25.

Consistent with the constitutional and statutory procedures, a witness may testify to (1) an in-court identification of a defendant that is relevant to the offense charged and that is based on present recollection at the time of the in-court identification and (2) his or her recognition of the defendant made at a relevant time prior to testifying based upon a personal viewing of the defendant or the viewing of a pictorial, photographic, electronic, filmed, or video recorded reproduction of the defendant.

If a witness cannot on the basis of present recollection make an in-court identification, consistent with the constitutional and statutory procedures, the witness may testify to his or her identification of the defendant that is relevant to the offense charged and that was made at a relevant time before testifying based upon a personal viewing of the defendant or the viewing of a pictorial, photographic, electronic, filmed, or video recorded reproduction of the defendant; provided, there is independent proof that the person viewed personally or by a pictorial, photographic, electronic, filmed or video recorded reproduction was the defendant.

4.25. Evidence of Plea and Ancillary Statements

(1) When a plea of guilty is withdrawn or vacated, evidence of that plea and any statement made in the course of entering that plea:

(a) is not admissible in a criminal proceeding against the person who entered the plea;

(b) is admissible in a civil proceeding against the person who entered the plea, provided that the vacatur was not based upon a violation of due process.

(2) A defendant's statement made on advice of counsel to a prosecutor for the purpose of obtaining a beneficial disposition of the defendant's case is, in the absence of the agreed upon disposition, admissible against the defendant in a subsequent trial, provided the trial is not the consequence of the prosecutor's improper breach of the agreement and provided the parties did not otherwise expressly agree.

Note

Subdivision (1). Subdivision (1) (a) is derived from *People v Spitaleri* (9 NY2d 168 [1961]). In *Spitaleri*, the Court of Appeals held a withdrawn guilty plea is “out of the case forever and for all purposes.” (*Id.* at 173.) Thus, once a guilty plea is withdrawn, neither the fact of the plea nor the contents of the plea may be subsequently used at a trial by the prosecuting authority as evidence in chief or to impeach a defendant who testifies. (*People v Moore*, 66 NY2d 1028, 1030 [1985].) As acknowledged by the Court of Appeals, the *Spitaleri* rule is not constitutionally or statutorily compelled and rests upon the principle that “it would be unfair to allow a defendant to withdraw a plea of guilty and then permit its use against him [or her] at trial.” (*People v Evans*, 58 NY2d 14, 22 [1982].)

Subdivision (1) (b), as derived from *Cohens v Hess* (92 NY2d 511 [1998]), recognizes that the *Spitaleri* rule does not apply in civil proceedings. Thus, when the vacatur of a defendant's plea is not based upon any violation of due process in the taking of the guilty plea, it is admissible in a civil proceeding. (*Cohens v Hess*, 92 NY2d at 515.)

For the purposes of this rule, a plea of guilty includes an *Alford* plea; that is, a plea entered pursuant to *North Carolina v Alford* (400 US 25 [1970]). In an *Alford* plea, the defendant enters a plea of guilty without admitting factual guilt of the offense but in the face of strong evidence of guilt, often to avoid the consequences of a conviction of a more serious offense. (*Id.* at 472, 475.) The Supreme Court held such a plea is not constitutionally proscribed, and “may generally be used for the same purposes as any other conviction.” (*Id.* at 475.) New York recognizes the validity of an *Alford* plea, and the Court of Appeals has held that it has the same consequences as a plea that admits factual guilt. (See *Matter of Silmon v Travis*, 95 NY2d 470, 475 [2000].)

Subdivision (2). Subdivision (2) is derived from *People v Evans* (58 NY2d 14 [1982]) and *People v Curdgel* (83 NY2d 862 [1994]). In both cases, the defendant, in pursuit of a favorable plea agreement and upon the advice and in the presence of counsel, voluntarily furnished the prosecutor with an incriminating statement. In *Evans* the defendant agreed to testify in two trials against an accomplice, and in *Curdgel* the defendant agreed to testify in the grand jury against his accomplices. Before testifying in the grand jury, Curdgel signed a waiver of immunity.

Although for different reasons, each defendant ultimately went to trial—*Evans*, because his conviction upon his plea was reversed for unrelated reasons; and *Curdgel*, because he breached the plea agreement by publicly contradicting his testimony. At *Evans*’s trial, the People were permitted to use against him his statements to the prosecutor and his testimony at the accomplice’s trials; at *Curdgel*’s trial, the People were permitted to use his grand jury testimony against him.

The plea agreements in *Evans* and *Curdgel* did not include a condition that the statements or testimony would not be admissible at a subsequent trial of the defendant. (See *Curdgel*, 83 NY2d at 864-865 [“As in (Curdgel’s) case, the *Evans* defendant . . . set no conditions on the subsequent use of his testimony”].)

In *Evans*, the Court noted that because the defendant entered into an agreement for the exchange of statements or testimony for a beneficial plea that did not include a condition limiting the use of the statements or testimony “when it would have been a simple task to include such a limiting condition as part of that plea, [the defendant] assumed the risk that the challenged evidence might be used against him if he succeeded on his appeal.” (*Evans*, 58 NY2d at 23.) In *Curdgel*, the Court noted that “the People bargained for use of defendant’s testimony in the prosecution of his accomplices.” (*Curdgel*, 83 NY2d at 865.) After the defendant’s breach of that agreement, the People were permitted to use the defendant’s grand jury testimony at his trial, given in exchange for a beneficial plea offer, “as this was a counseled, foreseeable use of his testimony.” (*Id.*)

The statement or testimony in *Evans* and *Curdgel* was bargained for by the People in return for a beneficial plea offer; therefore, when, through no fault of the People, a guilty plea did not result, the People were not precluded from using what they had bargained for against each defendant as this was a “foreseeable” consequence of the plea agreement. (See *People v Melo*, 160 AD2d 600, 600–601 [1st Dept 1990] [“The defendant could have sought as a condition for the negotiations an agreement from the prosecutor not to use his statements against him, but he did not. Absent such agreement with the District Attorney, prepleading admissions made in the presence of the defendant’s attorney are admissible” (citation omitted)]; but cf. *People v Thompson*, 108 AD3d 732 [2d Dept 2013].)

4.27. Proof of Previous Conviction; When Allowed [CPL 60.40 (3)]

Subject to the limitations prescribed in [CPL] section 200.60, the people may prove that a defendant has been previously convicted of an offense when the fact of such previous conviction constitutes an element of the offense charged, or proof thereof is otherwise essential to the establishment of a legally sufficient case.

Note

This section restates verbatim CPL 60.40 (3), except for the bracketed reference to the CPL. The statute omits the reference to the CPL.

Under CPL 200.60, if a prior conviction is an element of an offense, a defendant may preclude proof of that conviction if, outside the presence of the jury, the defendant admits the prior conviction.

4.29. Statements of Defendants; Corroboration (CPL 60.50)

A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed.

Note

This section reproduces verbatim CPL 60.50.

The statute's purpose is to "avert the danger that a crime may have been confessed when no crime *in any degree* has been committed by anyone" (*People v Chico*, 90 NY2d 585, 590 [1997] [internal quotation marks omitted]). Accordingly, CPL 60.50 "does not mandate submission of independent evidence of every component of the crime charged but merely requires some proof, of whatever weight, that a crime was committed by someone" (*People v McGee*, 20 NY3d 513, 517 [2013] [internal quotation marks omitted]; see CJI2d[NY] Corroboration of a Confession).

The additional proof may be "either direct or circumstantial" (*People v Daniels*, 37 NY2d 624, 629 [1975]) and is sufficient when "in addition to the confession, there is proof of circumstances which, although they may have an innocent construction, are nevertheless calculated to suggest the commission of crime, and for the explanation of which the confession furnishes the key" (*People v Reade*, 13 NY2d 42, 45 [1963]; see *People v Booden*, 69 NY2d 185 [1987]; *People v Lipsky*, 57 NY2d 560, 571 [1982]).

4.01. Relevant Evidence

(1) Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the proceeding more probable or less probable than it would be without the evidence.

(2) All relevant evidence is admissible except as otherwise provided or required by the Constitution of the United States or the Constitution, statutes, or common law of New York State.

Note

Subdivision (1). Subdivision (1) defines the term “relevant evidence.” It is derived from *People v Davis* (43 NY2d 17, 27 [1977]). As observed by the Court of Appeals, under this definition the evidence must tend to prove a fact that is material in the litigation. (*People v Stevens*, 76 NY2d 833, 835 [1990] [Evidence “should not be admitted unless relevant to a material fact to be proved at trial”]; *People v Scarola*, 71 NY2d 769, 777 [1988] [“Evidence is relevant if it has any tendency in reason to prove the existence of any material fact”]; *People v Yazum*, 13 NY2d 302, 304 [1963] [“all that is necessary is that the evidence have relevance, that it tend to convince that the fact sought to be established is so. That it is equivocal or that it is consistent with suppositions other than guilt does not render it inadmissible”].)

Subdivision (2). Subdivision (2) is derived from *Ando v Woodberry* (8 NY2d 165, 167 [1960] [“(I)t is well to recall the principle, basic to our law of evidence, that ‘(a)ll facts having rational probative value are admissible’ unless there is sound reason to exclude them, unless, that is, ‘some specific rule forbids’ (1 Wigmore, Evidence [3d ed., 1940], p. 293). It is this general principle which gives rationality, coherence and justification to our system of evidence and we may neglect it only at the risk of turning that system into a trackless morass of arbitrary and artificial rules”]). The Court of Appeals has repeatedly referred to this “principle.” (*E.g. Scarola*, 71 NY2d at 777 [“In New York, the general rule is that all relevant evidence is admissible unless its admission violates some exclusionary rule”]; *People v Alvino*, 71 NY2d 233, 241 [1987]; *People v Lewis*, 69 NY2d 321, 325 [1987].)

4.02 Direct and Circumstantial Evidence Defined

(1) Direct evidence is evidence of a fact based on a witness's personal knowledge of that fact acquired by means of the witness's senses. Direct evidence may prove guilt of a charged offense or liability for a civil wrong if, standing alone, that evidence satisfies a jury that guilt of the offense has been proved beyond a reasonable doubt or that liability for a civil wrong has been proven by a preponderance of the evidence or other applicable burden of proof.

(2) Circumstantial evidence is direct evidence of a fact from which a person may reasonably infer the existence or nonexistence of another fact. Circumstantial evidence may prove guilt of a charged offense or liability for a civil wrong, if that evidence, while not directly establishing guilt of the offense or liability for a civil wrong, gives rise to an inference of guilt beyond a reasonable doubt or of liability for the civil wrong by a preponderance of the evidence or other applicable burden of proof.

(3) The law draws no distinction between circumstantial evidence and direct evidence in terms of weight or importance. Either type of evidence or a combination of both may be enough to meet the applicable burden of proof, depending on the facts of the case as determined by the finder of fact.

(4) In a criminal proceeding, a defendant's confession of guilt constitutes direct evidence. A defendant's admission, not amounting to a confession because it does not directly acknowledge guilt but includes inculpatory statements from which a jury may infer guilt, is circumstantial evidence.

Note

Subdivisions (1) and (2) are derived from CJI2d(NY) Evidence—Circumstantial Evidence and PJI 1:70 (General Instruction—Circumstantial Evidence). Those definitions summarize the law of New York, beginning with *People v Bretagna* (298 NY 323, 325-326 [1949]):

“Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. * * * Circumstantial evidence . . . never proves directly the fact in question. In other words, direct . . . evidence, as the term is commonly used, means statements by witnesses, directly probative of one or more of the principal . . . facts of the case, while circumstantial evidence puts before the tribunal facts which, alone or with others, are in some degree but indirectly, probative of one or more of those principal . . . facts, and from which one or more of those principal facts may properly be inferred” (*id.* [internal quotation marks omitted]; see *People v Hardy*, 26 NY3d 245, 251 [2015] [“This Court has described circumstantial evidence as evidence that never proves directly the fact in question. (*People v Bretagna*, 298 NY 323, 325 [1949]). By contrast . . . direct evidence . . . requires no inference to establish (a particular fact)” (internal quotation marks and citations omitted)]; *Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986] [“To establish a prima facie case of negligence based wholly on circumstantial evidence, ‘(i)t is enough that (plaintiff) shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred.’ The law does not require that plaintiff’s proof ‘positively exclude every other possible cause’ of the accident but defendant’s negligence. Rather, her proof must render those other causes sufficiently ‘remote’ or ‘technical’ to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence” (citations omitted)]; *Markel v Spencer*, 5 AD2d 400 [4th Dept 1958], *aff’d without op* 5 NY2d 958 [1959]).

In *Hardy*, the defendant was charged with larceny of a purse. A surveillance video inside a club showed the defendant positioning himself between the complainant and her purse; putting the purse underneath him; and, when the complainant left, “rifling through its contents” and walking away with the purse in hand (26 NY3d at 248). The surveillance video therefore was direct evidence, proving the actus reus, that is, the “taking” element, of larceny. That the “defendant offered the jury an alternative explanation of his behavior, one that was inconsistent with [the element of] larcenous intent, does not change the character of the evidence from direct to circumstantial” (*id.* at 251). As *Hardy* explained, “a particular piece of evidence is not required to be wholly dispositive of guilt in order to constitute direct evidence, so long as it proves directly a disputed fact without requiring an inference to be made. In other words, even if a particular item of evidence does not

conclusively require a guilty verdict, so long as the evidence proves directly a fact in question [in *Hardy*, the actus reus], the evidence is direct evidence of guilt” (*id.* at 248, 250-251; *e.g. People v Daddona*, 81 NY2d 990, 992 [1993] [“The criminal possession counts charged were amply supported by direct evidence: there was eyewitness testimony that defendant directed the stolen vehicles in and out of the driveway, thereby establishing, with direct evidence, that he was in constructive possession of the stolen vehicles, or that he was acting in concert with those in physical possession of the stolen vehicles”]; *People v Roldan*, 88 NY2d 826, 827 [1996] [“This case involves direct evidence . . . Eyewitness testimony, if believed by the jury, established that defendant engaged in acts which directly proved that at the very least he acted as a lookout while the crime was being committed”])).

Perhaps the most important reason for distinguishing between direct and circumstantial evidence is that “a trial court must grant a defendant’s request for a circumstantial evidence charge when the proof of the defendant’s guilt rests solely on circumstantial evidence. By contrast, where there is both direct and circumstantial evidence of the defendant’s guilt, such a charge need not be given” (*Hardy* at 249 [citations omitted]; *see People v Silva*, 69 NY2d 858, 859 [1987] [The complainant “was unable to make an identification of defendant and there was no direct evidence linking him to the robbery. Thus, . . . the case against defendant on the robbery counts was wholly circumstantial. It was, therefore, error for the court to refuse to give a circumstantial evidence charge”])).

Each subdivision refers to the burden of proof in a civil case by the terminology “preponderance of the evidence or other applicable burden of proof.” The other applicable burdens of proof utilized in varying civil cases include “clear and convincing evidence” and “substantial evidence” (*see e.g. Guide to NY Evid rule 3.01 [3] [c] and the note thereto*).

Subdivision (3) is also derived from CJI2d(NY) Evidence—Circumstantial Evidence and PJI 1:70, which reflect the views expressed in *People v Benzinger* (36 NY2d 29, 32 [1974] [The reason for the rule on how to evaluate circumstantial evidence “is not that circumstantial evidence is thought to be weaker than direct evidence, since the reverse is frequently true. Rather, the rule draws attention to the fact that proof by circumstantial evidence may require careful reasoning by the trier of facts”]) and *People v Cleague* (22 NY2d 363, 367 [1968] [The rule on how to evaluate circumstantial evidence does not stem “from any distrust of circumstantial evidence or any vaunted favoring of direct evidence. The myth of innate superiority of direct testimonial evidence was exploded long ago. Indeed, circumstantial evidence is generally stronger, at least when it depends, as it often does, upon undisputed evidentiary facts about which human observers are less likely to err as a matter of accuracy or to distort as a matter of motivation, emotional shock, or external suggestion. On the other hand, direct evidence almost always, even in the instance of bystanders, is subject to one or more of these psychological infirmities. Hence, the occasional superior reliability of the evidentiary circumstances” (citation omitted)])).

Subdivision (4) is derived from *People v Bretagna* (298 NY 323, 326 [1949] [“a confession of guilt by a defendant in a criminal cause . . . is not circumstantial evidence” but an admission “not amounting to a confession because not directly acknowledging guilt, but including inculpatory acts from which a jury may or may not infer guilt, is circumstantial, not direct evidence”]) and *People v Hardy* (26 NY3d 245, 249-250 [2015]):

“[The defendant’s] statement to the prosecution witness that he did not have the purse but could get it was not direct evidence of his guilt. A defendant’s statement is direct evidence only if it constitutes a relevant admission of guilt. . . .

“By contrast, where the defendant makes an admission that merely includ[es] inculpatory acts from which a jury may or may not infer guilt, the statement is circumstantial and not direct evidence. . . .

“Here, defendant’s statement—that he did not have the purse but could get it—was not a direct admission of his guilt of larceny. Rather, defendant’s statement was also consistent with an inference that although he did not steal the purse, he knew where the purse was located and thought he could obtain it. Inasmuch as his statement merely included inculpatory facts from which the jury may or may not have inferred guilt, his statement was circumstantial rather than direct evidence” (internal quotation marks and citations omitted).

4.03. Completing and Explaining Writing, Recording, Conversation or Transaction

When part of a writing, conversation, recorded statement or testimony, or evidence of part of a transaction is admitted, any other part of that writing, conversation, recorded statement or testimony, or evidence of any other part of the transaction, may be admitted when necessary to complete, explain, or clarify the previously admitted part. The timing of the admission of such additional parts is subject to the court's discretion.

Note

This rule is derived from long-standing Court of Appeals precedent which recognizes that when evidence has been admitted, an adverse party may offer evidence necessary to complete, explain, or clarify the evidence that has been introduced. (*See e.g. Rouse v Whited*, 25 NY 170, 174-175 [1862] [“ ‘Where a statement, forming part of a conversation, is given in evidence, whatever was said by the same person in the same conversation, that would in any way qualify or explain that statement, is also admissible’ ” (citing *Prince v Samo*, 7 Adol & Ellis 627 [1838]; 1 Phillips' Evidence 416 [4th Am ed, from 10th Eng ed])]; *Grattan v Metropolitan Life Ins. Co.*, 92 NY 274, 284 [1883] [“The rule appears to be firmly settled, both as to a conversation or writing, that the introduction of a part renders admissible so much of the remainder as tends to explain or qualify what has been received and that is to be deemed a qualification which rebuts and destroys the inference to be derived from or the use to be made of the portion put in evidence”]; *Nay v Curley*, 113 NY 575, 578-579 [1889] [“where a party calls a witness and examines him as to a particular part of a communication or transaction, the other party may call out the whole of the communication or transaction bearing upon or tending to explain or qualify the particular part to which the examination of the other party was directed”].) The rule is founded upon “the plainest principles of equity.” (*Rouse*, 25 NY at 177 [“All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and therefore the plainest principles of equity require, that if one of the statements is to be used against the party, all the other statements tending to explain it or to qualify this use, should be shown and considered in connection with it”].)

The rule as stated reflects the limits on “completeness” imposed by the Court of Appeals, namely, “(a) No utterance irrelevant to the issue is receivable; (b) no more of the remainder of the utterance than concerns the same subject and is explanatory of the first part is receivable; (c) the remainder thus received merely

aids in the construction of the utterance as a whole, and is not in itself testimony.” (*People v Schlessel*, 196 NY 476, 481 [1909].)

Under the rule, when part of a party’s own statement is admitted against that party as an admission against the party’s interest, the party may offer into evidence any part of the statement which is exculpatory. (See e.g. *People v Dlugash*, 41 NY2d 725, 736 [1977]; *People v Gallo*, 12 NY2d 12, 15-16 [1962]; *Grattan*, 92 NY at 284-286[.]) Similarly, when a witness has been impeached by a statement the witness previously made, other parts of the statement may be admitted to clarify or explain the statement. (See e.g. *People v Ochoa*, 14 NY3d 180, 187 [2010]; *Feblot v New York Times Co.*, 32 NY2d 486, 496-498 [1973]; see also *People v Ramos*, 70 NY2d 639, 640-641 [1987] [Court emphasized that parts of the statement used for impeachment purposes that concerned unrelated matters were not admissible].) This rule of “completeness” does not in any way modify rule 8.05 (Admission by Adopted Statement) as it relates to a defendant’s silence.

The rule also addresses a timing issue; that is, when the completion evidence may be admitted. The rule commits the timing determination to the discretion of the court. (See e.g. *People v Torre*, 42 NY2d 1036, 1037 [1977] [where part is admitted during cross-examination, other parts may be admitted on re-direct]; *Gallo*, 12 NY2d at 15-16 [where part of a written statement was read into the record on the People’s rebuttal, other parts which were exculpatory may be admitted at that time].)

While other jurisdictions’ codification of the completeness rule permits the use of other writings or recordings for explanatory and clarification purposes of the admitted writing or recording (see e.g. Fed Rules Evid rule 106), the Court of Appeals has not addressed the use of other writings or recordings.

It should also be noted that the rule of completeness has been expressly incorporated by the legislature in CPLR 3117 (b) (“If only part of a deposition is read at the trial by a party, any other party may read any other part of the deposition which ought in fairness to be considered in connection with the part read”) and in CPLR 4517 (b) (“If only part of the prior trial testimony of a witness is read at the trial by a party, any other party may read any other part of the prior testimony of that witness that ought in fairness to be considered in connection with the part read”).

4.05. Conditional Relevance (Evidence Offered “Subject to Connection”)

When the admissibility of offered evidence depends on the introduction of further evidence to fulfill the requirements of admissibility, the court may admit the offered evidence after, or subject to, receipt of that further evidence. Upon failure of a party to fulfill the requirements of further evidence, the offered evidence must be struck and the jury instructed to disregard it, or, if undue prejudice has resulted, the court may grant a mistrial.

Note

This rule governs the situation where the relevance of offered evidence depends upon the existence of an additional fact(s). It is derived from Court of Appeals precedent that in such a situation the court may admit the evidence “subject to connection”—later proof of that additional fact(s)—or require before admitting the evidence proof of that additional fact(s). (*See e.g. People v Caban*, 5 NY3d 143, 151 [2005]; *Cover v Cohen*, 61 NY2d 261, 269 n 2 [1984].) The order of proof is within the discretion of the court. (*See e.g. Caban*, 5 NY3d at 151.) However, the Court has cautioned that where the evidence is highly prejudicial in content, the “better practice would be for relevance to be established prior to admission, out of the presence of the jury.” (*Cover*, 61 NY2d at 269 n 2.) The second sentence sets forth judicial options when the promised connection does not occur. (*See People v Stone*, 29 NY3d 166, 171 [2017]; *United States Vinegar Co. v Schlegel*, 143 NY 537, 544 [1894].)

4.07. Exclusion of Relevant Evidence

A court may exclude relevant evidence if its probative value is outweighed by the danger that its admission would:

- (1) create undue prejudice to a party;**
- (2) confuse the issues and mislead the jury;**
- (3) prolong the proceeding to an unreasonable extent without any corresponding advantage to the offering party; or**
- (4) unfairly surprise a party and no remedy other than exclusion could cure the prejudice caused by the surprise.**

Note

The Court of Appeals has held that relevant evidence is admissible as set forth in rule 1.05. The Court of Appeals, however, has also made clear that relevant evidence may be excluded by the trial court in the exercise of its discretion upon a consideration of pragmatic factors. (*See generally People v Davis*, 43 NY2d 17, 27 [1977].) These factors are set forth in subdivisions (1) – (4).

Relevant evidence may be excluded when, for example, it:

- causes undue prejudice (*see Mazella v Beals*, 27 NY3d 694, 710 [2016] [in a medical malpractice action, “any possible relevance of the consent order's contents (concerning defendant's negligent treatment of other patients) was outweighed by the obvious undue prejudice of his repeated violations of accepted medical standards”]; *People v Hudy*, 73 NY2d 40, 68 [1988]; *Davis*, 43 NY2d at 27);
- confuses the issues and misleads the jury (*see People v Santarelli*, 49 NY2d 242, 250 [1980] [in insanity cases where a mass of evidence of prior criminal conduct is offered, “the danger is particularly great that the jury will become confused by the mass of evidence presented and will decide to convict the defendant not because they find he was legally sane at the time of the act, but rather because they are convinced that he

is a person of general criminal bent”]; *Radosh v Shipstad*, 20 NY2d 504, 508 [1967]; *People v Nitzberg*, 287 NY 183, 189 [1941]);

- creates unreasonable delay or is unnecessarily cumulative (*see People v Petty*, 7 NY3d 277, 286-287 [2006] [court properly exercised its discretion in excluding a witness’ testimony as to threats the victim made against the defendant as four defense witnesses, including the defendant, had already testified that victim made numerous threats against defendant]; *Hudy*, 73 NY2d at 67 [“Where the facts underlying a witness’s reason to fabricate are admitted by the witness, extrinsic proof of those facts may properly be excluded, in the court’s discretion, on the ground that it would be cumulative”]; *Davis*, 43 NY2d at 27 [court properly excluded the testimony as its “probative value . . . could be outweighed by dangers that the main issue would be obscured, by prolongation of trial”]; *People v Harris*, 209 NY 70, 82 [1913] [court excluded evidence “tending to obscure the main issue in the minds of the jury, to lead them away from the principal matters which require their attention and to protract trials to an unreasonable extent without any corresponding advantage to any one concerned”]); or
- unfairly surprises the opposing party (*Davis*, 43 NY2d at 27; *Nitzberg*, 287 NY at 189).

The Court of Appeals has stressed that these concerns and their presence in a given case do not mandate exclusion of offered evidence; rather, these concerns must be balanced against the probative value of the evidence (*see People v Brewer*, 28 NY3d 272, 277 [2016]; *Kish v Board of Educ. of City of N.Y.*, 76 NY2d 379, 385 [1990]).

While the Court of Appeals has consistently enumerated the factors that may lead to a discretionary exclusion of relevant and otherwise admissible evidence, the Court has described the standard in differing ways. The majority, and most recent, of the Court’s decisions state that relevant evidence may be excluded if its probative value is “outweighed” by one of the enumerated factors. (*People v Brewer*, 28 NY3d 271, 277 [2016]; *Mazella*, 27 NY3d at 709; *People v Smith*, 27 NY3d 652, 668 [2016]; *People v DiPippo*, 27 NY3d 127, 135-136 [2016]; *Hudy*, 73 NY2d at 68; *Davis*, 43 NY2d at 27.) Other decisions have stated that the probative value must be “substantially outweighed” by one of the enumerated concerns. (*E.g. People v Caban*, 14 NY3d 369, 374 [2010]; *People v Scarola*, 71 NY2d 769, 777 [1988]; *People v Santarelli*, 49 NY2d 241, 255 [1980].) No decision discusses the difference between “outweighed” and “substantially outweighed.” An analysis of the decisions suggests that the same result would have been reached regardless of the formulation utilized. A fair assumption, therefore, is that the differing formulations do not affect the required balance between probative value

and prejudice. The rule utilizes the formulation found in the majority of the Court's opinions.

The Court of Appeals has cautioned that exclusion under the rule may not be required when a cautionary instruction to the jury can obviate the potential for prejudice. (*See People v Mountain*, 66 NY2d 197, 203 [1985].) Decisional law, however, recognizes that in some situations a limiting instruction may not be sufficient to protect a party adequately from the jury's misuse of the evidence, and that in such situations the court may take other action, such as precluding or redacting the evidence or directing a severance. (*Bruton v United States*, 391 US 123, 135 [1968] ["(T)here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored"]; *People v Johnson*, 27 NY3d 60, 70 [2016] ["curative instructions could not avoid the substantial risk" that the jury would misuse the evidence]; *People v Ceden*, 27 NY3d 110, 120 [2016] [redaction as made was not effective to preclude misuse of the evidence by the jury]; *Cover v Cohen*, 61 NY2d 261, 270 [1984] [evidence should be excluded where there is "substantial risk that such evidence may be over-emphasized by the jury"].)

4.08 “Open Door” Evidence

(1) A party may “open the door” to the introduction by an opposing party of evidence that would otherwise be inadmissible when in the presentation of argument, cross-examination of a witness, or other presentation of evidence the party has given an incomplete and misleading impression on an issue.

(2) A trial court must exercise its discretion to decide whether a party has “opened the door” to otherwise inadmissible evidence. In so doing, the trial court should consider whether, and to what extent, the evidence or argument claimed to “open the door” is incomplete and misleading and what, if any, otherwise inadmissible evidence is reasonably necessary to explain, clarify, or otherwise correct an incomplete and misleading impression.

(3) To assure the proper exercise of the court’s discretion and avoid the introduction of otherwise inadmissible evidence, the recommended practice is for a party to apply to the trial court for a ruling on whether the door has been opened before proceeding forward, and the court should so advise the parties before taking evidence.

Note

Subdivisions (1) and (2) recite the long-settled “open door” principle in New York, as primarily explained in *People v Melendez* (55 NY2d 445 [1982]); *People v Rojas* (97 NY2d 32, 34 [2001]); *People v Massie* (2 NY3d 179 [2004]); and *People v Reid* (19 NY3d 382 [2012]).

Melendez dealt with the issue of whether the defense had opened the door to permit the prosecutor to explore an aspect of the investigation that would not otherwise have been admissible. The Court began by noting that, when an “opposing party ‘opens the door’ on cross-examination to matters not touched upon during the direct examination, a party has the right on redirect to explain, clarify and fully elicit [the] question only partially examined on cross-examination.” (*Melendez* at 451

[internal quotation marks and citation omitted].)

Argument to the jury or other presentation of evidence also may open the door to the admission of otherwise inadmissible evidence. (*Rojas* at 34 [“defendant opened the door” based “on the combination of his opening statement and cross-examination of a prosecution witness”]; *Massie* at 184 [noting that a door may be opened by “evidence or argument”].)

The “open door” principle, however, “does have its limitations. By simply broaching a new issue on cross-examination, a party does not thereby run the risk that all evidence, no matter how remote or tangential to the subject matter opened up, will be brought out on redirect. . . . [T]he court should only allow so much additional evidence to be introduced on redirect as is necessary to meet what has been brought out in the meantime upon the cross-examination. . . . The principle merely allows a party to explain or clarify on redirect matters that have been put in issue for the first time on cross-examination, and the trial court should normally exclude all evidence which has not been made necessary by the opponent’s case in reply.” (*Melendez* at 452 [internal quotation marks, citations, and italics omitted].)

On the facts of *Melendez*, the Court ruled that “although defense counsel may have partially ‘opened the door’ by asking whether [one of the People’s witnesses] was a suspect, the passageway thus created was not so wide as to admit the hearsay testimony directly implicating the defendant in the crimes charged.” (*Id.* at 453.)

Massie recognized *Melendez* as the leading case on the subject, while noting that the application of the “open door” principle was not limited to cross-examination questions. *Massie* therefore set forth the guiding rule included in subdivision (2) for dealing with any “open door” issue in any circumstance. (*Massie* at 184 [“a trial court should decide ‘door-opening’ issues in its discretion, by considering whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression”]; see e.g. Guide to NY Evid rule 4.03, Completing and Explaining Writing, Recording, Conversation or Transaction.)

Reid pointed out that the “open door” principle exists to “avoid . . . unfairness and to preserve the truth-seeking goals of our courts.” For that reason, *Reid* held that even “the admission of testimony that violates the Confrontation Clause may be proper if the defendant opened the door to its admission.” (*Id.* at 388.) That holding, *Reid* pointed out, was consistent with the rule permitting the use of voluntary statements taken in violation of *Miranda v Arizona* (384 US 436 [1966]) “if a defendant opens the door by presenting conflicting testimony.” (*Id.* at 388; see Guide to NY Evid rule 6.14, Impeachment by Evidence Improperly Obtained.)

Other examples of situations where a party “open[s] the door” to otherwise inadmissible evidence include:

- “apparent inconsistencies or contradictions in a witness’ statements or acts brought out on cross-examination to discredit his testimony [which] may be reconciled on redirect by relating to the jury the relevant surrounding circumstances.” (*Melendez* at 451.)
- “where cross-examination raises the inference that the witness’ testimony was the product of a recent fabrication, a party on redirect can refute this allegation either by introducing consistent statements made by the witness at a time when there was no motive to lie or by having the witness explain why the information was not disclosed earlier.” (*Id.*)
- “where only a part of a statement has been brought out on cross-examination, the other parts may be introduced on redirect examination for the purpose of explaining or clarifying the statement.” (*Id.* at 451-452; see Guide to NY Evid rule 4.03, Completing and Explaining Writing, Recording, Conversation or Transaction.)
- Defense counsel’s question to a police officer witness for the People about whether there ever came a time when defendant “denied his involvement in this” opened the door to redirect examination about the defendant’s exact words, namely, “ ‘that he was there, but he didn’t rob the old lady.’ ” (*People v Goodson*, 57 NY2d 828, 829-830 [1982].)
- “evidence of a prior conviction [for robbery] that had been precluded by a pretrial [*Sandoval*] ruling . . . was nonetheless properly used by the prosecution on cross-examination to impeach” the testimony of defendant’s witness, a psychologist, who asserted that defendant had been nonviolent throughout his life. (*People v Fardan*, 82 NY2d 638, 641 [1993].)
- “Defendant’s claim that he had never seen or known [the codefendant] before his arrest on November 4, 1992 . . . opened the door to evidence . . . regarding [his] subsequent arrest with [the codefendant] on November 16, 1992 relevant for ‘contradiction and response’ with respect to the November 4, 1992 existence of their relationship and not simply to impeach his general credibility.” (*People v Blakeney*, 88 NY2d 1011, 1012 [1996].)
- The “[d]efendant opened the door to cross-examination regarding his motivation for prior guilty pleas and was subject to impeachment by the People’s use of the otherwise precluded evidence . . . where . . . defendant’s testimony was meant to elicit an incorrect jury inference that he had pleaded guilty and served prison terms in prior cases, but that he

would not plead guilty in this case because he was in fact innocent.” (*People v Cooper*, 92 NY2d 968, 969 [1998] [citations omitted].)

- When the People’s witnesses testified that the defendant “never denied” committing the crime, the trial court should have permitted the defense to introduce a taped telephone conversation between the defendant and the complainant prior to the defendant’s arrest, in which the defendant denied the allegations. (*People v Carroll*, 95 NY2d 375, 386 [2000].)

Subdivision (3) follows logically on the need for the trial court to make a ruling on whether the door has been opened before otherwise inadmissible evidence that may warrant a mistrial is admitted. (*See People v Rojas*, 97 NY2d 32, 40 [2001] [the “better practice” would have been for the People to ask for a “conference” to have the court decide whether the door had been opened to a question the prosecutor asked a witness]; *see also* Guide to NY Evid rule 1.07, Court Control Over Presentation of Evidence; rule 1.11, Court Determination of Preliminary Questions.)

4.09. Restricted Admissibility of Relevant Evidence

(1) Evidence may be admitted for one purpose but not for another, or as to one party but not as to another.

(2) In a trial by jury, the court shall provide an instruction on the scope of the evidence to the jury, as may be necessary or required by request of a party or by statute or decisional law.

Note

Subdivision (1). This rule is derived from Court of Appeals precedent holding that evidence is admissible as to any party or for any relevant purpose even though it may be inadmissible as to another party or for another purpose. In such circumstances, jury instructions as to the limited purpose for which the evidence may be considered are appropriate. (*Kish v Board of Educ. of City of N.Y.*, 76 NY2d 379, 385 [1990] [limited purpose]; *People v Williams*, 50 NY2d 996, 998 [1980] [limited purpose]; *People v Marshall*, 306 NY 223, 227 [1954] [admissible as to one defendant but not a codefendant].)

Subdivision (2). The request for a limiting instruction may be made when the evidence is admitted and at the close of trial for inclusion in the court's charge to the jury. (*Williams*, 50 NY2d at 998.)

4.11. Character Evidence

(1) Admissibility. Evidence of a person's character is not admissible to prove that the person acted in conformity therewith on a particular occasion except:

(a) In a civil or criminal proceeding, evidence of a person's character is admissible where that character is an essential element of a crime, charge, claim, or defense.

(b) In a criminal proceeding, a defendant may offer evidence of character that is relevant to prove the defendant acted in conformity therewith on a particular occasion, and, if the evidence is admitted, the People may rebut that evidence.

(c) In a criminal proceeding where the defendant interposes a defense of justification based on the defense of self or another: (i) evidence of the victim's reputation for violence and prior specific acts of violence by the victim against the defendant or others, if known to the defendant and reasonably related to the crime charged, is admissible on the issue of the defendant's belief of the necessity of defending himself or herself or another person from impending harm. Such evidence is not admissible to prove that the defendant was the "initial aggressor"; (ii) evidence of the victim's prior threats against the defendant, whether known to the defendant or not, is admissible to prove that the victim was the initial aggressor.

(d) In a civil or criminal proceeding, evidence of the character of a witness may be admissible to impeach the witness as provided in article six.

(2) Method of Proof. When evidence of a person's character is admissible, proof thereof may only be by testimony as to that person's reputation for the relevant character as set forth in rule 8.39 (1), except:

(a) If evidence of character is admissible under subdivision (1) (a) of this rule, the relevant character may be proved by testimony as to that person's reputation for the relevant character as set forth in rule 8.39 (1) and by proof of relevant specific acts.

(b) If a defendant in a criminal proceeding, through the testimony of a witness called by the defendant, offers evidence of his good character, the People may independently prove any previous conviction of the defendant for an offense that would tend to negate any character trait or quality attributed to the defendant in that witness' testimony.

(3) Cross-Examination. If a witness offers reputation evidence as to a person's character, that witness may be asked on cross-examination whether the witness has heard that the person has been convicted of a crime or engaged in conduct, other than the crime(s) or conduct with which the defendant is charged, that is inconsistent with that reputation.

Note

Subdivision (1). The general rule stated in subdivision (1) is derived from Court of Appeals precedent that has long recognized that in civil and criminal proceedings the character or a character trait of a person may not be proved to raise an inference that the person acted in conformity therewith on the occasion in issue. (See *e.g. People v Zackowitz*, 254 NY 192, 197 [1930]; *Noonan v Luther*, 206 NY 105, 108 [1912]; *McKane v Howard*, 202 NY 181, 186-187 [1911].) In the words of the Court of Appeals: “This court has declared that ‘[i]nflexibly the law has set its face against the endeavor to fasten guilt upon [a defendant] by proof of character or experience predisposing to an act of crime . . . The endeavor has been often made, but always it has failed.’ ” (*People v Mullin*, 41 NY2d 475, 479 [1977].) This exclusionary rule is “one, not of logic, but of policy.” (*Zackowitz*, 254 NY at 198.)

Evidence of a rape victim’s prior sexual conduct to prove conduct, *e.g.*, consent, is governed by CPL 60.42; and evidence of a victim’s sexual conduct in prosecutions for any offense is governed by CPL 60.43.

The remaining paragraphs of subdivision (1) set forth the exceptions to the rule’s bar to character evidence.

Subdivision (1) (a). Paragraph (a) of subdivision (1) sets forth the common-law rule that where the character or a trait of character of a person is, as a matter of substantive law, an essential element of a crime, charge, claim, or defense, that character or trait of character may be proved. (See *e.g. People v Mann*, 31 NY2d 253 [1972]; *Park v New York Cent. & Hudson Riv. R.R. Co.*, 155 NY 215, 219 [1898]; *Cleghorn v New York Cent. & Hudson Riv. R.R. Co.*, 56 NY 44, 46-47 [1874].)

Subdivision (1) (b). Paragraph (b) of subdivision (1) is derived from Court of Appeals precedent which gives a defendant in a criminal proceeding the option to introduce reputation evidence as to defendant’s own good character for the purpose of raising an inference that defendant would not be likely to commit the crime charged. (See *e.g. People v Aharonowicz*, 71 NY2d 678, 681 [1988] [“The principle has long been that in a criminal prosecution, the accused may introduce evidence as to his own good character to show that it is unlikely that he committed the particular offense charged”]; *People v Van Gaasbeck*, 189 NY 408, 413-414 [1907].) When the defendant opts to introduce evidence of good character, “such testimony must relate to the traits involved in the charge against him.” (*People v Miller*, 35 NY2d 65, 68 [1974].)

Additionally, the rule as stated recognizes that when the defendant puts his or her character in issue, the People may, in rebuttal, challenge the “good” character or character trait elicited by defendant. (*See e.g. People v Richardson*, 222 NY 103, 107 [1917]; *People v Hinksman*, 192 NY 421, 430-431 [1908].)

Subdivision (1) (c). Paragraph (c) of subdivision (1) is derived from Court of Appeals decisions that when the defendant interposes a justification defense of self-defense, evidence of the victim’s *reputation* for being a violent person and evidence of the victim’s prior violent acts against others, when known to the defendant, are admissible to show the defendant’s state of mind as to the necessity of defending himself or herself (*People v Rodawald*, 177 NY 408, 423 [1904]); and further, that evidence of the victim’s past violent *acts* against others, when known to the defendant, is admissible as to the reasonableness of defendant’s conduct, provided the evidence is reasonably related to the crime charged (*see e.g. Matter of Robert S.*, 52 NY2d 1046 [1981]; *People v Miller*, 39 NY2d 543, 551-552 [1976]).

On the question of who was the “initial aggressor,” *People v Petty* (7 NY3d 277 [2006]) permits evidence of the victim’s threats against the defendant, whether the defendant was aware of the threats or not. That evidence permits an inference of the victim’s “intent” to “act upon [the uttered threats]” and that he or she did so as the initial aggressor (*id.* at 285).

Subdivision (1) (d) notes that when character evidence is admitted for impeachment purposes, it may be admissible under the rules to be set forth in this Guide’s forthcoming article six.

Subdivision (2). This subdivision is derived from the well-established rule in New York that when a person’s character or character trait is admissible it must be proved by reputation testimony as set forth in rule 8.39 (1). Reputation testimony is the only form of proof permitted, and that reputation evidence must relate to the trait or traits involved in the charge against the defendant (*see e.g. People v Miller*, 35 NY2d 65, 68 [1974]; *People v Kuss*, 32 NY2d 436, 443 [1973]; *People v Van Gaasbeck*, 189 NY 408, 413-415 [1907]).

The witness may testify, upon an adequate foundation, that “I have heard the reputation for the relevant character or character trait is good,” or to the fact that since the witness has never heard anything contrary to the relevant character or character trait, defendant’s reputation must be “good.” (*Van Gaasbeck*, 189 NY at 420; *see also People v Bouton*, 50 NY2d 130, 140 [1980] [“And, the fact that the offer consisted solely of ‘negative evidence’—i.e., the absence of adverse comment

on the pertinent aspects of defendant’s character—could not in itself be the basis for an exclusionary ruling”].)

The opinions of those who know defendant personally and have firsthand knowledge of defendant’s character as well as proof of defendant’s commission of specific acts that may implicate the trait are inadmissible (*Van Gaasbeck*, 189 NY at 415-416). The basis for this limitation as stated by the Court of Appeals in *Van Gaasbeck* is that “its admission would lead to the introduction into the case of innumerable collateral issues which could not be tried out without introducing the utmost complication and confusion into the trial, tending to distract the minds of the jurymen and befog the chief issue in litigation” (*id.* at 418).

Additionally, the rule as stated in subdivision (2) recognizes that, when the defendant puts his or her character in issue pursuant to subdivision (1) (b), the People may now, in rebuttal, challenge the “good” character or character trait elicited by defendant. As derived from the common law, the People may introduce reputation evidence that defendant’s reputation for the relevant character or character trait placed in issue is “bad.” (See *e.g. Richardson*, 222 NY at 107; *Hinksman*, 192 NY at 430-431.)

The remaining paragraphs sets forth specific proof rules applicable in limited situations.

Subdivision (2) (a). Paragraph (a) of subdivision (2) is derived from Court of Appeals precedent that, where a person’s character is an element of a crime, charge, claim, or defense, the character may be proved by relevant specific acts. (See *e.g. Mann*, 31 NY2d at 259; *Park*, 155 NY at 219; *Cleghorn*, 56 NY at 46-47.) Although the case law is limited, courts have also permitted the character to be proved by reputation. (See *e.g. Wuensch v Morning Journal Assn.*, 4 App Div 110, 115-117 [1st Dept 1896].) However, the Court of Appeals has held to the contrary in an action where the defendant was alleged to have been negligent in hiring or retaining an incompetent employee. (See *Park*, 155 NY at 218-219 [“We are aware that in some states the courts have permitted incompetency of servants to be shown by general reputation, but we have never gone to that extent in this state. It appears to us that the safer and better rule is to require incompetency to be shown by the specific acts of the servant, and then, that the master knew or ought to have known of such incompetency. The latter may be shown by evidence tending to establish that such incompetency was generally known in the community”].)

It should also be noted that CPL 60.40 (3) states the rule that where a prior criminal conviction is an element of the charged crime, the prior conviction necessary to the proof of the charged crime may be independently proved unless the defendant has availed himself or herself of the procedural protections set forth in CPL 200.60 or CPL 200.63. (See William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, CPL 60.40, at subd three.)

Subdivision (2) (b). Paragraph (b) of subdivision (2) restates CPL 60.40 (2), which provides an additional avenue of proof to rebut the reputation evidence admitted when the defendant puts his or her character in issue pursuant to subdivision (1) (b). (See William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, CPL 60.40, at subd two.)

Subdivision (3). This subdivision is derived from Court of Appeals precedent which holds that the witness providing reputation testimony may be asked on cross-examination whether the witness has heard about particular events that are derogatory to the reputation testified to by the witness. (*People v Kuss*, 32 NY2d 436, 443 [1973] [(I)t is well established that they may be asked as to the existence of rumors or reports of particular acts allegedly committed by the defendant which are inconsistent with the reputation they have attributed to him"].) Specifically, the witness may only be asked whether the witness heard of the event and not whether the witness has personal knowledge of such an event. (*People v Kennedy*, 47 NY2d 196, 206 [1979] [“Assuming, *arguendo*, that Mrs. Kennedy did indeed serve as a character witness, any impeachment cross-examination should have been limited to her knowledge of defendant's reputation, and should not have extended to her personal knowledge of the underlying acts"].) In *Kuss*, the Court emphasized that there are certain limitations, namely, “[t]he inquiry cannot be used to prove the truth of the rumors, but only to show the ability of the witness to accurately reflect the defendant's reputation in the community. And the prosecutor must act in good faith; there must be some basis for his questions.” (*Kuss*, 32 NY2d at 443.)

And, if the witness is solely a character witness, he or she may not be questioned about the crimes or underlying conduct of the crimes of which the defendant is accused. (*People v Lopez*, 67 AD2d 624, 624 [1st Dept 1979] [“The district attorney also should not have asked defendant's character witness whether he would change his opinion of defendant's character if he heard that defendant had committed a cold-blooded murder, obviously referring to the case on trial. The question improperly assumed that the defendant was guilty of the crime with which he was charged, the very issue toward the determination of which the character

evidence was offered”]; *People v Lowery*, 214 AD2d 684, 685 [2d Dept 1995], *mod on other grounds* 88 NY2d 172 [1996] [“We agree with the defendant that the prosecutor’s cross-examination of a defense character witness exceeded the bounds of propriety insofar as the prosecutor utilized hypothetical questions which assumed the defendant’s guilt of the crimes for which he was on trial”]; *People v Gandy*, 152 AD2d 909, 909 [4th Dept 1989] [“The court erred in permitting the People to cross-examine defendant’s character witnesses concerning whether their opinions of defendant’s reputation would change if they knew that defendant had committed the crimes at issue”].)

4.13. Habit

Habit of a person or routine practice of an organization is a deliberate and repetitive practice by a person or organization in complete control of the circumstances under which the practice occurs (as opposed to conduct however frequent yet likely to vary from time to time depending on the circumstances). Evidence of a person’s habit or an organization’s routine practice is admissible to prove that the person or organization acted in conformity with that habit on a particular occasion.

Note

This rule sets forth New York’s habit and routine practice rule as established by Court of Appeals decisions.

The definition of habit of a person and regular practice of an organization contained in the first sentence is derived from *Halloran v Virginia Chems.* (41 NY2d 386, 389, 392 [1977] [mechanic’s practice of heating cans of Freon before transferring the gas to automobile air conditioning systems constituted admissible habit evidence as proof showed it was “a deliberate and repetitive practice” by a person “in complete control of the circumstances” as opposed to “conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstances”]); *Ferrer v Harris* (55 NY2d 285, 294 [1982] [evidence that mother had told her daughter not to cross the street without looking for cars was not admissible as habit evidence because the plaintiff made no showing of “a persistent habit or regular usage by one in control of the circumstances in which it is employed”]); and *Rivera v Anilesh* (8 NY3d 627, 635-636 [2007] [dentist’s pre-extraction injection procedure which would not vary from patient to patient constituted admissible habit evidence as the record established it was a “ ‘deliberate and repetitive practice’—the mundane administration of a local anesthetic prior to a relatively routine tooth extraction—by a trained, experienced professional ‘in complete control of the circumstances’ ”]).

The rule’s second sentence, as derived from several Court of Appeals decisions, provides that evidence of a person’s habit or an organization’s routine practice is admissible to prove that the habit or routine practice was followed on the occasion in issue. (*E.g. Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 508-509 [2015] [billing company’s regular office practices and procedures in handling no-fault claims to prove claims had been mailed]; *Rivera*, 8 NY3d at 635; *Halloran*, 41 NY2d at 392; *Beakes v DaCunha*, 126 NY 293, 298 [1891] [habit of being home on a specific day of the month to transact a specified

business]; *Matter of Kellum*, 52 NY 517, 519-520 [1873] [attorney's routine practice regarding execution of wills to prove proper execution of will].) As stated by the Court in *Halloran*: "[E]vidence of habit has, since the days of the common-law reports, generally been admissible to prove conformity on specified occasions" because "one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again" (41 NY2d at 391).

Of note, the Court of Appeals initially appeared disinclined to accept habit evidence in negligence cases. (See *Eppendorf v Brooklyn City & Newton R.R. Co.*, 69 NY 195, 197 [1877] [evidence of a plaintiff's habit of jumping on streetcars was not admissible to prove he was negligent on the day of the accident]; *Zucker v Whitridge*, 205 NY 50, 58-66 [1912] [proof that the deceased had usually looked both ways before crossing railroad tracks was not admissible to establish his care on the particular occasion].) *Halloran*, however, found that a "statement that evidence of habit or regular usage is never admissible to establish negligence is too broad" (41 NY2d at 392; see also *Ferrer v Harris*, 55 NY2d 285, 294 [1982] [acknowledging that *Halloran* "indicated support for less dogmatic adherence" to the exclusion of habit evidence in negligence cases]).

Rather, as explained in *Halloran*, "[W]here the issue involves proof of a deliberate and repetitive practice, a party should be able, by introducing evidence of such habit or regular usage, to allow the inference of its persistence, and hence negligence on a particular occasion. Far less likely to vary with the attendant circumstances, such repetitive conduct is more predictive than the frequency (or rarity) of jumping on streetcars or exercising stop-look-and-listen caution in crossing railroad tracks" (*Halloran*, 41 NY2d at 392 [citations omitted]; accord *Rivera v Anilesh*, 8 NY3d 627 [2007]).

Thus, in *Halloran*, a personal injury products liability action brought by a mechanic who sustained an injury in the use of the product, the Court authorized habit evidence of the plaintiff mechanic's habit in the use of that product which permitted an inference that he was negligent in its use. In *Rivera*, a patient sued her dentist in a malpractice action, and the Court allowed the dentist to offer habit evidence relating to her "routine procedure for administering injections of anesthesia" to show that she had not committed malpractice (8 NY3d at 635).

Before proof of habit or routine practice is admitted, the party offering the proof must "show on *voir dire* . . . that [the party] expects to prove a sufficient number of instances of the conduct in question" (*Halloran*, 41 NY2d at 392). In *Halloran*, for example, "[i]f defendant's witness was prepared to testify to seeing Halloran using an immersion coil [in servicing automobile air conditioner units] on only one occasion, exclusion was proper. If, on the other hand, plaintiff was seen a sufficient number of times, and it is preferable that defendant be able to fix, at least generally, the times and places of such occurrences, a finding of habit or regular usage would be warranted and the evidence admissible for the jury's consideration"

(*id.* at 392-393). And, while at one point decision law was unclear whether habit evidence was admissible only when there were no eyewitnesses to the conduct in issue (*see e.g. Zucker*, 205 NY at 58), recent decisions permit habit evidence regardless of whether eyewitnesses are available (*Rivera*, 8 NY3d at 635; *Halloran*, 41 NY2d at 390-391).

4.15. Liability Insurance

Evidence that a person was or was not insured against liability:

(1) is not admissible to prove that the person acted negligently or otherwise wrongfully or that the person should be held strictly liable, or to establish damages;

(2) is admissible to prove some other fact relevant to a material issue, such as agency, ownership or control over premises where the accident occurred or the instrumentality that caused the accident, or bias or prejudice of a witness.

Note

This rule is derived from well settled New York law governing the admissibility of evidence as to whether a person is or is not insured against liability.

As set forth in subdivision (1), such evidence is inadmissible when offered on the issue of whether an insured acted negligently or otherwise wrongfully or should be held strictly liable. (*See e.g. Salm v Moses*, 13 NY3d 816, 817 [2009] [“(e)vidence that a defendant carries liability insurance is generally inadmissible”]; *Leotta v Plessinger*, 8 NY2d 449, 461 [1960] [“(o)rdinarily whether a defendant has or has not obtained insurance is irrelevant to the issues, and, since highly prejudicial, therefore, inadmissible”]; *Simpson v Foundation Co.*, 201 NY 479, 490-491 [1911] [it was improper for plaintiff’s counsel to ask questions suggesting to the jury that the defendant was insured in order to induce the jury to give a larger verdict]; *see also Rendo v Schermerhorn*, 24 AD2d 773, 773 [3d Dept 1965] [“we cannot condone the obvious reference to the lack of defendants’ insurance coverage contained in defense counsel’s summation, a fact which in the circumstances here may very well have engendered sympathy in the jurors’ minds”].)

As stated by the Court of Appeals in *Salm*, excluding evidence of insurance coverage on the issue of liability is premised on two reasons:

“First, ‘it might make it much easier to find an adverse verdict if the jury understood that an insurance company would be compelled to pay the verdict.’ Second, evidence of liability insurance injects a collateral issue into the trial that is not relevant as to whether the insured acted negligently. Although we have acknowledged that liability insurance has increasingly become more prevalent and that, consequently, jurors are now more likely to be aware of the

possibility of insurance coverage, we have continued to recognize the potential for prejudice.” (*Salm*, 13 NY3d at 817-818 [citations excluded].)

Subdivision (2) recognizes that New York law does not exclude evidence of insurance coverage or lack of insurance when the evidence is offered for a purpose other than to establish liability or fault, such as to establish ownership or control over the premises where the accident occurred or the instrumentality that caused the accident (*see Leotta v Plessinger*, 8 NY2d 449, 462 [1960]), or to show bias or interest on the part of a witness. (*Salm*, 13 NY3d at 818.) The enumeration of potential admissible purposes is illustrative and not exclusive. When such evidence is admissible, however, the Court of Appeals has specifically cautioned that the trial court may exclude the evidence if it determines the risk of confusion or prejudice outweighs its probative value. (*Salm*, 13 NY3d at 818.)

4.16. Offers to Compromise (CPLR 4547)

Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages.

Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this rule shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations.

Furthermore, the exclusion established by this rule shall not limit the admissibility of such evidence when it is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proof of an effort to obstruct a criminal investigation or prosecution.

Note

This rule is verbatim from CPLR 4547. It governs the admissibility of evidence of compromise and settlement and offers to compromise or settle when offered to prove liability or lack thereof or the amount of damages.

CPLR 4547 was enacted in 1998 (L 1998, ch 317, §1). It tracks in large part the language of the original version of Federal Rules of Evidence rule 408 as the legislative intent was to make New York law consistent with that rule as it then existed (Senate Introducer's Mem in Support, Bill Jacket, L 1998, ch 317 at 4). In 2006, however, Federal Rules of Evidence rule 408 was amended to address issues that had split the federal courts regarding its applicability in criminal trials. The amended rule provides for the admissibility in criminal cases of statements made by a party in discussions regarding the compromise of a civil claim by a government agency acting in its regulatory, investigative, or enforcement capacity. However, Federal Rules of Evidence rule 408 makes evidence of a compromise or offers to

compromise civil litigation inadmissible in criminal actions involving the same facts.

The Court of Appeals has not addressed the issue of the applicability of CPLR 4547 in criminal actions. In *People v Newman* (107 AD3d 827 [1st Dept 2013]), the issue was raised but not resolved. In *Newman*, defendant was convicted of grand larceny in the first degree based on his embezzlement of money from the complainants. He argued that the trial court erred in admitting evidence of the written statement and the payments he made to the complainants as such evidence was barred by CPLR 4547. “Assuming, without deciding, that CPLR 4547 applies to criminal trials,” the Court concluded that the statute did not apply because defendant had admitted the embezzlements (*id.* at 828). In *People v Forbes-Haas* (32 Misc 3d 685 [Onondaga County Ct 2011]), a grand larceny in the third degree prosecution based on defendant’s alleged wrongful taking and withholding funds from an escrow account at a bank, the trial court allowed the prosecution to introduce into evidence statements made by the defendant during a settlement conference with employees of the bank, and the settlement agreement between the defendant and the bank. The court held that CPLR 4547 was inapplicable in a criminal action because “the public interest in prosecuting crime outweighs achieving a settlement of civil claims” (*id.* at 688).

4.17. Payment by Joint Tortfeasor [CPLR 4533-b]

(1) In an action for personal injury, injury to property or for wrongful death, any proof as to payment by or settlement with another joint tortfeasor, or one claimed to be a joint tortfeasor, offered by a defendant in mitigation of damages, shall be taken out of the hearing of the jury.

(2) The fact, but not the amount, of a settlement may, however, form a proper basis for impeachment of a testifying witness.

Note

Subdivision (1) restates verbatim CPLR 4533-b, except for the omission of the last sentence of that statute which reads: “The court shall deduct the proper amount, as determined pursuant to section 15-108 of the general obligations law, from the award made by the jury.”

CPLR 4533-b was designed to abrogate decisional law to the extent it was contrary. (*See Livant v Livant*, 18 AD2d 383 [1963], *lv dismissed* 13 NY2d 894 [1963].)

While subdivision (1) prohibits the introduction of evidence of a settlement with a tortfeasor when offered by a defendant in mitigation of damages, the statute does not prohibit, and decisional law allows, as set forth in subdivision (2), the use of such evidence when relevant to impeach a tortfeasor. (*See Maldonado v Cotter*, 256 AD2d 1073, 1075 [4th Dept 1998] [defendants properly cross-examined “the recovery room nurse concerning the fact but not the amount of plaintiff’s settlement with the Hospital, pursuant to which that nurse also was released from liability. ‘It has long been recognized that a prior settlement might well have an impact upon the credibility of a witness called to testify on behalf of a former adverse party’ (*Hill v Arnold*, 226 AD2d 232, 233)’”]; *compare Stevens v Atwal*, 30 AD3d 993, 994 [4th Dept 2006] [while recognizing that a prior settlement may be admissible to impeach a witness, held that on the facts of the case, “the settlements had no bearing on plaintiff’s credibility”].)

4.18. Payment of Medical and Other Expenses

Evidence of offering, promising, or making payment for medical, hospital, or other expenses, such as lost wages, resulting from an injury is not admissible as proof of liability for the injury, but is admissible to prove some other fact relevant to a material issue, such as agency, or ownership or control of an object or premises, or bias or prejudice of a witness.

Note

This rule is derived from established, albeit sparse, New York law governing the admissibility of evidence of a party's post-injury offer to pay the injured party's medical, hospital or other expenses, such as lost wages.

The first portion of the rule that precludes admissibility of the specified post-injury conduct is derived from *Grogan v Dooley* (211 NY 30 [1914, Cardozo, J.]). In *Grogan*, a personal injury action, the trial court permitted plaintiff to prove the defendant offered to pay his wages and medical expenses while he was disabled, viewing the offer as an admission of liability. The Court of Appeals rejected the ruling, holding the evidence had "no such significance." (*Id.* at 31.) Rather, the defendant's offer "should be treated as a humane recognition of an existing necessity" (*id.* at 32); and "[t]he law would be doing wrong to [persons making such offers] and scant service to [recipients of the offers] if it throttled the impulses of benevolence by distorting humane conduct into a confession of wrongdoing." (*Id.*)

While the rule excludes payment and offers of payment of medical and similar expenses, it does not encompass evidence of statements, e.g., opinions or admissions of fault or liability, when made in connection with the payment or offer. Such statements may, however, be inadmissible under Guide to New York Evidence rule 4.05 (Completing and Explaining Writing, Recording, Conversation or Transaction) when made in the context of settling or compromising a matter in dispute.

No New York case has addressed offers to pay property damage.

New York, however, in the second portion of the rule permits admissibility of the specified post-injury conduct when admissible for a purpose other than establishing liability. (See e.g. *Flieg v Levy*, 148 App Div 781, 783 [2d Dept 1912] [ownership of horse alleged to have struck or kicked plaintiff].) The non-liability purposes enumerated are suggested by *Flieg* and by comparable rules that statements or conduct of a party may not be admissible to establish liability for

reasons of policy, but may be admissible for non-liability purposes where such purposes are relevant.

4.19. Subsequent Remedial Measures

Evidence of measures taken after an event, that, if taken before the event, would have made injury or damage less likely to result:

(1) in civil proceedings, is not admissible when offered to prove negligence or culpable conduct in connection with the event or to prove negligent or culpable conduct with respect to a product alleged to be defective.

(2) in civil and criminal proceedings, is admissible to prove some other fact relevant to a material issue, such as ownership or control of an object or premises, feasibility of precautionary measures, or in a products liability proceeding to prove a manufacturing defect by a change in design.

Note

This rule governs the admissibility in civil proceedings of evidence of repairs or other measures, such as a modification, change, or precaution, taken by a party after an event, such as an accident, which if taken before the event would have made injury or damage less likely to result.

The exclusionary aspect of the rule does not necessarily apply in a criminal proceeding. As explained in *People v Thomas* (70 NY2d 823, 825 [1987]), where the defendant was prosecuted for a homicide arising out of the operation of a motor vehicle:

“defendant's proof of subsequent design modifications to his automobile offered in support of his defense that the accident was caused, not by his drinking, but by defects in his motor vehicle . . . should have been permitted. . . . Evidence of postaccident design changes is irrelevant in strict liability or negligence cases when offered to prove negligent design. Here, however, the conduct of the manufacturer or seller in designing the vehicle was not at issue. Rather, consistent with his explanation at the scene of the accident, defendant sought only to prove the existence of a ‘defect’ in his automobile, as part of his defense. Moreover, the policy reasons for not allowing evidence of postaccident repairs or improvements in the civil cases do not apply.” (Citations omitted.)

The rule is derived from well settled New York law. (See e.g. *Caprara v Chrysler Corp.*, 52 NY2d 114, 122 [1981]; *Getty v Town of Hamlin*, 127 NY 636, 638 [1891]; *Corcoran v Village of Peekskill*, 108 NY 151, 155 [1888].) The Court of Appeals in *Caprara* stated the rationale for this exclusionary rule:

“Now reaching the broader and more basic question of the role of postaccident change in this case, we start by reiterating the long accepted proposition that, in a negligence suit, proof of a defendant's postaccident repair or improvement ordinarily is not admissible. The reason for applying this rule of evidence to that kind of case is clear. Since at the heart of such an action is either affirmative conduct in creating a dangerous condition or a failure to perceive a foreseeable risk and take reasonable steps to avert its consequences, proof that goes to hindsight rather than foresight most often is entirely irrelevant and, at best, of low probative value.” (52 NY2d at 122.)

In strict product liability cases, Court of Appeals decisions make the exclusionary rule applicable in actions based on design defects or failure to warn, but inapplicable in actions based on a manufacturing defect. (See *Haran v Union Carbide Corp.*, 68 NY2d 710, 711-712 [1986] [in a failure to warn action, evidence of a subsequent change in warnings is inadmissible]; *Cover v Cohen*, 61 NY2d 261, 274-275 [1984] [in a *design defect* action, evidence of a subsequent change in design is inadmissible]; *Caprara*, 52 NY2d at 123-126 [in a *manufacturing defect* action, evidence of a subsequent design change is admissible as it tended to show a defect and that it was the cause of the accident].) The rationale for the distinction was explained by Justice Simons in *Rainbow v Elia Bldg. Co.* (79 AD2d 287, 292-293 [4th Dept 1981], *affd on op below* 56 NY2d 550 [1982]):

“Perhaps it is sufficient to note that in *Caprara* the court limited its decision to strict product liability cases involving manufacturing flaws, holding that the exclusionary rule did not apply to them because due care is not a defense in such cases. Clearly distinguishable under present New York law is a strict products liability claim of design defect, based as it is on a balancing of risk and utility factors, and involving considerations of reasonable care.” (Citation omitted.)

Finally, Court of Appeals decisions hold that the exclusionary rule is inapplicable where the evidence of subsequent remedial measures is offered for a non-liability purpose relevant in the action. (See e.g. *Scudero v Campbell*, 288 NY 328 [1942] [ownership]; *Caprara*, 52 NY2d at 122 [in dictum, noting impeachment of a witness would be a permissible purpose]; *Cover*, 61 NY2d at 270; *see also Stolowski v 234 E. 178th St. LLC*, 89 AD3d 549 [2011] [“The records of defendant's post-fire repairs and remedial measures do not fall within any of the recognized exceptions Contrary to plaintiffs' contentions, ‘general credibility

impeachment' is not an exception. Control is not at issue here since defendant concedes that it owns the premises"].)

**4.20. Complainant's Sexual Conduct or Dress
(CPL 60.42; 60.43; 60.48)**

**(1) Admissibility of Evidence of Victim's Sexual
Conduct in Sex Offense Cases [CPL 60.42]**

Evidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty of the Penal Law, unless such evidence:

- (a) proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; or**
- (b) proves or tends to prove that the victim has been convicted of an offense under section 230.00 of the Penal Law within three years prior to the sex offense which is the subject of the prosecution; or**
- (c) rebuts evidence introduced by the People of the victim's failure to engage in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact during a given period of time; or**
- (d) rebuts evidence introduced by the People which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or**
- (e) is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.**

(2) Admissibility of Evidence of Victim's Sexual Conduct in Non-Sex Offense Cases [CPL 60.43]

Evidence of the victim's sexual conduct, including the past sexual conduct of a deceased victim, may not be admitted in a prosecution for any offense, attempt to commit an offense or conspiracy to commit an offense defined in the Penal Law, unless such evidence is determined by the court to be relevant and admissible in the interests of justice, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination.

(3) Admissibility of Evidence of Victim's Manner of Dress in Sex Offense Cases [CPL 60.48]

Evidence of the manner in which the victim was dressed at the time of the commission of an offense may not be admitted in a prosecution for any offense, or an attempt to commit an offense, defined in article one hundred thirty of the Penal Law, unless such evidence is determined by the court to be relevant and admissible in the interests of justice, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination.

Note

Subdivision (1) restates verbatim CPL 60.42 ("Rules of evidence; admissibility of evidence of victim's sexual conduct in sex offense cases").

CPL 60.42, known as the "rape shield law," was enacted in 1975 (L 1975, ch 230, § 1) to address the "concerns that testimony about the sexual past of the victims of sex crimes often serves solely to harass the victim and confuse the jurors . . . At the same time, by providing exceptions to the general evidentiary prohibition of section 60.42, our Legislature acknowledged that there are instances where evidence of a complainant's sexual history might be relevant and admissible. The

exceptions also recognize that any law circumscribing the ability of the accused to defend against criminal charges remains subject to limitation by constitutional guarantees of due process and the right to confront the prosecution's witnesses." (*People v Williams*, 81 NY2d 303, 312 [1993]; *see Michigan v Lucas*, 500 US 145, 146 [1991]; *see also People v Scott*, 16 NY3d 589, 594 [2011] [evidence of a complainant's sexual conduct "must be precluded if it does not tend to establish a defense to the crime because it will only harass the victim and possibly confuse the jurors"]; *People v Halbert*, 80 NY2d 865 [1992] [example of a court appropriately balancing the prohibition and the defense]; *People v Halter*, 19 NY3d 1046 [2012] [same].)

Subdivision (2) restates verbatim CPL 60.43 ("Rules of evidence; admissibility of evidence of victim's sexual conduct in non-sex offense cases"). It was enacted in 1990 (L 1990, ch 832, § 1) and shares the same concerns as CPL 60.42.

Subdivision (3) restates verbatim CPL 60.48 ("Rules of evidence; admissibility of evidence of victim's manner of dress in sex offense cases"). It was enacted in 1994 (L 1994, ch 482, § 1) and also shares the same purpose as the other subdivisions.

4.20.1 Possession of Condoms; Receipt into Evidence (CPL 60.47)

Evidence that a person was in possession of one or more condoms may not be admitted at any trial, hearing, or other proceeding in a prosecution for section 230.00 [prostitution] of the Penal Law for the purpose of establishing probable cause for an arrest or proving any person's commission or attempted commission of such offense.

Note

This rule states verbatim (with the addition of the name of the offense in brackets) CPL 60.47.

The statute represents a policy determination that banning the use of condoms in prosecutions of prostitution will “obviate the public health risks attendant to the failure of a person engaged in prostitution to carry or use condoms out of fear that they would be seized and used as evidence” (William C. Donnino, Practice Commentaries, McKinney’s Cons Laws of NY, CPL 60.47).

4.20.3. Consciousness of Guilt

(1) Evidence of post-crime conduct that may in the context of a particular case evince a defendant's consciousness of guilt of the offense with which the defendant is charged is admissible. A consciousness of guilt may, for example, be evinced by a false alibi or explanation for one's actions, intimidation of a witness, destruction or concealment of evidence or flight.

(2) A defendant may introduce evidence of an innocent explanation for the conduct in order to rebut the inference of "consciousness of guilt."

(3) A jury should be advised of the limited probative value of "consciousness of guilt" evidence and must be so advised upon request of the defendant.

Note

Subdivision (1) is derived from a long line of Court of Appeals cases that have authorized the admission of relevant "consciousness of guilt" evidence. (*E.g. People v Bennett*, 79 NY2d 464, 469-470 [1992] ["Certain postcrime conduct is 'indicative of a consciousness of guilt, and hence of guilt itself.' . . . (C)onduct that has been recognized as revealing a guilty mind includes false statements or alibis; coercion or harassment of witnesses; and abandonment or concealment of evidence" (citations omitted)]; *People v Leyra*, 1 NY2d 199, 208 [1956] ["The assertion of false explanations or alibis as well as the destruction or concealment of evidence comes within the broad category of conduct evidencing a 'consciousness of guilt' and, therefore, admissible and relevant on the question of a defendant's guilt"].)

Although "consciousness of guilt" evidence may meet the relevancy test for admissibility in a particular case, New York courts have struggled with the weight a jury should be permitted to attribute to such evidence, and its value in determining the validity of a judgment of conviction. (*See Leyra*, 1 NY2d at 208-209 ["(I)t is difficult to determine from the decisions the precise weight or value to be assigned to (consciousness of guilt evidence) (T)he courts have consistently acknowledged the weakness of this type of evidence . . . where it is not supported by other proof of a truly substantial character"]; *Bennett*, 79 NY2d at 470 ["Consciousness of guilt evidence has consistently been viewed as weak because the connection between the conduct and a guilty mind often is tenuous. Even

innocent persons, fearing wrongful conviction, may flee or lie to extricate themselves from situations that look damning” (citations omitted)].)

“Consciousness of guilt” evidence therefore has been described as being of “slight value” (*People v Reddy*, 261 NY 479, 486 [1933]) and of “limited probative value,” with its probative weight “highly dependent upon the facts of each particular case.” (*People v Cintron*, 95 NY2d 329, 332-333 [2000]; *see* CJI2d[NY] General Applicability, Consciousness of Guilt [“(T)he weight and importance you (the jury) give to th(e) evidence (offered to show consciousness of guilt) depends on the facts of the case. Sometimes such evidence is only of slight value and, standing alone, it may never be the basis for a finding of guilt”].)

“Consciousness of guilt” evidence may provide the necessary corroboration of accomplice testimony. (*People v Ruberto*, 10 NY2d 428, 430 [1962].)

Examples of decisions relating to false statements as “consciousness of guilt” evidence are:

- The defendant’s false statement about finding the deceased’s credit card in a park after he had already used the card evinced a consciousness of guilt “of some crime” (*People v Levine*, 65 NY2d 845, 847 [1985]).
- Defendant’s statements “disclosing a pattern of inconsistent, and sometimes false, exculpatory stories” raised an inference of defendant’s consciousness of guilt (*People v Johnson*, 61 NY2d 932, 934 [1984]).
- The jury was “entitled to find consciousness of guilt if they disbelieved defendant’s explanation for his conduct” (*Cintron*, 95 NY2d at 332).

Before a jury may be charged to consider a consciousness of guilt emanating from a purportedly false alibi or explanation, there must be evidence independent of that offered to prove the defendant’s guilt, that the alibi or explanation is false. (*O’Donnell v State of New York*, 26 AD3d 59, 64 [2d Dept 2005]; *People v Sheiroad*, 124 AD2d 14, 18 [4th Dept 1987]; *People v Lawson*, 112 AD2d 457, 460 [3d Dept 1985]; *People v Abdul-Malik*, 61 AD2d 657, 661[1st Dept 1978].)

Examples of decisions relating to conduct as “consciousness of guilt” evidence are:

- A defendant’s attempt to flee from the police during a high-speed chase and his continued flight on foot after crashing his car allowed for a “reasonable inference that defendant knew that the vehicle was stolen and that he did not have the owner’s consent to operate it.” (*People v Cintron*, 95 NY2d 329, 333 [2000]; *see People v Yazum*, 13 NY2d 302, 304 [1963] [evidence of flight is admissible as “consciousness of guilt”

even though a defendant has reason to be in flight from the charged crime and some other crime].)

- “[T]estimony regarding defendant’s attempts to avoid giving an adequate breath sample for alco-sensor testing was properly admitted as evidence of consciousness of guilt” (*People v MacDonald*, 89 NY2d 908, 910 [1996]).
- “Evidence that defendant may have damaged the victim’s electronic devices to prevent her from preserving a record of defendant’s conduct is probative of his consciousness of guilt inasmuch as it is akin to evidence of tampering or witness intimidation” (*People v Cotton*, 184 AD3d 1145, 1146 [4th Dept 2020]).

Examples of evidence that did not warrant an inference of consciousness of guilt are:

- The defendant’s assertion, on being questioned by police, of his right to counsel, did not infer a consciousness of guilt. (*People v Al-Kanani*, 26 NY2d 473, 478 [1970].)
- It was error to introduce evidence of an attempted murder of an eyewitness to the crime as consciousness of guilt when the evidence did not connect the person who made the attempt to the defendant. (*People v McKnight*, 52 NY2d 760 [1980], *rev’d for reasons stated in dissent below* 71 AD2d 801, 802-804 [4th Dept 1979].)
- In an arson prosecution, the defendant’s false statements “regarding efforts to assist others are not inconsistent with his innocence. An innocent person in defendant’s position may have uttered such statements not because of knowledge of his own guilt but because of a misguided desire to gain praise and possibly save his job.” (*People v Marin*, 65 NY2d 741, 746 [1985].)
- Defendant’s attempt to obtain the complainant’s motor vehicle records by false representations did not constitute “consciousness of guilt” evidence in his prosecution for rape of the complainant. (*People v Bennett*, 79 NY2d 464, 470 [1992].)
- Admitting evidence of a “smile” as circumstantial evidence of consciousness of guilt is error. (*People v Harris*, 98 NY2d 452, 492 [2002].)
- The defendant’s resisting arrest six months after the alleged commission of an assault and after violating an order of protection was not admissible as evidence of consciousness of guilt in the assault trial. “The

defendant was not resisting arrest for the crimes charged at trial, and resisting arrest in this instance was too far removed from the underlying incident” and the probative value “was far outweighed by the potential prejudice of creating an inference that the defendant may have violent tendencies” (*People v Ramirez*, 180 AD3d 811, 813 [2d Dept 2020]).

Subdivision (2). New York law is well settled that a trial court not only must exercise care in determining whether proffered evidence constitutes relevant evidence of a “consciousness of guilt,” but also must permit the defense an opportunity to present evidence of an innocent explanation. (*People v Gilmore*, 66 NY2d 863, 867 [1985] [The court erred in preventing the defendant from testifying about what he had learned in his conversation with his mother-in-law that may have motivated his flight other than a consciousness of guilt].)

Subdivision (3). New York law is equally well settled that a court should and must, upon request of the defendant, charge the jury on the limited probative value of “consciousness of guilt” evidence. (E.g. *People v Limage*, 45 NY2d 845 [1978], *affg on mem below* 57 AD2d 906 [2d Dept 1977] [in this case, on request of the defendant, the trial court was required to instruct the jury as to the limited probative value of flight]; *People v Yazum*, 13 NY2d 302, 304 [1963] [“This court has always recognized the ambiguity of evidence of flight and insisted that the jury be closely instructed as to its weakness as an indication of guilt of the crime charged”]; *see* CJI2d[NY] General Applicability, Consciousness of Guilt.)

4.21.1 Culpability of a Third Party

(1) Evidence of the culpability of a person other than the defendant for the offense for which the defendant is charged is admissible when the probative value of the proffered evidence outweighs any countervailing risks of delay, prejudice, and confusion and is not so remote and speculative that it does not sufficiently connect the third party to the offense.

(2) A defense application to present third-party culpability evidence should be made, in the court's discretion, in writing or orally, at the earliest reasonable opportunity and must include an offer of proof in support of the application and, in particular, explain what evidence the defense would introduce to implicate a third party's culpability for the offense. The People must then have an opportunity to be heard. The court may then conduct any hearing that may be necessary to assess the arguments and, with or without the hearing, render a decision that includes a clear directive as to what evidence, if any, the court will and will not allow.

Note

Subdivision (1) is derived from a series of Court of Appeals cases, the seminal case being *People v Primo* (96 NY2d 351 [2001]).

Primo held that the admissibility of evidence of third-party culpability should be addressed under the “general balancing analysis” of whether the proponent has demonstrated that the proffered evidence has a probative value that outweighs the “countervailing risks of delay, prejudice and confusion.” (*Primo* at 356-357.) “Courts thus have been careful to exclude evidence of third-party culpability that has slight probative value and strong potential for undue prejudice, delay and confusion (see, *Greenfield v People*, [85 NY 75, 89 (1881)] [excluding evidence of ‘(r)emote acts, disconnected and outside of the crime itself’ to prove that someone else is the guilty party] . . .). The admission of evidence of third-party culpability may not rest on mere suspicion or surmise.” (*Primo* at 357.)

That the application of the *Primo* standard may exclude a proffered defense “does not infringe upon a defendant’s constitutional right to present a complete defense as set forth in the Sixth and Fourteenth Amendments.” (*People v Powell*,

27 NY3d 523, 526 [2016].)

The proffered evidence of third-party culpability in *Primo* was a ballistics report that linked a third person to the gun used to shoot the complainant coupled with proof that the third party was at the scene of the shooting. On those facts, *Primo* determined that the “probative value” of the evidence of the culpability of a third party proffered in that case “plainly outweighs the dangers of delay, prejudice and confusion.” (*Primo* at 357.)

Powell (27 NY3d at 531) reinforced *Primo*, holding that “courts should ‘exclude evidence of third-party culpability that has slight probative value and strong potential for undue prejudice, delay and confusion’ or where the evidence is so remote and speculative that it does not sufficiently connect the third party to the crime” (citation omitted).

Given that the proffered evidence of third-party culpability in *Powell* was based on a speculative assertion that “others could have had access to [the deceased’s] home or might have had reason to kill her—the trial court did not abuse its discretion by precluding the proffered evidence (*see People v Gamble*, 18 NY3d 386, 398-399 [2012] [speculative assertions that other unidentified individuals had a motive to harm a victim are insufficient to support admission of third-party culpability evidence]).” (*Powell* at 531-532; *see People v King*, 27 NY3d 147, 158 [2016] [the court properly rejected a defense proffer of a witness to testify to hearsay statements by two unidentified individuals, not including the defendant, that they had a motive to harm the victim]; *cf. Gamble* at 399 [“That the People introduced evidence establishing defendant’s motive for the shootings does not . . . open the door to generalized, speculative evidence of possible motives by unidentifiable persons” (internal quotation marks omitted)].)

Powell made it clear, however, that a third-party culpability claim “does not necessarily require a specific accusation that an identified individual committed the crime. For example, a proffer of an unknown DNA profile may be sufficient.” (*Powell* at 532.)

People v DiPippo (27 NY3d 127, 136 [2016]) followed *Primo*, adding that the absence of “proof directly linking the third party to the *crime scene*” was not necessarily fatal to the introduction of third-party culpability evidence.

On its facts, *DiPippo* found that notwithstanding the absence of proof linking the third party to the “crime scene,” the evidence of a culpable third party was sufficient in that it included a declaration against penal interest by the third party that implicated him in the crime, as well as a showing that the third party had committed other crimes with a unique *modus operandi* that paralleled the crime charged.

With respect to the “modus operandi” evidence, *DiPippo* explained that

“[w]hile unlikely to be sufficient standing alone,” it “is relevant to, and can support, a third-party culpability proffer where the crimes reflect a ‘modus operandi’ connecting the third party to the charged crimes.” (*Id.* at 138; *cf. People v Schulz*, 4 NY3d 521, 528 [2005] [the defendant offered “no evidence which shows a modus operandi”; but only evidence that an identified third party committed the same type of crime in the area of the charged crime and around the time of its occurrence].)

In permitting evidence of third-party culpability, the trial court retains discretion to determine what evidence would be appropriate. (*See Primo* at 357 [the court will “make its determination (of an application to admit third-party culpability) followed by clear directives as to what it will and will not allow”]; *People v Boyd*, 31 NY3d 953, 955 [2018] [where the defense was permitted to pursue a third-party culpability defense, the court did not abuse its discretion by refusing to admit in evidence facts concerning the arrest of the third party (who had inculcated himself and later recanted)]; *People v Hemphill*, 35 NY3d 1035, 1036 [2020] [where the defense presented a third-party culpability defense, “the trial court did not abuse its discretion by admitting evidence that the allegedly culpable third party pleaded guilty to possessing a firearm other than the murder weapon”].)

Subdivision (2) is derived from *Primo* (at 357):

“In practice, the balancing [of whether the probative value outweighs the countervailing risks] is best performed by requiring the defense, at the earliest reasonable opportunity, to make an offer of proof outside the presence of the jury to explain how it would introduce evidence of third-party culpability. The court will then hear any counter-arguments from the prosecutor, weigh the considerations, and make its determination followed by clear directives as to what it will and will not allow.”

4.21. Evidence of Crimes and Wrongs (*Molineux*)

(1) Evidence of crimes, wrongs, or other acts committed by a person is not admissible to prove that the person acted in conformity therewith on a particular occasion or had a propensity to engage in a wrongful act or acts. This evidence may be admissible when it is more probative than prejudicial to prove, for example:

motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or conduct that is inextricably interwoven with the charged acts; or to provide necessary background information or explanation; or to complete the narrative of the subject event or matter.

(2) In a criminal proceeding, where the defendant interposes a defense, the People on rebuttal may prove the defendant's commission of other crimes or wrongs when such crimes or wrongs are relevant and probative to disprove the defense.

Note

Subdivision (1). This rule sets forth what is generally known as the *Molineux* rule, after the seminal case of *People v Molineux* (168 NY 264 [1901]).

The first sentence sets forth the general rule, applicable in both civil and criminal proceedings, that when evidence of other crimes, wrongs or acts committed by a person is offered for the purpose of raising an inference that the person is likely to have committed the crime charged or the act in issue, the evidence is inadmissible. (*Molineux*, 168 NY at 291-293; *People v Morris*, 21 NY3d 588, 594 [2013] [(E)vvidence of uncharged crimes is inadmissible where its purpose is only to show a defendant's bad character or propensity towards crime"]; *People v Bradley*, 20 NY3d 128, 135 [2012] ["Without some better developed theory of relevance," evidence of a stabbing incident more than 10 years before defendant fatally stabbed her estranged boyfriend was "resonant solely for what (it) seemed to disclose about defendant's violent propensity and the manner of its expression"]; *Matter of Brandon*, 55 NY2d 206, 210-211 [1982] ["A general rule of evidence, applicable in both civil and criminal cases, is that it is improper to

prove that a person did an act on a particular occasion by showing that he did a similar act on a different, unrelated occasion”]; *People v Vargas*, 88 NY2d 856 [1996] [Where only the credibility of the complainant and the credibility of the defendant were at issue on whether there was a forcible or consensual sex act, evidence of the defendant having engaged in sexual misconduct with others was impermissible evidence of propensity, not probative evidence of intent].)

As explained in *People v Frumusa* (29 NY3d 364, 369 [2017]):

“The *Molineux* rule ‘ “is based on policy and not on logic.” ’ ‘It may be logical to conclude from a defendant’s prior crimes that he is inclined to act criminally, but such evidence “is excluded for policy reasons because it may induce the jury to base a finding of guilt on collateral matters or to convict a defendant because of his past” ’ ” (citations omitted).

The second sentence sets forth exceptions to the exclusionary rule recognized by the Court of Appeals. The exceptions relate to circumstances where the evidence of other crimes, wrongs, or acts is offered for a non-conformity purpose that is relevant in the proceeding. These exceptions are available in both civil and criminal proceedings. (See *Matter of Brandon*, 55 NY2d at 210-211; *Mazella v Beals*, 27 NY3d 694, 709-710 [2016].)

In *Molineux*, the Court listed examples of uncharged crimes that may be relevant to show (1) intent, (2) motive, (3) knowledge, (4) common scheme or plan, or (5) identity of the defendant (168 NY at 293). This enumeration is “merely illustrative” (*People v Vails*, 43 NY2d 364, 368 [1977]) and not intended to be “exhaustive” of the possible range of relevancy (*People v Santarelli*, 49 NY2d 241, 248 [1980]). The Court has continued to add to this enumeration. (See *People v Stanard*, 32 NY2d 143, 146 [1973] [“background evidence”]; *People v Cook*, 42 NY2d 204, 208 [1977] [“ ‘to complete the narrative’ ”]; *People v Vails*, 43 NY2d 364, 368 [1977].)

Even when evidence of other crimes, wrongs, or acts is admissible for such a non-conformity purpose, the court must weigh the evidence’s probative value against its prejudicial impact before admitting the evidence and may exclude the evidence in its discretion. (See Guide to NY Evid rule 4.07; *People v Alvino*, 71 NY2d 233, 241-242 [1987]; *People v Ventimiglia*, 52 NY2d 350, 360 [1981].)

In *People v Robinson* (68 NY2d 541, 544-545 [1986]), the Court of Appeals held the People must show by clear and convincing evidence that the defendant committed the other crimes in order to admit evidence under the identity exception.

In its discretion, a trial court may conduct an inquiry or hearing, outside the presence of the jury, to determine admissibility, and in particular whether there is sufficient evidence of the *Molineux* exception. The party against whom the

Molineux evidence is sought to be admitted, however, is not entitled to pretrial notice of the opposing party's intent to offer such evidence, albeit that is the preferred practice. (Cf. CPL 240.43 [notice is required of prior uncharged criminal, vicious or immoral acts which a prosecutor intends to use for impeachment].)

Preliminary evidence of a *Molineux* exception may be admitted pursuant to rule 4.05 of the Guide to New York Evidence (Conditional Relevance [Evidence Offered "Subject to Connection"]). (See *People v Small*, 12 NY3d 732, 733 [2009] [mid-trial grant of the People's application to introduce *Molineux* evidence to rebut the defendant's defense was proper]; *People v Ventimiglia*, 52 NY2d 350, 362 [1981] [prior to trial or the testimony of the *Molineux* witness "the prosecutor should ask for a ruling out of the presence of the jury at which the evidence to be produced can be detailed to the court, either as an offer of proof by counsel or, preferably, by presenting the live testimony of the witness"].) Nothing precludes a court from itself requiring a party to advise the court, orally or in writing, of a prospective trial application to admit *Molineux* evidence and conducting any necessary and appropriate proceeding to determine the matter.

It should be noted that in certain instances, a prior criminal conviction or conduct may be required proof of a criminal charge.

In instances where a prior criminal conviction must be proved, statutory law may permit a defendant to admit the prior criminal conviction outside the presence of the jury in order to preclude the People from offering proof of that conviction at trial (CPL 200.60, 200.63). The principles of *Molineux* set forth in this rule may, however, yet permit the People to prove the conviction (*People v Anderson*, 114 AD3d 1083, 1086 [3d Dept 2014]).

In a conspiracy case, an overt act must be alleged and proved to have been committed in furtherance of the conspiracy (Penal Law § 105.20). That overt act may constitute an uncharged crime. And, the Court of Appeals has held that an "indictment for conspiracy need not allege every overt act . . . If the indictment provides sufficient detail about the scope and nature of the conspiracy and the major overt acts committed in furtherance of it, then evidence may be offered at trial of related [non-enumerated] overt acts" (*People v Ribowsky*, 77 NY2d 284, 292-293 [1991] [citations omitted]), even if those overt acts include uncharged crimes (*People v Portis*, 129 AD3d 1300, 1302 [3d Dept 2015]; *People v Snagg*, 35 AD3d 1287, 1288 [4th Dept 2006]; *People v Morales*, 309 AD2d 1065 [3d Dept 2003]; *People v McKnight*, 281 AD2d 293 [1st Dept 2001]). While such overt acts are not subject to exclusion pursuant to the *Molineux* rule, their admissibility, as with all forms of evidence, may be subject to rule 1.07 of the Guide to New York Evidence (Exclusion of Relevant Evidence). It may therefore be advisable and the better practice (as it is for *Molineux* evidence) for a court to require that it be informed before the commencement of trial of any unenumerated overt acts the People intend to prove.

Subdivision (2). The rule in this subdivision is derived from several Court of Appeals decisions which permit evidence of a defendant's commission of other crimes or wrongs to rebut a defense raised by the defendant. (See *e.g. People v Israel*, 26 NY3d 236, 242-243 [2015] [rebuttal of extreme emotional distress disturbance]; *People v Santarelli*, 49 NY2d 241, 248 [1980] [rebuttal of insanity defense]; *People v Calvano*, 30 NY2d 199 [1972] [rebuttal of entrapment defense].)

Notably, in *People v Valentin* (29 NY3d 150 [2017]) where the defendant did not present evidence of an agency defense, but rather interposed the defense based on the People's evidence, the People were entitled to prove the defendant's prior conviction for a drug sale on the issue of his intent to sell.

4.22. Evidence of Destroyed Drugs (CPL 60.70)

(1) The destruction of dangerous drugs, pursuant to the provisions of CPL article 715, shall not preclude the admission on trial or in a proceeding in connection therewith of testimony or evidence where such testimony or evidence would otherwise have been admissible if such drugs had not been destroyed.

(2) Notwithstanding subdivision one, the failure to follow CPL article 715 does not preclude admission of testimony as to the nature and amount of the drugs seized if the prosecution has sufficiently explained the destruction, the drugs were not destroyed in bad faith, and the defendant is not prejudiced.

Note

Subdivision (1) restates verbatim CPL 60.70, except where the statutory language refers to “article seven hundred fifteen hereof,” this rule inserts the appropriate reference, namely, “CPL article 715.”

Subdivision (2) assumes that the normal prerequisites to the admissibility of drugs, such as chain of custody, can be met but that at some point the drugs themselves have been destroyed. In that instance, *People v Reed* (44 NY2d 799 [1978]) allows for testimony about the drugs if the criteria stated in the rule are fulfilled:

“[T]he destruction of the contraband by the police custodian was due to a clerical error which led him to reasonably believe that the case had been dismissed. The prosecution has thus sufficiently explained the destruction, and there is no indication and, indeed, no claim of bad faith. Additionally significant is the absence of any prejudice to the defendant as a result of the destruction of the substance prior to trial. . . . [T]he drugs were available to defendant for independent analysis or measurement for nearly two years, and were not destroyed until just prior to trial. At no time during this long period that the police had the substance did defendant seek to have the drugs examined; instead, he simply requested a copy of the police laboratory report. In light of these facts, the decision to allow testimony as to the nature and amount of the material seized did not constitute error” (*Reed* at 800-801).

4.23. Drugs or Alcohol in Blood (VTL 1195 & CPL 60.75)

(1) Upon the trial of any action or proceeding arising out of actions alleged to have been committed by any person arrested for a violation of any subdivision of section eleven hundred ninety-two of [the Vehicle and Traffic Law], the court shall admit evidence of the amount of alcohol or drugs in the defendant's blood as shown by a test administered pursuant to the provisions of section eleven hundred ninety-four of [the Vehicle and Traffic Law].

(2) In any prosecution where two or more offenses against the same defendant are properly joined in one indictment or charged in two accusatory instruments properly consolidated for trial purposes and where one such offense charges a violation of any subdivision of section eleven hundred ninety-two of the vehicle and traffic law [Operating a Motor Vehicle While Under the Influence of Alcohol or Drugs], chemical test evidence properly admissible as evidence of intoxication under subdivision one of section eleven hundred ninety-five of such law [Chemical Test Evidence] shall also, if relevant, be received in evidence with regard to the remaining charges in the indictments.

(3) This rule does not preclude the admission in any proceeding of evidence of the amount of alcohol or drugs in a person's blood, if legally obtained and relevant, notwithstanding the absence of any charge under the Vehicle and Traffic Law.

Note

Subdivision (1) restates Vehicle and Traffic Law § 1195 (1) except that the words “the Vehicle and Traffic Law” in brackets are substituted for “of this article.” By its terms, it applies to any “action or proceeding,” civil or criminal (*People v Ladd*, 89 NY2d 893, 896 [1996]).

Subdivision (2) restates Criminal Procedure Law § 60.75, except for the bracketed material. It applies to a criminal action, but as *Ladd* explains does not preempt application of the rule in subdivision (1):

“CPL 60.75 provides that when Vehicle and Traffic Law charges and Penal Law charges are tried together the evidence obtained pursuant to section 1194 of the Vehicle and Traffic Law is admissible as to both charges. The statute was enacted to remove any doubts arising from our holding in *People v Moselle* (57 NY2d 97 [1982]), that when charges from the two chapters were joined the test results were not admissible with respect to the Penal Law charges. Section 60.75 does not limit the use of blood test results to prosecutions under the Vehicle and Traffic Law or to prosecutions linking Vehicle and Traffic Law and Penal Law offenses. Indeed, section 1195 (1) of the Vehicle and Traffic Law provides that blood test results are admissible at the trial of ‘any action or proceeding’ arising out of a factual basis for a driving while intoxicated arrest. The evidence, if legally obtained and relevant, should be admissible in Penal Law prosecutions, notwithstanding the absence of any charge under the Vehicle and Traffic Law” (*Ladd*, 89 NY2d at 896).

Subdivision (3) is derived from the rule on “relevant evidence” (Guide to NY Evid rule 4.01 [2]) and *Ladd* (89 NY2d at 896).

4.24.1 Effect of Intoxication upon Liability [Penal Law §§ 15.25, 15.05 (3)]

In any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged except if the culpable mental state of the offense is “recklessly.” In that instance, a person who creates a substantial and unjustifiable risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

Note

The rule incorporates Penal Law § 15.25 (Effect of intoxication upon liability) and the exception set forth in Penal Law § 15.05 (3) (Culpability; definitions of culpable mental states).

Penal Law § 15.25 states the general rule that “[i]ntoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged.” Normally, the “element” that intoxication may negate is the actor’s culpable mental state (*see People v Newton*, 8 NY3d 460 [2007]).

The exception for the culpable mental state of “recklessly” is set forth in Penal Law § 15.05 (3) (*see People v Register*, 60 NY2d 270, 280 [1983], *overruled on other grounds People v Feingold*, 7 NY3d 288 [2006]).

The Court of Appeals has not decided whether intoxication may negate the element of “depraved indifference to human life,” declared a culpable mental state by *Feingold* and included in the definition of crimes that also require a defendant to act recklessly (*compare People v Wimes*, 49 AD3d 1286, 1287 [4th Dept 2008] [finding that intoxication could have negated the element of “depraved indifference” to human life], *and People v Coon*, 34 AD3d 869, 870 [3d Dept 2006] [finding that intoxication by crack cocaine negated “depraved indifference” to human life], *with People v Wells*, 53 AD3d 181, 193 [1st Dept 2008] [in dicta, the Court opined that intoxication was not a defense because in its view “culpability (for depraved indifference murder) is appropriately assessed at the time defendant made the conscious decision to embark on a course of conduct that inevitably resulted in his operation of a motor vehicle while in a state of extreme intoxication”]; *see also People v Lessey*, 40 Misc 3d 530 [Sup Ct, NY County 2013]).

Whether the evidence is sufficient to warrant an instruction to the finder of fact to consider the effect of intoxication on a defendant’s mental state depends on

such factors as: “the number of drinks, the period of time during which they were consumed, the lapse of time between consumption and the event at issue, whether the defendant consumed them on an empty stomach, whether the drinks were high in alcoholic content, and the specific impact of the alcohol upon the defendant’s behavior or mental state. *People v. Gaines*, 83 N.Y.2d 925, 615 N.Y.S.2d 309, 638 N.E.2d 954 (1994) (the defendant’s testimony that he had a couple of drinks and may have lost control, and the testimony of witnesses that the defendant was ‘high’ and had glassy eyes and alcohol on his breath was insufficient to warrant a charge on intoxication); *People v. Rodriguez*, 76 N.Y.2d 918, 563 N.Y.S.2d 48, 564 N.E.2d 658 (1990) (since there was no evidence as to when the defendant ingested the narcotics, the quantity ingested or the effect they had on him, a charge on intoxication was not warranted)” (William C. Donnino, Practice Commentary, McKinney’s Cons Laws of NY, Penal Law § 15.25).

Given the requisite showing, a defendant is entitled to the jury instruction: “[I]n determining whether the defendant had the (specify, e.g. intent and/or knowledge), necessary to commit a crime you may consider whether the defendant’s mind was affected by intoxicants to such a degree that he/she was incapable of forming the (specify, e.g. intent and/or knowledge) necessary for the commission of that crime” (CJI2d[NY] General Applicability, Defenses, Intoxication).

4.24. Consciousness of Guilt

(1) Evidence of post-crime conduct that may in the context of a particular case evince a defendant's consciousness of guilt of the offense with which the defendant is charged is admissible. A consciousness of guilt may, for example, be evinced by a false alibi or explanation for one's actions, intimidation of a witness, destruction or concealment of evidence or flight.

(2) A defendant may introduce evidence of an innocent explanation for the conduct in order to rebut the inference of "consciousness of guilt."

(3) A jury should be advised of the limited probative value of "consciousness of guilt" evidence and must be so advised upon request of the defendant.

Note

Subdivision (1) is derived from a long line of Court of Appeals cases that have authorized the admission of relevant "consciousness of guilt" evidence. (*E.g. People v Bennett*, 79 NY2d 464, 469-470 [1992] ["Certain postcrime conduct is 'indicative of a consciousness of guilt, and hence of guilt itself.' . . . (C)onduct that has been recognized as revealing a guilty mind includes false statements or alibis; coercion or harassment of witnesses; and abandonment or concealment of evidence" (citations omitted)]; *People v Leyra*, 1 NY2d 199, 208 [1956] ["The assertion of false explanations or alibis as well as the destruction or concealment of evidence comes within the broad category of conduct evidencing a 'consciousness of guilt' and, therefore, admissible and relevant on the question of a defendant's guilt"].)

Although "consciousness of guilt" evidence may meet the relevancy test for admissibility in a particular case, New York courts have struggled with the weight a jury should be permitted to attribute to such evidence, and its value in determining the validity of a judgment of conviction. (*See Leyra*, 1 NY2d at 208-209 ["(I)t is difficult to determine from the decisions the precise weight or value to be assigned to (consciousness of guilt evidence) (T)he courts have consistently acknowledged the weakness of this type of evidence . . . where it is not supported by other proof of a truly substantial character"]; *Bennett*, 79 NY2d at 470 ["Consciousness of guilt evidence has consistently been viewed as weak because the connection between the conduct and a guilty mind often is tenuous. Even

innocent persons, fearing wrongful conviction, may flee or lie to extricate themselves from situations that look damning” (citations omitted)].)

“Consciousness of guilt” evidence therefore has been described as being of “slight value” (*People v Reddy*, 261 NY 479, 486 [1933]) and of “limited probative value,” with its probative weight “highly dependent upon the facts of each particular case.” (*People v Cintron*, 95 NY2d 329, 332-333 [2000]; *see* CJI2d[NY] General Applicability, Consciousness of Guilt [“(T)he weight and importance you (the jury) give to th(e) evidence (offered to show consciousness of guilt) depends on the facts of the case. Sometimes such evidence is only of slight value and, standing alone, it may never be the basis for a finding of guilt”].)

“Consciousness of guilt” evidence may provide the necessary corroboration of accomplice testimony. (*People v Ruberto*, 10 NY2d 428, 430 [1962].)

Examples of decisions relating to false statements as “consciousness of guilt” evidence are:

- The defendant’s false statement about finding the deceased’s credit card in a park after he had already used the card evinced a consciousness of guilt “of some crime” (*People v Levine*, 65 NY2d 845, 847 [1985]).
- Defendant’s statements “disclosing a pattern of inconsistent, and sometimes false, exculpatory stories” raised an inference of defendant’s consciousness of guilt (*People v Johnson*, 61 NY2d 932, 934 [1984]).
- The jury was “entitled to find consciousness of guilt if they disbelieved defendant’s explanation for his conduct” (*Cintron*, 95 NY2d at 332).

Before a jury may be charged to consider a consciousness of guilt emanating from a purportedly false alibi or explanation, there must be evidence independent of that offered to prove the defendant’s guilt, that the alibi or explanation is false. (*O’Donnell v State of New York*, 26 AD3d 59, 64 [2d Dept 2005]; *People v Sheiroad*, 124 AD2d 14, 18 [4th Dept 1987]; *People v Lawson*, 112 AD2d 457, 460 [3d Dept 1985]; *People v Abdul-Malik*, 61 AD2d 657, 661[1st Dept 1978].)

Examples of decisions relating to conduct as “consciousness of guilt” evidence are:

- A defendant’s attempt to flee from the police during a high-speed chase and his continued flight on foot after crashing his car allowed for a “reasonable inference that defendant knew that the vehicle was stolen and that he did not have the owner’s consent to operate it.” (*People v Cintron*, 95 NY2d 329, 333 [2000]; *see People v Yazum*, 13 NY2d 302, 304 [1963] [evidence of flight is admissible as “consciousness of guilt”

even though a defendant has reason to be in flight from the charged crime and some other crime].)

- “[T]estimony regarding defendant’s attempts to avoid giving an adequate breath sample for alco-sensor testing was properly admitted as evidence of consciousness of guilt” (*People v MacDonald*, 89 NY2d 908, 910 [1996]).
- “Evidence that defendant may have damaged the victim’s electronic devices to prevent her from preserving a record of defendant’s conduct is probative of his consciousness of guilt inasmuch as it is akin to evidence of tampering or witness intimidation” (*People v Cotton*, 184 AD3d 1145, 1146 [4th Dept 2020]).

Examples of evidence that did not warrant an inference of consciousness of guilt are:

- The defendant’s assertion, on being questioned by police, of his right to counsel, did not infer a consciousness of guilt. (*People v Al-Kanani*, 26 NY2d 473, 478 [1970].)
- It was error to introduce evidence of an attempted murder of an eyewitness to the crime as consciousness of guilt when the evidence did not connect the person who made the attempt to the defendant. (*People v McKnight*, 52 NY2d 760 [1980], *rev’d for reasons stated in dissent below* 71 AD2d 801, 802-804 [4th Dept 1979].)
- In an arson prosecution, the defendant’s false statements “regarding efforts to assist others are not inconsistent with his innocence. An innocent person in defendant’s position may have uttered such statements not because of knowledge of his own guilt but because of a misguided desire to gain praise and possibly save his job.” (*People v Marin*, 65 NY2d 741, 746 [1985].)
- Defendant’s attempt to obtain the complainant’s motor vehicle records by false representations did not constitute “consciousness of guilt” evidence in his prosecution for rape of the complainant. (*People v Bennett*, 79 NY2d 464, 470 [1992].)
- Admitting evidence of a “smile” as circumstantial evidence of consciousness of guilt is error. (*People v Harris*, 98 NY2d 452, 492 [2002].)
- The defendant’s resisting arrest six months after the alleged commission of an assault and after violating an order of protection was not admissible as evidence of consciousness of guilt in the assault trial. “The

defendant was not resisting arrest for the crimes charged at trial, and resisting arrest in this instance was too far removed from the underlying incident” and the probative value “was far outweighed by the potential prejudice of creating an inference that the defendant may have violent tendencies” (*People v Ramirez*, 180 AD3d 811, 813 [2d Dept 2020]).

Subdivision (2). New York law is well settled that a trial court not only must exercise care in determining whether proffered evidence constitutes relevant evidence of a “consciousness of guilt,” but also must permit the defense an opportunity to present evidence of an innocent explanation. (*People v Gilmore*, 66 NY2d 863, 867 [1985] [The court erred in preventing the defendant from testifying about what he had learned in his conversation with his mother-in-law that may have motivated his flight other than a consciousness of guilt].)

Subdivision (3). New York law is equally well settled that a court should and must, upon request of the defendant, charge the jury on the limited probative value of “consciousness of guilt” evidence. (E.g. *People v Limage*, 45 NY2d 845 [1978], *affg on mem below* 57 AD2d 906 [2d Dept 1977] [in this case, on request of the defendant, the trial court was required to instruct the jury as to the limited probative value of flight]; *People v Yazum*, 13 NY2d 302, 304 [1963] [“This court has always recognized the ambiguity of evidence of flight and insisted that the jury be closely instructed as to its weakness as an indication of guilt of the crime charged”]; *see* CJI2d[NY] General Applicability, Consciousness of Guilt.)

4.24. Identification of a Defendant

Part I. Definition of blind or blinded procedure [CPL 60.25 (1) (C)]

For purposes of this section, a “blind or blinded procedure” is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproduction under circumstances where, at the time the identification is made, the public servant administering such procedure: (i) does not know which person in the array is the suspect, or (ii) does not know where the suspect is in the array viewed by the witness.

Part II. Identification by means of previous recognition, in addition to present identification [CPL 60.30]

(1) In any criminal proceeding in which the defendant’s commission of an offense is in issue, a witness who testifies that (a) he or she observed the person claimed by the People to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case, and (b) on the basis of present recollection, the defendant is the person in question, and (c) on a subsequent occasion he or she observed the defendant, or, where the observation is made pursuant to a blind or blinded procedure as defined in [part I of this rule], a pictorial, photographic, electronic, filmed or video recorded reproduction of the defendant, under circumstances consistent with such rights as an accused person may derive under the Constitution of this State or of the United States, and then also recognized him or her (the defendant) or the pictorial, photographic, electronic, filmed or video recorded reproduction of him or her as the same

person whom he or she had observed on the first or incriminating occasion, may, in addition to making an identification of the defendant at the criminal proceeding on the basis of present recollection as the person whom he or she (the witness) observed on the first or incriminating occasion, also describe his or her previous recognition of the defendant and testify that the person whom he or she observed or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed on such second occasion is the same person whom he or she had observed on the first or incriminating occasion. Such testimony and such pictorial, photographic, electronic, filmed or video recorded reproduction constitutes evidence-in-chief.

Part III. Identification by means of previous recognition, in absence of present identification [CPL 60.25]

(1) In any criminal proceeding in which the defendant's commission of an offense is in issue, testimony as provided in subdivision two may be given by a witness when:

(a) Such witness testifies that:

(i) He or she observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case; and

(ii) On a subsequent occasion he or she observed, under circumstances consistent with such rights as an accused person may derive under

the Constitution of this State or of the United States, a person or, where the observation is made pursuant to a blind or blinded procedure as defined in [part I of this rule], a pictorial, photographic, electronic, filmed or video recorded reproduction of a person whom he or she recognized as the same person whom he or she had observed on the first or incriminating occasion; and

(iii) He or she is unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question; and

(b) It is established that the defendant is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction the witness observed and recognized on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his or her recognition on such occasion and by such pictorial, photographic, electronic, filmed or video recorded reproduction.

(2) Under circumstances prescribed in subdivision one of this section, such witness may testify at the criminal proceeding that the person whom he or she observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion is the same person whom he or she observed on the first or incriminating occasion. Such

testimony, together with the evidence that the defendant is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion, constitutes evidence-in-chief.

Note

Part I is a verbatim reproduction of CPL 60.25 (1) (c), which applies to that section and by a cross-reference to CPL 60.30. At the end of the definition of “blind or blinded procedure,” the statute continues as follows:

“The failure of a public servant to follow such a procedure shall be assessed solely for purposes of this article and shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not constitute a legal basis to suppress evidence made pursuant to subdivision six of section 710.20 of this chapter. This article neither limits nor expands subdivision six of section 710.20 of this chapter.” (CPL 60.25 [1] [c].)

Part II is a verbatim reproduction of CPL 60.30.

Part III is a verbatim reproduction of CPL 60.25.

Consistent with the constitutional and statutory procedures, a witness may testify to (1) an in-court identification of a defendant that is relevant to the offense charged and that is based on present recollection at the time of the in-court identification and (2) his or her recognition of the defendant made at a relevant time prior to testifying based upon a personal viewing of the defendant or the viewing of a pictorial, photographic, electronic, filmed, or video recorded reproduction of the defendant.

If a witness cannot on the basis of present recollection make an in-court identification, consistent with the constitutional and statutory procedures, the witness may testify to his or her identification of the defendant that is relevant to the offense charged and that was made at a relevant time before testifying based upon a personal viewing of the defendant or the viewing of a pictorial, photographic, electronic, filmed, or video recorded reproduction of the defendant; provided, there is independent proof that the person viewed personally or by a pictorial, photographic, electronic, filmed or video recorded reproduction was the defendant.

4.25. Evidence of Plea and Ancillary Statements

(1) When a plea of guilty is withdrawn or vacated, evidence of that plea and any statement made in the course of entering that plea:

(a) is not admissible in a criminal proceeding against the person who entered the plea;

(b) is admissible in a civil proceeding against the person who entered the plea, provided that the vacatur was not based upon a violation of due process.

(2) A defendant's statement made on advice of counsel to a prosecutor for the purpose of obtaining a beneficial disposition of the defendant's case is, in the absence of the agreed upon disposition, admissible against the defendant in a subsequent trial, provided the trial is not the consequence of the prosecutor's improper breach of the agreement and provided the parties did not otherwise expressly agree.

Note

Subdivision (1). Subdivision (1) (a) is derived from *People v Spitaleri* (9 NY2d 168 [1961]). In *Spitaleri*, the Court of Appeals held a withdrawn guilty plea is “out of the case forever and for all purposes.” (*Id.* at 173.) Thus, once a guilty plea is withdrawn, neither the fact of the plea nor the contents of the plea may be subsequently used at a trial by the prosecuting authority as evidence in chief or to impeach a defendant who testifies. (*People v Moore*, 66 NY2d 1028, 1030 [1985].) As acknowledged by the Court of Appeals, the *Spitaleri* rule is not constitutionally or statutorily compelled and rests upon the principle that “it would be unfair to allow a defendant to withdraw a plea of guilty and then permit its use against him [or her] at trial.” (*People v Evans*, 58 NY2d 14, 22 [1982].)

Subdivision (1) (b), as derived from *Cohens v Hess* (92 NY2d 511 [1998]), recognizes that the *Spitaleri* rule does not apply in civil proceedings. Thus, when the vacatur of a defendant's plea is not based upon any violation of due process in the taking of the guilty plea, it is admissible in a civil proceeding. (*Cohens v Hess*, 92 NY2d at 515.)

For the purposes of this rule, a plea of guilty includes an *Alford* plea; that is, a plea entered pursuant to *North Carolina v Alford* (400 US 25 [1970]). In an *Alford* plea, the defendant enters a plea of guilty without admitting factual guilt of the offense but in the face of strong evidence of guilt, often to avoid the consequences of a conviction of a more serious offense. (*Id.* at 472, 475.) The Supreme Court held such a plea is not constitutionally proscribed, and “may generally be used for the same purposes as any other conviction.” (*Id.* at 475.) New York recognizes the validity of an *Alford* plea, and the Court of Appeals has held that it has the same consequences as a plea that admits factual guilt. (See *Matter of Silmon v Travis*, 95 NY2d 470, 475 [2000].)

Subdivision (2). Subdivision (2) is derived from *People v Evans* (58 NY2d 14 [1982]) and *People v Curdgel* (83 NY2d 862 [1994]). In both cases, the defendant, in pursuit of a favorable plea agreement and upon the advice and in the presence of counsel, voluntarily furnished the prosecutor with an incriminating statement. In *Evans* the defendant agreed to testify in two trials against an accomplice, and in *Curdgel* the defendant agreed to testify in the grand jury against his accomplices. Before testifying in the grand jury, Curdgel signed a waiver of immunity.

Although for different reasons, each defendant ultimately went to trial—*Evans*, because his conviction upon his plea was reversed for unrelated reasons; and *Curdgel*, because he breached the plea agreement by publicly contradicting his testimony. At *Evans*’s trial, the People were permitted to use against him his statements to the prosecutor and his testimony at the accomplice’s trials; at *Curdgel*’s trial, the People were permitted to use his grand jury testimony against him.

The plea agreements in *Evans* and *Curdgel* did not include a condition that the statements or testimony would not be admissible at a subsequent trial of the defendant. (See *Curdgel*, 83 NY2d at 864-865 [“As in (Curdgel’s) case, the *Evans* defendant . . . set no conditions on the subsequent use of his testimony”].)

In *Evans*, the Court noted that because the defendant entered into an agreement for the exchange of statements or testimony for a beneficial plea that did not include a condition limiting the use of the statements or testimony “when it would have been a simple task to include such a limiting condition as part of that plea, [the defendant] assumed the risk that the challenged evidence might be used against him if he succeeded on his appeal.” (*Evans*, 58 NY2d at 23.) In *Curdgel*, the Court noted that “the People bargained for use of defendant’s testimony in the prosecution of his accomplices.” (*Curdgel*, 83 NY2d at 865.) After the defendant’s breach of that agreement, the People were permitted to use the defendant’s grand jury testimony at his trial, given in exchange for a beneficial plea offer, “as this was a counseled, foreseeable use of his testimony.” (*Id.*)

The statement or testimony in *Evans* and *Curdgel* was bargained for by the People in return for a beneficial plea offer; therefore, when, through no fault of the People, a guilty plea did not result, the People were not precluded from using what they had bargained for against each defendant as this was a “foreseeable” consequence of the plea agreement. (See *People v Melo*, 160 AD2d 600, 600–601 [1st Dept 1990] [“The defendant could have sought as a condition for the negotiations an agreement from the prosecutor not to use his statements against him, but he did not. Absent such agreement with the District Attorney, prepleading admissions made in the presence of the defendant’s attorney are admissible” (citation omitted)]; but cf. *People v Thompson*, 108 AD3d 732 [2d Dept 2013].)

4.27. Proof of Previous Conviction; When Allowed [CPL 60.40 (3)]

Subject to the limitations prescribed in [CPL] section 200.60, the people may prove that a defendant has been previously convicted of an offense when the fact of such previous conviction constitutes an element of the offense charged, or proof thereof is otherwise essential to the establishment of a legally sufficient case.

Note

This section restates verbatim CPL 60.40 (3), except for the bracketed reference to the CPL. The statute omits the reference to the CPL.

Under CPL 200.60, if a prior conviction is an element of an offense, a defendant may preclude proof of that conviction if, outside the presence of the jury, the defendant admits the prior conviction.

4.29. Statements of Defendants; Corroboration (CPL 60.50)

A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed.

Note

This section reproduces verbatim CPL 60.50.

The statute's purpose is to "avert the danger that a crime may have been confessed when no crime *in any degree* has been committed by anyone" (*People v Chico*, 90 NY2d 585, 590 [1997] [internal quotation marks omitted]). Accordingly, CPL 60.50 "does not mandate submission of independent evidence of every component of the crime charged but merely requires some proof, of whatever weight, that a crime was committed by someone" (*People v McGee*, 20 NY3d 513, 517 [2013] [internal quotation marks omitted]; see CJI2d[NY] Corroboration of a Confession).

The additional proof may be "either direct or circumstantial" (*People v Daniels*, 37 NY2d 624, 629 [1975]) and is sufficient when "in addition to the confession, there is proof of circumstances which, although they may have an innocent construction, are nevertheless calculated to suggest the commission of crime, and for the explanation of which the confession furnishes the key" (*People v Reade*, 13 NY2d 42, 45 [1963]; see *People v Booden*, 69 NY2d 185 [1987]; *People v Lipsky*, 57 NY2d 560, 571 [1982]).

GUIDE TO NY EVIDENCE

ARTICLE 5 PRIVILEGES

TABLE OF CONTENTS

5.01 Self-incrimination 5.02 Spousal

5.03 Attorney

5.04 Physician

5.05 Clergy

5.07 Psychologist

5.08 Social Worker

5.09 Library

5.10 Rape Crisis Counselor

5.48 Electronic Communication of Privileged Info (CPLR 4548)

5.01. Self-Incrimination

(1) In a criminal proceeding:

(a) No person shall be compelled in any criminal case to be a witness against himself or herself.

(b) When the defendant does not testify on his or her own behalf, neither the court nor the prosecutor may comment adversely thereon.

(2) In a civil proceeding:

(a) A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish that he owes a debt or is otherwise subject to a civil suit.

(b) A competent witness may otherwise decline to give an answer which will tend to accuse himself or herself of a crime or to expose him or her to a penalty or forfeiture in response to a specific question.

(3) When during the giving of testimony, a witness invokes the privilege, the court must determine the degree of prejudice, if any, to the party whose right to examine the witness is impaired by the witness's invocation of the privilege and, upon that determination, take appropriate action to dissipate any prejudice.

Note

Subdivision (1) (a) restates both the Federal Constitution's Fifth Amendment and New York Constitution's (art I, § 6) prohibition on compelled self-incrimination. (*See generally* William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, CPL 50.10 [on the scope of the privilege in a criminal proceeding].)

Albeit the “general rule [is] that the witness is the judge of his right to invoke the privilege” (*People v Arroyo*, 46 NY2d 928, 930 [1979]), a witness may validly claim the privilege only where it is shown that the hazards of incrimination are “substantial and real, and not merely trifling or imaginary” (*Marchetti v United States*, 390 US 39, 53 [1968] [internal quotation marks and citation omitted]; see *Ohio v Reiner*, 532 US 17, 21 [2001]; *Zicarelli v New Jersey Comm’n of Investigation*, 406 US 472, 478 [1972]; *Carver Fed. Sav. Bank v Shaker Gardens, Inc.*, 167 AD3d 1337, 1340 [3d Dept 2018]).

Subdivision (1) (b) is derived from *Griffin v California* (380 US 609, 615 [1965]) [“We . . . hold that the Fifth Amendment . . . forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt”)].

CPL 300.10 (2) states: “Upon request of a defendant who did not testify in his own behalf, but not otherwise, the court must state that the fact that he did not testify is not a factor from which any inference unfavorable to the defendant may be drawn.” The failure to give that instruction, “on [the] defendant’s request,” is reversible error. (*People v Britt*, 43 NY2d 111, 115 [1977]; compare *People v Vereen*, 45 NY2d 856, 857 [1978] [instructing the jury as provided by the statute, over the defendant’s objection, may be harmless error].)

Subdivision (2) is derived from CPLR 4501. (See generally Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR 4501.)

Subdivision (2) (a) states verbatim the first sentence of CPLR 4501. (See *McDermott v Manhattan Eye, Ear & Throat Hosp.*, 15 NY2d 20, 28 [1964] [“Unlike his counterpart in a criminal prosecution, the defendant in a civil suit has no inherent right to remain silent or, once on the stand, to answer only those inquiries which will have no adverse effect on his case. Rather, he must, if called as a witness, respond to virtually all questions aimed at eliciting information he may possess relevant to the issues, even though his testimony on such matters might further the plaintiff’s case”].)

Subdivision (2) (b) is derived from the second sentence of CPLR 4501 which reads:

“This section does not require a witness to give an answer which will tend to accuse himself of a crime or to expose him to a penalty or forfeiture, nor does it vary any other rule respecting the examination of a witness.”

(See *Matter of Agnello v Corbisiero*, 177 AD2d 445, 446 [1st Dept 1991] [“While it is undeniably true that the privilege applies in both civil and criminal proceedings, petitioner here did not properly invoke the privilege. When he was called as a witness on respondent’s case, he refused to answer any and all questions put to him,

and not just questions the answers to which he reasonably believed could incriminate him” (citation omitted)].)

Subdivision (3) is derived from the holding in *People v Siegel* (87 NY2d 536, 544 [1995]) that “the trial court has wide discretion in fashioning the appropriate corrective response, depending on the degree of prejudice that was incurred by the party whose right of cross-examination of the witness was impaired by the claim of the privilege.” The *Siegel* Court highlighted three “corrective responses”:

- (a) directing that the entire testimony of the witness be stricken when the questions the witness refused to answer were closely related to a principal element of the case, or
- (b) directing that a portion of the testimony be stricken when the questions the witness refused to answer were connected to a discrete phase of the case, or
- (c) permitting the jury to consider the refusal to answer questions in determining the believability and weight of the testimony when the questions the witness refused to answer involve collateral matters or cumulative testimony concerning credibility.

(*Id.* at 544; *see also* CJI2d[NY] Witness Refuses to Answer—Refusal Effect on Witness Credibility, available at http://www.nycourts.gov/judges/cji/1-General/CJI2d.Witness_Refusal_Credibility.pdf; CJI2d[NY] Witness Refuses to Answer—Refusal Requires Testimony Stricken, available at http://www.nycourts.gov/judges/cji/1-General/CJI2d.Witness_Testimony_Stricken.pdf).

In a civil proceeding, “[w]hile the Fifth Amendment accords an individual the privilege not to answer questions . . . if the answers might incriminate the person in future criminal proceedings (*see Baxter v Palmigiano*, 425 US 308, 316 [1976]), a witness who asserts this Fifth Amendment privilege in a civil trial is not necessarily protected from consequences in the same manner as in a criminal trial.” (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co.*, — NY3d —, —, 2019 NY Slip Op 04643, *4 [2019].)

Thus, the consequences that may attend the invocation of the privilege in a civil case include:

- (a) permitting the jury to consider the failure to answer questions by a witness who is a party “ ‘in assessing the strength of evidence offered by the opposite party on the issue which the witness was in a position to controvert’ (*Marine Midland Bank v Russo Produce Co.*, 50 NY2d 31, 42 [1980]).” (*Andrew Carothers, M.D., P.C. v*

Progressive Ins. Co., — NY3d at — , 2019 NY Slip Op 04643, *4, *supra.*)

(b) “ ‘an unfavorable inference may be drawn against a party from the exercise of the privilege against self-incrimination’ (Prince, Richardson on Evidence § 5-710).” (*Id.*; see *El-Dehdan v El-Dehdan*, 26 NY3d 19, 37-38 [2015] [“a negative inference may be drawn in the civil context when a party invokes the right against self-incrimination. Here, defendant could invoke the privilege, but that did not relieve him of his burden to present adequate evidence of his (defense) to avoid civil contempt liability”]; see also PJI 1:76 [“General Instruction—Evidence—Claim of Privilege”].)

In its decision in *Carothers*, the Appellate Division held that an adverse inference may not be drawn against a party in a civil action where the privilege is invoked by a nonparty witness (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co.*, 150 AD3d 192, 203-204 [1st Dept 2017]; compare *Searle v Cayuga Med. Ctr. at Ithaca*, 28 AD3d 834, 837–838 [3d Dept 2006] [“While no adverse inference typically arises from the invocation of the privilege by a nonparty witness, that rule is not inflexible. The inference may be appropriate where the witness is a former party who settled, the testimony in question is directly relevant to an issue before the jury and the party being burdened by the adverse inference may be held vicariously liable due to the witness's actions” (citations omitted)]). The Court of Appeals, in its *Carothers* opinion, noted that they had “not previously decided whether a *nonparty*'s invocation of the Fifth Amendment may trigger an adverse inference instruction against a party in a civil case, and we have no occasion to do so here because any error by the trial court was harmless.” (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co.*, — NY3d at — , 2019 NY Slip Op 04643, *4-5, *supra.*)

(c) dismissal of the complaint. (*Levine v Bornstein*, 13 Misc 2d 161, 165 [Sup Ct, Kings County 1958], *affd no op* 7 AD2d 995 [2d Dept 1959], *affd no op* 6 NY2d 892 [1959] [plaintiff's refusal to answer questions in an examination before trial required dismissal of the complaint].)

5.02. Spouse (CPLR 4502)

(a) Incompetency where issue adultery.

A husband or wife is not competent to testify against the other in an action founded upon adultery, except to prove the marriage, disprove the adultery, or disprove a defense after evidence has been introduced tending to prove such defense.

(b) Confidential communication privileged.

A husband or wife shall not be required, or, without consent of the other if living, allowed, to disclose a confidential communication made by one to the other during marriage.

Note

Introduction. This rule is reproduced verbatim from CPLR 4502 (*see* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4502:1 *et seq.*).

The section is historically derived from the common-law rule that spouses were generally incompetent to testify against one another. Since 1867, the common-law rule has been statutorily abrogated (*People v Daghita*, 299 NY 194, 198 [1949]). CPLR 4512, the modern statutory abrogation of the common-law rule, provides that except as otherwise expressly proscribed, no person shall be excluded or excused from being a witness as the spouse of a party. CPLR 4502 is an express proscription on when a spouse may testify against the other. Subdivision (a), subject to certain exceptions, renders a spouse "incompetent" to testify that the other spouse committed adultery in an action founded on adultery (*Eades v Eades*, 83 AD2d 972 [3d Dept 1981], *lv dismissed* 55 NY2d 800 [1981]). Subdivision (b) provides for a spousal privilege to protect confidential communications between spouses.

CPLR 4502 (a). This subdivision generally prohibits a spouse from testifying that the other spouse has committed adultery. It is subject to three exceptions: (1) to prove the marriage; (2) to disprove the adultery; or (3) to disprove a defense to adultery after proof of a defense has been submitted. It mostly affects divorce actions based upon adultery (Domestic Relations Law § 170 [4]). It does not limit a spouse from testifying that the other spouse flaunted an adulterous relationship in support of a claim other than adultery, including a defense of cruelty in a legal separation action (*Poppe v Poppe*, 3 NY2d 312, 317 [1957]; Domestic Relations Law § 200) or a claim for divorce based on cruel and inhuman treatment

(*Fritz v Fritz*, 88 AD2d 778 [4th Dept 1982]; Domestic Relations Law § 170 [1]). With the repeal of adultery-only divorce laws in 1966, and the subsequent legislative enactment of irreconcilable differences as a ground for divorce in 2010, subdivision (a) has far less vitality (see *Fritz v Fritz* [wife testified to husband's admission of adultery to obtain divorce on cruel and inhuman treatment]; *Johnston v Johnston*, 156 AD3d 1181, 1182 [3d Dept 2017], *appeal dismissed upon the ground that no substantial constitutional question is directly involved* 31 NY3d 1126 [2018] [having determined that husband established an irretrievable breakdown of the marriage, the court was not bound to grant wife a judgment of divorce on the ground of adultery]).

CPLR 4502 (b). The spousal privilege protects confidential communications induced by the marital relationship. The privilege is “[d]esigned to protect and strengthen the marital bond” and will only encompass confidential statements “that are induced by the marital relation and prompted by the affection, confidence and loyalty engendered by such relationship” (*People v Mills*, 1 NY3d 269, 276 [2003] [citations omitted]; see *People v Fediuk*, 66 NY2d 881, 883 [1985]; *Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d 66, 73 [1982]; *People v Dudley*, 24 NY2d 410 [1969]). The key inquiry is whether the communication was induced by the marital relation itself; if so, the privilege will attach (*Poppe v Poppe*, 3 NY2d at 315), it being presumed that such communication was “conducted under the mantle of confidentiality” (*People v Fediuk*, 66 NY2d at 883, 884 [statements by husband to estranged wife after killing her lover were engendered by the marital relationship because husband “clung to the illusion that (the parties) could still reconcile”]).

For the privilege to apply, the parties must actually be legally married at the time the communication is made (*People v Mulgrave*, 163 AD2d 538 [2d Dept 1990] [no privilege for bigamous marriage]; *People v Chirse*, 132 AD2d 615, 616 [2d Dept 1987], *lv denied* 70 NY2d 749 [1987] [no privilege for statements made before marriage]). Separation of legally married parties will not necessarily preclude application of the privilege (*People v Fields*, 38 AD2d 231, 233 [1972], *affd on op below* 31 NY2d 713 [1972]). The operative consideration is whether the parties were legally married at the time the communication was made, not when it was received (see *Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d at 73 [note left before husband's death still subject to privilege, even though received after death]).

The privilege applies no matter the medium of communication (*People v Fediuk*, 66 NY2d 881 [1985] [telephone calls]; *Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d 66 [1982] [tapes]; *Poppe v Poppe*, 3 NY2d 312 [1957] [conversations]). The privilege may also apply to “disclosive” acts and actions, but only if induced by the marital relation and prompted by the affection, confidence, and loyalty engendered by such relationship (*People v Daghita*, 299 NY at 199 [observation by wife that husband was bringing home stolen property and storing it in house was privileged]; but see *People v Dudley*, 24 NY2d 410, 415 [1969] [defendant's acts and words to wife conveying where his victim was buried were

not privileged because they were not induced by his confidence in the marital relationship]; *People v Wilson*, 64 NY2d 634, 636 [1984] [testimony by wife of defendant husband's presence or absence from their apartment was not a communication that would not have been made but for the marital relationship; no privilege applied]).

Not every private communication between spouses is protected (*People v Dudley*, 24 NY2d at 413; *Poppe v Poppe*, 3 NY2d at 314). Communications that would have been made regardless of the marriage's existence are not protected (*Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d at 73). "[D]aily and ordinary exchanges" between spouses are not protected (*People v Dudley*, 24 NY2d at 413-414). Nor are communications about "ordinary business matters" (*People v Melski*, 10 NY2d 78, 80 [1961]). Although the privilege may apply to admissions or confessions of adultery, which are not intended to be disclosed to third parties, it does not apply to unfounded accusations of adultery or other abusive language (*Melski* at 81).

The privilege does not apply to communications between spouses or threats by one spouse against the other made during the course of physical abuse, because the declarant is not relying upon any confidential relationship to preserve secrecy (*People v Mills*, 1 NY3d at 276; *People v Dudley*, 24 NY2d at 413 [no privilege because no confidential relationship where marriage held together by fear and domination]). The privilege is not a shield "to forbid inquiry into the personal wrongs committed by one spouse against the other" (*People v Howard*, 134 AD3d 1153, 1154 [3d Dept 2015] [wife testified at husband's arson trial that he repeatedly threatened to burn the house down to prevent her from living there]). Nor may the privilege be used to protect criminal activity directed at the other spouse (*People v Fields*, 38 AD2d 231, 233 [1972], *affd on op below* 31 NY2d 713 [1972] [threats that husband would kill wife held not privileged]). Nor can it be invoked when the communication is a threat to silence the other spouse (*People v Fields*, 38 AD2d 231, 233 [1972], *affd on op below* 31 NY2d 713 [1972] [no privilege where husband threatened to kill wife if she disclosed her observations about his criminal conduct]).

The privilege does not apply to communications or statements made by spouses in the presence of others (*People v Melski*, 10 NY2d at 84 [wife of defendant charged with grand larceny was permitted to testify that members of the robbery gang met with her husband in her kitchen where stolen guns were laid out on a table]; *People v Howard*, 134 AD3d at 1153 [threats of arson made in the presence of mutual friends and the couple's children were not privileged]). Nor does the privilege apply where the spouse entitled to the privilege voluntarily discloses the communication to a third party (*People v Melski*, 10 NY2d at 79 [husband voluntarily disclosed his communications with wife to a state trooper]).

Whether a communication is confidential and, therefore, privileged is a preliminary question of fact to be determined by the trial judge (*People v Dudley*,

24 NY2d at 414; *People v Melski*, 10 NY2d at 79; *Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d at 73; see also Guide to NY Evid rule 1.11 [1]).

The privilege automatically attaches to a confidential communication (*Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d at 73). There is a rebuttable presumption that communications between spouses have been conducted under a mantle of confidentiality (*People v Fediuk*, 66 NY2d 881, 883 [1985]). The presumption is not rebutted merely by the fact that the parties are not living together at the time the communication is made, or that the marriage has deteriorated (*id.* at 883).

The privilege belongs to the spouse who made the confidential communication (*Prink v Rockefeller Ctr.*, 48 NY2d 309, 314 [1979]). While living, only the spouse against whom the testimony is offered can waive the privilege (*People v Fediuk*, 66 NY2d at 881). The privilege is not terminated by death (*Prink v Rockefeller Ctr.*, 48 NY2d at 314). After death, the privilege may still be waived by the decedent's representative (*id.* at 314 [privilege waived where husband's mental condition put in issue in a wrongful death action]).

5.03. Attorney (CPLR 4503)

(a) 1. Confidential communication privileged.

Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof.

Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof.

The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

2. Personal representatives.

(A) For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement

between the attorney and the personal representative to the contrary:

(i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and

(ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client.

(B) For purposes of this paragraph, “personal representative” shall mean (i) the administrator, administrator c.t.a., ancillary administrator, executor, preliminary executor, temporary administrator or trustee to whom letters have been issued within the meaning of subdivision thirty-four of section one hundred three of the surrogate’s court procedure act, and (ii) the guardian of an incapacitated communicant if and to the extent that the order appointing such guardian under subdivision (c) of section 81.16 of the mental hygiene law or any subsequent order of any court expressly

provides that the guardian is to be the personal representative of the incapacitated communicant for purposes of this section; “beneficiary” shall have the meaning set forth in subdivision eight of section one hundred three of the surrogate’s court procedure act and “estate” shall have the meaning set forth in subdivision nineteen of section one hundred three of the surrogate’s court procedure act.

(b) Wills and revocable trusts.

In any action involving the probate, validity or construction of a will or, after the grantor’s death, a revocable trust, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will, revocable trust, or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

Note

This rule is reproduced verbatim from CPLR 4503 (*see generally* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4503:1-C4503:7).

CPLR 4503 (a) (1) codifies the attorney-client privilege as recognized under the common law (*see Hurlburt v Hurlburt*, 128 NY 420, 424 [1891] [describing the predecessor statute as a “mere re-enactment of the common law”]).

CPLR 4503 (a) (2) abolishes the “fiduciary exception” to the privilege regarding communications between counsel and a personal representative of a decedent’s estate.

CPLR 4503 (b) creates a statutory exception to the privilege where the confidential communication between a deceased client and the client’s attorney involves the preparation, execution, or revocation of any will of that client or other relevant instrument.

The Court of Appeals has long viewed the attorney-client privilege as premised on the rationale that “one seeking legal advice will be able to confide fully and freely in his [or her] attorney, secure in the knowledge that his [or her] confidences will not later be exposed to public view to his [or her] embarrassment or legal detriment” (*Matter of Priest v Hennessy*, 51 NY2d 62, 67-68 [1980]). Such disclosure enables the attorney to act more effectively and expeditiously, thereby “ultimately promoting the administration of justice” (*Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 592 [1989]).

For the privilege to apply, an attorney-client relationship must exist, and such relationship “arises only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services” (*Priest*, 51 NY2d at 68-69). Once such relationship is established, the privilege will encompass a confidential communication made between the client and attorney, which was made for the purpose of obtaining or providing legal assistance to the client (see *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016]; *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377-378 [1991]). Communications that relate solely to nonlegal personal or business matters fall outside the privilege (*Spectrum Sys.* at 378 [“The communication itself must be primarily or predominantly of a legal character”]).

Confidentiality of the communication is the pillar of the attorney-client privilege (see *United States v Tellier*, 255 F2d 441, 447 [2d Cir 1958] [“It is of the essence of the attorney-client privilege that it is limited to those communications which are intended to be confidential”]). This key element of the privilege requires that, at the time of the communication between the client and the attorney, it was made in confidence and with the intent and reasonable expectation that the communication would not be disclosed to persons outside the attorney-client relationship (see *People v Osorio*, 75 NY2d 80, 84 [1989]; *People v Harris*, 57 NY2d 335, 343 [1982] [“Generally, communications made in the presence of third parties, whose presence is known to the (client), are not privileged”]; *Baumann v Steingester*, 213 NY 328, 331-333 [1915]). The element of confidentiality also requires that confidentiality be maintained (see *Osorio*, 75 NY2d at 84).

An exception to the general rule that the presence of a third party precludes a finding of confidentiality is the judicially recognized “common interest exception” (see generally *Ambac*, 27 NY3d at 625-630). Under this exception, where two or more clients separately retain counsel to advise them on matters of common legal interest, confidential communications that are revealed to one another for the purpose of furthering a common legal interest retain their confidential status (*id.* at 625).

The privilege may extend to confidential communications between the agents of the client and agents of the attorney, provided they are assisting in the legal representation involved (*Rossi*, 73 NY2d at 592-593 [corporate staff

attorney]; *Osorio*, 75 NY2d at 84 [an interpreter acting as “agent of either attorney or client to facilitate communication”]; *Matter of Putnam*, 257 NY 140, 143-144 [1931] [clerical staff]). Communications between the attorney and a consultant retained by the attorney to assist the attorney in providing legal services to the clients and not for testifying, e.g., an accountant, economist, or investment banker, may also be protected by the privilege (see *United States v Kovel*, 296 F2d 918, 921-922 [2d Cir 1961]; compare *Gottwald v Sebert*, 161 AD3d 679, 680 [1st Dept 2018] [“The communications between her counsel and press agents do not reflect a discussion of legal strategy relevant to the pending litigation but, rather, a discussion of a public relations strategy, and are not protected under the attorney-client privilege”])).

Certain details about the attorney-client relationship are not protected by the privilege. In *Matter of Priest v Hennessy*, the Court held that fee arrangements between attorney and client, including the amount of the retainer and the identity of a person paying the fee, do not ordinarily constitute a confidential communication and thus are not privileged in the usual case (51 NY2d at 69; see also *Eisic Trading Corp. v Somerset Mar.*, 212 AD2d 451 [1st Dept 1995] [time records and billing statements are not within attorney-client privilege if devoid of detailed information regarding the nature of services]). In *Matter of Jacqueline F.* (47 NY2d 215, 220-222 [1979]), the Court explained that while it is “generally stated” that a client’s identity (including the client’s whereabouts) is not privileged, “the rule in New York is not so broad as to state categorically that the privilege never attaches to a client’s identity.” *Jacqueline F.* noted, for example, that a client’s identity “must be disclosed where the question of identity arises during the course of litigation” and “absent other circumstances, an attorney cannot be compelled to reveal a client’s identity where the latter is not a party to a pending litigation” (*id.* at 220; CPLR 3118). Other circumstances in which disclosure of the client’s identity may be compelled include: “where an ‘attorney’s assertion of the privilege is a cover for co-operation in wrongdoing’ ”(*id.*); where there exists a legitimate “fear of reprisal” should the whereabouts of the client be disclosed (*id.* at 222); and where the client, as in *Jacqueline F.*, leaves the jurisdiction in an attempt to thwart the mandate of a court ordering the client to return custody of a child to her parents.

CPLR 4503 (a) permits the privilege to be invoked in any judicial, administrative, or legislative proceeding. Unless the client has waived the privilege, the attorney, the attorney’s employees, the client, the client’s agents, and an eavesdropper cannot be compelled in any such proceeding to disclose a privileged communication.

In addition to the exception to the privilege set forth in CPLR 4503 (b), New York courts have created exceptions. They include:

- crime-fraud exception (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 [1st Dept 2003] [privilege “may

not be invoked where it involves client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct”]);

- fiduciary exception (*NAMA Holdings, LLC v Greenberg Traurig LLP*, 133 AD3d 46, 52 [1st Dept 2015] [“In the corporate context, where a shareholder (or, as here, an investor in a company) brings suit against corporate management for breach of fiduciary duty or similar wrongdoing, courts have carved out a ‘fiduciary exception’ to the privilege that otherwise attaches to communications between management and corporate counsel”]);
- attorney-client dispute exception (see *Matter of Glines v Estate of Baird*, 16 AD2d 743, 743-744 [4th Dept 1962] [(T)he rule as to privileged communications does not apply when litigation arises between an attorney and client to the extent that their communications are relevant to the issue”]; *People v Mendoza*, 240 AD2d 316, 316 [1st Dept 1997] [defendant waived the attorney-privilege “by volunteering his claim that counsel, among other things, had coerced him to testify falsely at the suppression hearing”]); and
- public policy exception (*Priest*, 51 NY2d at 69 [(E)ven where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure”]).

As CPLR 4503 (a) recognizes, the client may waive the privilege (see generally Barker & Alexander, Evidence in New York State and Federal Courts § 5:10 [2d ed]). Waiver involves a loss of the privilege which occurs subsequent to the privilege having attached to the communication involved (*Harris*, 57 NY2d at 343 n 1). A waiver may occur in a myriad of situations. Waiver will be present, for example:

- when the client gives authority to an agent to waive the privilege (*People v Cassas*, 84 NY2d 718, 722 [1995]);
- when the client discloses the communication to another person (*People v Patrick*, 182 NY 131, 175 [1905]);
- when the client is a defendant in a criminal case and places his sanity in issue, the privilege is waived as to communications between the defendant and a psychiatrist retained by the attorney, and the psychiatrist may accordingly testify for the prosecution that he determined that the defendant was sane (*People v Edney*, 39 NY2d 620, 625 [1976]).

The Appellate Division departments have uniformly held that an inadvertent disclosure does not automatically result in a waiver of the privilege. Rather, the party making the disclosure may avoid a finding of waiver by showing:

(1) the party had no intention to disclose the matter and took reasonable steps to prevent any disclosure;

(2) the party promptly took reasonable steps to rectify its mistake upon discovery of the disclosure; and

(3) the party in possession of the matter will not be prejudiced if it cannot use the matter (*see e.g. New York Times Newspaper Div. of N.Y. Times Co. v Lehrer McGovern Bovis*, 300 AD2d 169, 172 [1st Dept 2002]; *AFA Protective Sys., Inc. v City of New York*, 13 AD3d 564, 565 [2d Dept 2004]; *McGlynn v Grinberg*, 172 AD2d 960, 961 [3d Dept 1991]; *Manufacturers & Traders Trust Co. v Servotronics, Inc.*, 132 AD2d 392, 399-400 [4th Dept 1987]).

A corollary to the attorney-client privilege is an attorney's ethical obligation, in the absence of a client's consent or waiver or certain exceptions, to "not knowingly reveal confidential information" or "use such information to the disadvantage of a client or for the advantage of the lawyer or a third person" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.6 [a]).

5.04. Physician, dentist, podiatrist, chiropractor and nurse (CPLR 4504)

(a) Confidential information privileged.

Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, a university faculty practice corporation organized under section fourteen hundred twelve of the not-for-profit corporation law to practice medicine or dentistry, and the patients to whom they respectively render professional medical services.

A patient who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this subdivision. For purposes of this subdivision:

- 1. “person” shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and**
- 2. “insurance benefits” shall include payments under a self-insured plan.**

(b) Identification by dentist; crime committed against patient under sixteen. A dentist shall be required to disclose information necessary for identification of a patient. A

physician, dentist, podiatrist, chiropractor or nurse shall be required to disclose information indicating that a patient who is under the age of sixteen years has been the victim of a crime.

(c) Mental or physical condition of deceased patient. A physician or nurse shall be required to disclose any information as to the mental or physical condition of a deceased patient privileged under subdivision (a), except information which would tend to disgrace the memory of the decedent, either in the absence of an objection by a party to the litigation or when the privilege has been waived:

- 1. by the personal representative, or the surviving spouse, or the next of kin of the decedent; or**
- 2. in any litigation where the interests of the personal representative are deemed by the trial judge to be adverse to those of the estate of the decedent, by any party in interest; or**
- 3. if the validity of the will of the decedent is in question, by the executor named in the will, or the surviving spouse or any heir-at-law or any of the next kin or any other party in interest.**

(d) Proof of negligence; unauthorized practice of medicine. In any action for damages for personal injuries or death against a person not authorized to practice medicine under article 131 of the education law for any act or acts constituting the practice of medicine, when such act or acts were a competent producing proximate or contributing cause of such injuries or death, the fact that such person practiced medicine without being so authorized shall be deemed prima facie evidence of negligence.

Note

This rule is reproduced verbatim from CPLR 4504 (*see generally* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4504).

New York’s physician-patient privilege “is entirely a creature of statute. At common law, confidential communications between physicians and patients received no protection against disclosure in a legal proceeding” (*Dillenbeck v Hess*, 73 NY2d 278, 283 [1989] [tracing history of privilege]). While limited to licensed physicians when first enacted by the New York Legislature in 1828, the privilege has since been expanded to encompass dentists, podiatrists, chiropractors, registered professional nurses, and licensed practical nurses, as well as corporate health care providers specified in CPLR 4504 (a).

The Court of Appeals has stated three rationales for the physician-patient privilege: (1) to encourage patients to make available to their physicians the information necessary for diagnosis and treatment; (2) to promote candid record keeping by medical professionals; and (3) to protect “patients’ reasonable privacy expectations against disclosure of sensitive personal information” (*Matter of Grand Jury Investigation in N.Y. County*, 98 NY2d 525, 529 [2002]). While “information” is broader than the “communications” between a patient and physician, the privilege seeks to protect and foster “confidential communications, not the mere facts and incidents of a person’s medical history” (*Williams v Roosevelt Hosp.*, 66 NY2d 391, 396-397 [1985] [“a witness may not refuse to answer questions regarding matters of fact, such as those posed in this case, as to whether her children had any physical or congenital problems, whether she was in the care of a physician or was taking medication during a certain period of time, or concerning the facts surrounding an abortion merely because those topics relate to events that required medical care or advice from a physician”]).

The patient is the privilege-holder and may seek damages in tort for a breach of the privilege (*see Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 53-54 [2016] [detailing elements of a cause of action for breach of physician-patient confidentiality]). If the patient is not a party to the proceeding in which disclosure is sought, another party may assert the physician-patient privilege on the patient’s behalf (*see Matter of Grand Jury Investigation of Onondaga County*, 59 NY2d 130, 135 [1983] [hospital or physician may assert privilege for protection of patient suspected or accused of a crime]). Whoever asserts the privilege must establish the following elements: (1) the existence of a professional relationship between the patient and one of the health care professionals or providers specified in CPLR 4504 (a); (2) the information sought to be shielded from disclosure was acquired in the course of this professional relationship and was necessary for the patient’s diagnosis or treatment; and (3) the patient intended the information to be kept confidential (*see Koump v Smith*, 25 NY2d 287, 294 [1969]; *Dillenbeck*, 73 NY2d at 289; *People v Decina*, 2 NY2d 133, 145 [1956]).

Only the patient may waive the physician-patient privilege. Waiver occurs “when the patient personally, or through his witnesses, either lay or medical, introduces testimony or documents concerning privileged information It also results from failure to object to disclosure of privileged information” (*Hughson v St. Francis Hosp. of Port Jervis*, 93 AD2d 491, 500 [2d Dept 1983]). CPLR 4504 (a) provides, however, that a patient may authorize disclosure of privileged information for purposes of obtaining insurance benefits without effecting a waiver.

The privilege is waived where a party affirmatively places his or her physical or mental condition in controversy (see *Koump*, 25 NY2d at 294 [patient affirmatively puts his or her physical or mental condition in issue by bringing a personal injury action]). The burden is on the party seeking disclosure to make an evidentiary showing that the patient’s physical condition is in controversy (*Dillenbeck*, 73 NY2d at 288). The waiver extends only to medical information related to the physical or mental condition that has been put in issue. (Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, C4504:3, *supra*.)

Although in derogation of the common law, the physician-patient privilege is “afforded a broad and liberal construction to carry out its policy Conversely, exceptions that limit the privilege are afforded a narrow construction” (*People v Rivera*, 25 NY3d 256, 262-263 [2015] [citation and internal quotation marks omitted]). Section 4504 itself contains two exceptions; namely, CPLR 4504 (b) (requiring dentists to disclose information necessary for identification of a patient, and health care professionals to disclose information indicating that a patient under 16 years old has been a crime victim); and CPLR 4504 (c) (generally requiring physicians and nurses to disclose otherwise privileged information about the mental or physical condition of a deceased patient).

The legislature has created numerous other specific exceptions. As the Court of Appeals observed in *Rivera* (at 262):

“When the legislature has sought to either limit or abrogate the privilege beyond the confines of section 4504, it has been clear in its intent (see Social Services Law § 384-b [3] [h] [privilege not available in a proceeding seeking an order committing the guardianship and custody of a destitute or dependent child]; Social Services Law § 413 [identifying class of mandatory reporters of suspected child abuse and maltreatment]; Social Services Law § 415 [providing that reports of suspected child abuse or maltreatment must be made in writing and ‘shall be admissible in evidence in any proceedings relating to child abuse or maltreatment’]; Family Ct Act § 1046 [a] [vii] [stating that the privilege ‘shall (not) be a ground for excluding evidence which otherwise would be admissible’ in abuse and neglect proceedings]; Mental Hygiene Law § 81.09 [d] [permitting a court evaluator in guardianship proceedings to apply

for permission to inspect medical and psychiatric records of the alleged incapacitated persons, and allowing the court to order such disclosure notwithstanding the physician-patient privilege]; Public Health Law § 3373 [stating that ‘(f)or the purposes of duties arising out of’ article 33, relating to controlled substances, ‘no communication made to a practitioner shall be deemed confidential within the meaning of the civil practice law and rules relating to confidential communications between such practitioner and patient’)].

“Although the legislature may not always explicitly set forth its intention to limit or abrogate the privilege by expressly cross-referencing CPLR 4504, its intent is evident from the directives of the particular statute (*see* Penal Law § 265.25 [requiring attending physicians to report to police every case of ‘any . . . injury arising from or caused by the discharge of a gun or firearm’ and ‘a wound which is likely to or may result in death and is actually or apparently inflicted by a knife, icepick or other sharp or pointed instrument’]; Penal Law § 265.26 [requiring physicians to report certain burn injuries to the office of fire prevention and control]; Public Health Law § 2101 [1] [requiring physicians to ‘immediately give notice of every case of communicable disease’ to the proper authorities]).” (*See also Matter of Grand Jury Investigation of Onondaga County*, 59 NY2d at 135-136.)

Finally, CPLR 4504 (d) provides that when someone not authorized to practice medicine performs acts that are a “competent producing proximate or contributing cause of” personal injuries or death to another, the fact that such person engaged in the unauthorized practice of medicine is *prima facie* evidence of negligence in any ensuing action for damages for personal injury or death.

5.05. Confidential Communication to Clergy Privileged (CPLR 4505)

Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed [to] disclose a confession or confidence made to him in his professional character as spiritual advisor.

Note

This rule is reproduced verbatim from CPLR 4505, albeit with the addition of “[to].” (See Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4505.)

The Court of Appeals has observed that “the privilege originally applied only to communications with members of the clergy who were enjoined from disclosing the substance of such communications under the rules or practices of their religion.” (*Lightman v Flaum*, 97 NY2d 128, 134 [2001] [citation omitted].) Now, however, “[a]lthough often referred to as a ‘priest-penitent’ privilege, the statutory privilege is not limited to communications with a particular class of clerics or congregants. . . . On the contrary, in enacting CPLR 4505, the Legislature intended to recognize the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance without regard to the religion’s specific beliefs or practices.” (*People v Carmona*, 82 NY2d 603, 608 [1993] [citations and internal quotation marks omitted].) The Court added that “the New York statute is intentionally aimed at all religious ministers who perform ‘significant spiritual counselling which may involve disclosure of sensitive matters’ (Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4505, at 683).” (*Carmona*, 82 NY2d at 608-609.)

As to the nature of the communications to which the privilege applies, the Court has made clear that “[t]he priest-penitent privilege arises not because statements are made to a clergyman. Rather, something more is needed. There must be reason to believe that the information sought required the disclosure of information under the cloak of the confessional or was in any way confidential[,] for it is only confidential communications made to a clergyman in his spiritual capacity which the law endeavors to protect.” (*Matter of Keenan v Gigante*, 47 NY2d 160, 166 [1979] [citations and internal quotation marks omitted].) “New York’s test for the privilege’s applicability distills to a single inquiry: whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance.” (*Carmona*, 82 NY2d at 609, citing *Matter of Keenan v Gigante*, 47 NY2d at 166.)

In *Carmona*, the Court of Appeals has offered as examples of communications to which the privilege did not apply:

- where disclosures were made to a rabbi for the purpose of obtaining his assistance in securing an attorney and a favorable plea bargain (citing *People v Drelich*, 123 AD2d 441 [2d Dept 1986]);
- where a congregant apologized to a priest in the priest's capacity as a victim and solicited the priest's aid in contacting an attorney (citing *People v Schultz*, 161 AD2d 970 [3d Dept 1990]);
- and where a priest informed a congregant of allegations made against him by his wife and stepdaughter and warned him that the authorities would be advised unless he quit his job at a day-care center (citing *Matter of N. & G. Children*, 176 AD2d 504 [1st Dept 1991]). (*Carmona*, 82 NY2d at 609.)

A person to whom the privilege contemplated by the statute applies may expressly waive it or may implicitly waive it by his or her conduct. (*Carmona*, 82 NY2d at 611.)

5.07. Psychologist (CPLR 4507)

The confidential relations and communications between a psychologist registered under the provisions of article one hundred fifty-three of the education law and his client are placed on the same basis as those provided by law between attorney and client, and nothing in such article shall be construed to require any such privileged communications to be disclosed.

A client who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this section. For purposes of this section:

- 1. “person” shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and**
- 2. “insurance benefits” shall include payments under a self-insured plan.**

Note

This rule is reproduced verbatim from CPLR 4507. (See Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4507.)

The underlying premise of the psychologist-client privilege is that “confidentiality is the essential ingredient for successful psychotherapy” (*Frederick R.C. v Helene C.*, 153 Misc 2d 660, 662 [Sup Ct, Suffolk County 1992]). The privilege as created by CPLR 4507 is analogized to the attorney-client privilege (*People v Wilkins*, 65 NY2d 172, 178 [1985] [privilege was placed “on the same footing as that between attorney and client”]). Thus, the subject communications to be privileged must have been made in confidence and for the purpose of obtaining the psychologist’s professional services. (See Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts § 5:22 [2d ed].)

For the privilege to be invoked, CPLR 4507 requires the psychologist to be registered under Education Law article 153. Thus, the privilege does not extend to psychologists who are not licensed or authorized to practice in New York.

The psychologist's client may waive the privilege, either expressly or impliedly. (*See e.g. Matter of Charles RR.*, 166 AD2d 763, 764 [3d Dept 1990].) However, CPLR 4507 precludes a finding of waiver of the privilege when the client authorizes disclosure in order to obtain insurance benefits.

Statutory exceptions to CPLR 4507 are set forth in Family Court Act § 1046 (a) (vii) (no privilege in child abuse or neglect proceedings); Social Services Law §§ 413 and 415 (cases of suspected child abuse or maltreatment must be reported in writing and such written reports are admissible in any proceedings relating to child abuse or maltreatment); Social Services Law § 384-b (3) (h) (no privilege in proceedings for guardianship and custody of destitute or dependent children); Mental Hygiene Law § 81.09 (d) (court may authorize court evaluator's inspection of psychological records of person alleged to be incapacitated and order "such further disclosure of such records as the court deems proper"); and Mental Hygiene Law § 33.13 (c) (1) (court may order disclosure of mental health records in specified facilities upon finding that interests of justice significantly outweigh need for confidentiality).

A privilege may be breached in a criminal proceeding when necessary to enforce a constitutional right of a defendant. (*See Pennsylvania v Ritchie*, 480 US 39 [1987]; *People v Bridgeland*, 19 AD3d 1122, 1125 [4th Dept 2005] [where a witness's credibility was "crucial" and there was a good faith basis to believe that her testimony was false, the psychologist privilege "must yield to defendant's constitutional right of confrontation"]; *People v Jaikaran*, 95 AD3d 903, 904 [2d Dept 2012]; *cf. People v McCray*, 23 NY3d 193, 198 [2014] [the trial court properly denied disclosure of confidential mental health records after the court conducted an in camera review of the records and determined the "defendant's interest in obtaining the records to be outweighed by the complainant's interest in confidentiality; and defendant's interest could be outweighed only if there was no reasonable possibility that the withheld materials would lead to his acquittal"].)

5.08. Social Worker (CPLR 4508)

(a) Confidential information privileged. A person licensed as a licensed master social worker or a licensed clinical social worker under the provisions of article one hundred fifty-four of the education law shall not be required to disclose a communication made by a client, or his or her advice given thereon, in the course of his or her professional employment, nor shall any clerk, stenographer or other person working for the same employer as such social worker or for such social worker be allowed to disclose any such communication or advice given thereon; except

1. that such social worker may disclose such information as the client may authorize;

2. that such social worker shall not be required to treat as confidential a communication by a client which reveals the contemplation of a crime or harmful act;

3. where the client is a child under the age of sixteen and the information acquired by such social worker indicates that the client has been the victim or subject of a crime, the social worker may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry;

4. where the client waives the privilege by bringing charges against such social worker and such charges involve confidential communications between the client and the social worker.

(b) Limitations on waiver. A client who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to

any person shall not be deemed to have waived the privilege created by this section. For purposes of this subdivision:

1. “person” shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and

2. “insurance benefits” shall include payments under a self-insured plan.

Note

This section is reproduced verbatim from CPLR 4508 (*see generally* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4508).

The statute that embodies this rule establishes a privilege for a confidential communication between a licensed social worker and his or her client made during professional employment (*see Matter of Rutland v O’Brien*, 143 AD3d 1060, 1063 [3d Dept 2016] [in an action to modify a prior order of custody, the father could not call the daughter’s counselor, a licensed clinical social worker, to testify about their privileged communications in the absence of a knowing waiver from the daughter “notwithstanding the absence of any objection by the attorney for the children”]).

The “social worker” must be a “licensed master social worker or a licensed clinical social worker” pursuant to Education Law article 154 (*cf. Matter of Humberstone v Wheaton*, 21 AD3d 1416, 1417 [4th Dept 2005] [a child’s communications to a “school guidance counselor” who was not (as then required) a “certified” social worker were accordingly not privileged]; *People v Bridges*, 142 Misc 2d 789, 790 [Monroe County Ct 1989] [a communication between a patient and a hospital’s volunteer counselor who was not a certified social worker was not protected by the “social worker” privilege]).

The privilege extends to any “clerk, stenographer or other person working for the same employer as such social worker or for such social worker” (CPLR 4508 [a]; *cf. Matter of Grand Jury Proceedings [Doe]*, 56 NY2d 348, 353 [1982] [a hospital that is the subject of a grand jury investigation for crimes committed upon its patients may not decline to honor a grand jury subpoena for a patient record

on the ground that it includes notes of a communication between its social worker and a patient]).

The privilege only protects a communication to a social worker that was intended to be confidential (*People v Alaire*, 148 AD2d 731, 737 [2d Dept 1989] [the defendant's statement to his social worker "was made in the presence of a third party, namely (a police sergeant) and (the sergeant's) presence was known to the defendant. In view thereof, it cannot be said that the defendant intended his statement to be confidential and thus, the privilege did not attach"]; *Matter of Allers [G.P.]*, 37 Misc 3d 1219[A], 2012 NY Slip Op 52095[U] [Sup Ct, Dutchess County 2012]).

A communication that reveals the contemplation of a crime or harmful act, though purportedly intended to be confidential, is by statute expressly not privileged (CPLR 4508 [a] [2]).

Similarly, a purported confidential communication of a child under 16 that indicates the child has been the victim or subject of a crime is not privileged when the social worker is required to testify at a proceeding in which the commission of the crime is a subject of inquiry (CPLR 4508 [a] [3]; see Social Services Law § 413 [social worker and others required to report cases of suspected child abuse or maltreatment]; Family Ct Act § 1046 [a] [vii] [neither the spousal, physician-patient, psychologist-client, or social worker privilege "shall be a ground for excluding evidence which otherwise would be admissible" in child protective proceedings]).

The client may expressly waive the privilege and thereby permit the social worker to testify to their communications (CPLR 4508 [a] [1]). The client may also impliedly waive the privilege by bringing charges against the social worker which involve the confidential communications (CPLR 4508 [a] [4]), or by otherwise affirmatively placing his or her medical and psychological condition in issue (see *Abraha v Adams*, 148 AD3d 1730, 1731 [4th Dept 2017] [in a medical malpractice action the "plaintiff waived any privilege afforded by CPLR 4508 by affirmatively placing her medical and psychological condition in controversy through the broad allegations of injury in her bills of particulars"]; *Velez v Daar*, 41 AD3d 164, 165 [1st Dept 2007] [in medical malpractice action for psychological and emotional injuries suffered because of a failure to diagnose a cancer, "(p)laintiff clearly waived his statutory social worker-patient confidentiality privilege (CPLR 4508) by placing his psychological condition in controversy, which he did by acknowledging in his testimony that factors other than his thyroid cancer were causes of his psychological symptoms"]; *Robles v Merrill Lynch/WFC/L, Inc.*, 40 AD3d 412, 412 [1st Dept 2007] ["Plaintiff waived the relevant privilege (CPLR 4508) by alleging injuries in her bill of particulars that affirmatively placed her mental condition in issue"]).

By subdivision (b), the client does not waive the privilege for all purposes by simply authorizing disclosure of the privileged communications to obtain insurance (*compare People v O'Gorman*, 91 Misc 2d 539 [Sup Ct, Suffolk County 1977] [privileged information was waived with respect to information given to establish or maintain eligibility for public assistance]).

By a separate statute, the privilege is not lost for the “sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication” (*see* CPLR 4548).

A privilege may be breached in a criminal proceeding when necessary to enforce a constitutional right of a defendant (*see Pennsylvania v Ritchie*, 480 US 39 [1987]; *People v Bridgeland*, 19 AD3d 1122, 1125 [4th Dept 2005] [where a witness’s credibility was “crucial” and there was a good faith basis to believe that her testimony was false, the psychologist privilege “must yield to defendant’s constitutional right of confrontation”]; *People v Jaikaran*, 95 AD3d 903, 904 [2d Dept 2012]; *cf. People v McCray*, 23 NY3d 193, 198 [2014] [the trial court properly denied disclosure of confidential mental health records after the court conducted an in camera review of the records and determined that the “defendant’s interest in obtaining the records to be outweighed by the complainant’s interest in confidentiality; and defendant’s interest could be outweighed only if there was no reasonable possibility that the withheld materials would lead to his acquittal”]).

5.09. Library records (CPLR 4509)

Library records, which contain names or other personally identifying details regarding the users of public, free association, school, college and university libraries and library systems of this state, including but not limited to records related to the circulation of library materials, computer database searches, interlibrary loan transactions, reference queries, requests for photocopies of library materials, title reserve requests, or the use of audio-visual materials, films or records, shall be confidential and shall not be disclosed except that such records may be disclosed to the extent necessary for the proper operation of such library and shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute.

Note

This rule restates verbatim CPLR 4509.

“The law thus protects the privacy interests of library users whose reading habits are nobody’s business but their own. The user may, of course, consent to disclosure, and the statute contains exceptions for proper operation of the library, court-ordered production, subpoenaed materials, and ‘where otherwise required by statute.’ ” (Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR 4509.)

5.10. Rape Crisis Counselor (CPLR 4510)

(a) Definitions. When used in this section, the following terms shall have the following meanings:

1. “Rape crisis program” means any office, institution or center which has been approved pursuant to subdivision fifteen of section two hundred six of the public health law, offering counseling and assistance to clients concerning sexual offenses, sexual abuses or incest.

2. “Rape crisis counselor” means any person who has been certified by an approved rape crisis program as having satisfied the training standards specified in subdivision fifteen of section two hundred six of the public health law, and who, regardless of compensation, is acting under the direction and supervision of an approved rape crisis program.

3. “Client” means any person who is seeking or receiving the services of a rape crisis counselor for the purpose of securing counseling or assistance concerning any sexual offenses, sexual abuse, incest or attempts to commit sexual offenses, sexual abuse, or incest, as defined in the penal law.

(b) Confidential information privileged. A rape crisis counselor shall not be required to disclose a communication made by his or her client to him or her, or advice given thereon, in the course of his or her services nor shall any clerk, stenographer or other person working for the same program as the rape crisis counselor or for the rape crisis counselor be allowed to disclose any such communication or advice given thereon nor shall any records made in the course of the services given to the client or recording of any communications made by or to a client be required to

be disclosed, nor shall the client be compelled to disclose such communication or records, except:

- 1. that a rape crisis counselor may disclose such otherwise confidential communication to the extent authorized by the client;**
- 2. that a rape crisis counselor shall not be required to treat as confidential a communication by a client which reveals the intent to commit a crime or harmful act;**
- 3. in a case in which the client waives the privilege by instituting charges against the rape crisis counselor or the rape crisis program and such action or proceeding involves confidential communications between the client and the rape crisis counselor.**

(c) Who may waive the privilege. The privilege may only be waived by the client, the personal representative of a deceased client, or, in the case of a client who has been adjudicated incompetent or for whom a conservator has been appointed, the committee or conservator.

(d) Limitation on waiver. A client who, for the purposes of obtaining compensation under article twenty-two of the executive law or insurance benefits, authorizes the disclosure of any privileged communication to an employee of the office of victim services or an insurance representative shall not be deemed to have waived the privilege created by this section.

Note

This rule is reproduced verbatim from CPLR 4510. (*See generally* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4510.)

By its enactment of CPLR 4510 creating the rape crisis counselor privilege, the legislature sought to ensure that victims of sexual offenses receive needed counseling. (See Legislative Mem in Support, Bill Jacket, L 1993, ch 432, 1993 Legis Ann at 311 [“Confidentiality in rape crisis counseling is essential in creating trust, the cornerstone of any therapeutic relationship. Unless the victim is guaranteed confidentiality, he or she will be inhibited in discussion and unable to receive the full benefits of counseling”].)

The privilege by its terms applies to confidential communications disclosed by a client to a rape crisis counselor and includes advice given during the counseling. A “client” is defined in CPLR 4510 (a) (3) as a person seeking or receiving counseling concerning any sexual offense, including sexual abuse, incest, or attempts to commit any of those offenses as defined in the Penal Law. A “rape crisis counselor” is defined in CPLR 4510 (a) (2) as a person who is certified by an approved rape crisis program after completing a training program specified by Public Health Law § 206 (15), and who is being directed and supervised by an approved rape crisis program.

Once the privilege attaches to a confidential communication, the client, to maintain the privilege, and a rape crisis counselor, and any person working for the rape crisis program are prohibited from disclosing the communication and any records or recordings made in the course of the counseling. Nor may those parties be compelled to disclose the communications or records.

CPLR 4510 (b) sets forth three exceptions to the privilege: (1) the client authorizes disclosure; (2) the communication reveals the client’s intent to commit a crime or other harmful act; and (3) the client waives the privilege by filing charges against the counselor or the rape crisis program and the charges relate to the confidential communication. In addition to these exceptions, Family Court Act § 1046 (a) (vii) provides that the privilege may not be invoked in child abuse or neglect proceedings.

In recognition that the privilege may be breached in a criminal case when necessary to enforce a constitutional right of a defendant, CPL 60.76 establishes a procedure for an in camera review of the privileged information and disclosure as may be required. (See *Pennsylvania v Ritchie*, 480 US 39 [1987]; *People v Bridgeland*, 19 AD3d 1122, 1125 [4th Dept 2005] [where a witness’s credibility was “crucial” and there was a good faith basis to believe that her testimony was false, the psychologist privilege “must yield to defendant’s constitutional right of confrontation”]; *People v Jaikaran*, 95 AD3d 903, 904 [2d Dept 2012]; Peter Preiser, Practice Commentaries, McKinney’s Cons Laws of NY, Book 11A, CPL 60.76; cf. *People v McCray*, 23 NY3d 193, 198 [2014] [the trial court properly denied disclosure of confidential mental health records after the court conducted an in camera review of the records and determined the “defendant’s interest in obtaining the records to be outweighed by the complainant’s interest in

confidentiality; and defendant's interest could be outweighed only if there was no reasonable possibility that the withheld materials would lead to his acquittal"].)

5.01. Self-Incrimination

(US Const 4th Amend; NY Const, art 1, § 6; CPLR 4501)

(1) In a criminal proceeding:

(a) No person shall be compelled in any criminal case to be a witness against himself or herself.

(b) When the defendant does not testify on his or her own behalf, neither the court nor the prosecutor may comment adversely thereon.

(2) In a civil proceeding:

(a) A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish that he owes a debt or is otherwise subject to a civil suit.

(b) A competent witness may otherwise decline to give an answer which will tend to accuse himself or herself of a crime or to expose him or her to a penalty or forfeiture in response to a specific question.

(3) When during the giving of testimony, a witness invokes the privilege, the court must determine the degree of prejudice, if any, to the party whose right to examine the witness is impaired by the witness's invocation of the privilege and, upon that determination, take appropriate action to dissipate any prejudice.

Note

Subdivision (1) (a) restates both the Federal Constitution's Fifth Amendment and New York Constitution's (art I, § 6) prohibition on compelled self-incrimination. (*See generally* William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, CPL 50.10 [on the scope of the privilege in a criminal proceeding].)

Albeit the “general rule [is] that the witness is the judge of his right to invoke the privilege” (*People v Arroyo*, 46 NY2d 928, 930 [1979]), a witness may validly claim the privilege only where it is shown that the hazards of incrimination are “substantial and real, and not merely trifling or imaginary” (*Marchetti v United States*, 390 US 39, 53 [1968] [internal quotation marks and citation omitted]; see *Ohio v Reiner*, 532 US 17, 21 [2001]; *Zicarelli v New Jersey Comm’n of Investigation*, 406 US 472, 478 [1972]; *Carver Fed. Sav. Bank v Shaker Gardens, Inc.*, 167 AD3d 1337, 1340 [3d Dept 2018]).

Subdivision (1) (b) is derived from *Griffin v California* (380 US 609, 615 [1965] [“We . . . hold that the Fifth Amendment . . . forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt”]).

CPL 300.10 (2) states: “Upon request of a defendant who did not testify in his own behalf, but not otherwise, the court must state that the fact that he did not testify is not a factor from which any inference unfavorable to the defendant may be drawn.” The failure to give that instruction, “on [the] defendant’s request,” is reversible error. (*People v Britt*, 43 NY2d 111, 115 [1977]; compare *People v Vereen*, 45 NY2d 856, 857 [1978] [instructing the jury as provided by the statute, over the defendant’s objection, may be harmless error].)

Subdivision (2) is derived from CPLR 4501. (See generally Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR 4501.)

Subdivision (2) (a) states verbatim the first sentence of CPLR 4501. (See *McDermott v Manhattan Eye, Ear & Throat Hosp.*, 15 NY2d 20, 28 [1964] [“Unlike his counterpart in a criminal prosecution, the defendant in a civil suit has no inherent right to remain silent or, once on the stand, to answer only those inquiries which will have no adverse effect on his case. Rather, he must, if called as a witness, respond to virtually all questions aimed at eliciting information he may possess relevant to the issues, even though his testimony on such matters might further the plaintiff’s case”].)

Subdivision (2) (b) is derived from the second sentence of CPLR 4501 which reads:

“This section does not require a witness to give an answer which will tend to accuse himself of a crime or to expose him to a penalty or forfeiture, nor does it vary any other rule respecting the examination of a witness.”

(See *Matter of Agnello v Corbisiero*, 177 AD2d 445, 446 [1st Dept 1991] [“While it is undeniably true that the privilege applies in both civil and criminal proceedings, petitioner here did not properly invoke the privilege. When he was called as a

witness on respondent's case, he refused to answer any and all questions put to him, and not just questions the answers to which he reasonably believed could incriminate him" (citation omitted)].)

Subdivision (3) is derived from the holding in *People v Siegel* (87 NY2d 536, 544 [1995]) that "the trial court has wide discretion in fashioning the appropriate corrective response, depending on the degree of prejudice that was incurred by the party whose right of cross-examination of the witness was impaired by the claim of the privilege." The *Siegel* Court highlighted three "corrective responses":

- (a) directing that the entire testimony of the witness be stricken when the questions the witness refused to answer were closely related to a principal element of the case, or
- (b) directing that a portion of the testimony be stricken when the questions the witness refused to answer were connected to a discrete phase of the case, or
- (c) permitting the jury to consider the refusal to answer questions in determining the believability and weight of the testimony when the questions the witness refused to answer involve collateral matters or cumulative testimony concerning credibility.

(*Id.* at 544; *see also* CJI2d[NY] Witness Refuses to Answer—Refusal Effect on Witness Credibility, available at http://www.nycourts.gov/judges/cji/1-General/CJI2d.Witness_Refusal_Credibility.pdf; CJI2d[NY] Witness Refuses to Answer—Refusal Requires Testimony Stricken, available at http://www.nycourts.gov/judges/cji/1-General/CJI2d.Witness_Testimony_Stricken.pdf).

In a civil proceeding, "[w]hile the Fifth Amendment accords an individual the privilege not to answer questions . . . if the answers might incriminate the person in future criminal proceedings (*see Baxter v Palmigiano*, 425 US 308, 316 [1976]), a witness who asserts this Fifth Amendment privilege in a civil trial is not necessarily protected from consequences in the same manner as in a criminal trial." (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co.*, 33 NY3d 389, 407 [2019].)

Thus, the consequences that may attend the invocation of the privilege in a civil case include:

- (a) permitting the jury to consider the failure to answer questions by a witness who is a party " 'in assessing the strength of evidence offered by the opposite party on the issue which the witness was in a position to controvert' (*Marine Midland Bank v Russo Produce*

Co., 50 NY2d 31, 42 [1980]).” (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co.*, 33 NY3d at 407, *supra.*)

(b) “ ‘an unfavorable inference may be drawn against a party from the exercise of the privilege against self-incrimination’ (Prince, Richardson on Evidence § 5-710).” (*Id.*; *see El-Dehdan v El-Dehdan*, 26 NY3d 19, 37-38 [2015] [“a negative inference may be drawn in the civil context when a party invokes the right against self-incrimination. Here, defendant could invoke the privilege, but that did not relieve him of his burden to present adequate evidence of his (defense) to avoid civil contempt liability”]; *see also* PJI 1:76 [“General Instruction—Evidence—Claim of Privilege”].)

In its decision in *Carothers*, the Appellate Division held that an adverse inference may not be drawn against a party in a civil action where the privilege is invoked by a nonparty witness (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co.*, 150 AD3d 192, 203-204 [1st Dept 2017]; *compare Searle v Cayuga Med. Ctr. at Ithaca*, 28 AD3d 834, 837–838 [3d Dept 2006] [“While no adverse inference typically arises from the invocation of the privilege by a nonparty witness, that rule is not inflexible. The inference may be appropriate where the witness is a former party who settled, the testimony in question is directly relevant to an issue before the jury and the party being burdened by the adverse inference may be held vicariously liable due to the witness's actions” (citations omitted)]). The Court of Appeals, in its *Carothers* opinion, noted that they had “not previously decided whether a *nonparty's* invocation of the Fifth Amendment may trigger an adverse inference instruction against a party in a civil case, and we have no occasion to do so here because any error by the trial court was harmless.” (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co.*, 33 NY3d at 407, *supra.*)

(c) dismissal of the complaint. (*Levine v Bornstein*, 13 Misc 2d 161, 165 [Sup Ct, Kings County 1958], *affd no op* 7 AD2d 995 [2d Dept 1959], *affd no op* 6 NY2d 892 [1959] [plaintiff’s refusal to answer questions in an examination before trial required dismissal of the complaint].)

5.02. Spouse (CPLR 4502)

(a) Incompetency where issue adultery.

A husband or wife is not competent to testify against the other in an action founded upon adultery, except to prove the marriage, disprove the adultery, or disprove a defense after evidence has been introduced tending to prove such defense.

(b) Confidential communication privileged.

A husband or wife shall not be required, or, without consent of the other if living, allowed, to disclose a confidential communication made by one to the other during marriage.

Note

Introduction. This rule is reproduced verbatim from CPLR 4502 (*see* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4502:1 *et seq.*).

The section is historically derived from the common-law rule that spouses were generally incompetent to testify against one another. Since 1867, the common-law rule has been statutorily abrogated (*People v Daghita*, 299 NY 194, 198 [1949]). CPLR 4512, the modern statutory abrogation of the common-law rule, provides that except as otherwise expressly proscribed, no person shall be excluded or excused from being a witness as the spouse of a party. CPLR 4502 is an express proscription on when a spouse may testify against the other. Subdivision (a), subject to certain exceptions, renders a spouse "incompetent" to testify that the other spouse committed adultery in an action founded on adultery (*Eades v Eades*, 83 AD2d 972 [3d Dept 1981], *lv dismissed* 55 NY2d 800 [1981]). Subdivision (b) provides for a spousal privilege to protect confidential communications between spouses.

CPLR 4502 (a). This subdivision generally prohibits a spouse from testifying that the other spouse has committed adultery. It is subject to three exceptions: (1) to prove the marriage; (2) to disprove the adultery; or (3) to disprove a defense to adultery after proof of a defense has been submitted. It mostly affects divorce actions based upon adultery (Domestic Relations Law § 170 [4]). It does not limit a spouse from testifying that the other spouse flaunted an adulterous relationship in support of a claim other than adultery, including a defense of cruelty in a legal separation action (*Poppe v Poppe*, 3 NY2d 312, 317 [1957]; Domestic Relations Law § 200) or a claim for divorce based on cruel and inhuman treatment

(*Fritz v Fritz*, 88 AD2d 778 [4th Dept 1982]; Domestic Relations Law § 170 [1]). With the repeal of adultery-only divorce laws in 1966, and the subsequent legislative enactment of irreconcilable differences as a ground for divorce in 2010, subdivision (a) has far less vitality (see *Fritz v Fritz* [wife testified to husband's admission of adultery to obtain divorce on cruel and inhuman treatment]; *Johnston v Johnston*, 156 AD3d 1181, 1182 [3d Dept 2017], *appeal dismissed upon the ground that no substantial constitutional question is directly involved* 31 NY3d 1126 [2018] [having determined that husband established an irretrievable breakdown of the marriage, the court was not bound to grant wife a judgment of divorce on the ground of adultery]).

CPLR 4502 (b). The spousal privilege protects confidential communications induced by the marital relationship. The privilege is “[d]esigned to protect and strengthen the marital bond” and will only encompass confidential statements “that are induced by the marital relation and prompted by the affection, confidence and loyalty engendered by such relationship” (*People v Mills*, 1 NY3d 269, 276 [2003] [citations omitted]; see *People v Fediuk*, 66 NY2d 881, 883 [1985]; *Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d 66, 73 [1982]; *People v Dudley*, 24 NY2d 410 [1969]). The key inquiry is whether the communication was induced by the marital relation itself; if so, the privilege will attach (*Poppe v Poppe*, 3 NY2d at 315), it being presumed that such communication was “conducted under the mantle of confidentiality” (*People v Fediuk*, 66 NY2d at 883, 884 [statements by husband to estranged wife after killing her lover were engendered by the marital relationship because husband “clung to the illusion that (the parties) could still reconcile”]).

For the privilege to apply, the parties must actually be legally married at the time the communication is made (*People v Mulgrave*, 163 AD2d 538 [2d Dept 1990] [no privilege for bigamous marriage]; *People v Chirse*, 132 AD2d 615, 616 [2d Dept 1987], *lv denied* 70 NY2d 749 [1987] [no privilege for statements made before marriage]). Separation of legally married parties will not necessarily preclude application of the privilege (*People v Fields*, 38 AD2d 231, 233 [1972], *affd on op below* 31 NY2d 713 [1972]). The operative consideration is whether the parties were legally married at the time the communication was made, not when it was received (see *Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d at 73 [note left before husband's death still subject to privilege, even though received after death]).

The privilege applies no matter the medium of communication (*People v Fediuk*, 66 NY2d 881 [1985] [telephone calls]; *Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d 66 [1982] [tapes]; *Poppe v Poppe*, 3 NY2d 312 [1957] [conversations]). The privilege may also apply to “disclosive” acts and actions, but only if induced by the marital relation and prompted by the affection, confidence, and loyalty engendered by such relationship (*People v Daghita*, 299 NY at 199 [observation by wife that husband was bringing home stolen property and storing it in house was privileged]; but see *People v Dudley*, 24 NY2d 410, 415 [1969] [defendant's acts and words to wife conveying where his victim was buried were

not privileged because they were not induced by his confidence in the marital relationship]; *People v Wilson*, 64 NY2d 634, 636 [1984] [testimony by wife of defendant husband's presence or absence from their apartment was not a communication that would not have been made but for the marital relationship; no privilege applied]).

Not every private communication between spouses is protected (*People v Dudley*, 24 NY2d at 413; *Poppe v Poppe*, 3 NY2d at 314). Communications that would have been made regardless of the marriage's existence are not protected (*Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d at 73). "[D]aily and ordinary exchanges" between spouses are not protected (*People v Dudley*, 24 NY2d at 413-414). Nor are communications about "ordinary business matters" (*People v Melski*, 10 NY2d 78, 80 [1961]). Although the privilege may apply to admissions or confessions of adultery, which are not intended to be disclosed to third parties, it does not apply to unfounded accusations of adultery or other abusive language (*Melski* at 81).

The privilege does not apply to communications between spouses or threats by one spouse against the other made during the course of physical abuse, because the declarant is not relying upon any confidential relationship to preserve secrecy (*People v Mills*, 1 NY3d at 276; *People v Dudley*, 24 NY2d at 413 [no privilege because no confidential relationship where marriage held together by fear and domination]). The privilege is not a shield "to forbid inquiry into the personal wrongs committed by one spouse against the other" (*People v Howard*, 134 AD3d 1153, 1154 [3d Dept 2015] [wife testified at husband's arson trial that he repeatedly threatened to burn the house down to prevent her from living there]). Nor may the privilege be used to protect criminal activity directed at the other spouse (*People v Fields*, 38 AD2d 231, 233 [1972], *affd on op below* 31 NY2d 713 [1972] [threats that husband would kill wife held not privileged]). Nor can it be invoked when the communication is a threat to silence the other spouse (*People v Fields*, 38 AD2d 231, 233 [1972], *affd on op below* 31 NY2d 713 [1972] [no privilege where husband threatened to kill wife if she disclosed her observations about his criminal conduct]).

The privilege does not apply to communications or statements made by spouses in the presence of others (*People v Melski*, 10 NY2d at 84 [wife of defendant charged with grand larceny was permitted to testify that members of the robbery gang met with her husband in her kitchen where stolen guns were laid out on a table]; *People v Howard*, 134 AD3d at 1153 [threats of arson made in the presence of mutual friends and the couple's children were not privileged]). Nor does the privilege apply where the spouse entitled to the privilege voluntarily discloses the communication to a third party (*People v Melski*, 10 NY2d at 79 [husband voluntarily disclosed his communications with wife to a state trooper]).

Whether a communication is confidential and, therefore, privileged is a preliminary question of fact to be determined by the trial judge (*People v Dudley*,

24 NY2d at 414; *People v Melski*, 10 NY2d at 79; *Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d at 73; see also Guide to NY Evid rule 1.11 [1]).

The privilege automatically attaches to a confidential communication (*Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d at 73). There is a rebuttable presumption that communications between spouses have been conducted under a mantle of confidentiality (*People v Fediuk*, 66 NY2d 881, 883 [1985]). The presumption is not rebutted merely by the fact that the parties are not living together at the time the communication is made, or that the marriage has deteriorated (*id.* at 883).

The privilege belongs to the spouse who made the confidential communication (*Prink v Rockefeller Ctr.*, 48 NY2d 309, 314 [1979]). While living, only the spouse against whom the testimony is offered can waive the privilege (*People v Fediuk*, 66 NY2d at 881). The privilege is not terminated by death (*Prink v Rockefeller Ctr.*, 48 NY2d at 314). After death, the privilege may still be waived by the decedent's representative (*id.* at 314 [privilege waived where husband's mental condition put in issue in a wrongful death action]).

5.03. Attorney (CPLR 4503)

(a) 1. Confidential communication privileged.

Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof.

Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof.

The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

2. Personal representatives.

(A) For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement

between the attorney and the personal representative to the contrary:

(i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and

(ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client.

(B) For purposes of this paragraph, “personal representative” shall mean (i) the administrator, administrator c.t.a., ancillary administrator, executor, preliminary executor, temporary administrator or trustee to whom letters have been issued within the meaning of subdivision thirty-four of section one hundred three of the surrogate’s court procedure act, and (ii) the guardian of an incapacitated communicant if and to the extent that the order appointing such guardian under subdivision (c) of section 81.16 of the mental hygiene law or any subsequent order of any court expressly

provides that the guardian is to be the personal representative of the incapacitated communicant for purposes of this section; “beneficiary” shall have the meaning set forth in subdivision eight of section one hundred three of the surrogate’s court procedure act and “estate” shall have the meaning set forth in subdivision nineteen of section one hundred three of the surrogate’s court procedure act.

(b) Wills and revocable trusts.

In any action involving the probate, validity or construction of a will or, after the grantor’s death, a revocable trust, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will, revocable trust, or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

Note

This rule is reproduced verbatim from CPLR 4503 (*see generally* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4503:1-C4503:7).

CPLR 4503 (a) (1) codifies the attorney-client privilege as recognized under the common law (*see Hurlburt v Hurlburt*, 128 NY 420, 424 [1891] [describing the predecessor statute as a “mere re-enactment of the common law”]).

CPLR 4503 (a) (2) abolishes the “fiduciary exception” to the privilege regarding communications between counsel and a personal representative of a decedent’s estate.

CPLR 4503 (b) creates a statutory exception to the privilege where the confidential communication between a deceased client and the client’s attorney involves the preparation, execution, or revocation of any will of that client or other relevant instrument.

The Court of Appeals has long viewed the attorney-client privilege as premised on the rationale that “one seeking legal advice will be able to confide fully and freely in his [or her] attorney, secure in the knowledge that his [or her] confidences will not later be exposed to public view to his [or her] embarrassment or legal detriment” (*Matter of Priest v Hennessy*, 51 NY2d 62, 67-68 [1980]). Such disclosure enables the attorney to act more effectively and expeditiously, thereby “ultimately promoting the administration of justice” (*Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 592 [1989]).

For the privilege to apply, an attorney-client relationship must exist, and such relationship “arises only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services” (*Priest*, 51 NY2d at 68-69). Once such relationship is established, the privilege will encompass a confidential communication made between the client and attorney, which was made for the purpose of obtaining or providing legal assistance to the client (see *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016]; *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377-378 [1991]). Communications that relate solely to nonlegal personal or business matters fall outside the privilege (*Spectrum Sys.* at 378 [“The communication itself must be primarily or predominantly of a legal character”]).

Confidentiality of the communication is the pillar of the attorney-client privilege (see *United States v Tellier*, 255 F2d 441, 447 [2d Cir 1958] [“It is of the essence of the attorney-client privilege that it is limited to those communications which are intended to be confidential”]). This key element of the privilege requires that, at the time of the communication between the client and the attorney, it was made in confidence and with the intent and reasonable expectation that the communication would not be disclosed to persons outside the attorney-client relationship (see *People v Osorio*, 75 NY2d 80, 84 [1989]; *People v Harris*, 57 NY2d 335, 343 [1982] [“Generally, communications made in the presence of third parties, whose presence is known to the (client), are not privileged”]; *Baumann v Steingester*, 213 NY 328, 331-333 [1915]). The element of confidentiality also requires that confidentiality be maintained (see *Osorio*, 75 NY2d at 84).

An exception to the general rule that the presence of a third party precludes a finding of confidentiality is the judicially recognized “common interest exception” (see generally *Ambac*, 27 NY3d at 625-630). Under this exception, where two or more clients separately retain counsel to advise them on matters of common legal interest, confidential communications that are revealed to one another for the purpose of furthering a common legal interest retain their confidential status (*id.* at 625).

The privilege may extend to confidential communications between the agents of the client and agents of the attorney, provided they are assisting in the legal representation involved (*Rossi*, 73 NY2d at 592-593 [corporate staff

attorney]; *Osorio*, 75 NY2d at 84 [an interpreter acting as “agent of either attorney or client to facilitate communication”]; *Matter of Putnam*, 257 NY 140, 143-144 [1931] [clerical staff]). Communications between the attorney and a consultant retained by the attorney to assist the attorney in providing legal services to the clients and not for testifying, e.g., an accountant, economist, or investment banker, may also be protected by the privilege (see *United States v Kovel*, 296 F2d 918, 921-922 [2d Cir 1961]; compare *Gottwald v Sebert*, 161 AD3d 679, 680 [1st Dept 2018] [“The communications between her counsel and press agents do not reflect a discussion of legal strategy relevant to the pending litigation but, rather, a discussion of a public relations strategy, and are not protected under the attorney-client privilege”]).

Certain details about the attorney-client relationship are not protected by the privilege. In *Matter of Priest v Hennessy*, the Court held that fee arrangements between attorney and client, including the amount of the retainer and the identity of a person paying the fee, do not ordinarily constitute a confidential communication and thus are not privileged in the usual case (51 NY2d at 69; see also *Eisic Trading Corp. v Somerset Mar.*, 212 AD2d 451 [1st Dept 1995] [time records and billing statements are not within attorney-client privilege if devoid of detailed information regarding the nature of services]). In *Matter of Jacqueline F.* (47 NY2d 215, 220-222 [1979]), the Court explained that while it is “generally stated” that a client’s identity (including the client’s whereabouts) is not privileged, “the rule in New York is not so broad as to state categorically that the privilege never attaches to a client’s identity.” *Jacqueline F.* noted, for example, that a client’s identity “must be disclosed where the question of identity arises during the course of litigation” and “absent other circumstances, an attorney cannot be compelled to reveal a client’s identity where the latter is not a party to a pending litigation” (*id.* at 220; CPLR 3118). Other circumstances in which disclosure of the client’s identity may be compelled include: “where an ‘attorney’s assertion of the privilege is a cover for co-operation in wrongdoing’ ”(*id.*); where there exists a legitimate “fear of reprisal” should the whereabouts of the client be disclosed (*id.* at 222); and where the client, as in *Jacqueline F.*, leaves the jurisdiction in an attempt to thwart the mandate of a court ordering the client to return custody of a child to her parents.

CPLR 4503 (a) permits the privilege to be invoked in any judicial, administrative, or legislative proceeding. Unless the client has waived the privilege, the attorney, the attorney’s employees, the client, the client’s agents, and an eavesdropper cannot be compelled in any such proceeding to disclose a privileged communication.

In addition to the exception to the privilege set forth in CPLR 4503 (b), New York courts have created exceptions. They include:

- crime-fraud exception (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 [1st Dept 2003] [privilege “may

not be invoked where it involves client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct”]);

- fiduciary exception (*NAMA Holdings, LLC v Greenberg Traurig LLP*, 133 AD3d 46, 52 [1st Dept 2015] [“In the corporate context, where a shareholder (or, as here, an investor in a company) brings suit against corporate management for breach of fiduciary duty or similar wrongdoing, courts have carved out a ‘fiduciary exception’ to the privilege that otherwise attaches to communications between management and corporate counsel”]);
- attorney-client dispute exception (see *Matter of Glines v Estate of Baird*, 16 AD2d 743, 743-744 [4th Dept 1962] [“(T)he rule as to privileged communications does not apply when litigation arises between an attorney and client to the extent that their communications are relevant to the issue”]; *People v Mendoza*, 240 AD2d 316, 316 [1st Dept 1997] [defendant waived the attorney-privilege “by volunteering his claim that counsel, among other things, had coerced him to testify falsely at the suppression hearing”]); and
- public policy exception (*Priest*, 51 NY2d at 69 [“(E)ven where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure”]).

As CPLR 4503 (a) recognizes, the client may waive the privilege (see generally Barker & Alexander, Evidence in New York State and Federal Courts § 5:10 [2d ed]). Waiver involves a loss of the privilege which occurs subsequent to the privilege having attached to the communication involved (*Harris*, 57 NY2d at 343 n 1). A waiver may occur in a myriad of situations. Waiver will be present, for example:

- when the client gives authority to an agent to waive the privilege (*People v Cassas*, 84 NY2d 718, 722 [1995]);
- when the client discloses the communication to another person (*People v Patrick*, 182 NY 131, 175 [1905]);
- when the client is a defendant in a criminal case and places his sanity in issue, the privilege is waived as to communications between the defendant and a psychiatrist retained by the attorney, and the psychiatrist may accordingly testify for the prosecution that he determined that the defendant was sane (*People v Edney*, 39 NY2d 620, 625 [1976]).

The Appellate Division departments have uniformly held that an inadvertent disclosure does not automatically result in a waiver of the privilege. Rather, the party making the disclosure may avoid a finding of waiver by showing:

(1) the party had no intention to disclose the matter and took reasonable steps to prevent any disclosure;

(2) the party promptly took reasonable steps to rectify its mistake upon discovery of the disclosure; and

(3) the party in possession of the matter will not be prejudiced if it cannot use the matter (*see e.g. New York Times Newspaper Div. of N.Y. Times Co. v Lehrer McGovern Bovis*, 300 AD2d 169, 172 [1st Dept 2002]; *AFA Protective Sys., Inc. v City of New York*, 13 AD3d 564, 565 [2d Dept 2004]; *McGlynn v Grinberg*, 172 AD2d 960, 961 [3d Dept 1991]; *Manufacturers & Traders Trust Co. v Servotronics, Inc.*, 132 AD2d 392, 399-400 [4th Dept 1987]).

A corollary to the attorney-client privilege is an attorney's ethical obligation, in the absence of a client's consent or waiver or certain exceptions, to "not knowingly reveal confidential information" or "use such information to the disadvantage of a client or for the advantage of the lawyer or a third person" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.6 [a]).

5.04. Physician, dentist, podiatrist, chiropractor and nurse (CPLR 4504)

(a) Confidential information privileged.

Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, a university faculty practice corporation organized under section fourteen hundred twelve of the not-for-profit corporation law to practice medicine or dentistry, and the patients to whom they respectively render professional medical services.

A patient who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this subdivision. For purposes of this subdivision:

- 1. “person” shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and**
- 2. “insurance benefits” shall include payments under a self-insured plan.**

(b) Identification by dentist; crime committed against patient under sixteen. A dentist shall be required to disclose information necessary for identification of a patient. A

physician, dentist, podiatrist, chiropractor or nurse shall be required to disclose information indicating that a patient who is under the age of sixteen years has been the victim of a crime.

(c) Mental or physical condition of deceased patient. A physician or nurse shall be required to disclose any information as to the mental or physical condition of a deceased patient privileged under subdivision (a), except information which would tend to disgrace the memory of the decedent, either in the absence of an objection by a party to the litigation or when the privilege has been waived:

- 1. by the personal representative, or the surviving spouse, or the next of kin of the decedent; or**
- 2. in any litigation where the interests of the personal representative are deemed by the trial judge to be adverse to those of the estate of the decedent, by any party in interest; or**
- 3. if the validity of the will of the decedent is in question, by the executor named in the will, or the surviving spouse or any heir-at-law or any of the next kin or any other party in interest.**

(d) Proof of negligence; unauthorized practice of medicine. In any action for damages for personal injuries or death against a person not authorized to practice medicine under article 131 of the education law for any act or acts constituting the practice of medicine, when such act or acts were a competent producing proximate or contributing cause of such injuries or death, the fact that such person practiced medicine without being so authorized shall be deemed prima facie evidence of negligence.

Note

This rule is reproduced verbatim from CPLR 4504 (*see generally* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4504).

New York’s physician-patient privilege “is entirely a creature of statute. At common law, confidential communications between physicians and patients received no protection against disclosure in a legal proceeding” (*Dillenbeck v Hess*, 73 NY2d 278, 283 [1989] [tracing history of privilege]). While limited to licensed physicians when first enacted by the New York Legislature in 1828, the privilege has since been expanded to encompass dentists, podiatrists, chiropractors, registered professional nurses, and licensed practical nurses, as well as corporate health care providers specified in CPLR 4504 (a).

The Court of Appeals has stated three rationales for the physician-patient privilege: (1) to encourage patients to make available to their physicians the information necessary for diagnosis and treatment; (2) to promote candid record keeping by medical professionals; and (3) to protect “patients’ reasonable privacy expectations against disclosure of sensitive personal information” (*Matter of Grand Jury Investigation in N.Y. County*, 98 NY2d 525, 529 [2002]). While “information” is broader than the “communications” between a patient and physician, the privilege seeks to protect and foster “confidential communications, not the mere facts and incidents of a person’s medical history” (*Williams v Roosevelt Hosp.*, 66 NY2d 391, 396-397 [1985] [“a witness may not refuse to answer questions regarding matters of fact, such as those posed in this case, as to whether her children had any physical or congenital problems, whether she was in the care of a physician or was taking medication during a certain period of time, or concerning the facts surrounding an abortion merely because those topics relate to events that required medical care or advice from a physician”]).

The patient is the privilege-holder and may seek damages in tort for a breach of the privilege (*see Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 53-54 [2016] [detailing elements of a cause of action for breach of physician-patient confidentiality]). If the patient is not a party to the proceeding in which disclosure is sought, another party may assert the physician-patient privilege on the patient’s behalf (*see Matter of Grand Jury Investigation of Onondaga County*, 59 NY2d 130, 135 [1983] [hospital or physician may assert privilege for protection of patient suspected or accused of a crime]). Whoever asserts the privilege must establish the following elements: (1) the existence of a professional relationship between the patient and one of the health care professionals or providers specified in CPLR 4504 (a); (2) the information sought to be shielded from disclosure was acquired in the course of this professional relationship and was necessary for the patient’s diagnosis or treatment; and (3) the patient intended the information to be kept confidential (*see Koump v Smith*, 25 NY2d 287, 294 [1969]; *Dillenbeck*, 73 NY2d at 289; *People v Decina*, 2 NY2d 133, 145 [1956]).

Only the patient may waive the physician-patient privilege. Waiver occurs “when the patient personally, or through his witnesses, either lay or medical, introduces testimony or documents concerning privileged information It also results from failure to object to disclosure of privileged information” (*Hughson v St. Francis Hosp. of Port Jervis*, 93 AD2d 491, 500 [2d Dept 1983]). CPLR 4504 (a) provides, however, that a patient may authorize disclosure of privileged information for purposes of obtaining insurance benefits without effecting a waiver.

The privilege is waived where a party affirmatively places his or her physical or mental condition in controversy (see *Koump*, 25 NY2d at 294 [patient affirmatively puts his or her physical or mental condition in issue by bringing a personal injury action]). The burden is on the party seeking disclosure to make an evidentiary showing that the patient’s physical condition is in controversy (*Dillenbeck*, 73 NY2d at 288). The waiver extends only to medical information related to the physical or mental condition that has been put in issue. (Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, C4504:3, *supra*.)

Although in derogation of the common law, the physician-patient privilege is “afforded a broad and liberal construction to carry out its policy Conversely, exceptions that limit the privilege are afforded a narrow construction” (*People v Rivera*, 25 NY3d 256, 262-263 [2015] [citation and internal quotation marks omitted]). Section 4504 itself contains two exceptions; namely, CPLR 4504 (b) (requiring dentists to disclose information necessary for identification of a patient, and health care professionals to disclose information indicating that a patient under 16 years old has been a crime victim); and CPLR 4504 (c) (generally requiring physicians and nurses to disclose otherwise privileged information about the mental or physical condition of a deceased patient).

The legislature has created numerous other specific exceptions. As the Court of Appeals observed in *Rivera* (at 262):

“When the legislature has sought to either limit or abrogate the privilege beyond the confines of section 4504, it has been clear in its intent (see Social Services Law § 384-b [3] [h] [privilege not available in a proceeding seeking an order committing the guardianship and custody of a destitute or dependent child]; Social Services Law § 413 [identifying class of mandatory reporters of suspected child abuse and maltreatment]; Social Services Law § 415 [providing that reports of suspected child abuse or maltreatment must be made in writing and ‘shall be admissible in evidence in any proceedings relating to child abuse or maltreatment’]; Family Ct Act § 1046 [a] [vii] [stating that the privilege ‘shall (not) be a ground for excluding evidence which otherwise would be admissible’ in abuse and neglect proceedings]; Mental Hygiene Law § 81.09 [d] [permitting a court evaluator in guardianship proceedings to apply

for permission to inspect medical and psychiatric records of the alleged incapacitated persons, and allowing the court to order such disclosure notwithstanding the physician-patient privilege]; Public Health Law § 3373 [stating that ‘(f)or the purposes of duties arising out of’ article 33, relating to controlled substances, ‘no communication made to a practitioner shall be deemed confidential within the meaning of the civil practice law and rules relating to confidential communications between such practitioner and patient’)].

“Although the legislature may not always explicitly set forth its intention to limit or abrogate the privilege by expressly cross-referencing CPLR 4504, its intent is evident from the directives of the particular statute (*see* Penal Law § 265.25 [requiring attending physicians to report to police every case of ‘any . . . injury arising from or caused by the discharge of a gun or firearm’ and ‘a wound which is likely to or may result in death and is actually or apparently inflicted by a knife, icepick or other sharp or pointed instrument’]; Penal Law § 265.26 [requiring physicians to report certain burn injuries to the office of fire prevention and control]; Public Health Law § 2101 [1] [requiring physicians to ‘immediately give notice of every case of communicable disease’ to the proper authorities]).” (*See also Matter of Grand Jury Investigation of Onondaga County*, 59 NY2d at 135-136.)

Finally, CPLR 4504 (d) provides that when someone not authorized to practice medicine performs acts that are a “competent producing proximate or contributing cause of” personal injuries or death to another, the fact that such person engaged in the unauthorized practice of medicine is *prima facie* evidence of negligence in any ensuing action for damages for personal injury or death.

5.05. Confidential Communication to Clergy Privileged (CPLR 4505)

Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed [to] disclose a confession or confidence made to him in his professional character as spiritual advisor.

Note

This rule is reproduced verbatim from CPLR 4505, albeit with the addition of “[to].” (See Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4505.)

The Court of Appeals has observed that “the privilege originally applied only to communications with members of the clergy who were enjoined from disclosing the substance of such communications under the rules or practices of their religion.” (*Lightman v Flaum*, 97 NY2d 128, 134 [2001] [citation omitted].) Now, however, “[a]lthough often referred to as a ‘priest-penitent’ privilege, the statutory privilege is not limited to communications with a particular class of clerics or congregants. . . . On the contrary, in enacting CPLR 4505, the Legislature intended to recognize the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance without regard to the religion’s specific beliefs or practices.” (*People v Carmona*, 82 NY2d 603, 608 [1993] [citations and internal quotation marks omitted].) The Court added that “the New York statute is intentionally aimed at all religious ministers who perform ‘significant spiritual counselling which may involve disclosure of sensitive matters’ (Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4505, at 683).” (*Carmona*, 82 NY2d at 608-609.)

As to the nature of the communications to which the privilege applies, the Court has made clear that “[t]he priest-penitent privilege arises not because statements are made to a clergyman. Rather, something more is needed. There must be reason to believe that the information sought required the disclosure of information under the cloak of the confessional or was in any way confidential[,] for it is only confidential communications made to a clergyman in his spiritual capacity which the law endeavors to protect.” (*Matter of Keenan v Gigante*, 47 NY2d 160, 166 [1979] [citations and internal quotation marks omitted].) “New York’s test for the privilege’s applicability distills to a single inquiry: whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance.” (*Carmona*, 82 NY2d at 609, citing *Matter of Keenan v Gigante*, 47 NY2d at 166.)

In *Carmona*, the Court of Appeals has offered as examples of communications to which the privilege did not apply:

- where disclosures were made to a rabbi for the purpose of obtaining his assistance in securing an attorney and a favorable plea bargain (citing *People v Drelich*, 123 AD2d 441 [2d Dept 1986]);
- where a congregant apologized to a priest in the priest's capacity as a victim and solicited the priest's aid in contacting an attorney (citing *People v Schultz*, 161 AD2d 970 [3d Dept 1990]);
- and where a priest informed a congregant of allegations made against him by his wife and stepdaughter and warned him that the authorities would be advised unless he quit his job at a day-care center (citing *Matter of N. & G. Children*, 176 AD2d 504 [1st Dept 1991]). (*Carmona*, 82 NY2d at 609.)

A person to whom the privilege contemplated by the statute applies may expressly waive it or may implicitly waive it by his or her conduct. (*Carmona*, 82 NY2d at 611.)

5.07. Psychologist (CPLR 4507)

The confidential relations and communications between a psychologist registered under the provisions of article one hundred fifty-three of the education law and his client are placed on the same basis as those provided by law between attorney and client, and nothing in such article shall be construed to require any such privileged communications to be disclosed.

A client who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this section. For purposes of this section:

- 1. “person” shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and**
- 2. “insurance benefits” shall include payments under a self-insured plan.**

Note

This rule is reproduced verbatim from CPLR 4507. (See Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4507.)

The underlying premise of the psychologist-client privilege is that “confidentiality is the essential ingredient for successful psychotherapy” (*Frederick R.C. v Helene C.*, 153 Misc 2d 660, 662 [Sup Ct, Suffolk County 1992]). The privilege as created by CPLR 4507 is analogized to the attorney-client privilege (*People v Wilkins*, 65 NY2d 172, 178 [1985] [privilege was placed “on the same footing as that between attorney and client”]). Thus, the subject communications to be privileged must have been made in confidence and for the purpose of obtaining the psychologist’s professional services. (See Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts § 5:22 [2d ed].)

For the privilege to be invoked, CPLR 4507 requires the psychologist to be registered under Education Law article 153. Thus, the privilege does not extend to psychologists who are not licensed or authorized to practice in New York.

The psychologist's client may waive the privilege, either expressly or impliedly. (*See e.g. Matter of Charles RR.*, 166 AD2d 763, 764 [3d Dept 1990].) However, CPLR 4507 precludes a finding of waiver of the privilege when the client authorizes disclosure in order to obtain insurance benefits.

Statutory exceptions to CPLR 4507 are set forth in Family Court Act § 1046 (a) (vii) (no privilege in child abuse or neglect proceedings); Social Services Law §§ 413 and 415 (cases of suspected child abuse or maltreatment must be reported in writing and such written reports are admissible in any proceedings relating to child abuse or maltreatment); Social Services Law § 384-b (3) (h) (no privilege in proceedings for guardianship and custody of destitute or dependent children); Mental Hygiene Law § 81.09 (d) (court may authorize court evaluator's inspection of psychological records of person alleged to be incapacitated and order "such further disclosure of such records as the court deems proper"); and Mental Hygiene Law § 33.13 (c) (1) (court may order disclosure of mental health records in specified facilities upon finding that interests of justice significantly outweigh need for confidentiality).

A privilege may be breached in a criminal proceeding when necessary to enforce a constitutional right of a defendant. (*See Pennsylvania v Ritchie*, 480 US 39 [1987]; *People v Bridgeland*, 19 AD3d 1122, 1125 [4th Dept 2005] [where a witness's credibility was "crucial" and there was a good faith basis to believe that her testimony was false, the psychologist privilege "must yield to defendant's constitutional right of confrontation"]; *People v Jaikaran*, 95 AD3d 903, 904 [2d Dept 2012]; *cf. People v McCray*, 23 NY3d 193, 198 [2014] [the trial court properly denied disclosure of confidential mental health records after the court conducted an in camera review of the records and determined the "defendant's interest in obtaining the records to be outweighed by the complainant's interest in confidentiality; and defendant's interest could be outweighed only if there was no reasonable possibility that the withheld materials would lead to his acquittal"].)

5.08. Social Worker (CPLR 4508)

(a) Confidential information privileged. A person licensed as a licensed master social worker or a licensed clinical social worker under the provisions of article one hundred fifty-four of the education law shall not be required to disclose a communication made by a client, or his or her advice given thereon, in the course of his or her professional employment, nor shall any clerk, stenographer or other person working for the same employer as such social worker or for such social worker be allowed to disclose any such communication or advice given thereon; except

1. that such social worker may disclose such information as the client may authorize;

2. that such social worker shall not be required to treat as confidential a communication by a client which reveals the contemplation of a crime or harmful act;

3. where the client is a child under the age of sixteen and the information acquired by such social worker indicates that the client has been the victim or subject of a crime, the social worker may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry;

4. where the client waives the privilege by bringing charges against such social worker and such charges involve confidential communications between the client and the social worker.

(b) Limitations on waiver. A client who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to

any person shall not be deemed to have waived the privilege created by this section. For purposes of this subdivision:

1. “person” shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and

2. “insurance benefits” shall include payments under a self-insured plan.

Note

This section is reproduced verbatim from CPLR 4508 (*see generally* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4508).

The statute that embodies this rule establishes a privilege for a confidential communication between a licensed social worker and his or her client made during professional employment (*see Matter of Rutland v O’Brien*, 143 AD3d 1060, 1063 [3d Dept 2016] [in an action to modify a prior order of custody, the father could not call the daughter’s counselor, a licensed clinical social worker, to testify about their privileged communications in the absence of a knowing waiver from the daughter “notwithstanding the absence of any objection by the attorney for the children”]).

The “social worker” must be a “licensed master social worker or a licensed clinical social worker” pursuant to Education Law article 154 (*cf. Matter of Humberstone v Wheaton*, 21 AD3d 1416, 1417 [4th Dept 2005] [a child’s communications to a “school guidance counselor” who was not (as then required) a “certified” social worker were accordingly not privileged]; *People v Bridges*, 142 Misc 2d 789, 790 [Monroe County Ct 1989] [a communication between a patient and a hospital’s volunteer counselor who was not a certified social worker was not protected by the “social worker” privilege]).

The privilege extends to any “clerk, stenographer or other person working for the same employer as such social worker or for such social worker” (CPLR 4508 [a]; *cf. Matter of Grand Jury Proceedings [Doe]*, 56 NY2d 348, 353 [1982] [a hospital that is the subject of a grand jury investigation for crimes committed upon its patients may not decline to honor a grand jury subpoena for a patient record

on the ground that it includes notes of a communication between its social worker and a patient]).

The privilege only protects a communication to a social worker that was intended to be confidential (*People v Alaire*, 148 AD2d 731, 737 [2d Dept 1989] [the defendant's statement to his social worker "was made in the presence of a third party, namely (a police sergeant) and (the sergeant's) presence was known to the defendant. In view thereof, it cannot be said that the defendant intended his statement to be confidential and thus, the privilege did not attach"]; *Matter of Allers [G.P.]*, 37 Misc 3d 1219[A], 2012 NY Slip Op 52095[U] [Sup Ct, Dutchess County 2012]).

A communication that reveals the contemplation of a crime or harmful act, though purportedly intended to be confidential, is by statute expressly not privileged (CPLR 4508 [a] [2]).

Similarly, a purported confidential communication of a child under 16 that indicates the child has been the victim or subject of a crime is not privileged when the social worker is required to testify at a proceeding in which the commission of the crime is a subject of inquiry (CPLR 4508 [a] [3]; see Social Services Law § 413 [social worker and others required to report cases of suspected child abuse or maltreatment]; Family Ct Act § 1046 [a] [vii] [neither the spousal, physician-patient, psychologist-client, or social worker privilege "shall be a ground for excluding evidence which otherwise would be admissible" in child protective proceedings]).

The client may expressly waive the privilege and thereby permit the social worker to testify to their communications (CPLR 4508 [a] [1]). The client may also impliedly waive the privilege by bringing charges against the social worker which involve the confidential communications (CPLR 4508 [a] [4]), or by otherwise affirmatively placing his or her medical and psychological condition in issue (see *Abraha v Adams*, 148 AD3d 1730, 1731 [4th Dept 2017] [in a medical malpractice action the "plaintiff waived any privilege afforded by CPLR 4508 by affirmatively placing her medical and psychological condition in controversy through the broad allegations of injury in her bills of particulars"]; *Velez v Daar*, 41 AD3d 164, 165 [1st Dept 2007] [in medical malpractice action for psychological and emotional injuries suffered because of a failure to diagnose a cancer, "(p)laintiff clearly waived his statutory social worker-patient confidentiality privilege (CPLR 4508) by placing his psychological condition in controversy, which he did by acknowledging in his testimony that factors other than his thyroid cancer were causes of his psychological symptoms"]; *Robles v Merrill Lynch/WFC/L, Inc.*, 40 AD3d 412, 412 [1st Dept 2007] ["Plaintiff waived the relevant privilege (CPLR 4508) by alleging injuries in her bill of particulars that affirmatively placed her mental condition in issue"]).

By subdivision (b), the client does not waive the privilege for all purposes by simply authorizing disclosure of the privileged communications to obtain insurance (*compare People v O'Gorman*, 91 Misc 2d 539 [Sup Ct, Suffolk County 1977] [privileged information was waived with respect to information given to establish or maintain eligibility for public assistance]).

By a separate statute, the privilege is not lost for the “sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication” (*see* CPLR 4548).

A privilege may be breached in a criminal proceeding when necessary to enforce a constitutional right of a defendant (*see Pennsylvania v Ritchie*, 480 US 39 [1987]; *People v Bridgeland*, 19 AD3d 1122, 1125 [4th Dept 2005] [where a witness’s credibility was “crucial” and there was a good faith basis to believe that her testimony was false, the psychologist privilege “must yield to defendant’s constitutional right of confrontation”]; *People v Jaikaran*, 95 AD3d 903, 904 [2d Dept 2012]; *cf. People v McCray*, 23 NY3d 193, 198 [2014] [the trial court properly denied disclosure of confidential mental health records after the court conducted an in camera review of the records and determined that the “defendant’s interest in obtaining the records to be outweighed by the complainant’s interest in confidentiality; and defendant’s interest could be outweighed only if there was no reasonable possibility that the withheld materials would lead to his acquittal”]).

5.09. Library records (CPLR 4509)

Library records, which contain names or other personally identifying details regarding the users of public, free association, school, college and university libraries and library systems of this state, including but not limited to records related to the circulation of library materials, computer database searches, interlibrary loan transactions, reference queries, requests for photocopies of library materials, title reserve requests, or the use of audio-visual materials, films or records, shall be confidential and shall not be disclosed except that such records may be disclosed to the extent necessary for the proper operation of such library and shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute.

Note

This rule restates verbatim CPLR 4509.

“The law thus protects the privacy interests of library users whose reading habits are nobody’s business but their own. The user may, of course, consent to disclosure, and the statute contains exceptions for proper operation of the library, court-ordered production, subpoenaed materials, and ‘where otherwise required by statute.’ ” (Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR 4509.)

5.10. Rape Crisis Counselor (CPLR 4510)

(a) Definitions. When used in this section, the following terms shall have the following meanings:

1. “Rape crisis program” means any office, institution or center which has been approved pursuant to subdivision fifteen of section two hundred six of the public health law, offering counseling and assistance to clients concerning sexual offenses, sexual abuses or incest.

2. “Rape crisis counselor” means any person who has been certified by an approved rape crisis program as having satisfied the training standards specified in subdivision fifteen of section two hundred six of the public health law, and who, regardless of compensation, is acting under the direction and supervision of an approved rape crisis program.

3. “Client” means any person who is seeking or receiving the services of a rape crisis counselor for the purpose of securing counseling or assistance concerning any sexual offenses, sexual abuse, incest or attempts to commit sexual offenses, sexual abuse, or incest, as defined in the penal law.

(b) Confidential information privileged. A rape crisis counselor shall not be required to disclose a communication made by his or her client to him or her, or advice given thereon, in the course of his or her services nor shall any clerk, stenographer or other person working for the same program as the rape crisis counselor or for the rape crisis counselor be allowed to disclose any such communication or advice given thereon nor shall any records made in the course of the services given to the client or recording of any communications made by or to a client be required to

be disclosed, nor shall the client be compelled to disclose such communication or records, except:

- 1. that a rape crisis counselor may disclose such otherwise confidential communication to the extent authorized by the client;**
- 2. that a rape crisis counselor shall not be required to treat as confidential a communication by a client which reveals the intent to commit a crime or harmful act;**
- 3. in a case in which the client waives the privilege by instituting charges against the rape crisis counselor or the rape crisis program and such action or proceeding involves confidential communications between the client and the rape crisis counselor.**

(c) Who may waive the privilege. The privilege may only be waived by the client, the personal representative of a deceased client, or, in the case of a client who has been adjudicated incompetent or for whom a conservator has been appointed, the committee or conservator.

(d) Limitation on waiver. A client who, for the purposes of obtaining compensation under article twenty-two of the executive law or insurance benefits, authorizes the disclosure of any privileged communication to an employee of the office of victim services or an insurance representative shall not be deemed to have waived the privilege created by this section.

Note

This rule is reproduced verbatim from CPLR 4510. (*See generally* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4510.)

By its enactment of CPLR 4510 creating the rape crisis counselor privilege, the legislature sought to ensure that victims of sexual offenses receive needed counseling. (See Legislative Mem in Support, Bill Jacket, L 1993, ch 432, 1993 Legis Ann at 311 [“Confidentiality in rape crisis counseling is essential in creating trust, the cornerstone of any therapeutic relationship. Unless the victim is guaranteed confidentiality, he or she will be inhibited in discussion and unable to receive the full benefits of counseling”].)

The privilege by its terms applies to confidential communications disclosed by a client to a rape crisis counselor and includes advice given during the counseling. A “client” is defined in CPLR 4510 (a) (3) as a person seeking or receiving counseling concerning any sexual offense, including sexual abuse, incest, or attempts to commit any of those offenses as defined in the Penal Law. A “rape crisis counselor” is defined in CPLR 4510 (a) (2) as a person who is certified by an approved rape crisis program after completing a training program specified by Public Health Law § 206 (15), and who is being directed and supervised by an approved rape crisis program.

Once the privilege attaches to a confidential communication, the client, to maintain the privilege, and a rape crisis counselor, and any person working for the rape crisis program are prohibited from disclosing the communication and any records or recordings made in the course of the counseling. Nor may those parties be compelled to disclose the communications or records.

CPLR 4510 (b) sets forth three exceptions to the privilege: (1) the client authorizes disclosure; (2) the communication reveals the client’s intent to commit a crime or other harmful act; and (3) the client waives the privilege by filing charges against the counselor or the rape crisis program and the charges relate to the confidential communication. In addition to these exceptions, Family Court Act § 1046 (a) (vii) provides that the privilege may not be invoked in child abuse or neglect proceedings.

In recognition that the privilege may be breached in a criminal case when necessary to enforce a constitutional right of a defendant, CPL 60.76 establishes a procedure for an in camera review of the privileged information and disclosure as may be required. (See *Pennsylvania v Ritchie*, 480 US 39 [1987]; *People v Bridgeland*, 19 AD3d 1122, 1125 [4th Dept 2005] [where a witness’s credibility was “crucial” and there was a good faith basis to believe that her testimony was false, the psychologist privilege “must yield to defendant’s constitutional right of confrontation”]; *People v Jaikaran*, 95 AD3d 903, 904 [2d Dept 2012]; Peter Preiser, Practice Commentaries, McKinney’s Cons Laws of NY, Book 11A, CPL 60.76; cf. *People v McCray*, 23 NY3d 193, 198 [2014] [the trial court properly denied disclosure of confidential mental health records after the court conducted an in camera review of the records and determined the “defendant’s interest in obtaining the records to be outweighed by the complainant’s interest in

confidentiality; and defendant's interest could be outweighed only if there was no reasonable possibility that the withheld materials would lead to his acquittal"].)

5.48 Privileged communications; electronic communication thereof (CPLR 4548)

No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.

Note

This rule restates CPLR 4548. The rule is plainly designed to make clear that a communication of privileged information whether by traditional means or modern electronic means remains privileged, notwithstanding that electronic means may be subject to interception by non-privileged parties.

Further, the “statutory language makes clear that the involvement of a person who plays a *necessary* role in the delivery of the electronic communication does *not* constitute a waiver of privilege.” (*Green v Beer*, 2010 WL 3422723, *4, 2010 US Dist LEXIS 87484, *10 [SD NY, Aug. 24, 2010, No. 06 Civ. 4156 (KMW) (JCF)] [plaintiffs lacked “proficiency in the use of email,” and “their son’s assistance was ‘necessary for the delivery or facilitation’ of counsel’s emailed communications to the (plaintiffs)” (2010 WL 3422723, *5, 2010 US Dist LEXIS 87484, *13)].)

Of course, the communicated message must otherwise conform to the requirements of the privilege. “If a wife, for example, sends her husband an e-mail message with a ‘cc’ to her brother-in-law, or she knows that a business associate is looking over her shoulder when she types the message on her computer screen, no privilege should attach.” (Vincent C. Alexander, *Practice Commentaries*, McKinney’s Cons Laws of NY, Book 7B, CPLR 4548.)

GUIDE TO NEW YORK EVIDENCE
ARTICLE 6: WITNESSES & IMPEACHMENT
TABLE OF CONTENTS

WITNESSES

COMPETENCY

6.01 COMPETENCY OF A WITNESS

6.02 COMPETENCY OF PREVIOUSLY HYPNOTIZED WITNESS

6.02.1 DEAD MAN'S STATUTE (Incompetency of a Witness to Testify to a Transaction or Communication with a Deceased or Mentally Ill Person)

EXCLUSION

6.03 EXCLUSION OF WITNESSES

TESTIMONY

6.04 INTERPRETER

6.05 OATH OR AFFIRMATION FOR WITNESS TO TESTIFY

6.06 SCOPE & MANNER OF EXAMINATION OF WITNESSES

6.07 NONEXPERT LIMITED TO PERSONAL KNOWLEDGE TESTIMONY

6.09 REFRESHING RECOLLECTION

6.10 TESTIMONY OF ACCOMPLICE, CORROBORATION

6.10.1 MISSING WITNESSES

IMPEACHMENT

6.11 IMPEACHMENT IN GENERAL

6.12 IMPEACHMENT OF ALIBI

6.13 IMPEACHMENT BY BIAS, HOSTILITY, INTEREST

6.14 IMPEACHMENT BY EVIDENCE IMPROPERLY OBTAINED

6.15 IMPEACHMENT BY INCONSISTENT STATEMENT

6.16 IMPEACHMENT OF A LAW ENFORCEMENT OFFICER

6.17 IMPEACHMENT BY INSTANCES OF MISCONDUCT

6.19 IMPEACHMENT BY PRIOR CONVICTION

6.20 IMPEACHMENT RECENT FABRICATION

6.21 IMPEACHMENT BY RELIGIOUS BELIEF

6.23 IMPEACHMENT BY REPUTATION

6.01. Competency of a Witness to Testify

Every person is competent to be a witness unless the court determines that the person does not have the capacity to warrant the reception of the person's evidence. A person may be competent to be a witness but may not be competent to testify to specific matters as a result of the application of other rules of evidence.

Note

The rule is derived from the New York State Constitution, statutory provisions, and Court of Appeals precedent. (*See e.g.* NY Const, art I, § 3 [“no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief”]; CPLR 4512 [“Except as otherwise expressly prescribed, a person shall not be excluded or excused from being a witness, by reason of his interest in the event or because he is a party or the spouse of a party”]; CPLR 4513 [“A person who has been convicted of a crime is a competent witness”]; CPL 60.20 [1] [“Any person may be a witness in a criminal proceeding unless the court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence”]; *People v Parks*, 41 NY2d 36, 45 [1976] [“The traditional rule still followed in this State, is that all adults are presumed to be competent to testify”]; *People v Fuller*, 50 NY2d 628, 636 [1980] [“Age alone is no testimonial infirmity”]; *Matter of Brown v Ristich*, 36 NY2d 183, 188 [1975] [“All adults are presumed competent to testify”]; *People v Rensing*, 14 NY2d 210, 213 [1964] [“The capacity of a person to be a witness is presumed”].)

The Court of Appeals has rejected arguments that a person is incompetent as a matter of law to testify as a witness when the person has been declared incompetent under the Mental Hygiene Law (*see Brown*, 36 NY2d at 188); has been adjudicated not responsible by reason of mental disease or defect (*see Rensing*, 14 NY2d at 213); or has received an “excessive” fee to testify (*see Caldwell v Cablevision Sys. Corp.*, 20 NY3d 365 [2013]). On the other hand, a person is incompetent as a matter of law to testify to matters that the witness recalled after being hypnotized (*People v Hughes*, 59 NY2d 523, 545 [1983]); and a judge is not competent to testify at a proceeding over which the judge is presiding (*People v Dohring*, 59 NY 374 [1874]).

As to the issue of a witness's competency generally, the Court of Appeals stated in *Brown* that a person is competent to be a witness, if the person

“has the ability to observe, recall and narrate, i.e., events that he sees must be impressed in his mind; they must be retained in his memory; and he must be able to recount them with sufficient ability such that

the presiding official is satisfied that the witness understands the nature of the questions put to him and can respond accordingly, and that he understands his moral responsibility to speak the truth.”

(*Brown*, 36 NY2d at 189.)

When a person’s ability to perceive, recall, narrate or understand the nature of an oath is challenged, the Court of Appeals has charged the court with the responsibility of determining whether the person “has sufficient intelligence to understand the nature of an oath and to give a reasonably accurate account of what he has seen and heard vis-à-vis the subject matter about which he is interrogated.” (*Rensing*, 14 NY2d at 213.) When the court is so satisfied, the person may testify. (*Brown*, 36 NY2d at 189.) In making that determination, the court may properly consider the testimony of physicians or other persons with information that would shed light on the capacity and intelligence of the prospective witness. (*Parks*, 41 NY2d at 46.) As the Court stated in *People v Washor* (196 NY 104, 109-110 [1909]): “There is no rule by which the extent of the intelligence of an adult who is called as a witness can be measured. It must necessarily be left to the good judgment of the trial court to determine whether such a witness offered by a party to an action shall be sworn. The determination of the trial court should be sustained particularly where the testimony is received and the weight to be given to it is left to the jury, unless there is a clear abuse of discretionary power.”

Deficiencies in a witness’s testimonial qualities that are not of such a nature to render the witness incompetent to testify may be admissible for impeachment purposes. (See e.g. *People v Freeland*, 36 NY2d 518, 525-526 [1975]; *People v Webster*, 139 NY 73, 87 [1893].) The witness may be questioned about such deficiencies on cross-examination, and, as such deficiencies are considered to be non-collateral matters, extrinsic evidence is admissible to establish them. (See e.g. *Badr v Hogan*, 75 NY2d 629, 634 [1990]; *Freeland*, 36 NY2d at 526.)

Statutory provisions rendering a person incompetent to testify as a witness or as to certain matters include CPL 60.20 (2) (“Every witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath. A witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath”), incorporated in Guide to New York Evidence rule 6.05; CPLR 4502 (a) (“A husband or wife is not competent to testify against the other in an action founded upon adultery, except to prove the marriage, disprove the adultery, or disprove a defense after evidence has been introduced tending to prove such defense”); and CPLR 4519 (historically known as the dead man’s statute) which, in substance, provides that a person or party interested in the event, or a predecessor in interest, is incompetent to testify to a personal transaction or communication with a deceased or a mentally ill person when such testimony is offered against the representative of the deceased or mentally ill person.

6.02.1 Dead Man's Statute--Incompetency of a Witness to Testify to a Transaction or Communication with a Deceased or Mentally Ill Person (CPLR 4519)

(1) Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his [or her] interest or title by assignment or otherwise, shall not be examined as a witness in his [or her] own behalf or interest, or in behalf of the party succeeding to his [or her] title or interest against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person, or a person deriving his [or her] title or interest from, through or under a deceased person or mentally ill person, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or mentally ill person, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his [or her] own behalf, or the testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication.

(2) A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof.

(3) No party or person interested in the event, who is otherwise competent to testify, shall be disqualified from testifying by the possible imposition of costs against him or the award of costs to him.

(4) A party or person interested in the event or a person from, through or under whom such a party or interested person derives his [or her] interest or title by assignment or otherwise, shall not be qualified for

the purposes of this section, to testify in his [or her] own behalf or interest, or in behalf of the party succeeding to his [or her] title or interest, to personal transactions or communications with the donee of a power of appointment in an action or proceeding for the probate of a will, which exercises or attempts to exercise a power of appointment granted by the will of a donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate.

(5) Nothing contained in this section, however, shall render a person incompetent to testify as to the facts of an accident or the results therefrom where the proceeding, hearing, defense or cause of action involves a claim of negligence or contributory negligence in an action wherein one or more parties is the representative of a deceased or incompetent person based upon, or by reason of, the operation or ownership of a motor vehicle being operated upon the highways of the state, or the operation or ownership of aircraft being operated in the air space over the state, or the operation or ownership of a vessel on any of the lakes, rivers, streams, canals or other waters of this state, but this provision shall not be construed as permitting testimony as to conversations with the deceased.

Note

This rule reproduces CPLR 4519, except for the title of the statute (“Personal transaction or communication between witness and decedent or mentally ill person”) and the addition of subdivision numbers for easier reference.

The statute, known as the “Dead Man’s Statute,” sets forth an exception to the general rule of competency described in Guide to New York Evidence rule 6.01. It provides, in substance, that a person, or party interested in the event, or predecessor in interest is incompetent to testify to a personal transaction or communication with a deceased or mentally ill person when such testimony is offered against the representative of the deceased or mentally ill person.

As explained in *Matter of Zalk* (10 NY3d 669, 678-679 [2008]):

“ ‘The rule of evidence popularly referred to as the Dead Man's Statute’ was enacted by the New York Legislature in 1851, and is ‘widely considered to be the last vestige of the common-law rule which made all interested persons and parties incompetent to testify. After the general rule barring testimony from interested persons was abolished, a new rule was adopted to prevent the living from testifying to certain “personal transactions” with the dead. One of the main purposes of the rule was to protect the estate of the deceased from claims of the living who, through their own perjury, could make factual assertions which the decedent could not refute in court’ (*Matter of Wood*, 52 NY2d 139, 143-144 [1981] [citations omitted]).”

“Thus, when death or mental illness seals the lips of one of the parties to a transaction, the Dead Man's Statute seeks to achieve adversarial balance by sealing the lips of the surviving party. Transactions or communications between the interested witness and the decedent or mentally ill person must therefore be proven by means other than the testimony of an interested witness, such as documentary evidence and the testimony of disinterested witnesses” (Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4519:1).

Subdivision (1) of the rule sets forth the basic components of the Dead Man’s Statute. The remaining subdivisions address issues arising from application of the statute. For purposes of this note, CPLR 4519, as recited in subdivision (1) of the rule, is broken down into the following five parts:

- The type of proceeding to which the rule applies
- The witness whose testimony the rule precludes
- The party or person the witness is precluded from testifying against
- The substance of the forbidden testimony
- An exception to the rule

The note concludes with a discussion of procedural issues and how the protection of the statute may be waived.

The type of proceeding to which CPLR 4519 applies

CPLR 4519 does not apply in criminal proceedings.

CPLR 4519, as recited in subdivision (1) of the rule, states it applies to: “the trial of an action or the hearing upon the merits of a special proceeding.”

Thus, CPLR 4519 applies in all civil actions and has been invoked in administrative hearings (*Matter of Zalk*, 10 NY3d 669 [2008]). It does not apply to pretrial discovery under CPLR article 31 or other preliminary matters that do not

result in a decision on the merits (*Matter of Van Volkenburgh*, 254 NY 139 [1930]). Admission of such testimony at these early stages does not constitute a waiver of the rule at trial. (*Id.*)

In Surrogate's Court, the words, "hearing upon the merits of a special proceeding" includes all proceedings "which have for their immediate object an affirmative determination affecting the rights of any party thereto" (*Matter of Christie*, 167 Misc 484, 487 [Sur Ct, Kings County 1938]).

CPLR article 31 applies in Surrogate's Court, but there are additional discovery proceedings specifically applicable in that court in which testimony forbidden by CPLR 4519 may be allowed without creating a waiver of the statute in future hearings and proceedings on the merits. The statute does not apply in pretrial discovery brought under SCPA 1404 (examination of the attesting witness and or attorney drafter); 2211 (examination of an accounting fiduciary); and 2102 (examination of fiduciary dealing with the assets of the estate). In a discovery proceeding under SCPA 2103 (proceeding by fiduciary to discover property withheld or obtain information) a witness's testimony about communications with a decedent is not deemed a waiver of CPLR 4519 (SCPA 2104 [6]). Once an answer asserting ownership is interposed in a discovery proceeding, the proceeding is no longer in an "inquisitorial phase," but becomes a trial on the merits to which CPLR 4519 applies (*Matter of Detweiler*, 121 Misc 2d 453 [Sur Ct, Cattaraugus County 1983]).

CPLR 4519 has been held to apply in an application for a preliminary injunction in which the court decides a party's likelihood of success on the merits (*Matter of Tschernia*, 18 Misc3d 1114[A], 2007 NY Slip Op 52510[U] [Sur Ct, Nassau County 2007]).

The affidavit of an interested person, incompetent to testify under the statute, may not be used to support a motion for summary judgment, but it may be used to defeat such a motion by raising an issue of fact (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]).

The witness whose testimony the rule precludes

By CPLR 4519, as recited in subdivision (1) of the rule, "a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his [or her] interest or title by assignment or otherwise, shall not be examined as a witness in his [or her] own behalf or interest, or in behalf of the party succeeding to his [or her] title or interest."

The Court of Appeals has explained that the "true test of the interest of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest

uncertain, remote, or contingent” (*Hobart v Hobart*, 62 NY 80, 83 [1875]). For example, just before testifying, an interested witness who was then incompetent to testify became disinterested and competent by transferring to his sister stock that had created his interest. He no longer had a “present” interest in the proceeding (*Friedrich v Martin*, 294 NY 588 [1945]). It has been held that the interest must be financial (*Tworowski v Tworowski*, 181 Misc 2d 1038 [Sup Ct, Kings County 1999]).

Generally, the executor of the estate is not disqualified from testifying under the Dead Man’s Statute. An executor’s commissions are fixed by statute and the fact that the executor will receive them does not make him financially interested in the outcome (*Matter of Wilson*, 103 NY 374 [1886]). If there is, however, a bequest to the executor in the will, or if he or she has a claim against the estate, the executor will be considered an interested party and barred from testifying (*Matter of Green*, 247 App Div 540 [4th Dept 1936]).

Relationship through blood or marriage to an interested party standing alone does not make the relative an interested party (*Laka v Krystek*, 261 NY 126 [1933]).

An interested person or party may not be examined “as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest” (CPLR 4519; *Rousseau v Rouss*, 180 NY 116 [1904]). The witness may testify, however, against his or her own interest or successor’s interest (*Matter of Tremaine*, 156 AD2d 862 [3d Dept 1989]). When respondents are called by their adversary, they are not testifying in their own interest and their testimony is not barred by the statute (*Matter of Hauck*, NYLJ, Dec. 23, 1992 at 25, col 3 [Sur Ct, NY County], *aff’d* 200 AD2d 405 [1st Dept 1994]). The predecessor in interest of the interested party is also barred from testifying by this section. (See *Abbott v Doughan*, 204 NY 223 [1912] for a discussion of the rationale behind this provision.)

The party or person the witness is precluded from testifying against

The interested person or party may not be called to testify in his or her own behalf or interest “against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person, or a person deriving his [or her] title or interest from, through or under a deceased person or mentally ill person, by assignment or otherwise” (CPLR 4519 [Guide to NY Evid rule 6.02.1 (1)]). These individuals are often referred to as the “protected party.” They have standing to raise the objection (and also the ability to waive it). (See section on waiver.)

The decedent normally is easily identified, but a missing party not yet determined to be dead may not be protected under the statute (*Jacobs v Stark*, 83 Misc 2d 605, 608 [Civ Ct, NY County 1975] [“the granting of temporary administration to conserve the estate of an absentee is an insufficient adjudication of death to satisfy application of the unambiguous exclusionary statutory rule of CPLR 4519”]).

By the statute, a witness must testify against an individual specified in the statute for the witness's testimony to be barred. As a result, for example, an attorney testifying in his own behalf in an attorney discipline hearing was not prohibited from testifying about his deceased client's instructions to retain the monies remaining in the attorney's escrow account from the sale of her property, as payment for legal services, because he was not testifying against the executor, administrator or survivor of his client (*Matter of Zalk*, 10 NY 3d 669 [2008]). In so ruling, the Court rejected the holding of the Appellate Division that the attorney's testimony was against the decedent's surviving daughters because they stood to be deprived of the monies in the escrow account (*Matter of Zalk*, 45 AD3d 42 [1st Dept 2007]).

Historically, the Dead Man's Statute protected a person who had been declared by a court to be a "lunatic" and for whom the court had appointed a committee. In *Clark v Dada* (183 App Div 253, 262 [4th Dept 1918]), the Appellate Division held that a person for whom a committee had not been appointed was not protected from the testimony of an interested party even though he had been adjudged insane by a county judge and committed to a hospital for treatment. The Court discussed the many forms of mental illness and noted that, unlike deceased persons, the lips of persons committed to a hospital may not be forever sealed, and they may be able to dispute testimony against them. There was one dissent, arguing that it had been established, at least presumptively, that the hospitalized person was a "lunatic." While the majority's solution (no committee, no protection) is draconian and no longer the law, it presages the difficulties future courts would encounter in determining who is protected from testimony of an interested party by reason of mental illness.

The term "committee of a mentally ill person" remains in the Dead Man's Statute, although in 1993, with the enactment of article 81 of the Mental Hygiene Law (Proceedings for Appointment of a Guardian for Personal Needs or Property Management), a "guardianship system" replaced the law establishing a "committee of a mentally ill person." In its legislative findings, the legislature found that a "committee, with its judicial finding of incompetence and the accompanying stigma and loss of civil rights, traditionally involves a deprivation that is often excessive and unnecessary" (Mental Hygiene Law § 81.01). The goal of the Mental Hygiene Law is to find the least restrictive form of intervention needed for the protection of the person for whom a guardian is sought. For example, the order could restrict the guardian to handling the financial affairs for the alleged incapacitated person. It is possible for the alleged incapacitated person to consent to the appointment of a guardian. There are several provisions for the appointment of a guardian, none of which necessarily require a finding of mental illness (see SCPA arts 17 [Guardians and Custodians], 17-A [Guardians of Persons Who Are Intellectually Disabled and Developmentally Disabled]; see CPLR 1202 [Appointment of Guardian Ad Litem]).

Thus, an objection pursuant to CPLR 4519 brought by an article 81 guardian or any guardian authorized by the law of this state may not end the inquiry into whether the incapacitated party is a protected party because of mental illness. Although the guardian should have standing to raise that objection, the question of whether or not the person is mentally ill for purposes of CPLR 4519 may *yet* have to be resolved by the court in which the objection is raised. Allegedly mentally ill persons still may be competent to testify rather than have their lips sealed. (See Guide to NY Evid rule 6.01, Note, second paragraph *et seq.*, for discussion of mental illness and competency to testify; Jerome Prince, Richardson on Evidence § 6-126 at 338 [Farrell 11th ed 1995] [“The question (of the applicability of CPLR 4519) is further complicated by the fact that mental illness does not, per se, render one incompetent as a witness. See § 6-105. Perhaps the applicability of the statute should depend upon the testimonial competency of the mentally ill person. If the mentally ill person is competent to testify, there is no need to invoke the rationale of the statute, i.e., to create an equality of disadvantage by silencing one party when the other has been silenced by mental illness or death”].)

In a case decided after the enactment of article 81, *Tworowski v Tworowski* (181 Misc 2d 1038 [Sup Ct, Kings County 1999]), the court permitted co-guardians of the person and property appointed by Supreme Court to claim the protection of the Dead Man’s Statute against a claim that the alleged protected person was not mentally ill. The court apparently did not rely entirely on the order’s underlying determination of mental illness because the court made its own separate finding of mental illness. The court discussed the prior history of the “committee of a mentally ill person,” noting in particular that a

“ ‘[c]ommittee’ is not a term which has been interpreted strictly in decisions on the applicability of CPLR 4519. Courts have decided that the privilege may apply to the judicially appointed guardian ad litem of a person hospitalized for mental illness where a committee did not exist. (*Matter of Musczak*, 196 Misc 364 [Sur Ct, NY County 1949]; *Matter of Harkavy*, 184 Misc 742 [Sur Ct, NY County 1945].) In addition, Vincent C. Alexander notes that ‘[a]lthough expansion of the scope of CPLR 4519 probably should be resisted as a general matter, on this issue the purpose of the statute is surely served by a liberal reading of the term “committee.” ’ (Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4519:3, at 173.) The husband’s mental insufficiencies are well documented, including the significant impairment of his memory. The statute is designed to protect the interests of a person such as the husband and his coguardians and they are entitled to its benefit.” (*Tworowski v Tworowski* at 1040.)

The protection from testimony by an interested party or person concerning a personal transaction or communication extends to “a person deriving his title or interest from, through or under a deceased person or mentally ill person.” For

example, in *Pope v Allen* (90 NY 298 [1882]), the Court held that the Dead Man's Statute protected both the deceased conveyor of title to land ("from" whom the land was conveyed to the interested party) and the deceased person who had conveyed to him ("through" whom it was conveyed) and "under" whom it was conveyed by both of the predecessors in title.

The statute has been held to protect a successor trustee from testimony by interested persons concerning transactions with the original trustee, now deceased (*Brundige v Bradley*, 294 NY 345 [1945]).

In *Ward v New York Life Ins. Co.* (225 NY 314 [1919]), the Court held that a beneficiary of an insurance policy, named by the insured, does not claim "from, through or under" the insured because the deceased insured did not have an interest in the proceeds of the policy during his lifetime and, therefore, the claim of the beneficiary was from the insurance company not the decedent. This decision prompted much criticism but has never been reversed. (See Alexander, Practice Commentaries, CPLR C4519:3.)

In *Poslock v Teachers' Retirement Bd. of Teachers' Retirement Sys.* (88 NY2d 146 [1996]), the Court affirmed an Appellate Division ruling that distinguished *Ward* because the retirement benefits in question (with exception of the life insurance proceeds) belonged to the decedent during his lifetime and he had the ability to manage them. The protection of the statute was therefore available to prevent an interested party from testifying about communications with the decedent about the lump sum benefits from the pension. In keeping with *Ward*, the Court also held that the protection of the statute did not apply to communications concerning the life insurance portion of the death benefits.

The substance of the forbidden testimony

Subdivision (1) dictates that the interested person or party shall not be examined "concerning a personal transaction or communication between the witness and the deceased person or mentally ill person."

In *Clift v Moses* (112 NY 426, 435 [1889]), the Court explained:

"It has been held with general uniformity that the section prohibits not only direct testimony of the survivor that a personal transaction did or did not take place, and what did or did not occur between the parties, but also every attempt by indirection to prove the same thing, as by negating the doing of a particular thing by any other person than the deceased, or by disconnecting a particular fact from its surroundings and permitting the survivor to testify to what on its face may seem an independent fact, when in truth it had its origin in or directly resulted from a personal transaction."

Griswold v Hart (205 NY 384, 395 [1912]) excluded “the testimony of an interested witness to any knowledge which he has gained by the use of his senses from the personal presence of the deceased.” (See *Hadley v Clabeau*, 140 Misc 2d 994 [Sup Ct, Cattaraugus County 1988], *affd* 161 AD2d 1141 [4th Dept 1990] [in a dispute over a faulty deed description, the widow of deceased-seller was barred by statute from testifying to her observation of her husband taking measurements along a natural boundary as evidence of the property he intended to convey].)

On the other hand, in an action against the representative of a deceased joint tenant of joint savings accounts the Appellate Division held that the surviving joint tenant could testify to her intent in opening the account. The Court found that her testimony was to the fact of her intent, not a communication with the decedent (*Brezinski v Brezinski*, 84 AD2d 464 [4th Dept 1982]).

An exception to the rule

Testimony is barred “except where the executor, administrator, survivor, committee or person . . . deriving title or interest is examined in his own behalf, or the testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication” (CPLR 4519; Guide to NY Evid rule 6.02.1 [1]).

Based on that exception, the Appellate Division has ruled that an interested party may introduce the testimony of the decedent given at a pretrial deposition and then testify at trial to the matters described by the decedent (*Tepper v Tannenbaum*, 65 AD2d 359 [1st Dept 1978]; *Ward v Kovacs*, 55 AD2d 391 [2d Dept 1977]).

In addition to the introduction of a pretrial deposition, the exception for the introduction in evidence of the “testimony of the mentally ill person or deceased person . . . concerning the same transaction or communication” may allow the “use of an interested witness’s testimony from a former proceeding or deposition in which the witness and the decedent were adverse parties and the subject matter was essentially the same, thereby insuring that an adequate opportunity for relevant cross-examination of the witness was afforded. Such former testimony is hearsay, but it may fall within one or another hearsay exception for the testimony of a witness who has become unavailable for some reason, here the incompetency of the witness due to the adverse party’s death.” (Alexander, Practice Commentaries, CPLR C4519:5 [b].)

Unfortunately, a witness who is incompetent to testify pursuant to the Dead Man’s Statute is not listed, among witnesses considered unavailable to testify, in CPLR 4517, as there required for the admission of former testimony in a civil proceeding, or in CPLR 3117, as there required for the admission of depositions in a civil proceeding. Both statutes, however, allow an application to the court for a finding of “exceptional circumstances” to permit the admission of otherwise

inadmissible hearsay testimony. Until 2000, CPLR 4517's list included incapacity under the Dead Man's Statute in the list, but it was inadvertently omitted when the statute was amended. Another possible route around the hearsay problem is the common-law rule on the admissibility of prior testimony of an unavailable witness, which has been held to coexist with the statutory rule (*Fleury v Edwards*, 14 NY2d 334 [1964]). No case, however, holds that incapacity under the Dead Man's Statute was part of the common law (see Guide to NY Evid rule 8.36, Prior Testimony in a Civil Proceeding).

Subdivision (2) of the rule exempts from application of the statute a stockholder or officer of a banking corporation that might be considered an interested party. This exemption is limited to stockholders in banking corporations. A stockholder of a corporation other than a banking corporation is considered a person interested in the event and may be barred from testifying against a protected party (*Friedrich v Martin*, 294 NY 588 [1945]; *Andrews v Reiners*, 112 App Div 378 [2d Dept 1906]).

Subdivision (3) of the rule states that the possible imposition of costs or the award of costs does not make a witness "interested" under the statute.

Subdivision (4) of the rule prohibits an "interested party," as described in the subdivision, from testifying to "personal transactions or communications with the donee of a power of appointment in an action or proceeding for the probate of a will, which exercises or attempts to exercise a power of appointment granted by the will of a donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate." This 1935 addition to the Dead Man's Statute was passed by the legislature to address issues raised in *Matter of Carroll* (153 Misc 649 [Sur Ct, NY County 1934], *decree mod* 247 App Div 11 [1st Dept 1936], *mod* 274 NY 288 [1937]). As explained by Alexander in the Practice Commentaries to CPLR 4519:

"The *Carroll* court observed that without statutory modification, persons who would take certain property under the terms of A's will in the event of B's invalid exercise of a power of appointment given by A lacked standing to bar testimony by B's appointees regarding their dealings with the now-deceased B on the issue of the validity of B's exercise of the power. The persons who would take in the case of default were deemed to derive their property from A, rather than B. This created the potential for jury confusion and inconsistent results in cases in which appointees might be named in B's will as beneficiaries of property not covered by the power of appointment. With respect to the same will, such appointee-beneficiaries could testify to transactions with B on the issue of the validity of the exercise of the power of appointment but not on the issue of the validity of the will in general. The statutory language changes this result by prohibiting interested witnesses from testifying in their

own behalf with respect to personal transactions or communications with the now-deceased donee of a power of appointment in probate proceedings involving the will in which the power of appointment was exercised” (CPLR C4519:3).

Subdivision (5) of the rule covers the type of testimony (“facts of an accident or the results therefrom”) by a witness in personal injury or wrongful death cases that does not render the witness incompetent to testify under the statute (*Rost v Kessler*, 267 App Div 686, 687 [4th Dept 1944]). In *Rost*, the “fact” was the identity of the driver of the car and the Appellate Division held that the defendant should have been permitted to testify that the decedent was the driver since the testimony did not require the recitation of a communication with the decedent.

Procedural issues

The party objecting to the competency of a witness under the Dead Man’s Statute has the burden of proving incompetency (*Stay v Horvath*, 177 AD2d 897, 899 [3d Dept 1991] [“the party claiming that a witness is a person ‘interested in the event’ (CPLR 4519) carries the burden of proving that the witness’s testimony is subject to this statutory exclusion” (citations omitted)]; *Matter of Mead*, 129 AD2d 1008 [4th Dept 1987]).

The objection must be to the competency of the witness, not to the competency of the testimony because the testimony may be relevant, but the witness not competent to give that testimony (*Hoag v Wright*, 174 NY 36, 39 [1903]; *Matter of Farley*, 91 Misc 185, 196 [Sur Ct, Clinton County 1915]).

An objection to the competency of a witness must be timely. The testimony of the witness, given without objection, will not be stricken (*Matter of Maijgren*, 193 Misc 814 [Sur Ct, Monroe County 1948]).

An objection must be made to each transaction; but failure to object to one transaction does not bar objections to subsequent transactions (*Matter of Johnson*, 17 Misc 2d 489, 490 [Sur Ct, NY County 1959] [“The fact that objection had not been made earlier in the testimony and the consequent waiver of the incompetency of the witness at that time did not extend to later testimony and did not preclude objection to further transactions”]).

CPLR 4519 does not bar documentary evidence against a deceased’s estate but the evidence must be authenticated by a non-interested party (*Acevedo v Audubon Mgt.*, 280 AD2d 91, 95 [1st Dept 2001]).

By a separate statute, in a right-of-election case, while a spouse may not testify in support of his or her right of election filed against the estate, the spouse is not disqualified from testifying to his or her contribution to jointly held property that is claimed as a testamentary substitute (EPTL 5-1.1 [b] [3]; 5-1.1-A [b]).

Waiver

A “protected party” may waive the provisions of CPLR 4519 only at a trial of an action or hearing on the merits of a special proceeding (*Matter of Van Volkenburgh*, 254 NY 139 [1930]). The “protected party’s” waiver may be made in any one of five ways:

1. by expressly stating a waiver;
2. by failing to object (*Ralley v O’Connor*, 71 App Div 328 [1st Dept 1902]);
3. by introducing prior testimony of the decedent or mentally ill person about the transaction or communication (CPLR 4519);
4. by testifying in his or her behalf about the transaction or communication CPLR 4519. In this instance, however, the waiver is limited. “By introducing such testimony, the [protected party] does not ‘open the door’ to any or all personal transactions with the decedent. Rather, the waiver of the statute is limited to the ‘personal transaction’ in issue. (*Martin v Hillen*, 142 NY 140.)” (*Matter of Wood*, 52 NY2d at 145); or
5. by examining the witness regarding the transaction or communication (*Nay v Curley*, 113 NY 575 [1889]; *Matter of Dunbar*, 139 Misc 2d 955 [Sur Ct, Bronx County 1988]; *Matter of Smith*, 84 AD2d 664 [3d Dept 1981]).

References

For further commentary on the intricacies of the Dead Man’s Statute, see Alexander, Practice Commentaries CPLR 4519 and Prince, Richardson on Evidence § 6-121 *et seq.* (Farrell 11th ed 1995). For a discussion of the Dead Man’s Statute as it is specifically applied in Surrogate’s Court proceedings, see 2 Harris, New York Estates: Probate Administration and Litigation (6th ed Thomson-Reuters) and Warren’s Heaton, Surrogate’s Court Practice (7th ed LexisNexis).

6.02 Competency of a Previously Hypnotized Witness

(1) Given that statements made under hypnosis are inherently unreliable:

(a) a witness's testimony as to events the witness recalls as a result of hypnosis is inadmissible;

(b) a witness's statement made under hypnosis is, as a general rule, inadmissible for the purposes of impeachment; and

(c) a party's admission induced by hypnosis is inadmissible.

(2) A witness's testimony as to events the witness recalls prior to hypnosis is admissible when, at a pretrial hearing, the proponent of the witness establishes by clear and convincing proof that the testimony of the witness as to his or her prehypnotic recollection will be reliable and that there has been no substantial impairment of the defendant's right of cross-examination. In particular, the trial court must determine the extent of the witness's prehypnotic recollection (which would establish the boundaries of admissible testimony) and whether the hypnosis was so impermissibly suggestive as to require exclusion of in-court testimony with respect to such prehypnotic recollection. Evidence, testimonial and documentary, which is material to the pretrial determination should be received at the hearing, without rigid application of the hearsay rule.

(3) If the witness is held to be competent to testify, the party affected by the testimony may introduce proof with respect to the hypnotic procedures followed as well as expert testimony concerning the potential effect of the hypnosis on the witness's recollections.

Note

Subdivision (1) is derived from Court of Appeals decisions.

Subdivision (1) (a) sets forth the holding of *People v Hughes* (59 NY2d 523, 545 [1983] [“the defendant is entitled to a new trial because the trial court should not have permitted the victim to testify to events recalled after the hypnotic sessions”])).

Subdivision (1) (b) sets forth the holding of *People v Hults* (76 NY2d 190, 192 [1990] [“hypnotic statements are, as a general rule, also inadmissible for purposes of impeachment”])). Thus far, there has been no exception made to the “general rule.”

Subdivision (1) (c) sets forth the holding of *People v Schreiner* (77 NY2d 733, 734 [1991] [a defendant’s statement which had been “hypnotically induced” during a psychiatric examination “in which he confessed to the murder . . . was improperly received in evidence against him”])).

Subdivision (2) is derived from *Hughes*, which held that the “pretrial use of hypnosis does not necessarily render the witness incompetent to testify to events recalled prior to being hypnotized” (*Hughes* at 545).

A pretrial hearing, however, is required to determine “the extent of the witness’s prehypnotic recollection (which would establish the boundaries of admissible testimony) and whether the hypnosis was so impermissibly suggestive as to require exclusion of in-court testimony with respect to such prehypnotic recollection” (*Hughes* at 546).

At that hearing, “evidence, testimonial and documentary, which is material to the determination thereof should be received . . . without rigid application of the hearsay rule” (*Hughes* at 547). The burden of proof rests upon the People to demonstrate by “clear and convincing proof that the testimony of the witness as to his or her prehypnotic recollection will be reliable and that there has been no substantial impairment of the defendant’s right of cross-examination” (*Hughes* at 547; see *People v Tunstall*, 63 NY2d 1, 8 [1984] [the defendant was entitled to a hearing on his claim that “the victim’s confidence in her prehypnotic recollections, such as her identification of defendant, may have been artificially enhanced by the hypnotic process, thereby impairing defense counsel’s ability to conduct a meaningful cross-examination of her”])).

On the remand of *Hughes* from the Court of Appeals, a hearing was conducted; the hearing was, however, ultimately found to be deficient for failure to adequately explore the propriety of admitting the prehypnotic testimony of the witness. The court “heard no expert testimony whatsoever on the suggestiveness of the hypnotic procedures that had been used . . . Moreover, although the court viewed that portion of a videotape showing the victim’s interview, prior to hypnosis, about

her prehypnotic recollection, the court did not view that portion covering the hypnotic session itself” (*People v Hughes*, 72 NY2d 1035, 1037-1038 [1988]).

Subdivision (3) is based on the following holding of *Hughes*:

“If the witness is held to be competent to testify, the defendant, of course, has the option at trial of introducing proof with respect to the hypnotic procedures followed as well as expert testimony concerning the potential effect of the hypnosis on the witness’s recollections. And since there is general agreement in the scientific community that a witness who has been hypnotized usually acquires some measure of confidence in events recalled under hypnosis, the court should charge the jury to that effect if the defendant requests it” (*People v Hughes*, 59 NY2d 523, 547-548 [1983]; see CJI2d[NY] General Applicability, Witness Underwent Hypnosis).

6.03. Exclusion of Witness from Courtroom

(1) Subject to subdivision two, a court may exclude a witness from a courtroom prior to the time the witness is anticipated to testify in that proceeding.

(2) A court may not exclude from the courtroom:

(a) a party in a civil trial and a defendant in a criminal trial, unless the party or defendant has waived or forfeited the right to be present;

(b) when a party is not a natural person, an officer or employee of the party designated as its representative by its attorney; or

(c) a person whose presence is shown by a party to be essential to the presentation of the party's case.

Note

Subdivision (1). The Court of Appeals has approved the exclusion of witnesses from the courtroom prior to their testimony. (*People v Cooke*, 292 NY 185, 190-191 [1944] [“It is hard for us to understand . . . why such a motion (to exclude witnesses) should not be granted as of course”]; *see also Levine v Levine*, 56 NY2d 42, 49 [1982].) As further explained by the Appellate Division, First Department, in *Philpot v Fifth Ave. Coach Co.* (142 App Div 811, 813 [1st Dept 1911]): “While such an application is in the discretion of the court, it is often extremely important that witnesses testifying to an [occurrence] of this character should be examined without having heard the testimony of other witnesses. What is important is that each person’s impression of the occurrence should be stated—not suggested or colored by what he has heard others testify to, and for the court to refuse a request by counsel on either side to exclude all witnesses from the court room except the one under examination closely approaches an abuse of discretion.”

The Court of Appeals has not addressed the corollary issues of whether a court may direct an attorney not to give a prospective witness a transcript of the testimony of a witness who has testified, or whether a court may direct a witness who has testified not to discuss his or her testimony with a prospective witness.

Subdivision (2). Subdivision (2) covers three classes of witnesses.

Subdivision (2) (a) recognizes that a defendant in a criminal proceeding has a statutory right (as well as a constitutional right) to be present at “trial” unless that right has been waived or forfeited. (CPL 260.20; *People v Dokes*, 79 NY2d 656, 659-660 [1992] [“A defendant's presence at trial is required not only by the Confrontation and Due Process Clauses of the Federal and State Constitutions (*see*, US Const 6th, 14th Amends; NY Const, art I, §6), but also by CPL 260.20”]; *People v Byrnes*, 33 NY2d 343, 349 [1974] [“the right may be lost where the defendant engages in misconduct so disruptive that the trial cannot properly proceed with him in the courtroom”].) The statutory term “trial” incorporates “both any ‘material stage’ of the trial [*People v. Turaine*, 78 N.Y.2d 871, 872, 573 N.Y.S.2d 64, 577 N.E.2d 55 (1991)], as well as any ‘ancillary proceeding’ for which the defendant's presence is ‘substantially and materially related to the ability to defend,’ including proceedings at which the defendant ‘can potentially contribute,’ or at which the defendant's presence would ensure ‘a more reliable determination’ of the proceeding. *People v. Roman*, 88 N.Y.2d 18, 25-26, 643 N.Y.S.2d 10, 665 N.E.2d 1050 (1996).” (William C. Donnino, Practice Commentaries, McKinney’s Cons Laws of NY, Book 11, CPL 260.20.)

The Appellate Division, Second Department, has recognized a party’s constitutional right to be present in a civil trial. (*Carlisle v County of Nassau*, 64 AD2d 15, 18 [2d Dept 1978] [“(T)he fundamental constitutional right of a person to have a jury trial in certain civil cases includes therein the ancillary right to be present at all stages of such a trial, except deliberations of the jury Such right is basic to due process of law”].) The civil party’s right to be present may be waived or forfeited. (*See Ajaeb v Ajaeb*, 276 App Div 1094 [2d Dept 1950], *affd* 301 NY 605 [1950].)

Mental Hygiene Law § 81.11 (c) provides that a hearing to determine whether the appointment of a guardian is necessary for an alleged incapacitated person “must be conducted in the presence of the person alleged to be incapacitated,” with only limited exceptions provided.

Subdivision (2) (b) is derived from long-established decisional law. (*See e.g. Perry v Kone, Inc.*, 147 AD3d 1091, 1094 [2d Dept 2017]; *Sherman v Irving Mdse. Corp.*, 26 NYS2d 645, 645 [App Term, 1st Dept 1941] [“Great caution should be exercised in considering an application to exclude the officers of corporations, or a representative in charge of the matters litigated”].)

Subdivision (2) (c) is derived from Court of Appeals precedent which holds that “ ‘a person whose presence is shown by a party to be essential to the presentation of the party’s cause’ ” is generally exempt from the exclusion requirement. (*People v Santana*, 80 NY2d 92, 99-101 [1992]; *see also Perry*, 147 AD3d at 1094; *Carlisle*, 64 AD2d at 20.) An example of a person whose presence is shown by a party to be essential to the presentation of the party’s cause would be an expert of a party who needs to hear the testimony of the other party’s expert in

order to present rebuttal testimony. (See *Santana*, 80 NY2d at 99-101; *R.J. Cornelius, Inc. v Cally*, 158 AD2d 331, 332 [1st Dept 1990].)

6.04. Interpreter

A court shall appoint an interpreter when necessary for a witness or a party to communicate or be understood or for a party to understand the proceedings, and, upon appointment, the interpreter must give an oath or affirmation to make a true translation.

Note

The portion of the rule dealing with the appointment of an interpreter is in part derived from the Uniform Rules for Trial Courts, which require that a court appoint an interpreter “[i]n all civic and criminal cases, when a court determines that a party or witness, or an interested parent or guardian of a minor party in a Family Court proceeding, is unable to understand and communicate in English to the extent that he or she cannot meaningfully participate in the court proceedings.” (Uniform Rules for Trial Cts [22 NYCRR] § 217.1 [a].)

A court through its administrative arm may employ qualified interpreters for assignment as necessary and, upon doing so, have them take an oath or affirmation to make a true translation. (See Judiciary Law §§ 386-390.) If the interpreter is not an employee of the court and has not been given the oath or affirmation to make a true translation, the court must swear the interpreter. See *People v Fisher* (223 NY 459, 464-466 [1918]), wherein the Court of Appeals noted that an interpreter upon his or her appointment by the court must be sworn to interpret accurately. Nothing, including this rule or rule 6.02, requires or permits the interpreter to be sworn as a witness.

A court has the discretion to determine whether the interpreter is qualified to serve and whether an interpreter, once appointed, is biased in favor of a party or witness, is not effectively communicating with a witness, or is not accurately conveying what a witness is saying, thereby necessitating removal. (See *People v Lee*, 21 NY3d 176, 179 [2013]; *People v Pavao*, 59 NY2d 282, 293 [1983].)

**6.05. Oath or Affirmation for a Witness to Testify
(CPLR 2309; CPL 60.20 [2]; Family Court Act § 152 [b])**

(1) Except as otherwise provided in subdivision two and subdivision three, before testifying, a witness must declare that he or she will testify truthfully by oath or affirmation administered in a form calculated to awaken the conscience and impress the mind of the witness in accordance with that witness's religious or ethical beliefs.

(2) In a criminal proceeding:

(a) A witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath.

(b) A witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath.

(c) A witness understands the nature of an oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished.

(d) A witness ineligible to testify under oath pursuant to paragraph (a) or (b) may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof.

(3) In a Family Court proceeding, a judge may dispense with the formality of placing a minor under oath before taking the minor's testimony.

Note

Subdivision (1). This rule is derived from Court of Appeals precedent that holds that requiring a witness to take an oath or make an affirmation is a “traditional safeguard[] to truthfulness” (*Matter of Hecht v Monaghan*, 307 NY 461, 474 [1954]). The requirement of an oath or affirmation, the Court has observed, serves two functions: “(1) to awaken the witness to his moral duty to tell the truth, and (2) to deter false testimony by providing a legal ground for perjury prosecutions” (*see Matter of Brown v Ristich*, 36 NY2d 183,189 [1975]). The form of the oath or affirmation as stated in this rule is taken substantially verbatim from CPLR 2309 (b).

The choice whether to take an oath or affirmation rests with the witness. As to this choice, the Court of Appeals has observed that as a general proposition “any attempt to discredit or otherwise penalize a witness because of his . . . exercise of his right to affirm the truth of his testimony is improper” (*People v Wood*, 66 NY2d 374, 378 [1985]).

Whether the witness has sufficient intelligence to understand the nature of an oath or affirmation raises an issue of competency to be decided by the court before the witness is sworn (*see* Guide to NY Evid rule 6.01 and Note).

Subdivision (2). This rule restates verbatim CPL 60.20 (2). Of note, CPL 60.20 (3) provides a defendant may not be convicted of an offense solely upon unsworn evidence given pursuant to CPL 60.20 (2).

Subdivision (3). This rule is taken substantially verbatim from Family Court Act § 152 (b). Appellate Division decisions hold that this statutory provision applies to Family Court proceedings that are civil in nature (*see e.g. Matter of Danielle M.*, 151 AD2d 240 [1st Dept 1989]; *Matter of Elizabeth D.*, 139 AD2d 66 [4th Dept 1988] [child protective proceedings]). In quasi-criminal proceedings in Family Court, however, the Appellate Division has held that CPL 60.20 (3)’s requirement of corroboration of an unsworn witness applies (*see Matter of Wade H.*, 41 AD2d 817 [1st Dept 1973]; *Matter of Steven B.*, 30 AD2d 442, 444 [1st Dept 1968] [juvenile delinquency proceedings]).

6.10. Scope & Manner of Examination of Witnesses

(1) Subject to subdivisions two and three, as well as rule 4.01 (Relevant Evidence) and a defendant's rights to confrontation and to present a defense in a criminal proceeding, the scope and manner of examining witnesses is committed to the sound discretion of the court.

(2) Cross-examination of a witness should ordinarily be limited to the subject matter of the direct examination and matters affecting credibility. The court may in its discretion, however, permit examination into additional matters and may be required to do so in a criminal case.

(3) Redirect and re-cross-examination of a witness is limited to the matters covered on the witness's cross-examination or redirect examination, respectively.

(4) Leading Questions.

(a) A court should not permit leading questions during the direct examination of a witness, except a court may permit leading questions, for example, with respect to introductory matters; examination of a child; expediting a proceeding as to matters that are not in dispute; when necessary to clarify a witness's testimony; when examining a witness about a prior inconsistent statement; or as provided in paragraph (b).

(b) When a party calls (i) an adverse party, (ii) a witness identified with an adverse party, or (iii) a witness who is hostile or becomes hostile during examination, the court may permit leading questions in conducting the direct examination.

(c) A court shall permit leading questions during the cross-examination of a witness.

(d) When on cross-examination, a court permits inquiry into matters that were not covered on direct examination, the cross-examination is subject to the provisions of subdivisions (4) (a) and (b).

Note

Subdivision (1) restates a rule often referred to by the Court of Appeals (*Bernstein v Bodean*, 53 NY2d 520, 529 [1981] [(W)ith respect to the examination of all witnesses, the scope and manner of interrogation are committed to the Trial Judge in the exercise of his responsibility to supervise and to oversee the conduct of the trial"]; *Matter of Friedel v Board of Regents of Univ. of State of N.Y.*, 296 NY 347, 352 [1947] [“Once the right has been accorded, the extent of cross-examination rests largely in the discretion of the tribunal, whose exercise thereof is not reviewable unless abused”]; *People v Schwartzman*, 24 NY2d 241, 244 [1969] [“The nature and extent of cross-examination is subject to the sound discretion of the Trial Judge”]).

The scope of the trial court’s discretion includes the responsibility to protect a witness from harassment, undue embarrassment, or physical danger (*People v Stanard*, 42 NY2d 74, 84 [1977] [There is a duty to protect a witness from questions which “harass, annoy, humiliate or endanger him”]).

In a criminal proceeding, the trial court in its exercise of sound discretion must respect the boundaries drawn by a defendant’s constitutional right to present a defense (*e.g. Davis v Alaska*, 415 US 308, 316 [1974] [“Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness’ story to test the witness’ perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.” Trial court erred in not permitting the defense to cross-examine a witness about possible bias]; *California v Trombetta*, 467 US 479, 485 [1984] [“Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense”]; *Crane v Kentucky*, 476 US 683, 687 [1986] [An evidentiary ruling may not deprive a defendant “of his fundamental constitutional right to a fair opportunity to present a defense.” Thus, it was error for the trial court to preclude the jury from considering the credibility of a confession that the trial judge found to be voluntary]; *People v Carroll*, 95 NY2d 375, 385 [2000] [“A court’s discretion in evidentiary rulings is circumscribed by

the rules of evidence and the defendant's constitutional right to present a defense"]; *People v Robinson*, 89 NY2d 648, 650 [1997] [Defendant's "constitutional right to due process requires the admission of hearsay evidence consisting of Grand Jury testimony when the declarant has become unavailable to testify at trial," and "the hearsay testimony is material, exculpatory and has sufficient indicia of reliability"]; *People v Hudy*, 73 NY2d 40, 56 [1988] [While the ex post facto part of the decision was abrogated by *Carmell v Texas* (529 US 513 [2000]), the Court "also conclude(d) that defendant was improperly denied the right to present his case by the trial court's ruling foreclosing examination of the two investigating officers about the manner in which the child-witnesses were first questioned"]].

Subdivision (2) in its first sentence restates New York law that cross-examination should ordinarily be limited to an examination into matters affecting the witness's credibility and matters testified to on direct examination (e.g. *People v Chin*, 67 NY2d 22, 28 [1986] ["(C)ross-examiner may delve deep in order to attack credibility and present an alternate view of the facts"]; *People v Giblin*, 115 NY 196, 199 [1889] ["It is an office of cross-examination to exhibit the improbabilities of the witness' story"]; *People ex rel. Phelps v Court of Oyer & Terminer of County of N.Y.*, 83 NY 436, 460 [1881] ["As a general rule the range and extent of such an examination is within the discretion of the trial judge, subject, however, to the limitation that it must relate to matters pertinent to the issue, or to specific facts which tend to discredit the witness or impeach his moral character"]]).

A trial court's discretion should ordinarily be exercised to preclude examination into matters that were not elicited on direct examination (see e.g. *Goff v Paul*, 8 AD3d 971, 972 [4th Dept 2004]; *Hall v Allemannia Fire Ins. Co. of Pittsburgh*, 175 App Div 289, 292 [4th Dept 1916]). This rule exists primarily "to prevent the cross-examiner from cluttering up the direct examiner's case with unfavorable and extraneous facts when he could make the witness his own" (*People v Hadden*, 95 AD2d 725, 725-726 [1st Dept 1983]). The courts have, however, cautioned that cross-examination is not strictly limited "to the precise details brought out on direct examination" (*Crawford v Nilan*, 264 App Div 46, 51 [3d Dept 1942], *revd on other grounds* 289 NY 444 [1943]). Rather, the examination may seek an explanation and clarification of matters that were not fully disclosed on direct (*People v Ayala*, 194 AD2d 547, 547 [2d Dept 1993]). Thus, cross-examination into inferences, implications, and explanations suggested by or arising from the direct examination is permitted (see *Barker & Alexander*, *Evidence in New York State and Federal Courts* § 6:72 at 628 [2d ed]).

The second sentence of subdivision (2) restates New York law that nonetheless permits a court in an appropriate case to allow inquiry into matters that were not at all the subject of direct examination (*Neil v Thorn*, 88 NY 270, 275-276 [1882]; see *White v McLean*, 57 NY 670 [1874] [abstract; text at 47 How Prac 193, 198 (1874)] ("It makes no difference that the witness under examination

was the opposite party to the action. He is but a witness, and the general rules applicable to adverse witnesses govern the case. Though a broader range of cross-examination than is usual is allowable, it is still subject to the discretion of the court”)).

In a civil proceeding, a court’s exercise of discretion to permit a cross-examination to go beyond direct examination may be proper only when it relates to an issue in the case and examination into that issue does not frustrate the orderly presentation of a party’s proof (*cf. American Motorists Ins. Co. v Schindler El. Corp.*, 291 AD2d 467, 468-469 [2d Dept 2002]; *Grcic v City of New York*, 139 AD2d 621, 626 [2d Dept 1988]).

In a criminal proceeding, the Appellate Division has indicated that a trial court should exercise its discretion to permit inquiry into a relevant issue, regardless whether the issue was raised on direct (*see People v Casiano*, 148 AD3d 1044, 1046 [2d Dept 2017] [The “defense is permitted to exceed the scope of a direct examination in order to prove a relevant proposition such as the justification defense”]; *People v Joslyn*, 103 AD3d 1254, 1256 [4th Dept 2013] [(I)n a criminal case, a party may prove through cross-examination any relevant proposition, regardless of the scope of direct examination”]; *People v Kennedy*, 70 AD2d 181, 186 [2d Dept 1979] [(I)t is well settled that in a criminal case a party may prove through cross-examination any relevant proposition, regardless of the scope of the direct examination”]).

Where cross-examination of the witness on matters not raised on direct is permitted, the court also has the discretion to rule that the cross-examiner has made the witness the cross-examiner’s own witness to that extent. In that situation, the rules governing direct examination, including the restriction on leading questions set forth in subdivision (4) (a) and the rule limiting impeachment of one’s own witness set forth in rule 6.11 (3) of the Guide to New York Evidence, apply (*see Bennett v Crescent Athletic-Hamilton Club*, 270 NY 456, 458 [1936]; *People ex rel. Phelps*, 83 NY at 459-460).

Subdivision (3) is derived from *People v Buchanan* (145 NY 1, 24 [1895] [A “witness may be re-examined by the party calling him upon all topics on which he has been cross-examined, for the purpose of explaining any new facts which came out; but the re-examination must be confined to the subject-matter of the cross-examination”]; *People v Zigouras*, 163 NY 250, 256 [1900] [“While the range in details to which the re-examination may extend should rest largely in the discretion of the court, to the end that immaterial issues may not arise, enough should be permitted to prevent a part of the truth from conveying a false impression”]; *People v Regina*, 19 NY2d 65, 78 [1966] [(T)he prosecution’s question on redirect examination was properly within the scope of matters gone into on cross-examination and did no more than to explain, clarify and fully elicit a question only partially examined by the defense”]; *accord People v Ochoa*, 14

NY3d 180, 186-187 [2010]; *Feblot v New York Times Co.*, 32 NY2d 486, 498 [1973]).

Subdivision (4) governs the use of leading questions in examining witnesses. The New York courts have traditionally considered a question to be leading if it suggests to the witness the answer the examiner wants (*see e.g. People v Mather*, 4 Wend 229, 247 [Sup Ct of Judicature 1830] [“A question is leading which puts into a witness’ mouth the words that are to be echoed back, or plainly suggests the answer which the party wishes to get from him”]). Whether a leading question may be used in examining a witness is committed to the court’s discretion (*see Downs v New York Cent. R.R. Co.*, 47 NY 83, 88 [1871] [“It was within the discretion of the judge at the trial to suffer a question, leading in form, to be put”]).

Subdivision (4) (a) restates New York’s rule that leading questions are ordinarily not permitted on direct examination (*see e.g. People v Blauvelt*, 156 AD3d 1333, 1335 [4th Dept 2017]; *People v Cuttler*, 270 AD2d 654, 655 [3d Dept 2000]).

“The general rule is that leading questions may not be used during the direct examination of a witness. This rule is explained by the likelihood that a witness will be friendly, or at least nonhostile, toward the party who called her and therefore susceptible to mouthing the version of events sought to be proved by that party. Thus, to help ensure that the fact-finder hears the facts as they are known by the witness, not by counsel, leading questions are generally prohibited on direct” (Barker & Alexander § 6:70 at 622).

A court may allow leading questions, however, when appropriate in particular circumstances, e.g., examination on introductory matters (*Mather*, 4 Wend at 247); examination of a child (*People v Martina*, 48 AD3d 1271, 1272 [2008] [sexual abuse case]; *People v Graham*, 171 AD3d 1566, 1570 [4th Dept 2019]); expediting a trial as to matters that are not in dispute (*Cope v Sibley*, 12 Barb 521, 524-525 [Sup Ct General Term 1850]); when necessary to clarify a witness’s testimony (*People v Brizen*, 118 AD3d 590, 590-591 [2014]; *People v Williams*, 242 AD2d 469, 469 [1st Dept 1997] [clarify testimony of person who had displayed a difficulty with the language]); and when examining a witness about an inconsistent statement (*Sloan v New York Cent. R.R. Co.*, 45 NY 125, 127 [1871]). A court may also permit leading questions to avoid having the witness testify to matters the court has ruled inadmissible.

Subdivision (4) (b) restates New York law when the witness is an adverse party or closely identified with an adverse party or has demonstrated hostility to the party or the party’s attorney. Leading questions may be used during the examination of such witnesses (*Becker v Koch*, 104 NY 394, 401 [1887]; *Jordan*

v Parrinello, 144 AD2d 540, 540 [2d Dept 1988]), but the court may disallow the use of leading questions when the witness shows no sign of hostility (*Matter of Argila v Edelman*, 174 AD3d 521, 524 [2d Dept 2019]; *Matter of Giaquinto*, 164 AD3d 1527, 1530-1531 [3d Dept 2018]; *Jackson v Montefiore Med. Ctr.*, 109 AD3d 762, 763 [1st Dept 2013]). Factors suggestive of hostility include reluctance to testify and evasiveness in answering questions (e.g. *Matter of Ostrander v Ostrander*, 280 AD2d 793, 793-794 [3d Dept 2001]).

Subdivision (4) (c) restates familiar New York law that permits leading questions during the cross-examination of a witness (Barker & Alexander § 6:70 at 622 [“(O)n cross-examination a witness usually is of an uncooperative frame of mind and is more likely to resist the suggestions of the cross-examiner. Therefore, leading questions ordinarily are allowed on cross-examination”]). When in a civil proceeding, however, one party on its direct case calls an adverse party, the court may preclude the attorney for that party-witness from asking leading questions on the “cross-examination” (*id.* § 6:70 at 622 n 6).

Subdivision (4) (d) restates New York law recognizing cross-examination into matters not the subject of direct examination, as permitted under subdivision (2), is in effect direct examination and therefore is subject to the rules governing leading questions on direct examination, as set forth in subdivision (4) (a) and (b) (see *People ex rel. Phelps*, 83 NY at 459).

6.07. Nonexpert Witness Limited to Personal Knowledge Testimony

Except for an expert witness giving an expert opinion, a witness may testify to a matter only if the witness has personal knowledge of the matter. Personal knowledge is knowledge based on the exercise of the witness's own senses. Evidence of a witness's personal knowledge may be apparent from the testimony of the witness or may be attested to by the witness.

Note

This rule sets forth New York's well settled law that a witness is incompetent to testify to a specific matter when the witness lacks personal knowledge of the matter. The definition of personal knowledge stated in the rule's second sentence is drawn from *Hallenbeck v Vogt* (9 AD2d 836 [3d Dept 1959]).

The rule's first sentence is derived from decisions of the Court of Appeals and the Appellate Divisions and states a fundamental proposition of the law of evidence (*e.g. People v Regina*, 19 NY2d 65, 68-70 [1966] [witness's testimony that he saw perpetrators during a five second time period fire two shots properly admitted]; *Senecal v Drollette*, 304 NY 446, 448-449 [1952] [witness's testimony as to the make of the car that struck him should have been admitted as the witness said he "got a glance at it just before it hit him"]; *Matter of Rios v Selsky*, 32 AD3d 632, 633 [3d Dept 2006] [hearing officer properly denied request of respondent to call certain witnesses as the witnesses had no personal knowledge of the incident]; *Overseas Trust Bank v Poon*, 181 AD2d 762, 763 [2d Dept 1992] [testimony of husband concerning wife's overseas trips during a relevant time period properly excluded as it was "clear" the husband lacked personal knowledge]).

The trial court is charged with making the determination of whether the witness has personal knowledge. In essence, this rule of personal knowledge is an application of Guide to New York Evidence rules 4.01 (Relevant Evidence) and 4.05 (Conditional Relevance).

The rule's third sentence is derived from *Regina* (19 NY2d at 68-70) and *Senecal* (304 NY at 448-449).

The expert witness exception is derived from *Cassano v Hagstrom* (5 NY2d 643, 646 [1959] [expert opinion may be based on the expert's personal knowledge or upon facts in evidence made known to the expert]) and *Hambusch v New York City Tr. Auth.* (63 NY2d 723, 726 [1984] [expert opinion can be based in part on inadmissible evidence if it is "of a kind accepted in the profession as reliable in forming a professional opinion" and the evidence is established to be reliable]).

It must also be noted that the rule's requirement of personal knowledge does not prohibit a witness from testifying to an out-of-court statement that is not barred by the hearsay rules set forth in article 8 of this Guide, provided the witness heard or read the statement. In such circumstances, the witness has the requisite personal knowledge of the "matter," i.e., the out-of-court statement.

6.09. Refreshing Witness Recollection

(1) A witness may use any writing or other matter to refresh the witness's memory while testifying.

(2) If a witness, while testifying, uses a writing or other matter to refresh the witness's memory, an adverse party is entitled to inspect the writing or other matter and to cross-examine the witness about the writing or other matter.

Note

Subdivision (1). The rule stated in subdivision (1) is derived from *Huff v Bennett* (6 NY 337, 339 [1852] [A witness “is permitted to assist his memory by the use of any written instrument, memorandum or entry in a book, and it is not necessary that such writing should have been made by the witness himself, or that it should be an original writing, provided after inspecting it he can speak to the facts from his own recollection”]); *Howard v McDonough* (77 NY 592, 593 [1879] [“A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed”]); and *People v Ferraro* (293 NY 51, 56 [1944] [“These statements were regarded as more strongly indicative of defendant’s guilt than the statements given by the witnesses on the trial. It was proper to use such statements to refresh the recollection of the witness”])).

As the writing is only being used to refresh recollection, the writing is not admitted nor are its contents disclosed to the jury except as provided by subdivision (2). (*Howard*, 77 NY at 593 [noting that when the witness’s “memory has thus been refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence”]; see also CPL 60.35 [3].) Whether the writing may be used for substantive evidence will turn upon whether it is otherwise admissible, e.g., admissible under Guide to New York Evidence rule 8.25, as a past recollection recorded.

The foundation for invoking this rule is a showing that the witness is having difficulty recalling a fact that the witness had perceived. (See *People v Gezzo*, 307 NY 385, 390 [1954] [police inspector testified he had “no independent recollection” of his interview of the defendant]; *People v Oddone*, 22 NY3d 369, 377 [2013] [“When a witness, describing an incident more than a year in the past, says that it ‘could have’ lasted ‘a minute or so,’ and adds ‘I don’t know,’ the inference that her recollection could benefit from being refreshed is a compelling one”].)

Whether objects or matters other than a writing can be used to refresh a witness’s recollection has not been addressed by the Court of Appeals. The First

and Second Departments have upheld the use of sound recordings to refresh a witness's recollection. (See *People v Reger*, 13 AD2d 63, 70 [1st Dept 1961]; *Seaberg v North Shore Lincoln-Mercury, Inc.*, 85 AD3d 1148, 1151 [2d Dept 2011].)

The court retains discretion to control the refreshing recollection process. (See *McCarthy v Meaney*, 183 NY 190, 193-194 [1905].) This discretion is to be exercised in determining whether the witness's recollection has in fact been refreshed and whether the witness is not just relating what he or she has just read or perceived. (*Id.* at 193-194.)

Subdivision (2). The rule stated in subdivision (2) is derived from *People v Gezzo* (307 NY at 393-394 [“ ‘The right of a party to protection against the introduction against him of false, forged or manufactured evidence, which he is not permitted to inspect, must not be invaded a hair's breadth. It is too valuable to be trifled with, or to permit the court to enter into any calculation as to how far it may be encroached upon without injury to the party’ . . . ‘The defendant had the right to see, and to use on cross-examination, any memorandum or writing which had served to refresh the memory of the witness on his direct examination. . . . As the conversation was material, the defendant might possibly have been prejudiced by this limitation upon his cross-examination’ ” (quoting *Tibbetts v Sternberg*, 66 Barb 201, 203 [Sup Ct, NY County 1870], and *Schwicker v Levin*, 76 App Div 373, 375 [2d Dept 1902])]).

Whether, as provided in Federal Rules of Evidence rule 612 (a), this production rule extends to writings used by the witness to refresh the witness's recollection before testifying has not been addressed by the Court of Appeals, albeit relevant writings of a witness are subject to pretrial disclosure in criminal proceedings. (See CPL 240.44, 240.45; *People v Rosario*, 9 NY2d 286 [1961], and its progeny.) Appellate Division decisions consistently hold that the right of inspection extends to writings or objects used by a witness prior to testifying. (See *e.g. Merrill Lynch Realty Commercial Servs. v Rudin Mgt. Co.*, 94 AD2d 617 [1st Dept 1983]; *Doxtator v Swarthout*, 38 AD2d 782 [4th Dept 1972].)

The Court of Appeals has also not addressed the issue of whether the use of a privileged writing for refreshing recollection purposes affects a waiver of the privilege otherwise applicable to the writing. Appellate Division decisions addressing this issue are conflicting. (Compare *Grieco v Cunningham*, 128 AD2d 502 [2d Dept 1987] [“any” privilege waived], with *Beach v Touradji Capital Mgt., LP*, 99 AD3d 167, 171 [1st Dept 2012] [attorney work product privilege not waived].)

For a discussion of the issues relating to the application of the refreshing recollection rule to writings used by a witness to refresh the witness's recollection before testifying, and privilege waiver resulting from the use of a privileged writing to refresh recollection, either while testifying or before testifying, see Michael J.

Hutter, *Review by Witness of Privileged Documents At and Before Trial and Deposition in New York, When, If Ever, Will the Privilege Be Lost* (38 Pace L Rev — [2018]).

4.20.2 Corroboration of Accomplice Testimony (CPL 60.22)

1. A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense. The corroborative evidence need not, by itself, prove that a crime was committed or that the defendant is guilty. What the law requires is that there be evidence that tends to connect the defendant with the commission of the crime charged in such a way as may reasonably satisfy the finder of fact that the accomplice is telling the truth about the defendant's participation in that crime.

2. An “accomplice” means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in:

(a) The offense charged; or

(b) An offense based upon the same or some of the same facts or conduct which constitute the offense charged.

3. A witness who is an accomplice as defined in subdivision two is no less such because a prosecution or conviction of himself would be barred or precluded by some defense or exemption, such as infancy, immunity or previous prosecution, amounting to a collateral impediment to such a prosecution or conviction, not affecting the conclusion that such witness engaged in the conduct constituting the offense with the mental state required for the commission thereof.

Note

This rule states verbatim CPL 60.22 except for sentence two of subdivision (1). That sentence is drawn from CJI2d(NY) Accomplice as a Matter of Law and incorporates the applicable statutory and decisional law (*e.g. People v Breland*, 83 NY2d 286, 292, 294 [1994] [“ ‘The corroborative evidence need . . . not establish all the elements of the offense (CPL 60.22 [1])’ ” nor need the corroboration

evidence “lead exclusively to the inference of the defendant’s guilt” (citations omitted)]; *People v Reome*, 15 NY3d 188, 192 [2010] [the “ ‘role of the additional evidence is only to connect the defendant with the commission of the crime, not to prove that he committed it. The accomplice testimony, if credited by the jury, may serve the latter purpose’ ” (citation omitted)]]).

Penal Law § 20.00 defines an “accomplice” for purposes of criminal liability (*see* CJI2d[NY] Accessorial Liability). CPL 60.22 defines when a witness who gives testimony that incriminates a defendant will be deemed an accomplice for purposes of requiring corroboration of that witness’s testimony. As *People v Fielding* (39 NY2d 607, 610 [1976]) explained:

“CPL 60.22 (subds 2, 3) were enacted to broaden the rule . . . which had defined an accomplice as one who at common law might have been convicted of the offense either as a principal or as an accessory before the facts. . . . [T]his ‘definition was unduly restrictive and at odds with the purpose of the accomplice doctrine: namely, preclusion of conviction solely upon the testimony of persons who are in some way criminally implicated in, and possibly subject to, prosecution for the general conduct or factual transaction on trial.’

“Thus, under the . . . statute, one would not avoid accomplice status merely because he was not a principal or an accessory. Nor would he avoid such status because a defense in bar, such as infancy, was available to him as an impediment to prosecution. But, nevertheless, to be an accomplice, he would have to be in some way criminally implicated in, and possibly subject to, prosecution for the general conduct or factual transaction on trial. Put another way, to be an accomplice, one would necessarily have to be at least potentially subject to sanctions of a penal character for his participation in the crimes of the defendant on trial” (internal quotation marks and citations omitted; *see also* *People v Wing*, 77 NY2d 851, 852 [1991]; *People v Jones*, 73 NY2d 902, 903 [1989]; *People v Cobos*, 57 NY2d 798, 801 [1982]; *People v Dorta*, 46 NY2d 818, 820 [1978]).

Once a witness is declared an accomplice as a “matter of law” (*see* CJI2d[NY] Accomplice as a Matter of Law) or as a “matter of fact” for the finder of fact to decide (*see* CJI2d[NY] Accomplice as a Matter of Fact) and the finder of fact decides the witness was an accomplice, CPL 60.22 (1) and this rule require that the defendant “may not be convicted of any offense upon the testimony of [the] accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.”

While the governing standard on what will satisfy that “corroborative evidence” requirement varied over the years, *Reome* (15 NY3d 188 [2010]), in

overruling *People v Hudson* (51 NY2d 233 [1980]), appeared to have settled the governing standard:

“The text of CPL 60.22 (1), requiring ‘corroborative evidence tending to connect the defendant with the commission of such offense,’ need not be read, as it was in *Hudson*, to require that all corroboration that depends to any degree on the accomplice’s testimony be ignored. . . . There can be corroborative evidence that, read with the accomplice’s testimony, makes it more likely that the defendant committed the offense, and thus tends to connect him to it. . . .

“As early as 1921, we said, in language we have repeatedly echoed since then: ‘Matters in themselves of seeming indifference or light trifles of the time and place of persons meeting may so *harmonize* with the accomplice’s narrative as to have a tendency to furnish the necessary connection between defendant and the crime.’ . . . And we have held that some evidence may be considered corroborative even though it simply supports the accomplice testimony, and does not independently incriminate the defendant. Thus, in *Breland*, we relied on forensic evidence as to the location of a body and the gunshot wounds found in it that ‘corresponded with the details’ supplied by an accomplice (83 NY2d at 293). . . .

“Courts may consider harmonizing evidence as well as [evidence independent of the accomplice’s testimony], while giving due weight to the difference between the two. Some evidence that is not independent will obviously be worthless: If an accomplice testifies that the defendant committed a crime next to a tree in Central Park, the prosecution cannot ‘corroborate’ this testimony by proving the existence of the tree. But in other cases, as in this one, harmonizing evidence may provide a substantial basis for crediting accomplice testimony” (*Reome*, 15 NY3d at 194 [citations omitted]).

6.11. Impeachment in General

(1) The credibility of a witness may be impeached by evidence that has a tendency in reason to discredit the truthfulness or accuracy of the witness's testimony.

(2) Evidence of impeachment may be used in the cross-examination of a witness. The party examining the witness is bound by the witness's answer unless the evidence of impeachment is not collateral. Evidence is not collateral when it is directly relevant to one or more issues in the action, or to the capacity of the witness to testify pursuant to rule 6.01 (Competency to Testify) and rule 6.03 (Oath or Affirmation) or is evidence admissible pursuant to rule 6.13 (Impeachment by Bias, Hostility, Interest) or rule 6.15 (Impeachment by Prior Inconsistent Statement). Evidence of impeachment which is not collateral may be proved by extrinsic evidence.

(3) Except as set forth in rule 6.15 (Impeachment by Prior Inconsistent Statement), a party may not impeach its own witness. A party may, however, through examination, elicit testimony that an adverse party is expected to argue impeaches the witness's credibility, and a party is not precluded from presenting a witness whose testimony is not consistent with one of that party's other witnesses.

Note

Subdivision (1). The rule stated in this subdivision is derived from Court of Appeals precedent. Impeachment evidence is designed "to discredit the witness and to persuade the fact finder that the witness is not being truthful." (*People v*

Walker, 83 NY2d 455, 461 [1994].) It may be accomplished on cross-examination or in particular instances by extrinsic evidence.

The Court of Appeals has commented that the credibility of a witness is “a many faceted concept, of course, requiring a careful assessment of a number of subtle factors before testimony can be labeled as believable or unbelievable.” (*People v Wise*, 46 NY2d 321, 325 [1978].) The Court has explained that whether particular facts or matters are a proper subject of impeachment is an issue of relevance, namely, whether “[a]s a matter of reason and common experience” they bear on the witness’s credibility. (See *Walker*, 83 NY2d at 462.)

Subdivision (2). Subdivision (2) sets forth the general rule that permits the use of evidence of impeachment to cross-examine a witness and that the party examining the witness is bound by the witness’s answers unless the evidence of impeachment is not collateral. (See *e.g. Badr v Hogan*, 75 NY2d 629, 635 [1990]; *People v Pavao*, 59 NY2d 282, 288-289 [1983]; *Halloran v Virginia Chems.*, 41 NY2d 386, 390, 393 [1977]; *People v Schwartzman*, 24 NY2d 241, 245 [1969]; *Potter v Browne*, 197 NY 288, 293 [1910].) Impeaching evidence is not collateral when directly relevant to one or more issues in the case (see *People v Cade*, 73 NY2d 904 [1989]); or independently admissible to impeach the witness, *e.g.* show the witness’s bias, hostility or impaired ability to perceive or understand the nature of an oath or affirmation. (See *Badr*, 75 NY2d at 635; *Schwartzman*, 24 NY2d at 245.)

Thus, if the matter is collateral, the cross-examiner may inquire into it, but must take the witness’s answer and is not free to put in independent proof about the collateral matter. (*Wise*, 46 NY2d at 328.) “This rule,” the Court of Appeals has observed, “is premised on sound policy considerations for if extrinsic evidence which is otherwise inadmissible is allowed to be introduced to contradict each and every answer given by a witness solely for the purpose of impeaching that witness, numerous collateral minitrials would arise involving the accuracy of each of the witness’ answers. The resulting length of the trial would by far outweigh the limited probative value of such evidence.” (*Pavao*, 59 NY2d at 289.)

Evidence that charges on trial had already been determined adversely to the defendant by another tribunal, however, is inadmissible for impeachment of the defendant or otherwise. See Guide to NY Evidence rule 6.16(4).

Impeachment is subject to the control of the trial court's exercise of sound discretion. (See *Schwartzman*, 24 NY2d at 245; *Langley v Wadsworth*, 99 NY 61, 63 [1885] [noting when the object of cross-examination "is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial judge, and unless abused, its exercise is not the subject of review"].) While the Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees the defendant in a criminal trial an opportunity for cross-examination, it does not guarantee a cross-examination "that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v Fensterer*, 474 US 15, 20 [1985]; *People v Burns*, 6 NY3d 793, 795 [2006].) Thus, it is generally within the court's sound discretion to limit the scope of cross-examination of the criminal defendant when questions are irrelevant, concern collateral issues, or risk misleading the jury. (*Ibid.*).

Subdivision (3). The first portion of subdivision (3) is derived from Court of Appeals precedent that sets forth a rule against a party impeaching the party's own witnesses upon any credibility ground, except as the rule has been statutorily modified with respect to impeachment by use of the witness's prior inconsistent statement. (See e.g. *People v Fitzpatrick*, 40 NY2d 44, 49-53 [1976]; *Carlisle v Norris*, 215 NY 400, 408-409 [1915]; *Cross v Cross*, 108 NY 628, 629 [1888] [rule is applicable when a party calls an adverse party]; *Becker v Koch*, 104 NY 394, 401-402 [1887].) This rule "descends to us from the ancient time when a party's witnesses were brought into court not to swear to facts in a case but rather to a party's own credibility. Not surprisingly, it then was considered ill befitting for a party to question the veracity of his own witnesses." (*Fitzpatrick*, 40 NY2d at 49; see also *People v Minsky*, 227 NY 94, 99-100 [1919] ["A party should not be permitted, after having unsuccessfully taken a chance to secure favorable testimony, to attack his own witness and ask the jury to infer the contrary of what has been sworn to, because the falsity of the evidence is to be presumed from the general character of the witness"]; *Carlisle*, 215 NY at 409 [by calling a witness the party "vouched for his reliability and credibility"].)

The remaining portions of the subdivision are also derived from Court of Appeals precedent. Thus, the Court has cautioned that the party is not bound by the testimony of a witness the party calls and that the party may always contradict the witness's testimony on a relevant issue by proof from other sources. (See *Spampinato v A.B.C. Consol. Corp.*, 35 NY2d 283, 287 [1974]; *Carlisle*, 215 NY at 410 [rule does not prevent the party from asking to have the "truthfulness or accuracy" of the witness's testimony submitted to the jury].) The Court has also

held the rule against impeaching the party's own witness does not prohibit a party from preemptively bringing out on direct examination facts to take the "sting" out of an expected cross-examination. (*See Minsky*, 227 NY at 98 ["The law does not . . . compel a party to conceal the bad record of his witnesses from the jury, to have it afterwards revealed by the opposing party with telling effect. Such a rule would be unfair alike to the party calling the witness and the jury"].)

6.25 Impeachment by Alibi Testimony

(1) Neither a defendant nor a defense witness who gives testimony, inconsistent with a notice of alibi filed pursuant to statute but withdrawn before trial or disavowed at trial, may be impeached by that notice of alibi on cross-examination or by introduction of that notice in rebuttal.

(2) A defendant or witness who gives alibi testimony may be impeached by a statement the defendant or witness, as the case may be, made prior to or following the filing of a notice of alibi inconsistent with the alibi testimony.

(3) (a) A witness who testifies at trial to an alibi may be impeached for failure to have timely presented the alibi to law enforcement authorities, provided the witness's failure to do so was not pursuant to the advice of defense counsel and the court has so determined before permitting questions.

(b) The foundation for the impeachment will normally include demonstrating that the witness was aware of the nature of the charges pending against the defendant, had reason to recognize that he possessed exculpatory information, had a reasonable motive for acting to exonerate the defendant, and was familiar with the means to make such information available to law enforcement authorities.

Note

Subdivision (1) is derived from *People v Burgos-Santos* (98 NY2d 226 [2002] [where the notice of alibi had been withdrawn prior to trial it was error to use that notice of alibi to cross-examine the defendant in order to impeach his testimony that he was present at the crime scene but was an innocent victim of an assault rather than the perpetrator]) and *People v Rodriguez* (3 NY3d 462 [2004] [where the notice of alibi was disavowed at trial on defendant's case, it was error to introduce the notice of alibi in rebuttal to impeach the defendant's alibi witnesses who testified to an alibi other than the one in the notice]; see also *People v Gray*,

125 AD3d 1107, 1107 [3d Dept 2015] [“The Court of Appeals has unequivocally established that the People may not use a defendant’s notice of alibi for impeachment purposes on cross-examination where the defendant has withdrawn such notice prior to trial”]; see Fed Rules Crim Pro rule 12.1 [f] [“Evidence of an intention to rely on an alibi defense, later withdrawn, or of a statement made in connection with that intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention”)].

By CPL 250.20, a defendant who intends to present an alibi defense is compelled to file a notice of alibi within 20 days of arraignment. That “compulsion” is not in violation of the Federal Constitution because, “[a]t most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the [defendant] from the beginning planned to divulge at trial” (*Williams v Florida*, 399 US 78, 85-86 [1970]). Use of that compelled notice of alibi to impeach a defendant or the defendant’s defense when it has been withdrawn or disavowed, however, raised a constitutional concern in both *Burgos-Santos* and *Rodriguez*. The Court did not decide the constitutional issue. Instead, the Court disallowed the notice as impeachment evidence, explaining that CPL 250.20 specified the remedies for a violation of the statutory requirements and those remedies did not include impeachment of the defendant or defendant’s witnesses.

The facts in *Rodriguez* suggest a broad definition of what constitutes a disavowal of an alibi notice and when that disavowal is timely. In *Rodriguez*, the defendant did not withdraw the notice of alibi; instead “it became obvious from the [defense witness’s] surprise testimony that defendant was presenting a new and different alibi” (*Rodriguez* at 465).

Subdivision (2) is derived from *People v McGraw* (40 AD3d 302, 302-303 [1st Dept 2007]). Absent the compulsion inherent in the filing of a notice of alibi, a defendant or defense witness who testifies to an alibi may be impeached by a statement, made prior to the filing of a notice of alibi, that is inconsistent with the testimony given at trial. As *McGraw* explained:

“The court properly admitted the rebuttal testimony of defendant’s former counsel concerning preindictment statements made by him to the District Attorney’s Office with defendant’s consent, regarding defendant’s whereabouts at the time of the robbery, which directly conflicted with the alibi defendant presented at trial. A statement made by an agent of a party, acting within the scope of his authority, is admissible as an admission against the party. This is not a case of using defendant’s withdrawn alibi notice to impeach him or his case, since there never was an alibi notice relating to the first alibi; instead, the first alibi was volunteered in an effort to forestall indictment. We reject defendant’s argument that the statement made by defendant’s original attorney to the prosecutor’s office was the

equivalent of an alibi notice. On the contrary, counsel did not provide this statement as a form of disclosure mandated by CPL 250.20” (*McGraw* at 302-303 [citations omitted]; see *People v Johnson*, 46 AD3d 276, 278 [1st Dept 2007] [absent a notice of alibi having been filed, the defendant was properly impeached during cross-examination by her attorney’s statements made at a prior bail application given “a reasonable inference that such statements were attributable to defendant, and they significantly contradicted her trial testimony”]; cf. Guide to NY Evid rules 8.03, Admission by Party and 6.14, Impeachment by Evidence Improperly Obtained).

Subdivision (3) is derived from *People v Dawson* (50 NY2d 311 [1980]). While permitting cross-examination of an alibi witness for failure to come forward before trial to law enforcement authorities, *Dawson* added some cautionary notes:

“[T]he Trial Judge should inform the jurors, upon request, that the witness has no civic or moral obligation to volunteer exculpatory information to law enforcement authorities and that they may consider the witness’ prior failure to come forward only insofar as it casts doubt upon the witness’ in-court statements by reason of its apparent inconsistency. Finally, when such questioning begins, the Trial Judge should call a bench conference to ascertain whether the witness refrained from speaking under the advice of defense counsel, for in such a case examination on the issue of the witness’ postconsultation silence would be improper and could well result in a mistrial” (*Dawson* at 322-323; see *People v Jenkins*, 88 NY2d 948, 950 [1996] [an alibi witness was properly impeached because a close relative or friend’s “knowledge that defendant is incarcerated pending trial may be reasonably found to be inconsistent with the witness’ failure to come forward with exculpatory evidence which might result in the accused’s being freed”]; cf. *People v Burgos*, 50 NY2d 992, 993-994 [1980] [“It was error for the Trial Judge to refuse to advise the jury that defendant’s alibi witnesses had no duty to volunteer exculpatory information to law enforcement authorities” and it would have been “best had the court stricken the entire line of questioning” when it was apparent that defense counsel had advised the witness that the witness had no duty to advise the authorities of the alibi]).

Dawson at 321 n 4 sets forth the foundational elements for a cross-examination:

“In most cases, the District Attorney may lay a ‘proper foundation’ for this type of cross-examination by first demonstrating that the witness was aware of the nature of the charges pending against the defendant, had reason to recognize that he possessed exculpatory

information, had a reasonable motive for acting to exonerate the defendant and, finally, was familiar with the means to make such information available to law enforcement authorities.”

Impeachment of an alibi witness may include rebuttal testimony (*see People v Knight*, 80 NY2d 845, 848 [1992] [The People properly presented rebuttal evidence “to rebut the alibi witnesses’ testimony about their postarrest statements to police by calling the police officer to testify that such statements were never made”]; *People v Patterson*, 194 AD2d 570, 571 [2d Dept 1993] [“Under *People v Knight*, extrinsic evidence is not admissible if offered solely on the issue of the witness’s general credibility but may be admitted to the extent that it bears on the truthfulness of the alibi if it is used to challenge the validity of the alibi, a material issue in the case. If this (threshold) is met, the fact that the evidence also tends to impeach the witness’ credibility does not render the evidence collateral” (citation and internal quotation marks omitted)]).

6.13. Impeachment by Bias, Hostility, Interest

The credibility of a witness may be impeached by asking the witness on cross-examination about the witness's bias, hostility, or interest for or against any party to the proceeding and by extrinsic evidence of such bias, hostility, or interest.

Note

This rule is derived from decisions of the Court of Appeals that recognize that a witness's partiality for or against a party in the proceeding may be shown to impeach the witness's credibility. (See *e.g. Coleman v New York City Tr. Auth.*, 37 NY2d 137, 142 [1975] [noting "the relevancy of all facts which bear on the probable partiality" of a witness for impeachment purposes]; *Schultz v Third Ave. R.R. Co.*, 89 NY 242, 248-249 [1882] ["It is always competent to show that a witness produced upon the trial of an action is hostile in his feelings toward the party against whom he is called to testify or that he entertains malice toward that party, and so it has been held in many cases"].) Illustrative examples of partiality recognized by the Court include a witness's bias in favor of the party calling the witness (see *People v Webster*, 139 NY 73, 85 [1893] ["bias is always of importance in determining credibility" and noting that bias may arise from family, business or close social relationships]; *People v Brown*, 26 NY2d 88, 94-95 [1970]); hostility to the party against whom the witness testifies (see *Brink v Stratton*, 176 NY 150, 152 [1903] ["it was competent to prove the hostility of any or all of these witnesses towards the defendants"]; *People v Brooks*, 131 NY 321, 325-326 [1892]); or the witness's interest in the case, personal, financial or other (see *People v Jackson*, 74 NY2d 787, 790 [1989] [witness who cooperated with prosecutor only after receiving a reduced sentence on a pending charge had an "obvious interest"]; *Coleman*, 37 NY2d at 142 ["an interest in a cause being a circumstance available for impeachment"]).

The rule as stated reflects the Court of Appeals holdings that evidence of partiality may be brought out on cross-examination and, as partiality is not a collateral matter, by extrinsic evidence. (See *People v Chin*, 67 NY2d 22, 31 [1986] ["interest or bias is not collateral"]; *Potter v Browne*, 197 NY 288, 293 [1910] ["The well-settled rule invoked by counsel for the plaintiff is that which permits a party to show the hostility of a witness toward him. This may be done by proving the hostile acts or declarations of the witness, either out of his own mouth or from the lips of others"]; *Brink*, 176 NY at 152 [hostility of witnesses may be shown "by their cross-examination or by other testimony"].) Extrinsic evidence of partiality may be admitted without first cross-examining the witness about the matter. (See *e.g. People v Michalow*, 229 NY 325, 331 [1920] ["It is not necessary to first examine the witness as to his hostility"]; *Brink*, 176 NY at 152.)

The Court of Appeals has noted that the trial court has discretion to control the presentation of evidence of partiality. (See *People v Corby*, 6 NY3d 231, 234-237 [2005]; *Brooks*, 131 NY at 325-327.) While such discretion may be exercised to limit the extent of the evidence admitted, the trial court may not completely exclude the offered evidence unless the inference of impartiality is remote or speculative, or the party who seeks to impeach the witness lacks a good faith basis for the question, or the evidence would be cumulative. (See *People v Hudy*, 73 NY2d 40, 57 [1988]; *People v Chin*, 67 NY2d 22, 28-29 [1986]; *People v Thomas*, 46 NY2d 100, 105 [1978]; *People v McDowell*, 9 NY2d 12, 15 [1961].) In essence, the court must weigh the probative value of the evidence against the danger that its admission would unduly prejudice a party, confuse an issue, or be cumulative. (See Guide to NY Evid rule 4.07, Exclusion of Relevant Evidence).

In criminal proceedings, both the United States Supreme Court and the Court of Appeals have cautioned that the exercise of discretion to limit or exclude evidence of partiality of witnesses testifying against defendants must be exercised in light of the Sixth Amendment's right of confrontation guaranteed to the defendant. (*Davis v Alaska*, 415 US 308, 318 [1974] ["While counsel was permitted to ask (the witness) whether he was biased, counsel was unable to make a record from which to argue why (the witness) might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial"; thus, defendant's right of confrontation was denied]; *Hudy*, 73 NY2d at 57 ["both the constitutional and the evidentiary rules" were breached when the trial court precluded defense counsel from questioning the police officers in the manner proposed; defendant had been prevented from cross-examining them about their questioning of complaining witnesses that may have shown possible fabrication by those witnesses].)

6.14 Impeachment by Evidence Improperly Obtained

(1) A voluntary statement of a defendant obtained by law enforcement in violation of (a) the required pre-interrogation warnings or (b) the defendant's right to counsel may be used to impeach the credibility of a defendant who gives testimony inconsistent with the statement.

(2) A voluntary statement or other evidence that is the product of an illegal seizure of or from a defendant may provide a basis for impeachment of a defendant who testifies in a manner inconsistent with his or her connection to the seized evidence.

(3) While the use of an inconsistent statement or other evidence taken in violation of a constitutional directive may be used to impeach the testimony of a defendant, it may not be used, directly or indirectly, to establish the People's case.

Note

Introduction. The rationale underlying this rule is that, absent the rule, a “defendant’s constitutional shield against having illegally seized evidence used against him could be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances” or other evidence illegally seized from the defendant (*United States v Havens*, 446 US 620, 626 [1980] [internal quotation marks omitted]; see *People v Johnson*, 27 NY2d 119, 122 [1970] [“the constitutional privilege ought to shield a man against unfairness by the State in using such a statement in his prosecution, but should not immunize him from inquiry when he affirmatively proffers testimony as part of a strategy in contested litigation in which truth is a critical ingredient”])). The use of an inconsistent statement or other evidence taken in violation of a constitutional directive, however, is limited to impeachment of a defendant who testifies on his or her behalf and “may not be used, directly or indirectly, to establish the People’s case” (*People v Ricco*, 56 NY2d 320, 323 [1982]).

Subdivision (1) is derived from both United States Supreme Court and New York Court of Appeals decisions.

The principal decisions in the United States Supreme Court are *Harris v New York* (401 US 222 [1971], *affg* *People v Harris*, 25 NY2d 175 [1969] [a

defendant's voluntary statement made to police that was inadmissible on the prosecution's case in chief because it was taken in violation of the required pre-interrogation warnings of *Miranda v Arizona* (384 US 436 [1966]) may be used to impeach the defendant's credibility]) and *Oregon v Hass* (420 US 714, 714-715 [1975] [the *Harris* holding was reaffirmed where the only difference between the two cases was that Harris received defective pre-interrogation warnings and Hass received proper warnings but thereafter asked to telephone a lawyer before making the statement used for impeachment])).

In *Harris*, the prior inconsistent statement was elicited during cross-examination of the defendant (*Harris*, 401 US at 223). In *Hass*, the Court held that the trial court erred in denying the prosecutor's application to call a rebuttal witness to testify to the inconsistent statement (*Hass*, 420 US at 723-724).

The Court of Appeals has long held that "[o]ur rule permits the use for impeachment not only of statements obtained in violation of a defendant's *Miranda* rights, but also of those obtained in violation of his right to counsel under the State Constitution" (*People v Maerling*, 64 NY2d 134, 140 [1984] [citations omitted]).

The principal decisions in the Court of Appeals on permitting impeachment of a defendant by a voluntary statement taken in violation of the defendant's pre-interrogation warnings include: *Harris* (25 NY2d at 177 [on cross-examination of the defendant, the prosecutor properly used a statement taken from the defendant in violation of the required pre-interrogation warnings that was at "complete variance" with the defendant's direct testimony to impeach the defendant]) and *People v Wilson* (28 NY3d 67, 72 [2016] [the prosecutor properly used the defendant's statements made to police after he had invoked his right to remain silent to impeach the defendant's testimony]).

The principal decisions in the Court of Appeals on permitting impeachment of a defendant by a voluntary statement taken in violation of the defendant's right to counsel include: *People v Kulis* (18 NY2d 318, 322 [1966] [a statement was taken after the defendant requested an attorney]); *People v Boodie* (26 NY2d 779, 781 [1970] [statement taken from defendant after arraignment in the absence of counsel]); *Maerling* (statements to a jail guard made while in custody in absence of counsel); and *People v Meadows* (64 NY2d 956, 958 [1985] [statement taken after the right to counsel attached by virtue of the commencement of the action by the filing of a complaint and issuance of a warrant]).

The defendant must have given the prior statement voluntarily (*Maerling*, 64 NY2d at 140 ["If the statement was voluntary, it may be used to impeach; if it was not, it may not be admitted, even though it may be reliable"]; *People v Walker*, 67 NY2d 776 [1986] [a judicial finding that the defendant's statement was involuntary precluded its use to impeach the defendant's testimony]). The People bear the burden of showing that statements were made voluntarily, i.e., that the "statements were not products of coercion," either physical or psychological (which

includes the use of “deception” in the service of “psychologically oriented interrogation” that “eclipse[s] individual will”); in other words the statements must be given as a result of a “ ‘free and unconstrained choice by [their] maker’ ” (*People v Thomas*, 22 NY3d 629, 641-642 [2014]). Also, a statement obtained by a grant of immunity is involuntary (*New Jersey v Portash*, 440 US 450, 459 [1979] [“Testimony given in response to a grant of legislative immunity is the essence of coerced testimony”]).

Harris authorized the use of the defendant’s prior statement for impeachment “provided of course that the trustworthiness of the evidence satisfies legal standards” (401 US at 224). That proviso, however, was not intended to require a judicial determination of trustworthiness; the purported inconsistent statement, as with any purported inconsistent statement, presents an issue of fact and credibility for the jury to decide (*People v Washington*, 51 NY2d 214, 221 [1980]).

The defendant opens the door to impeachment once the defendant “recounts the events to which the prior inconsistent statement relates” (*People v Wise*, 46 NY2d 321, 327 [1978]; see Guide to NY Evid rule 4.08, “Open Door” Evidence)]. As *Wise* further explained: “where a defendant’s trial testimony offers one version of the events in question, and his prior remark to a police officer suggests a contrary view of those events, the jury is entitled to hear the previous statement so that it may fully assess the witness’ credibility” (*Wise* at 327-328; compare *People v Rahming*, 26 NY2d 411, 418 [1970] [in this case, the prosecutor erred in ranging “beyond the defendant’s direct examination ‘in order to lay a foundation for the tainted evidence (i.e., statement taken in violation of pre-interrogation warnings) on rebuttal’ ” (citations omitted)]; see *Havens*, 446 US 620).

Subdivision (2) is derived from the holdings of the United States Supreme Court. (See *Walder v United States*, 347 US 62, 64 [1954] [the defendant’s testimony on direct examination that he had never possessed any narcotics opened the door, solely for the purpose of attacking the defendant’s credibility, to evidence of the heroin unlawfully seized from him in connection with a prior case that was dismissed due to the illegal seizure of the heroin]; *Havens*, 446 US at 627-628 [holding that “a defendant’s statements made in response to proper cross-examination reasonably suggested by the defendant’s direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained and that is inadmissible on the government’s direct case, or otherwise, as substantive evidence of guilt”]; see *United States v Leon*, 468 US 897, 910 [1984] [“Evidence obtained in violation of the Fourth Amendment and inadmissible in the prosecution’s case in chief may be used to impeach a defendant’s direct testimony”].)

“It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which

evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths" (*Walder* at 65).

The Court of Appeals has relied on the Supreme Court holdings in its decisions permitting impeachment of a defendant by a voluntary statement taken in violation of the defendant's pre-interrogation warnings or right to counsel (*Kulis*, 18 NY2d at 322-323; *Johnson*, 27 NY2d at 121-122; *Maerling*, 64 NY2d at 140-141). The Appellate Division has applied the holding in *Havens* to the facts of individual cases (*People v LaFontant*, 46 AD3d 840, 841-842 [2d Dept 2007] [when the defendant testified that he had not possessed a gun prior to the day of the incident, a photograph of the defendant holding a gun that was the product of an illegal search of his cell phone was properly admitted as impeachment evidence]; *People v Donnelly*, 103 AD2d 941, 941-942 [3d Dept 1984] [when the defendant testified concerning his consumption of alcohol prior to the accident, the results of a blood alcohol test that had been suppressed was properly admitted]; see *People v Dash*, 126 AD2d 737, 737 [2d Dept 1987] ["While illegally obtained physical evidence is inadmissible as substantive proof in the People's case-in-chief, it may be used for purposes of impeaching a defendant who testifies in his own behalf"]).

Method of Impeachment. The traditional requirements for proving an inconsistent statement of a defendant are to raise the statement and circumstances of its making with the defendant on cross-examination and, if the defendant denies making the statement, to introduce it through rebuttal evidence (Guide to NY Evid rule 6:15, Impeachment by Prior Inconsistent Statement).

More than a century ago, however, in *Blossom v Barrett* (37 NY 434, 438 [1868]), the Court of Appeals held that the foundation for a prior inconsistent statement "does not apply when the admission sought to be proved is that of a party to the suit. The party's confessions are competent without interrogating him at all in regard to it." *Mindlin v Dorfman* (197 App Div 770, 772 [1st Dept 1921]) explained the rationale for *Blossom* as follows:

"The reason for the difference in the rule relating to witnesses and parties is that the only object of requiring the warning is to provide a fair opportunity of explanation before the witnesses' departure, whereas a party is in theory present during the trial, and has in fact ample opportunity to protect himself by taking the stand for any explanations which he may deem necessary after hearing the testimony of his alleged admissions."

The United States Supreme Court, in *Oregon v Hass* (420 US 714 [1975]), approved the introduction of a statement, taken in violation of *Miranda*, solely in rebuttal, to impeach the credibility of the defendant's testimony. The defendant accordingly was not at first cross-examined about the statement. Consistent with the rationale of *Blossom* as explained in *Mindlin*, the defendant then "again took

the stand” (*id.* at 717) to address the rebuttal evidence, at which point the trial court instructed the jury that the statement bore only on the defendant’s credibility.

Some Appellate Division decisions, without considering *Blossom*, have held that it is error not to employ the traditional foundation requirements for a statement improperly obtained from the defendant, and, upon the failure to confront the defendant on cross-examination with the statement, rebuttal evidence of the inconsistent statement is not authorized (*People v Robinson*, 267 AD2d 1031, 1031 [4th Dept 1999]; *People v Watford*, 146 AD2d 590 [2d Dept 1989]; *People v Jones*, 134 AD2d 915 [4th Dept 1987]; *People v Grainger*, 114 AD2d 285, 290 [4th Dept 1986]).

Since *Blossom*, it appears that the Court of Appeals has not been asked whether the failure to question the defendant on cross-examination about an improperly obtained inconsistent statement precludes its use as rebuttal evidence. The Court has been presented with cases in which the traditional foundation requirements were employed, and, of course, there was no error in doing so. *Wise*, for example, states that the “law pertaining to prior inconsistent statements is well developed” and then lists the traditional foundation requirements that were utilized in that case; but *Wise* also stated that “[p]rimarily at issue here is whether defendant’s previous utterance was sufficiently inconsistent with his trial testimony to warrant its use on cross-examination” (*Wise* at 326).

There are, however, dicta, particularly in *People v Washington* (51 NY2d 214 [1980]), suggesting that *Blossom* still may represent current law and the presentation of an inconsistent statement improperly obtained from a testifying defendant may be admissible on rebuttal, without first confronting the defendant on cross-examination with the statement. *Washington* (at 220) states: “It is also apparent that the prosecutor may use the statements on cross-examination of the defendant (*Harris v New York, supra*) or on rebuttal by calling another witness to testify that the defendant made them (*Oregon v Hass, supra*)” (emphasis added).

Thus, *Washington* states, “or on rebuttal,” and cites to *Hass*, which approved introduction of the inconsistent statement *solely* on rebuttal, with the right of the defendant to resume the stand to address the rebuttal (as authorized by *Blossom*), and with an instruction to the jury that the statement related only to the credibility of the defendant (*Oregon* at 717).

Wise also makes a point of explaining that the evidence of the statement presented in rebuttal in that case met the requirements for rebuttal evidence, not simply that the statement was admissible on rebuttal because the defendant denied making the statement on cross-examination. (*Wise* at 328; *cf. People v Knight*, 80 NY2d 845, 847 [1992] [“the rule prohibiting the use of extrinsic evidence to impeach a witness on a matter that is merely collateral . . . has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the jury must decide”]; *People v Patterson*, 194 AD2d 570, 571

[2d Dept 1993] [“Under *People v Knight*, extrinsic evidence is not admissible if offered solely on the issue of the witness’s general credibility but may be admitted to the extent that it bears on the truthfulness of the alibi if it is used to challenge the validity of the alibi, a material issue in the case. If this threshold is met, the fact that the evidence also tends to impeach the witness’ credibility does not render the evidence collateral” (citation and internal quotation marks omitted)].)

Subdivision (3) states the undisputed holding of decisional law that any authorized use of evidence improperly obtained is solely for the purposes of impeachment (*People v Ricco*, 56 NY2d at 323).

**6.15. Impeachment by Prior Inconsistent Statement
(CPLR 4514; CPL 60.35 [2])**

(1) A witness's credibility may be impeached by evidence that the witness has made a statement, whether written or not, inconsistent with the witness's present testimony.

(2) In examining a witness concerning a prior inconsistent statement, the examining party must first show the statement or disclose its contents to the witness before asking the witness to affirm or deny the statement.

(3) If the witness denies making the prior inconsistent statement or is unable to recall making the statement, extrinsic evidence of the statement is admissible. If the witness admits making the prior inconsistent statement, whether to admit extrinsic evidence of the statement is committed to the discretion of the court.

(4) A party may not impeach its own witness by evidence of the witness's prior inconsistent statement, except as follows:

(a) In a civil proceeding, any party may introduce proof that any witness has made a prior statement inconsistent with the witness's testimony if the statement was made in a writing signed by the witness or was made under oath.

(b) In a criminal proceeding, when a witness, upon examination by the party who called the witness, gives testimony upon a material issue of the case which tends to disprove the party's position, the party may introduce evidence that the witness has previously made either a written statement signed by the witness or an oral

statement under oath contradictory to the witness's testimony.

(5) The credibility of a witness may be impeached by showing that the witness omitted to state a relevant fact or to state it more fully prior to testifying, at a time when the witness's attention was called to the matter and the witness was specifically asked about the facts embraced in the question asked at a hearing or trial. Even though the matter was not called to the attention of the witness, the credibility of the witness may be impeached by showing that the circumstances surrounding the omission made it most unnatural for the witness to have omitted the information from what the witness said.

(6) Except in a civil case, as provided in rule 8.33 (1), an inconsistent statement is not admissible for the truth of the contents of the statement; rather, it is admissible solely for the purpose of determining the credibility of the witness.

Note

Subdivision (1). The rule set forth in subdivision (1) is derived from the seminal decision on the subject, *Larkin v Nassau Elec. R.R. Co.* (205 NY 267, 268-269 [1912]), wherein the Court of Appeals held:

“Any statement of a witness made out of court, orally or in writing, if contradictory of a material part of his testimony, may be, if properly proven, introduced in evidence, not as substantive proof of the truth of such statement, but as tending to discredit him. If it is sought to prove the expression of an opinion inconsistent with the testimony, it is enough if the opinion is so incompatible with the facts testified to by the witness that an honest mind knowing the facts would not be likely to entertain the opinion. Repugnant statements or contraries cannot be true and the fact that the witness has made them tends to show that he is untrustworthy through carelessness, an uncertain memory or dishonesty.” (*See also Sloan v New York Cent. R.R. Co.*, 45 NY 125, 127 [1871] [prior inconsistent statement “is competent, for the purpose of impeachment, to prove that a witness has made statements out of

court in conflict with his evidence in court upon a material question in the case”].)

Those holdings are embedded in a statute governing a criminal case: “Evidence concerning a prior contradictory statement . . . may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. Upon receiving such evidence at a jury trial, the court must so instruct the jury.” (CPL 60.35 [2].)

Thus, as the relevance of the prior inconsistent statement is predicated upon the fact that it was made, and not for its truth, the hearsay rule does not bar the statement.

In the limited circumstance set forth in rule 8.33, however, decisional law permits a prior inconsistent statement to be admitted for its truth. (See rule 8.33 and the Note thereto.)

For a prior statement to be inconsistent for purposes of the rule, it is not necessary that “there be a direct and positive contradiction. It is enough that the testimony and the statements are inconsistent and tend to prove differing facts.” (*Larkin*, 205 NY at 269.) In *People v Wise* (46 NY2d 321, 327 [1978]), the Court of Appeals noted that where there is some doubt as to whether a statement is “inconsistent,” the “balance should be struck in favor of admissibility, leaving to the jury the function of determining what weight should be assigned the impeachment evidence. Applied in this fashion, the law of previous contradictory statements will advance rather than impede the truth-seeking process.”

Where a prior inconsistent statement of a defendant in a criminal proceeding is involved, a statement made in violation of the defendant’s federal or state right to counsel or the pre-interrogation warnings of *Miranda v Arizona* (384 US 436 [1966]) may, if otherwise voluntarily made, be used to impeach a defendant who testifies on his or her own behalf. (*People v Maerling*, 64 NY2d 134, 140 [1984]; *People v Wilson*, 28 NY3d 67 [2016]; *People v Harris*, 25 NY2d 175 [1969], *aff’d* 401 US 222 [1971].) It must be noted that the statement must be voluntary; an involuntary statement may never be used for impeachment. Similarly, evidence seized in violation of the Fourth Amendment may be used to impeach a defendant who testifies on his or her own behalf. (*United States v Havens*, 446 US 620 [1980]; *People v Maerling*, 64 NY2d 134 [1984].)

Subdivision (2). Subdivision (2) recites the foundation warning required for inquiring of a prior inconsistent statement, as derived from *Larkin v Nassau Elec. R.R. Co.* (205 NY 267, 269 [1912] [citations omitted]):

“In case the statements are oral, the warning is given by asking the witness, in substance and effect, if he did not at a given time and

place in the presence of or to a person or persons specified make the alleged contradictory statements. In case the statements are in writing and unsubscribed, the paper must be shown or read to the witness and marked for identification, and, if subscribed, the signature and in case he so demands the paper must be shown to him.” (*See also Wise*, 46 NY2d at 326 [“To set the stage for the prior inconsistency, the questioner must first inform the witness of the circumstances surrounding the making of the statement, and inquire of him whether he in fact made it”].)

The foundation requirement does not apply where the witness who made the prior statement is a party to the proceeding. (*Blossom v Barrett*, 37 NY 434, 438 [1868] [“The (foundation) rule insisted on does not apply when the admission sought to be proved is that of a party to the suit. The party’s confessions are competent without interrogating him at all in regard to it”]. *But see* Guide to NY Evid rule. 6.14, Impeachment by Evidence Improperly Obtained; Method of Impeachment.)

Subdivision (3). The rule set forth in subdivision (3) is also derived from *Larkin v Nassau Elec. R.R. Co.*:

“The attention of a witness having been thus called to the contradictory statements, they may be proven and introduced in evidence in the regular course of the trial. They may, of course, be proved by the admissions of the witness made at the time his attention was called to them. If he fully and clearly admits the making of them as provable by the impeaching party, further proof of them is unnecessary.” (205 NY at 269-270; *see also Hanlon v Ehrich*, 178 NY 474, 480 [1904] [“If . . . the witness denies having made the statement, or does not remember having made it, he may then be contradicted by any person who heard him make it (or documentary evidence”].)

Whether to admit the extrinsic evidence when the witness has admitted the inconsistency is committed to the sound discretion of the trial court. (*See People v Piazza*, 48 NY2d 151, 163-165 [1979]; *People v Schainuck*, 286 NY 161, 165 [1941].) In deciding on the admissibility of a prior inconsistent statement a court may consider whether the statement relates to a collateral matter and would not be admissible pursuant to rule 6.11 (Impeachment in General). (*Cf. People v Knight*, 80 NY2d 845, 847 [1992] [“the rule prohibiting the use of extrinsic evidence to impeach a witness on a matter that is merely collateral . . . has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the jury must decide”].)

Subdivision (4) (a) and (b) are taken virtually verbatim from CPLR 4514 and CPL 60.35, respectively. They were enacted “to correct the inequities

occasioned by the fact that in many cases both sides were unfairly hampered by their inability to impeach unreliable witnesses upon whom they were compelled to rely.” (*People v McCormick*, 278 App Div 410, 413 [1st Dept 1951], *aff’d* 303 NY 403 [1952].)

Subdivision (5). This subdivision is derived from two Court of Appeals decisions that address whether an omission in a prior statement may render the statement inconsistent, *People v Bornholdt* (33 NY2d 75, 88 [1973]) and *People v Savage* (50 NY2d 673, 679 [1980]). The Court of Appeals has instructed that “a witness may not be impeached simply by showing that he omitted to state a fact, or to state it more fully at a prior time.” (*Bornholdt*, 33 NY2d at 88.) Impeachment by omission in a prior statement, however, is permissible where it is shown that “at the prior time the witness’ attention was called to the matter and that he was specifically asked about the facts embraced in the question propounded at trial.” (*Bornholdt*, 33 NY2d at 88.) This rule, the Court observed, “accords with human experience recognizing that unless asked directly about a matter a person may quite normally omit it from a narrative description.” (*Ibid.* at 89.) The Court has also held that impeachment by omission in a prior statement is permissible “when given circumstances make it most unnatural to omit certain information.” (*People v Savage*, 50 NY2d 673, 679 [1980]; *see also People v Chery*, 28 NY3d 139, 145 [2016] [where defendant testified at trial that the complainant assaulted him, his failure to relate an exculpatory fact in a statement to police at the time of his arrest in which he described the complainant’s conduct as relatively minor misconduct was an “unnatural omission”].) In such circumstances, the witness’s attention need not have been drawn to the matter at the time the statement was made. This rule, too, as the Court stated, “is firmly imbedded in behavioral expectations.” (*Savage*, 50 NY2d at 679.) As to the application of *Savage* and *Bornholdt* to grand jury testimony, *see People v Dismel* (16 Misc 3d 1120[A], 2007 NY Slip Op 51519[U] [Sup Ct, Kings County 2007]).

Subdivision (6). See the commentary for subdivision (1).

6.16 Impeachment of a Law Enforcement Officer

(1) A law enforcement witness is subject to the same rules governing the impeachment of any witness, as set forth in Guide to New York Evidence rule 6.11. The credibility of a law enforcement witness therefore may be impeached by evidence that has a tendency in reason to discredit the truthfulness or accuracy of the witness's testimony.

(2) The foundational requirements include:

(a) the showing of a good faith basis for the impeachment inquiry. A good faith basis for an impeachment inquiry requires that the inquiring party have a reasonable basis for believing the truth of things about which counsel seeks to ask.

(b) identification of specific allegations, credibility determinations, or acts of misconduct that are relevant to the credibility of the witness in the current proceeding.

(c) the trial court's assessment as to whether the proffered impeachment inquiry would confuse or mislead the jury or create a substantial risk of undue prejudice to the parties. Upon a finding that it would, the court may in the exercise of its discretion preclude or limit the scope of the inquiry.

(3) Sources of a good faith basis for impeachment of a law enforcement officer include:

(a) Civil lawsuit.

(i) Specific acts of misconduct lodged in a lawsuit against a testifying member of law enforcement constitutes a good faith basis for an impeachment inquiry of the

allegations asserted in that lawsuit that are relevant to the witness's credibility in the action in which the witness is testifying.

(ii) If the lawsuit did not result in an adverse finding against a witness, on cross-examination, it is not permitted to ask the witness if he or she has been sued, or if the case was settled (unless there was an admission of wrongdoing), or if the criminal charges related to the plaintiffs in those actions were dismissed. However, pursuant to paragraph (a) of this subdivision, questions based on the specific allegations of the lawsuit may be asked.

(b) A judicial determination that a law enforcement witness testified falsely in a proceeding, while not binding on the question of the witness's credibility in the proceeding in which the witness is testifying, constitutes a good faith basis for an impeachment inquiry of that witness with respect to that determination.

(c) Other misconduct of the witness, whether proved in a court proceeding or not, including, for example, acts of dishonesty and misstatements about an event or the officer's conduct made to a prosecutor, constitutes a good faith basis for an impeachment inquiry of the witness.

(4) Evidence that charges on trial had already been determined adversely to the defendant by another tribunal is inadmissible for impeachment of the defendant or otherwise.

Note

This rule is derived from the holdings of *People v Smith* (27 NY3d 652 [2016]) and *People v Rouse* (34 NY3d 269 [2019]).

Subdivision (1) is derived from *Smith*, which held that “law enforcement witnesses should be treated in the same manner as any other witness for purposes of cross-examination. The same standard for good faith basis and specific allegations relevant to credibility applies—as does the same broad latitude to preclude or limit cross-examination” (*Smith* at 661-662; *Rouse* at 273).

Subdivision (2) is drawn from the “logical framework” *Smith* set forth for deciding whether *to permit* the impeachment inquiry:

“First, counsel must present a good faith basis for inquiring, namely, the lawsuit relied upon; second, specific allegations that are relevant to the credibility of the law enforcement witness must be identified; and third, the trial judge exercises discretion in assessing whether inquiry into such allegations would confuse or mislead the jury, or create a substantial risk of undue prejudice to the parties” (*Smith* at 662).

Rouse declared that a good faith basis “requires only that counsel have some reasonable basis for believing the truth of things about which counsel seeks to ask” (*Rouse* at 277 [internal quotation marks and citation omitted]).

Subdivision (3) (a) (i) is derived from the facts of the three cases decided in the *Smith* opinion (*Smith*; *Ingram*; *McGhee*). In all three cases, the Court held that a lawsuit alleging misconduct by the testifying officers constituted a good faith basis for the inquiry and that specific allegations in those lawsuits about which the defense sought to question the officers were relevant to the case on trial and the credibility of the witness.

In *Ingram*, for example, the defense was that the officers had “fabricated evidence and concocted a false story” of the events (27 NY3d at 666). The officers were subject to a pending civil suit that alleged some of the same conduct; that civil suit provided the good faith basis for the inquiry and for the inquiry of “specific allegations” that were relevant to the officers’ credibility (*id.* at 667). The trial court had denied the application to cross-examine the officers because the civil action was pending. That, the Court of Appeals held, was an abuse of discretion.

It was not relevant that the action was pending or that the lawsuits had not been resolved, given the long-standing rule of impeachment that a good faith basis for inquiry about bad acts is permitted irrespective of whether the prior bad act has been proved in a court proceeding (*Smith* at 661; *Rouse* at 273).

Subdivision (3) (a) (ii) sets forth the limitation on cross-examination that *Smith* pronounced:

“Where a lawsuit has not resulted in an adverse finding against a police officer, as is the case with these three appeals, defendants should not be permitted to ask a witness if he or she has been sued, if the case was settled (unless there was an admission of wrongdoing) or if the criminal charges related to the plaintiffs in those actions were dismissed. However, subject to the trial court’s discretion, defendants should be permitted to ask questions based on the specific allegations of the lawsuit if the allegations are relevant to the credibility of the witness” (*Smith* at 662).

Subdivision (3) (b) and (c) are principally derived from *Rouse*. *Rouse* confirmed the holding and scope of *Smith* by recognizing that, subject to the analytical framework set forth in *Smith*, misstatements of a testifying officer made to a federal prosecutor in a different matter and a prior judicial determination in which a testifying officer was found to have given unreliable testimony constituted a good faith basis for inquiry (*Rouse*, 34 NY3d at 276-278).

The officer in *Rouse* had “misled” a federal prosecution with respect to his involvement in a ticket-fixing scheme about which the defense should have been permitted to cross-examine him, given that dishonesty is conduct bearing on a person’s truthfulness. (*Id.* at 276 [“even where a prior bad act by a law enforcement officer is not criminal, it may be a proper subject for impeachment questioning where it demonstrates an untruthful bent or significantly reveals a willingness . . . to place the advancement of his individual self-interest ahead of principle or of the interests of society” (internal quotation marks and citation omitted)].)

Also, in *Rouse*, there were federal court rulings that the police officers testifying in the state court proceeding had given testimony “incredible in a manner which suggested that the officers may have falsely testified in order to obtain a desired result” (*id.* at 280). Those determinations, held *Rouse*,

“were probative of the officers’ credibility in the current prosecution, where defendant’s entire defense was aimed at convincing the jury that the officers were incorrectly identifying him as the shooter in order to avoid backlash for allegedly assaulting defendant upon arrest or for capturing an innocent bystander. The only countervailing prejudice articulated by the court in precluding defense counsel from this line of inquiry was concern that the jury *may* view the prior judicial determinations of credibility as binding. Such concern, however, could be mitigated by providing the jury with clarifying or limiting instructions, and that prejudice does not outweigh the probative and impeaching value of the inquiry.” (*Id.* at 280-281.)

Other examples where the trial court properly allowed or should have allowed cross-examination include: *People v Enoe* (144 AD3d 1052, 1054 [2d Dept 2016] [An officer who testified about having witnessed the defendant possessing a gun in the back seat of a livery cab was properly subject to cross-examination about specific allegations in a federal lawsuit that the officer had falsely arrested an individual “on a weapon possession charge” in order to gain overtime compensation and “ ‘credit’ for a gun-related arrest”]) and *People v Conner* (184 AD3d 431, 431 [1st Dept 2020] [defendant should have been permitted to cross-examine an officer about allegations in a civil lawsuit that charged him with the lodging of false charges, given that the complaint contained “allegations of falsification specific to this officer (and another officer), which bore on his credibility at the trial”]).

By comparison, examples where the trial court properly denied the impeachment inquiry include: *People v Watson* (163 AD3d 855, 860-861 [2d Dept 2018] [the trial court properly exercised its discretion in precluding defense counsel from inquiring into the underlying facts of two federal lawsuits because the “complaints in those actions only contained broad conclusory allegations of unlawful police action by large groups of officers, and did not set forth specific acts of misconduct against [the testifying officer] individually”]); *People v Williams* (184 AD3d 442, 442 [1st Dept 2020] [“The court providently exercised its discretion in precluding defendant from cross-examining a Department of Correction captain about a pending disciplinary investigation. The allegations underlying the pending investigation involved a violation of Department policy that had no bearing on the officer’s credibility, whether in general or in this case”]) and *People v Barnes* (173 AD3d 565, 566 [1st Dept 2019] [The court properly denied defense counsel’s motion to cross-examine a police witness based on a federal action against him “and other officers” that had been settled without any admission of wrongdoing, where the federal “ ‘complaint did not allege, or even support an inference, that (the witness) personally engaged in any specific misconduct or acted with knowledge of the misconduct of other officers’ ” (quoting *Smith* at 663))]).

In light of the repeal of Civil Rights Law § 50-a (L 2020, ch 96 [eff June 12, 2020]), issues have arisen regarding the scope of required disclosure of police internal affairs bureau (IAB) files and the corresponding availability of those records for impeachment. One court has directed the disclosure of “substantiated” and “unsubstantiated” IAB files of police officers involved in a case with the further holding that “exonerated” or “unfounded” files need not be produced on the theory that as a threshold matter there is an insufficient good faith basis for cross-examination by defense counsel of the latter files. The ultimate issue regarding the scope of permissible cross-examination of such witnesses, however, remains unsettled and will probably be resolved by in limine motions directed to the trial judge’s discretion. (See *People v Randolph*, 69 Misc 3d 770 [Sup Ct, Suffolk County 2020].)

Subdivision (4) is derived from *People v Rosenfeld* (11 NY2d 290, 297-

298 [1962]) where the Court explained that it had “held it to be serious error to bring to the jury’s attention in a criminal case the fact that the charges on trial had already been determined adversely to the defendant by another tribunal.” Thus, *Rosenfeld* held it was error for the prosecutor in cross-examining defendants who were police officers to elicit that they had been suspended from police duty for the conduct for which they were on trial. (*Id.* at 297-299.)

6.17. Impeachment by Instances of Misconduct

(1) Subject to paragraph (c),

(a) the credibility of a witness may be impeached on cross-examination by asking the witness about prior specific criminal, vicious, or immoral conduct of the witness; and

(b) the credibility of a witness who gives evidence of a person's character also may be cross-examined about whether the witness has heard of prior specific criminal, vicious, or immoral conduct of the witness who was the subject of the character testimony.

(c) Cross-examination authorized by paragraphs (a) and (b) is permissible only if:

(i) the nature of the conduct or the circumstances in which it occurred bear logically and reasonably on the witness's credibility;

(ii) the question has a good faith basis;

(iii) the question does not relate to conduct underlying a criminal charge of which the witness was acquitted; and

(iv) in a criminal case, the question about prior criminal, vicious, or immoral conduct of the defendant was authorized by the court prior to trial.

(2) Except for the admission of a criminal conviction pursuant to rule 6.19, extrinsic evidence is not admissible to prove prior criminal, vicious, or immoral conduct.

(3) A defendant in a criminal proceeding does not, by the act of testifying, waive the privilege against self-incrimination with respect to questions concerning pending unrelated criminal charges.

(4) When a witness is impeached pursuant to subdivision one, the party who offered that witness may in rebuttal present evidence of that witness's character for truthfulness pursuant to rule 6.23 (2).

Note

Subdivision (1). The rule in subdivision (1) (a) regarding cross-examination of the witness regarding prior instances of misconduct committed by the witness is derived from substantial Court of Appeals precedent. (See *e.g. People v Smith*, 27 NY3d 652, 660, 662 [2016] [“witnesses—and indeed, even a testifying defendant—may be cross-examined on ‘prior specific criminal, vicious or immoral conduct,’ provided that ‘the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility’ ” and “a good faith basis for inquiring” is established]; *People v Sorge*, 301 NY 198, 200 [1950] [“A defendant, like any other witness, may be ‘interrogated upon cross-examination in regard to any vicious or criminal act of his life’ that has a bearing on his credibility as a witness”]; *People v Webster*, 139 NY 73, 84 [1893] [“It is now an elementary rule that a witness may be specially interrogated upon cross-examination in regard to any vicious or criminal act of his life”].) Whether the specific instance of conduct in issue logically and reasonably relates to the witness's credibility is committed to the sound discretion of the court. (See *People v Coleman*, 56 NY2d 269, 273 [1982].) It should be noted that misconduct that demonstrates an “untruthful bent,” even though perhaps falling outside the “conventional category of immoral, vicious or criminal acts,” may be a proper subject of impeachment. (*People v Walker*, 83 NY2d 455, 461 [1994] [impeachment by defendant's use of alias].)

Subdivision (1) (b) states New York's rule permitting the cross-examination of a character witness about whether the witness had heard about prior specific instances of conduct at odds with the reputation attributed to the person who was the subject of the character testimony. (See *People v Kennedy*, 47 NY2d 196, 206 [1979] [“Assuming, *arguendo*, that Mrs. Kennedy did indeed serve as a character witness, any impeachment cross-examination should have been limited to her knowledge of defendant's reputation, and should not have extended to her personal knowledge of the underlying acts”]; *People v Kuss*, 32 NY2d 436, 443 [1973] [when the credibility of character witnesses is at issue, “it is well established that they may be asked as to the existence of rumors or reports of particular acts allegedly committed by the defendant which are inconsistent with the reputation they have attributed to him. However(,) as the defendant indicates, there are certain

limitations. The inquiry cannot be used to prove the truth of the rumors, but only to show the ability of the witness to accurately reflect the defendant's reputation in the community. And the prosecutor must act in good faith; there must be some basis for his questions" (citation omitted)]; *see also People v Alamo*, 23 NY2d 630 [1969].) Of note, both *Kuss* and *Alamo* cite with approval *Michelson v United States* (335 US 469 [1948]), with the Court in *Alamo* stating that *Michelson* is the

"leading modern case on character testimony and the cross-examination of a character witness . . . There, the policy problem of allowing this type of evidence at all was examined exhaustively by Justice Jackson, including a number of New York cases, and it was held that when a defendant introduces the subject of his good character it 'throw[s] open the entire subject' of his good name through cross-examination of the witnesses called as to contrary reports and rumors and by independent proof adversely affecting the reputation of defendant. The court felt that the archaic disadvantages of the rule could be overcome by 'discretionary controls in the hands of a wise and strong trial court.' " (*Alamo*, 23 NY2d at 634 [citation omitted].)

Since use of this impeachment method has the potential for unfair prejudice, especially to a defendant in a criminal proceeding, and may confuse or mislead the jury, the nature and extent of the cross-examination are subject to the sound discretion of the court. (*Smith*, 27 NY3d 652.)

When exercising its discretion regarding the potential cross-examination of a defendant in a criminal proceeding, whether with respect to a prior criminal conviction or any other criminal, vicious or immoral conduct, the trial court must, upon a request of the defendant, prior to trial, exercise its discretion in accord with the dictates of *People v Sandoval* (34 NY2d 371 [1974]), and *People v Kennedy* (47 NY2d at 205-206). *Sandoval* explained that "regarding the potential cross-examination of a defendant in a criminal proceeding, whether with respect to a prior criminal conviction or any other criminal, vicious or immoral conduct, the trial court must, upon a request of the defendant, prior to trial, exercise its discretion in accord with the dictates of *People v Sandoval* (34 NY2d 371 [1974]), and *People v Kennedy* (47 NY2d at 205-206). *Sandoval* explained that

"[t]o the extent . . . that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand." (*Sandoval*, 34 NY2d at 377.)

And, the Court of Appeals has added that in the court's exercise of discretion "there are no per se rules requiring preclusion because of the age, nature, and number" of crimes or acts of misconduct sought to be examined about. (*People v Walker*, 83 NY2d at 459.)

Subdivision (1) (c) (i) restates the Court of Appeals holdings in *People v Smith* (27 NY3d at 662) and *People v Coleman* (56 NY2d 269, 273 [1982]) that the specific instance of conduct must logically and reasonably relate to the witness's credibility and that whether it does is committed to the sound discretion of the court.

Subdivision (1) (c) (ii) is derived from *People v Smith* (27 NY3d at 662).

Subdivision (1) (c) (iii) is derived from *People v Santiago* (15 NY2d 640, 641 [1964] ["prejudicial error was committed when the prosecutor on cross-examination questioned defendant about a criminal charge on which he had been acquitted"]). A witness may, however, be subject to impeachment by the underlying facts of a charge dismissed by the grand jury. (*People v Alamo*, 23 NY2d 630 [1969] [dismissal by the grand jury].)

Subdivision (1) (c) (iv) is derived from *People v Sandoval* (34 NY2d 371 [1974]) and CPL 240.43. *Sandoval* requires a pretrial determination as to whether any of the defendant's criminal convictions or prior instances of misconduct may be used for impeachment purposes. CPL 240.43 requires the prosecutor, upon the defendant's request, to notify the defendant before jury selection of "all specific instances of a defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for purposes of impeaching the credibility of the defendant."

The defendant has the burden "of demonstrating that the prejudicial effect of the admission of evidence thereof for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion." (*Sandoval* at 378.)

Sandoval set forth the various criteria a court may consider in exercising its discretion as follows:

"Evidence of prior specific criminal, vicious or immoral conduct should be admitted if the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility. Lapse of time, however, will affect the materiality if not the relevance of previous conduct. The commission of an act of impulsive violence, particularly if remote in time, will seldom have any logical bearing on the defendant's credibility, veracity or honesty at the time of trial. . . . To the extent, however, that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts

significantly revealed a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand. A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity. On the other hand, crimes or conduct occasioned by addiction or uncontrollable habit, as with alcohol or drugs . . . may have lesser probative value as to lack of in-court veracity. . . .

“Commission of perjury or other crimes or acts of individual dishonesty, or untrustworthiness (e.g., offenses involving theft or fraud, bribery, or acts of deceit, cheating, breach of trust) will usually have a very material relevance, whenever committed. By contrast, questions as to traffic violations should rarely, if ever, be permitted.” (*Sandoval* at 376–377.)

Subdivision (2). The rule stated in subdivision (2) is derived from substantial Court of Appeals precedent. (*See e.g. Badr v Hogan*, 75 NY2d 629, 635 [1990] [“Unlike material facts in dispute, or matters such as a witness’s bias, hostility, or impaired ability to perceive which may be proved independently for impeachment, plaintiff’s alleged prior misconduct had no direct bearing on any issue in the case other than credibility. If proven, it would show only that plaintiff had acted deceitfully on a prior *unrelated* occasion. The matter was, therefore, collateral and, under the settled rule, could not be pursued by the cross-examiner with extrinsic evidence to refute plaintiff’s denial” (citation omitted)]; *People v Zabrocky*, 26 NY2d 530, 535 [1970]; *Sorge*, 301 NY at 200). In *Sorge*, the Court noted that this rule barring the admissibility of extrinsic evidence did not preclude further questioning of the witness when the witness denied committing the act, stating: “[A] negative response will not fob off further interrogation of the witness himself, for, if it did, the witness would have it within his power to render futile most cross-examination. The rule is clear that while a witness’[s] testimony regarding collateral matters may not be refuted by the calling of other witnesses or by the production of extrinsic evidence, there is no prohibition against examining the witness himself further on the chance that he may change his testimony or his answer.” (*Id.* at 200–201 [citations omitted]; *compare* rule 8.35 [Prior Judgment of Conviction].)

Subdivision (3). The rule stated in subdivision (3) is derived from *People v Betts* (70 NY2d 289, 295 [1987] [“The policy of protecting the defendant’s opportunity to testify, while allowing the prosecution a balanced evidentiary response, is well served by the rule that the defendant’s choice to testify in the case on trial does not, by itself, effect a waiver of the privilege against self-incrimination as to pending unrelated charges. This rule will not, on the other hand, preclude prosecutors from inquiry into pending criminal charges if a defendant, in taking the

stand, makes assertions that open the door and render those charges relevant for contradiction and response”]); and *People v Cantave* (21 NY3d 374, 381 [2013] [“We hold that the prosecution may not cross-examine a defendant about the underlying facts of an unrelated criminal conviction on appeal, for the purpose of impeaching his credibility”]); *People v Smith* (87 NY2d 715, 721 [1996] [“a prospective defendant who elects to testify before the Grand Jury does not waive the privilege against self-incrimination as to credibility questioning regarding unrelated pending charges”]; *compare People v Brady*, 97 NY2d 233, 235 [2002] [defendant in a criminal proceeding may be cross-examined regarding his “admissions at the guilty plea allocution” to an unrelated charge for which he was awaiting sentencing]).

Subdivision (4). See commentary in the note to rule 6.23 (2).

6.19. Impeachment by Conviction

(1) The credibility of a witness may be impeached:

(a) in a civil proceeding, by asking the witness in good faith on cross-examination whether the witness has been convicted of a crime or by introducing into evidence a certified copy of the judgment of conviction for a crime.

(b) in a criminal proceeding:

(i) except as provided in subparagraph two, by asking the witness in good faith on cross-examination whether the witness has been convicted of a specified offense;

(ii) when the witness is the defendant, by asking the defendant in good faith on cross-examination about a prior conviction of a specified offense to the extent authorized by the court prior to trial;

(iii) if a witness denies the conviction or answers in an equivocal manner, the conviction may be proved by introducing into evidence a certified copy of the judgment of conviction.

(2) A witness's adjudication as a youthful offender under article 720 of the Criminal Procedure Law or an adjudication as a juvenile delinquent under article 3 of the Family Court Act is not admissible to impeach the witness's credibility; the conduct underlying the adjudication may, however, be used to cross-examine the witness, subject to rule 6.17 (1) (Impeachment by Instances of Misconduct).

(3) When a witness is impeached pursuant to subdivision one, the party who offered that witness may in rebuttal present evidence of that witness's character for truthfulness pursuant to rule 6.23 (2).

Note

Subdivision (1). The rule set forth in subdivision (1) governs impeachment of a witness in civil and criminal proceedings by evidence of a conviction of a crime. The rule is derived from CPLR 4513 and CPL 60.40 (1). The underlying premise of this rule is that “[e]vidence of conviction thus impeaches the general character for [the witness’s] truth and veracity.” (*Derrick v Wallace*, 217 NY 520, 525 [1916]; *see also People v Sandoval*, 34 NY2d 371, 377 [1974] [conviction of a crime shows a “demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others (which) goes to the heart of honesty and integrity”].)

In both civil and criminal proceedings, the method of impeachment by conviction is subject to the discretion of the court, exercised in accord with the dictates of *People v Sandoval* (34 NY2d 371 [1974] [defendant in a criminal proceeding as witness]) and of *People v Ocasio* (47 NY2d 55 [1979] [non-criminal defendant witness]).

The Court of Appeals has stressed that a good faith basis for the impeaching question is required. (*See People v D'Abate*, 37 NY2d 922, 923 [1975] [“it was improper for the prosecutor here on cross-examination to question defendant as to three out-of-State convictions with respect to which the prosecutor . . . had no certificates of conviction”].)

As to what convictions are admissible for purposes of the rule, CPLR 4513, governing civil proceedings, provides:

“A person who has been convicted of a *crime* is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer.” (Emphasis added.)

Impeachment by conviction of a “crime” includes only “a misdemeanor or a felony” (Penal Law § 10.00 [6]) and thus excludes a “violation” and a “traffic infraction.” (*See also Vehicle and Traffic Law § 155* [“A traffic infraction is not a crime and the punishment imposed therefor shall not be deemed for any purpose a penal or criminal punishment and shall not affect or impair the credibility as a witness or otherwise of any person convicted thereof”].)

By its terms, CPLR 4513 permits the judgment of conviction to be admitted into evidence even if the witness admits the conviction. (*See Moore v Leventhal*, 303 NY 534, 538 [1952].) However, extrinsic proof other than the judgment of conviction is not permitted. (*See People v Cardillo*, 207 NY 70, 71-71 [1912] [interpreting former Penal Law § 2444 from which CPLR 4513 is derived].)

CPL 60.40 (1) provides:

“If in the course of a criminal proceeding, any witness, including a defendant, is properly asked whether he was previously convicted of a specified offense and answers in the negative or in an equivocal manner, the party adverse to the one who called him may independently prove such conviction. If in response to proper inquiry whether he has ever been convicted of any offense the witness answers in the negative or in an equivocal manner, the adverse party may independently prove any previous conviction of the witness.”

The term “offense” includes violations as well as felonies and misdemeanors. (Penal Law § 10.00 [1] [“ ‘Offense’ means conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same”].) As in civil proceedings, convictions of traffic infractions may not be used for impeachment purposes. (Vehicle and Traffic Law § 155.)

Unlike a conviction being used to impeach a witness in a civil proceeding, in a criminal proceeding extrinsic evidence of the judgment of conviction is not authorized by CPL 60.40 to prove the conviction unless the witness has denied the conviction or is equivocal in answering the question about the conviction. Furthermore, this statutory provision recognizes that, unlike in civil proceedings, the permissible extrinsic evidence is, in the discretion of the court, not limited to the judgment of conviction.

For the purposes of the rule, in both civil and criminal proceedings a conviction includes a plea of guilty entered pursuant to *North Carolina v Alford* (400 US 25 [1970]). (*People v Miller*, 91 NY2d 372, 378 [1998]; *see also People v Serrano*, 15 NY2d 304 [1965].) In an *Alford* plea, the defendant enters a plea of guilty without admitting factual guilt of the offense but in the face of strong evidence of guilt, often to avoid the consequences of a conviction of a more serious offense. (*Matter of Silmon v Travis*, 95 NY2d 470, 472, 475 [2000].) The Court of Appeals held such a plea is not constitutionally proscribed, and “may generally be used for the same purposes as any other conviction.” (*Id.* at 475.) New York recognizes the validity of an *Alford* plea, and the Court of Appeals has held that it has the same consequences as a plea that admits factual guilt. (*Id.*)

Subdivision (1) (b) (ii) is derived from *People v Sandoval* (34 NY2d 371 [1974]) and its progeny. *Sandoval* requires a pretrial determination as to whether any of the defendant's criminal convictions or prior instances of misconduct may be used for impeachment purposes. The defendant has the burden "of demonstrating that the prejudicial effect of the admission of evidence thereof for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion." (*Id.* at 378.)

Sandoval also set forth the various criteria a court may consider in exercising its discretion as follows:

"Evidence of prior specific criminal, vicious or immoral conduct should be admitted if the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility. Lapse of time, however, will affect the materiality if not the relevance of previous conduct. The commission of an act of impulsive violence, particularly if remote in time, will seldom have any logical bearing on the defendant's credibility, veracity or honesty at the time of trial. . . . To the extent, however, that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand. A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity. On the other hand, crimes or conduct occasioned by addiction or uncontrollable habit, as with alcohol or drugs . . . , may have lesser probative value as to lack of in-court veracity

"Commission of perjury or other crimes or acts of individual dishonesty, or untrustworthiness (e.g., offenses involving theft or fraud, bribery, or acts of deceit, cheating, breach of trust) will usually have a very material relevance, whenever committed. By contrast, questions as to traffic violations should rarely, if ever, be permitted." (*Sandoval*, 34 NY2d at 376-377; *see also People v Williams*, 12 NY3d 726 [2009]; *People v Smith*, 18 NY3d 588 [2012].)

The *Sandoval* procedure is discretionary, rather than mandatory, for a witness who is not the defendant in a criminal proceeding. As stated by the Court of Appeals: "we take the opportunity presented by this case to make explicit that it is inapplicable to witnesses who are not defendants. That is not to say, with respect to a witness who is not a defendant, that a trial court is precluded, in its sound

discretion, from either entertaining an application for a ruling *in limine* on the permissible scope of cross-examination concerning a nonparty's prior misdeeds, or, if it believes it best, from refusing to do so in advance of the time when the question presents itself in regular course." (*Ocasio*, 47 NY2d at 59.)

Subdivision (2). The rule set forth is derived from *People v Duffy* (36 NY2d 258, 264 [1975] ["Although it would be impermissible to use a youthful offender adjudication to impeach, the illegal and immoral acts underlying the adjudication may be employed for such a purpose" (citations omitted)]) and *People v Gray* (84 NY2d 709, 712 [1995] ["It is . . . impermissible to use a youthful offender or juvenile delinquency adjudication as an impeachment weapon, because these adjudications are not convictions of a crime"])). Whether the underlying acts may be used for impeachment is subject to a pretrial *Sandoval* determination pursuant to rule 6.17.

Subdivision (3). See commentary in the Note to rule 6.23 (2).

6.21. Religious Beliefs or Opinions

Evidence of a witness's religious beliefs or opinions is not admissible to impeach or support the witness's credibility.

Note

This rule is derived from substantial Court of Appeals precedent. (See *e.g.* *Matter of State of New York v Andrew O.*, 16 NY3d 841, 844 [2011]; *People v Wood*, 66 NY2d 374, 379 [1985]; *Brink v Stratton*, 176 NY 150, 154-156 [1903].) As stated by the Court in *Wood*: “[A]ny attempt to discredit . . . a witness because of his religious beliefs or for the exercise of his right to affirm the truth of his testimony is improper, because those factors are irrelevant to the issue of credibility.” (*Wood*, 66 NY2d at 378; see also *Saunders v Champlain Bus Corp.*, 263 App Div 683, 684 [3d Dept 1942] [“The basic principle of our jurisprudence is that every citizen regardless of his position, his property, his race or his creed, is entitled to equal and exact justice”].)

This rule does not prevent the admission of evidence of religious beliefs or opinions when such evidence is relevant for a purpose other than attacking or supporting the witness's credibility. (See *e.g.* *Toomey v Farley*, 2 NY2d 71, 82 [1956] [“This . . . is that rare case in which proof of plaintiffs' piety and devotion to the tenets of their religion and of their prominence and activity in their church was pertinent to show the circumstances surrounding (plaintiffs), and as bearing upon the hurtful tendency of the libel, and the general damage to which (they were) exposed” (internal quotation marks omitted)]; *United States v Teicher*, 987 F2d 112, 118 [2d Cir 1993] [inquiry into a witness's religious beliefs “ ‘for the purpose of showing interest or bias because of them’ ” is not barred].)

6.23. Impeachment by Reputation for Untruthfulness and Rebuttal

(1) The credibility of a witness who has given substantive evidence may be impeached by evidence of the witness's reputation for untruthfulness in the community. A witness who testifies to another witness's reputation for untruthfulness may be asked whether the witness has heard of prior specific conduct that bears on the truthfulness of the witness who was the subject of the character testimony.

(2) When a witness's character for truthfulness is impeached by reputation evidence or otherwise, the party who called the witness may, in the discretion of the court, introduce evidence, in rebuttal, of that witness's reputation for truthfulness in the community. In the exercise of its discretion, the court may consider whether permitting the rebuttal evidence may result in confusion or cause the trial to be unduly extended in length. On cross-examination of the rebuttal witness, the witness may be asked whether the witness has heard of prior specific conduct that bears on the untruthfulness of the witness who was the subject of the character testimony.

Note

Subdivision (1). The rule stated in subdivision (1) is derived from *People v Hanley* (5 NY3d 108, 112 [2005]) and *People v Pavao* (59 NY2d 282 [1983]), where the Court of Appeals explained that “ ‘a party has a right to call a witness to testify that a key opposing witness, who gave substantive evidence and was not called for the purposes of impeachment, has a bad reputation in the community for truth and veracity’ ” (*Hanley* at 112, quoting *Pavao* at 290; *see also People v Fernandez*, 17 NY3d 70, 76 [2011]; *People v Hinksman*, 192 NY 421, 432 [1908]). The purpose of this rule is to “ensure[] that the jury is afforded a full picture of the witnesses presented, allowing it to give the proper weight to the testimony of such witnesses.” (*Hanley*, 5 NY3d at 112; *see also Pavao*, 59 NY2d at 290 [the rule provides “an effective means of testing and assessing the credibility of witnesses and reaching a proper verdict”].) The Court has noted that this form of impeachment is limited to a “key witness” or “key prosecution witness.” (*Pavao*, 59 NY2d at 290-291.)

The Court of Appeals has instructed that proof of a witness's untruthful character must be confined strictly to reputation evidence, rather than opinion testimony. (*Hanley*, 5 NY3d at 112; *Carlson v Winterson*, 147 NY 652, 656 [1895].) In this connection, the character witness may not testify to specific acts of untruthful character by the witness being impeached. (*Pavao*, 59 NY2d at 290.) Furthermore, the reputation evidence must also be confined strictly to reputation for "truth and veracity." (*Hanley*, 5 NY3d at 112; *Hinksman*, 192 NY at 435 ["We think that evidence of general bad character, which is nothing but evidence of general reputation, should not be considered competent to decide the issue whether a defendant who testifies in his own behalf is worthy of belief . . ."].)

Guide to New York Evidence rule 8.39 (Reputation Evidence) sets forth the rule on the evidence authorized to prove reputation.

The reputation evidence need not refer to the witness's reputation for untruthfulness at the time of the trial but may refer to a time prior to trial, provided that time is not so remote as to negate the probative value of an inference of a reputation of untruthfulness at the requisite time. (See Guide to NY Evid rule 4.07, Exclusion of Relevant Evidence; *Dollner v Lintz*, 84 NY 669, 669 [1881] ["General reputation is not usually the growth of a day or month, but results in most cases from a course of life or conduct for a period of time. . . . The trial judge may control the range of the inquiry"].)

The Court of Appeals in dictum has approved the practice of asking witnesses called to impeach another whether, from their knowledge of the testified to bad reputation for truthfulness, they would believe the witness about whom they testified under oath. (See *Carlson*, 147 NY at 656; *Elmendorf v Ross*, 221 App Div 376, 377 [3d Dept 1927]; *Spira v Holoschutz*, 38 Misc 754, 755 [App Term 1902].)

The instant rule is simply one specific form of impeachment of a witness for untruthfulness. It doesn't exclude using any other rule of evidence to impeach the untruthful witness. For example, untruthful character can be shown by prior acts of misconduct; criminal convictions; as well as by an untruthful reputation.

Subdivision (2). The rule stated in subdivision (2) is derived from Court of Appeals decisions which hold that when a witness's character for truthfulness is impeached, the party calling the witness may, in the discretion of the court, seek to support the witness's credibility by evidence of the witness's character for truthfulness in the community. (See *e.g.* *Pavao*, 59 NY2d at 290 ["Whether the opposing party may call witnesses to rebut the impeaching witness' statement is a question best left to the discretion of the Trial Judge for it is he who can best assess whether doing so may result in confusion or cause the trial to be unduly extended in length"]; *Derrick v Wallace*, 217 NY 520, 525 [1916] [rebuttal evidence of good reputation]; *Stape v People*, 85 NY 390, 393 [1881].) This rule permits such character witness to testify that the witness has never heard the impeached witness's veracity questioned (see *People v Van Gaasbeck*, 189 NY 408, 419-420 [1907];

People v Davis, 21 Wend 309, 315 [Sup Ct of Judicature 1839]) and that the witness would believe the impeached witness under oath. (*See Adams v Greenwich Ins. Co.*, 70 NY 166, 170-171 [1877].)

The Court of Appeals has emphasized that the “court’s discretion arises only when a party seeks to rebut [the testimony of untruthfulness]. It is at that point that the judge may determine whether the admission of further testimony or the calling of additional witnesses is proper. This assures that the court will not be inundated with competing witnesses that will cause undue delay in bringing a trial to conclusion.” (*Hanley*, 5 NY3d at 114 [citation omitted]; *see also Pavao*, 59 NY2d at 290.)

Reasons for the introduction of rebuttal evidence of reputation evidence for truthfulness include not only when a witness is impeached by reputation for untruthfulness (*Stape*, 85 NY at 393) but also when a witness is impeached by criminal conviction or other instances of misconduct (*Derrick*, 217 NY at 525 [“Evidence of conviction thus impeaches the general character for truth and veracity and may be met by evidence of general good character”]).

Impeachment by proof of prior inconsistent statements, however, does not permit the admission of evidence of the witness’s reputation for truthfulness. (*See Frost v McCarger*, 29 Barb 617, 620, 621 [Sup Ct, Gen Term 1859].) Similarly, the New York courts have held that evidence contradicting a witness’s factual testimony does not permit evidence of the witness’s reputation for truthfulness. (*Kravitz v Long Is. Jewish-Hillside Med. Ctr.*, 113 AD2d 577, 584 [2d Dept 1985] [“contradictions and improbabilities . . . did not constitute an attempt to prove bad character”]; *People v Rector*, 19 Wend 569, 586 [Sup Ct of Judicature 1838]; *see Derrick*, 217 NY at 525.)

6.01. Competency of a Witness to Testify

Every person is competent to be a witness unless the court determines that the person does not have the capacity to warrant the reception of the person's evidence. A person may be competent to be a witness but may not be competent to testify to specific matters as a result of the application of other rules of evidence.

Note

The rule is derived from the New York State Constitution, statutory provisions, and Court of Appeals precedent. (*See e.g.* NY Const, art I, § 3 [“no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief”]; CPLR 4512 [“Except as otherwise expressly prescribed, a person shall not be excluded or excused from being a witness, by reason of his interest in the event or because he is a party or the spouse of a party”]; CPLR 4513 [“A person who has been convicted of a crime is a competent witness”]; CPL 60.20 [1] [“Any person may be a witness in a criminal proceeding unless the court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence”]; *People v Parks*, 41 NY2d 36, 45 [1976] [“The traditional rule still followed in this State, is that all adults are presumed to be competent to testify”]; *People v Fuller*, 50 NY2d 628, 636 [1980] [“Age alone is no testimonial infirmity”]; *Matter of Brown v Ristich*, 36 NY2d 183, 188 [1975] [“All adults are presumed competent to testify”]; *People v Rensing*, 14 NY2d 210, 213 [1964] [“The capacity of a person to be a witness is presumed”].)

The Court of Appeals has rejected arguments that a person is incompetent as a matter of law to testify as a witness when the person has been declared incompetent under the Mental Hygiene Law (*see Brown*, 36 NY2d at 188); has been adjudicated not responsible by reason of mental disease or defect (*see Rensing*, 14 NY2d at 213); or has received an “excessive” fee to testify (*see Caldwell v Cablevision Sys. Corp.*, 20 NY3d 365 [2013]). On the other hand, a person is incompetent as a matter of law to testify to matters that the witness recalled after being hypnotized (*People v Hughes*, 59 NY2d 523, 545 [1983]); and a judge is not competent to testify at a proceeding over which the judge is presiding (*People v Dohring*, 59 NY 374 [1874]).

As to the issue of a witness's competency generally, the Court of Appeals stated in *Brown* that a person is competent to be a witness, if the person

“has the ability to observe, recall and narrate, i.e., events that he sees must be impressed in his mind; they must be retained in his memory; and he must be able to recount them with sufficient ability such that

the presiding official is satisfied that the witness understands the nature of the questions put to him and can respond accordingly, and that he understands his moral responsibility to speak the truth.”

(*Brown*, 36 NY2d at 189.)

When a person’s ability to perceive, recall, narrate or understand the nature of an oath is challenged, the Court of Appeals has charged the court with the responsibility of determining whether the person “has sufficient intelligence to understand the nature of an oath and to give a reasonably accurate account of what he has seen and heard vis-à-vis the subject matter about which he is interrogated.” (*Rensing*, 14 NY2d at 213.) When the court is so satisfied, the person may testify. (*Brown*, 36 NY2d at 189.) In making that determination, the court may properly consider the testimony of physicians or other persons with information that would shed light on the capacity and intelligence of the prospective witness. (*Parks*, 41 NY2d at 46.) As the Court stated in *People v Washor* (196 NY 104, 109-110 [1909]): “There is no rule by which the extent of the intelligence of an adult who is called as a witness can be measured. It must necessarily be left to the good judgment of the trial court to determine whether such a witness offered by a party to an action shall be sworn. The determination of the trial court should be sustained particularly where the testimony is received and the weight to be given to it is left to the jury, unless there is a clear abuse of discretionary power.”

Deficiencies in a witness’s testimonial qualities that are not of such a nature to render the witness incompetent to testify may be admissible for impeachment purposes. (See e.g. *People v Freeland*, 36 NY2d 518, 525-526 [1975]; *People v Webster*, 139 NY 73, 87 [1893].) The witness may be questioned about such deficiencies on cross-examination, and, as such deficiencies are considered to be non-collateral matters, extrinsic evidence is admissible to establish them. (See e.g. *Badr v Hogan*, 75 NY2d 629, 634 [1990]; *Freeland*, 36 NY2d at 526.)

Statutory provisions rendering a person incompetent to testify as a witness or as to certain matters include CPL 60.20 (2) (“Every witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath. A witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath”), incorporated in Guide to New York Evidence rule 6.05; CPLR 4502 (a) (“A husband or wife is not competent to testify against the other in an action founded upon adultery, except to prove the marriage, disprove the adultery, or disprove a defense after evidence has been introduced tending to prove such defense”); and CPLR 4519 (historically known as the dead man’s statute) which, in substance, provides that a person or party interested in the event, or a predecessor in interest, is incompetent to testify to a personal transaction or communication with a deceased or a mentally ill person when such testimony is offered against the representative of the deceased or mentally ill person.

6.02.1 Dead Man's Statute--Incompetency of a Witness to Testify to a Transaction or Communication with a Deceased or Mentally Ill Person (CPLR 4519)

(1) Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his [or her] interest or title by assignment or otherwise, shall not be examined as a witness in his [or her] own behalf or interest, or in behalf of the party succeeding to his [or her] title or interest against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person, or a person deriving his [or her] title or interest from, through or under a deceased person or mentally ill person, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or mentally ill person, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his [or her] own behalf, or the testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication.

(2) A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof.

(3) No party or person interested in the event, who is otherwise competent to testify, shall be disqualified from testifying by the possible imposition of costs against him or the award of costs to him.

(4) A party or person interested in the event or a person from, through or under whom such a party or interested person derives his [or her] interest or title by assignment or otherwise, shall not be qualified for

the purposes of this section, to testify in his [or her] own behalf or interest, or in behalf of the party succeeding to his [or her] title or interest, to personal transactions or communications with the donee of a power of appointment in an action or proceeding for the probate of a will, which exercises or attempts to exercise a power of appointment granted by the will of a donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate.

(5) Nothing contained in this section, however, shall render a person incompetent to testify as to the facts of an accident or the results therefrom where the proceeding, hearing, defense or cause of action involves a claim of negligence or contributory negligence in an action wherein one or more parties is the representative of a deceased or incompetent person based upon, or by reason of, the operation or ownership of a motor vehicle being operated upon the highways of the state, or the operation or ownership of aircraft being operated in the air space over the state, or the operation or ownership of a vessel on any of the lakes, rivers, streams, canals or other waters of this state, but this provision shall not be construed as permitting testimony as to conversations with the deceased.

Note

This rule reproduces CPLR 4519, except for the title of the statute (“Personal transaction or communication between witness and decedent or mentally ill person”) and the addition of subdivision numbers for easier reference.

The statute, known as the “Dead Man’s Statute,” sets forth an exception to the general rule of competency described in Guide to New York Evidence rule 6.01. It provides, in substance, that a person, or party interested in the event, or predecessor in interest is incompetent to testify to a personal transaction or communication with a deceased or mentally ill person when such testimony is offered against the representative of the deceased or mentally ill person.

As explained in *Matter of Zalk* (10 NY3d 669, 678-679 [2008]):

“ ‘The rule of evidence popularly referred to as the Dead Man's Statute’ was enacted by the New York Legislature in 1851, and is ‘widely considered to be the last vestige of the common-law rule which made all interested persons and parties incompetent to testify. After the general rule barring testimony from interested persons was abolished, a new rule was adopted to prevent the living from testifying to certain “personal transactions” with the dead. One of the main purposes of the rule was to protect the estate of the deceased from claims of the living who, through their own perjury, could make factual assertions which the decedent could not refute in court’ (*Matter of Wood*, 52 NY2d 139, 143-144 [1981] [citations omitted]).”

“Thus, when death or mental illness seals the lips of one of the parties to a transaction, the Dead Man's Statute seeks to achieve adversarial balance by sealing the lips of the surviving party. Transactions or communications between the interested witness and the decedent or mentally ill person must therefore be proven by means other than the testimony of an interested witness, such as documentary evidence and the testimony of disinterested witnesses” (Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4519:1).

Subdivision (1) of the rule sets forth the basic components of the Dead Man’s Statute. The remaining subdivisions address issues arising from application of the statute. For purposes of this note, CPLR 4519, as recited in subdivision (1) of the rule, is broken down into the following five parts:

- The type of proceeding to which the rule applies
- The witness whose testimony the rule precludes
- The party or person the witness is precluded from testifying against
- The substance of the forbidden testimony
- An exception to the rule

The note concludes with a discussion of procedural issues and how the protection of the statute may be waived.

The type of proceeding to which CPLR 4519 applies

CPLR 4519 does not apply in criminal proceedings.

CPLR 4519, as recited in subdivision (1) of the rule, states it applies to: “the trial of an action or the hearing upon the merits of a special proceeding.”

Thus, CPLR 4519 applies in all civil actions and has been invoked in administrative hearings (*Matter of Zalk*, 10 NY3d 669 [2008]). It does not apply to pretrial discovery under CPLR article 31 or other preliminary matters that do not

result in a decision on the merits (*Matter of Van Volkenburgh*, 254 NY 139 [1930]). Admission of such testimony at these early stages does not constitute a waiver of the rule at trial. (*Id.*)

In Surrogate's Court, the words, "hearing upon the merits of a special proceeding" includes all proceedings "which have for their immediate object an affirmative determination affecting the rights of any party thereto" (*Matter of Christie*, 167 Misc 484, 487 [Sur Ct, Kings County 1938]).

CPLR article 31 applies in Surrogate's Court, but there are additional discovery proceedings specifically applicable in that court in which testimony forbidden by CPLR 4519 may be allowed without creating a waiver of the statute in future hearings and proceedings on the merits. The statute does not apply in pretrial discovery brought under SCPA 1404 (examination of the attesting witness and or attorney drafter); 2211 (examination of an accounting fiduciary); and 2102 (examination of fiduciary dealing with the assets of the estate). In a discovery proceeding under SCPA 2103 (proceeding by fiduciary to discover property withheld or obtain information) a witness's testimony about communications with a decedent is not deemed a waiver of CPLR 4519 (SCPA 2104 [6]). Once an answer asserting ownership is interposed in a discovery proceeding, the proceeding is no longer in an "inquisitorial phase," but becomes a trial on the merits to which CPLR 4519 applies (*Matter of Detweiler*, 121 Misc 2d 453 [Sur Ct, Cattaraugus County 1983]).

CPLR 4519 has been held to apply in an application for a preliminary injunction in which the court decides a party's likelihood of success on the merits (*Matter of Tschernia*, 18 Misc3d 1114[A], 2007 NY Slip Op 52510[U] [Sur Ct, Nassau County 2007]).

The affidavit of an interested person, incompetent to testify under the statute, may not be used to support a motion for summary judgment, but it may be used to defeat such a motion by raising an issue of fact (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]).

The witness whose testimony the rule precludes

By CPLR 4519, as recited in subdivision (1) of the rule, "a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his [or her] interest or title by assignment or otherwise, shall not be examined as a witness in his [or her] own behalf or interest, or in behalf of the party succeeding to his [or her] title or interest."

The Court of Appeals has explained that the "true test of the interest of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest

uncertain, remote, or contingent” (*Hobart v Hobart*, 62 NY 80, 83 [1875]). For example, just before testifying, an interested witness who was then incompetent to testify became disinterested and competent by transferring to his sister stock that had created his interest. He no longer had a “present” interest in the proceeding (*Friedrich v Martin*, 294 NY 588 [1945]). It has been held that the interest must be financial (*Tworowski v Tworowski*, 181 Misc 2d 1038 [Sup Ct, Kings County 1999]).

Generally, the executor of the estate is not disqualified from testifying under the Dead Man’s Statute. An executor’s commissions are fixed by statute and the fact that the executor will receive them does not make him financially interested in the outcome (*Matter of Wilson*, 103 NY 374 [1886]). If there is, however, a bequest to the executor in the will, or if he or she has a claim against the estate, the executor will be considered an interested party and barred from testifying (*Matter of Green*, 247 App Div 540 [4th Dept 1936]).

Relationship through blood or marriage to an interested party standing alone does not make the relative an interested party (*Laka v Krystek*, 261 NY 126 [1933]).

An interested person or party may not be examined “as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest” (CPLR 4519; *Rousseau v Rouss*, 180 NY 116 [1904]). The witness may testify, however, against his or her own interest or successor’s interest (*Matter of Tremaine*, 156 AD2d 862 [3d Dept 1989]). When respondents are called by their adversary, they are not testifying in their own interest and their testimony is not barred by the statute (*Matter of Hauck*, NYLJ, Dec. 23, 1992 at 25, col 3 [Sur Ct, NY County], *aff’d* 200 AD2d 405 [1st Dept 1994]). The predecessor in interest of the interested party is also barred from testifying by this section. (See *Abbott v Doughan*, 204 NY 223 [1912] for a discussion of the rationale behind this provision.)

The party or person the witness is precluded from testifying against

The interested person or party may not be called to testify in his or her own behalf or interest “against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person, or a person deriving his [or her] title or interest from, through or under a deceased person or mentally ill person, by assignment or otherwise” (CPLR 4519 [Guide to NY Evid rule 6.02.1 (1)]). These individuals are often referred to as the “protected party.” They have standing to raise the objection (and also the ability to waive it). (See section on waiver.)

The decedent normally is easily identified, but a missing party not yet determined to be dead may not be protected under the statute (*Jacobs v Stark*, 83 Misc 2d 605, 608 [Civ Ct, NY County 1975] [“the granting of temporary administration to conserve the estate of an absentee is an insufficient adjudication of death to satisfy application of the unambiguous exclusionary statutory rule of CPLR 4519”]).

By the statute, a witness must testify against an individual specified in the statute for the witness's testimony to be barred. As a result, for example, an attorney testifying in his own behalf in an attorney discipline hearing was not prohibited from testifying about his deceased client's instructions to retain the monies remaining in the attorney's escrow account from the sale of her property, as payment for legal services, because he was not testifying against the executor, administrator or survivor of his client (*Matter of Zalk*, 10 NY 3d 669 [2008]). In so ruling, the Court rejected the holding of the Appellate Division that the attorney's testimony was against the decedent's surviving daughters because they stood to be deprived of the monies in the escrow account (*Matter of Zalk*, 45 AD3d 42 [1st Dept 2007]).

Historically, the Dead Man's Statute protected a person who had been declared by a court to be a "lunatic" and for whom the court had appointed a committee. In *Clark v Dada* (183 App Div 253, 262 [4th Dept 1918]), the Appellate Division held that a person for whom a committee had not been appointed was not protected from the testimony of an interested party even though he had been adjudged insane by a county judge and committed to a hospital for treatment. The Court discussed the many forms of mental illness and noted that, unlike deceased persons, the lips of persons committed to a hospital may not be forever sealed, and they may be able to dispute testimony against them. There was one dissent, arguing that it had been established, at least presumptively, that the hospitalized person was a "lunatic." While the majority's solution (no committee, no protection) is draconian and no longer the law, it presages the difficulties future courts would encounter in determining who is protected from testimony of an interested party by reason of mental illness.

The term "committee of a mentally ill person" remains in the Dead Man's Statute, although in 1993, with the enactment of article 81 of the Mental Hygiene Law (Proceedings for Appointment of a Guardian for Personal Needs or Property Management), a "guardianship system" replaced the law establishing a "committee of a mentally ill person." In its legislative findings, the legislature found that a "committee, with its judicial finding of incompetence and the accompanying stigma and loss of civil rights, traditionally involves a deprivation that is often excessive and unnecessary" (Mental Hygiene Law § 81.01). The goal of the Mental Hygiene Law is to find the least restrictive form of intervention needed for the protection of the person for whom a guardian is sought. For example, the order could restrict the guardian to handling the financial affairs for the alleged incapacitated person. It is possible for the alleged incapacitated person to consent to the appointment of a guardian. There are several provisions for the appointment of a guardian, none of which necessarily require a finding of mental illness (see SCPA arts 17 [Guardians and Custodians], 17-A [Guardians of Persons Who Are Intellectually Disabled and Developmentally Disabled]; see CPLR 1202 [Appointment of Guardian Ad Litem]).

Thus, an objection pursuant to CPLR 4519 brought by an article 81 guardian or any guardian authorized by the law of this state may not end the inquiry into whether the incapacitated party is a protected party because of mental illness. Although the guardian should have standing to raise that objection, the question of whether or not the person is mentally ill for purposes of CPLR 4519 may *yet* have to be resolved by the court in which the objection is raised. Allegedly mentally ill persons still may be competent to testify rather than have their lips sealed. (See Guide to NY Evid rule 6.01, Note, second paragraph *et seq.*, for discussion of mental illness and competency to testify; Jerome Prince, Richardson on Evidence § 6-126 at 338 [Farrell 11th ed 1995] [“The question (of the applicability of CPLR 4519) is further complicated by the fact that mental illness does not, per se, render one incompetent as a witness. See § 6-105. Perhaps the applicability of the statute should depend upon the testimonial competency of the mentally ill person. If the mentally ill person is competent to testify, there is no need to invoke the rationale of the statute, i.e., to create an equality of disadvantage by silencing one party when the other has been silenced by mental illness or death”].)

In a case decided after the enactment of article 81, *Tworowski v Tworowski* (181 Misc 2d 1038 [Sup Ct, Kings County 1999]), the court permitted co-guardians of the person and property appointed by Supreme Court to claim the protection of the Dead Man’s Statute against a claim that the alleged protected person was not mentally ill. The court apparently did not rely entirely on the order’s underlying determination of mental illness because the court made its own separate finding of mental illness. The court discussed the prior history of the “committee of a mentally ill person,” noting in particular that a

“ ‘[c]ommittee’ is not a term which has been interpreted strictly in decisions on the applicability of CPLR 4519. Courts have decided that the privilege may apply to the judicially appointed guardian ad litem of a person hospitalized for mental illness where a committee did not exist. (*Matter of Musczak*, 196 Misc 364 [Sur Ct, NY County 1949]; *Matter of Harkavy*, 184 Misc 742 [Sur Ct, NY County 1945].) In addition, Vincent C. Alexander notes that ‘[a]lthough expansion of the scope of CPLR 4519 probably should be resisted as a general matter, on this issue the purpose of the statute is surely served by a liberal reading of the term “committee.” ’ (Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4519:3, at 173.) The husband’s mental insufficiencies are well documented, including the significant impairment of his memory. The statute is designed to protect the interests of a person such as the husband and his coguardians and they are entitled to its benefit.” (*Tworowski v Tworowski* at 1040.)

The protection from testimony by an interested party or person concerning a personal transaction or communication extends to “a person deriving his title or interest from, through or under a deceased person or mentally ill person.” For

example, in *Pope v Allen* (90 NY 298 [1882]), the Court held that the Dead Man's Statute protected both the deceased conveyor of title to land ("from" whom the land was conveyed to the interested party) and the deceased person who had conveyed to him ("through" whom it was conveyed) and "under" whom it was conveyed by both of the predecessors in title.

The statute has been held to protect a successor trustee from testimony by interested persons concerning transactions with the original trustee, now deceased (*Brundige v Bradley*, 294 NY 345 [1945]).

In *Ward v New York Life Ins. Co.* (225 NY 314 [1919]), the Court held that a beneficiary of an insurance policy, named by the insured, does not claim "from, through or under" the insured because the deceased insured did not have an interest in the proceeds of the policy during his lifetime and, therefore, the claim of the beneficiary was from the insurance company not the decedent. This decision prompted much criticism but has never been reversed. (See Alexander, Practice Commentaries, CPLR C4519:3.)

In *Poslock v Teachers' Retirement Bd. of Teachers' Retirement Sys.* (88 NY2d 146 [1996]), the Court affirmed an Appellate Division ruling that distinguished *Ward* because the retirement benefits in question (with exception of the life insurance proceeds) belonged to the decedent during his lifetime and he had the ability to manage them. The protection of the statute was therefore available to prevent an interested party from testifying about communications with the decedent about the lump sum benefits from the pension. In keeping with *Ward*, the Court also held that the protection of the statute did not apply to communications concerning the life insurance portion of the death benefits.

The substance of the forbidden testimony

Subdivision (1) dictates that the interested person or party shall not be examined "concerning a personal transaction or communication between the witness and the deceased person or mentally ill person."

In *Clift v Moses* (112 NY 426, 435 [1889]), the Court explained:

"It has been held with general uniformity that the section prohibits not only direct testimony of the survivor that a personal transaction did or did not take place, and what did or did not occur between the parties, but also every attempt by indirection to prove the same thing, as by negating the doing of a particular thing by any other person than the deceased, or by disconnecting a particular fact from its surroundings and permitting the survivor to testify to what on its face may seem an independent fact, when in truth it had its origin in or directly resulted from a personal transaction."

Griswold v Hart (205 NY 384, 395 [1912]) excluded “the testimony of an interested witness to any knowledge which he has gained by the use of his senses from the personal presence of the deceased.” (See *Hadley v Clabeau*, 140 Misc 2d 994 [Sup Ct, Cattaraugus County 1988], *affd* 161 AD2d 1141 [4th Dept 1990] [in a dispute over a faulty deed description, the widow of deceased-seller was barred by statute from testifying to her observation of her husband taking measurements along a natural boundary as evidence of the property he intended to convey].)

On the other hand, in an action against the representative of a deceased joint tenant of joint savings accounts the Appellate Division held that the surviving joint tenant could testify to her intent in opening the account. The Court found that her testimony was to the fact of her intent, not a communication with the decedent (*Brezinski v Brezinski*, 84 AD2d 464 [4th Dept 1982]).

An exception to the rule

Testimony is barred “except where the executor, administrator, survivor, committee or person . . . deriving title or interest is examined in his own behalf, or the testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication” (CPLR 4519; Guide to NY Evid rule 6.02.1 [1]).

Based on that exception, the Appellate Division has ruled that an interested party may introduce the testimony of the decedent given at a pretrial deposition and then testify at trial to the matters described by the decedent (*Tepper v Tannenbaum*, 65 AD2d 359 [1st Dept 1978]; *Ward v Kovacs*, 55 AD2d 391 [2d Dept 1977]).

In addition to the introduction of a pretrial deposition, the exception for the introduction in evidence of the “testimony of the mentally ill person or deceased person . . . concerning the same transaction or communication” may allow the “use of an interested witness’s testimony from a former proceeding or deposition in which the witness and the decedent were adverse parties and the subject matter was essentially the same, thereby insuring that an adequate opportunity for relevant cross-examination of the witness was afforded. Such former testimony is hearsay, but it may fall within one or another hearsay exception for the testimony of a witness who has become unavailable for some reason, here the incompetency of the witness due to the adverse party’s death.” (Alexander, Practice Commentaries, CPLR C4519:5 [b].)

Unfortunately, a witness who is incompetent to testify pursuant to the Dead Man’s Statute is not listed, among witnesses considered unavailable to testify, in CPLR 4517, as there required for the admission of former testimony in a civil proceeding, or in CPLR 3117, as there required for the admission of depositions in a civil proceeding. Both statutes, however, allow an application to the court for a finding of “exceptional circumstances” to permit the admission of otherwise

inadmissible hearsay testimony. Until 2000, CPLR 4517's list included incapacity under the Dead Man's Statute in the list, but it was inadvertently omitted when the statute was amended. Another possible route around the hearsay problem is the common-law rule on the admissibility of prior testimony of an unavailable witness, which has been held to coexist with the statutory rule (*Fleury v Edwards*, 14 NY2d 334 [1964]). No case, however, holds that incapacity under the Dead Man's Statute was part of the common law (see Guide to NY Evid rule 8.36, Prior Testimony in a Civil Proceeding).

Subdivision (2) of the rule exempts from application of the statute a stockholder or officer of a banking corporation that might be considered an interested party. This exemption is limited to stockholders in banking corporations. A stockholder of a corporation other than a banking corporation is considered a person interested in the event and may be barred from testifying against a protected party (*Friedrich v Martin*, 294 NY 588 [1945]; *Andrews v Reiners*, 112 App Div 378 [2d Dept 1906]).

Subdivision (3) of the rule states that the possible imposition of costs or the award of costs does not make a witness "interested" under the statute.

Subdivision (4) of the rule prohibits an "interested party," as described in the subdivision, from testifying to "personal transactions or communications with the donee of a power of appointment in an action or proceeding for the probate of a will, which exercises or attempts to exercise a power of appointment granted by the will of a donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate." This 1935 addition to the Dead Man's Statute was passed by the legislature to address issues raised in *Matter of Carroll* (153 Misc 649 [Sur Ct, NY County 1934], *decree mod* 247 App Div 11 [1st Dept 1936], *mod* 274 NY 288 [1937]). As explained by Alexander in the Practice Commentaries to CPLR 4519:

"The *Carroll* court observed that without statutory modification, persons who would take certain property under the terms of A's will in the event of B's invalid exercise of a power of appointment given by A lacked standing to bar testimony by B's appointees regarding their dealings with the now-deceased B on the issue of the validity of B's exercise of the power. The persons who would take in the case of default were deemed to derive their property from A, rather than B. This created the potential for jury confusion and inconsistent results in cases in which appointees might be named in B's will as beneficiaries of property not covered by the power of appointment. With respect to the same will, such appointee-beneficiaries could testify to transactions with B on the issue of the validity of the exercise of the power of appointment but not on the issue of the validity of the will in general. The statutory language changes this result by prohibiting interested witnesses from testifying in their

own behalf with respect to personal transactions or communications with the now-deceased donee of a power of appointment in probate proceedings involving the will in which the power of appointment was exercised” (CPLR C4519:3).

Subdivision (5) of the rule covers the type of testimony (“facts of an accident or the results therefrom”) by a witness in personal injury or wrongful death cases that does not render the witness incompetent to testify under the statute (*Rost v Kessler*, 267 App Div 686, 687 [4th Dept 1944]). In *Rost*, the “fact” was the identity of the driver of the car and the Appellate Division held that the defendant should have been permitted to testify that the decedent was the driver since the testimony did not require the recitation of a communication with the decedent.

Procedural issues

The party objecting to the competency of a witness under the Dead Man’s Statute has the burden of proving incompetency (*Stay v Horvath*, 177 AD2d 897, 899 [3d Dept 1991] [“the party claiming that a witness is a person ‘interested in the event’ (CPLR 4519) carries the burden of proving that the witness’s testimony is subject to this statutory exclusion” (citations omitted)]; *Matter of Mead*, 129 AD2d 1008 [4th Dept 1987]).

The objection must be to the competency of the witness, not to the competency of the testimony because the testimony may be relevant, but the witness not competent to give that testimony (*Hoag v Wright*, 174 NY 36, 39 [1903]; *Matter of Farley*, 91 Misc 185, 196 [Sur Ct, Clinton County 1915]).

An objection to the competency of a witness must be timely. The testimony of the witness, given without objection, will not be stricken (*Matter of Maijgren*, 193 Misc 814 [Sur Ct, Monroe County 1948]).

An objection must be made to each transaction; but failure to object to one transaction does not bar objections to subsequent transactions (*Matter of Johnson*, 17 Misc 2d 489, 490 [Sur Ct, NY County 1959] [“The fact that objection had not been made earlier in the testimony and the consequent waiver of the incompetency of the witness at that time did not extend to later testimony and did not preclude objection to further transactions”]).

CPLR 4519 does not bar documentary evidence against a deceased’s estate but the evidence must be authenticated by a non-interested party (*Acevedo v Audubon Mgt.*, 280 AD2d 91, 95 [1st Dept 2001]).

By a separate statute, in a right-of-election case, while a spouse may not testify in support of his or her right of election filed against the estate, the spouse is not disqualified from testifying to his or her contribution to jointly held property that is claimed as a testamentary substitute (EPTL 5-1.1 [b] [3]; 5-1.1-A [b]).

Waiver

A “protected party” may waive the provisions of CPLR 4519 only at a trial of an action or hearing on the merits of a special proceeding (*Matter of Van Volkenburgh*, 254 NY 139 [1930]). The “protected party’s” waiver may be made in any one of five ways:

1. by expressly stating a waiver;
2. by failing to object (*Ralley v O’Connor*, 71 App Div 328 [1st Dept 1902]);
3. by introducing prior testimony of the decedent or mentally ill person about the transaction or communication (CPLR 4519);
4. by testifying in his or her behalf about the transaction or communication CPLR 4519. In this instance, however, the waiver is limited. “By introducing such testimony, the [protected party] does not ‘open the door’ to any or all personal transactions with the decedent. Rather, the waiver of the statute is limited to the ‘personal transaction’ in issue. (*Martin v Hillen*, 142 NY 140.)” (*Matter of Wood*, 52 NY2d at 145); or
5. by examining the witness regarding the transaction or communication (*Nay v Curley*, 113 NY 575 [1889]; *Matter of Dunbar*, 139 Misc 2d 955 [Sur Ct, Bronx County 1988]; *Matter of Smith*, 84 AD2d 664 [3d Dept 1981]).

References

For further commentary on the intricacies of the Dead Man’s Statute, see Alexander, Practice Commentaries CPLR 4519 and Prince, Richardson on Evidence § 6-121 *et seq.* (Farrell 11th ed 1995). For a discussion of the Dead Man’s Statute as it is specifically applied in Surrogate’s Court proceedings, see 2 Harris, New York Estates: Probate Administration and Litigation (6th ed Thomson-Reuters) and Warren’s Heaton, Surrogate’s Court Practice (7th ed LexisNexis).

6.02 Competency of a Previously Hypnotized Witness

(1) Given that statements made under hypnosis are inherently unreliable:

(a) a witness's testimony as to events the witness recalls as a result of hypnosis is inadmissible;

(b) a witness's statement made under hypnosis is, as a general rule, inadmissible for the purposes of impeachment; and

(c) a party's admission induced by hypnosis is inadmissible.

(2) A witness's testimony as to events the witness recalls prior to hypnosis is admissible when, at a pretrial hearing, the proponent of the witness establishes by clear and convincing proof that the testimony of the witness as to his or her prehypnotic recollection will be reliable and that there has been no substantial impairment of the defendant's right of cross-examination. In particular, the trial court must determine the extent of the witness's prehypnotic recollection (which would establish the boundaries of admissible testimony) and whether the hypnosis was so impermissibly suggestive as to require exclusion of in-court testimony with respect to such prehypnotic recollection. Evidence, testimonial and documentary, which is material to the pretrial determination should be received at the hearing, without rigid application of the hearsay rule.

(3) If the witness is held to be competent to testify, the party affected by the testimony may introduce proof with respect to the hypnotic procedures followed as well as expert testimony concerning the potential effect of the hypnosis on the witness's recollections.

Note

Subdivision (1) is derived from Court of Appeals decisions.

Subdivision (1) (a) sets forth the holding of *People v Hughes* (59 NY2d 523, 545 [1983] [“the defendant is entitled to a new trial because the trial court should not have permitted the victim to testify to events recalled after the hypnotic sessions”])).

Subdivision (1) (b) sets forth the holding of *People v Hults* (76 NY2d 190, 192 [1990] [“hypnotic statements are, as a general rule, also inadmissible for purposes of impeachment”])). Thus far, there has been no exception made to the “general rule.”

Subdivision (1) (c) sets forth the holding of *People v Schreiner* (77 NY2d 733, 734 [1991] [a defendant’s statement which had been “hypnotically induced” during a psychiatric examination “in which he confessed to the murder . . . was improperly received in evidence against him”])).

Subdivision (2) is derived from *Hughes*, which held that the “pretrial use of hypnosis does not necessarily render the witness incompetent to testify to events recalled prior to being hypnotized” (*Hughes* at 545).

A pretrial hearing, however, is required to determine “the extent of the witness’s prehypnotic recollection (which would establish the boundaries of admissible testimony) and whether the hypnosis was so impermissibly suggestive as to require exclusion of in-court testimony with respect to such prehypnotic recollection” (*Hughes* at 546).

At that hearing, “evidence, testimonial and documentary, which is material to the determination thereof should be received . . . without rigid application of the hearsay rule” (*Hughes* at 547). The burden of proof rests upon the People to demonstrate by “clear and convincing proof that the testimony of the witness as to his or her prehypnotic recollection will be reliable and that there has been no substantial impairment of the defendant’s right of cross-examination” (*Hughes* at 547; see *People v Tunstall*, 63 NY2d 1, 8 [1984] [the defendant was entitled to a hearing on his claim that “the victim’s confidence in her prehypnotic recollections, such as her identification of defendant, may have been artificially enhanced by the hypnotic process, thereby impairing defense counsel’s ability to conduct a meaningful cross-examination of her”])).

On the remand of *Hughes* from the Court of Appeals, a hearing was conducted; the hearing was, however, ultimately found to be deficient for failure to adequately explore the propriety of admitting the prehypnotic testimony of the witness. The court “heard no expert testimony whatsoever on the suggestiveness of the hypnotic procedures that had been used . . . Moreover, although the court viewed that portion of a videotape showing the victim’s interview, prior to hypnosis, about

her prehypnotic recollection, the court did not view that portion covering the hypnotic session itself” (*People v Hughes*, 72 NY2d 1035, 1037-1038 [1988]).

Subdivision (3) is based on the following holding of *Hughes*:

“If the witness is held to be competent to testify, the defendant, of course, has the option at trial of introducing proof with respect to the hypnotic procedures followed as well as expert testimony concerning the potential effect of the hypnosis on the witness’s recollections. And since there is general agreement in the scientific community that a witness who has been hypnotized usually acquires some measure of confidence in events recalled under hypnosis, the court should charge the jury to that effect if the defendant requests it” (*People v Hughes*, 59 NY2d 523, 547-548 [1983]; see CJI2d[NY] General Applicability, Witness Underwent Hypnosis).

6.03. Exclusion of Witnesses

(1) Subject to subdivision two, a court may exclude a witness from a courtroom prior to the time the witness is anticipated to testify in that proceeding.

(2) A court may not exclude from the courtroom:

(a) a party in a civil trial and a defendant in a criminal trial, unless the party or defendant has waived or forfeited the right to be present;

(b) when a party is not a natural person, an officer or employee of the party designated as its representative by its attorney; or

(c) a person whose presence is shown by a party to be essential to the presentation of the party's case.

Note

Subdivision (1). The Court of Appeals has approved the exclusion of witnesses from the courtroom prior to their testimony. (*People v Cooke*, 292 NY 185, 190-191 [1944] [“It is hard for us to understand . . . why such a motion (to exclude witnesses) should not be granted as of course”]; *see also Levine v Levine*, 56 NY2d 42, 49 [1982].) As further explained by the Appellate Division, First Department, in *Philpot v Fifth Ave. Coach Co.* (142 App Div 811, 813 [1st Dept 1911]): “While such an application is in the discretion of the court, it is often extremely important that witnesses testifying to an [occurrence] of this character should be examined without having heard the testimony of other witnesses. What is important is that each person’s impression of the occurrence should be stated—not suggested or colored by what he has heard others testify to, and for the court to refuse a request by counsel on either side to exclude all witnesses from the court room except the one under examination closely approaches an abuse of discretion.”

The Court of Appeals has not addressed the corollary issues of whether a court may direct an attorney not to give a prospective witness a transcript of the testimony of a witness who has testified, or whether a court may direct a witness who has testified not to discuss his or her testimony with a prospective witness.

Subdivision (2). Subdivision (2) covers three classes of witnesses.

Subdivision (2) (a) recognizes that a defendant in a criminal proceeding has a statutory right (as well as a constitutional right) to be present at “trial” unless that right has been waived or forfeited. (CPL 260.20; *People v Dokes*, 79 NY2d 656, 659-660 [1992] [“A defendant's presence at trial is required not only by the Confrontation and Due Process Clauses of the Federal and State Constitutions (*see*, US Const 6th, 14th Amends; NY Const, art I, §6), but also by CPL 260.20”]; *People v Byrnes*, 33 NY2d 343, 349 [1974] [“the right may be lost where the defendant engages in misconduct so disruptive that the trial cannot properly proceed with him in the courtroom”].) The statutory term “trial” incorporates “both any ‘material stage’ of the trial [*People v. Turaine*, 78 N.Y.2d 871, 872, 573 N.Y.S.2d 64, 577 N.E.2d 55 (1991)], as well as any ‘ancillary proceeding’ for which the defendant's presence is ‘substantially and materially related to the ability to defend,’ including proceedings at which the defendant ‘can potentially contribute,’ or at which the defendant's presence would ensure ‘a more reliable determination’ of the proceeding. *People v. Roman*, 88 N.Y.2d 18, 25-26, 643 N.Y.S.2d 10, 665 N.E.2d 1050 (1996).” (William C. Donnino, Practice Commentaries, McKinney’s Cons Laws of NY, Book 11, CPL 260.20.)

The Appellate Division, Second Department, has recognized a party’s constitutional right to be present in a civil trial. (*Carlisle v County of Nassau*, 64 AD2d 15, 18 [2d Dept 1978] [“(T)he fundamental constitutional right of a person to have a jury trial in certain civil cases includes therein the ancillary right to be present at all stages of such a trial, except deliberations of the jury Such right is basic to due process of law”].) The civil party’s right to be present may be waived or forfeited. (*See Ajaeb v Ajaeb*, 276 App Div 1094 [2d Dept 1950], *affd* 301 NY 605 [1950].)

Mental Hygiene Law § 81.11 (c) provides that a hearing to determine whether the appointment of a guardian is necessary for an alleged incapacitated person “must be conducted in the presence of the person alleged to be incapacitated,” with only limited exceptions provided.

Subdivision (2) (b) is derived from long-established decisional law. (*See e.g. Perry v Kone, Inc.*, 147 AD3d 1091, 1094 [2d Dept 2017]; *Sherman v Irving Mdse. Corp.*, 26 NYS2d 645, 645 [App Term, 1st Dept 1941] [“Great caution should be exercised in considering an application to exclude the officers of corporations, or a representative in charge of the matters litigated”].)

Subdivision (2) (c) is derived from Court of Appeals precedent which holds that “ ‘a person whose presence is shown by a party to be essential to the presentation of the party’s cause’ ” is generally exempt from the exclusion requirement. (*People v Santana*, 80 NY2d 92, 99-101 [1992]; *see also Perry*, 147 AD3d at 1094; *Carlisle*, 64 AD2d at 20.) An example of a person whose presence is shown by a party to be essential to the presentation of the party’s cause would be an expert of a party who needs to hear the testimony of the other party’s expert in

order to present rebuttal testimony. (See *Santana*, 80 NY2d at 99-101; *R.J. Cornelius, Inc. v Cally*, 158 AD2d 331, 332 [1st Dept 1990].)

6.04. Interpreter

A court shall appoint an interpreter when necessary for a witness or a party to communicate or be understood or for a party to understand the proceedings, and, upon appointment, the interpreter must give an oath or affirmation to make a true translation.

Note

The portion of the rule dealing with the appointment of an interpreter is in part derived from the Uniform Rules for Trial Courts, which require that a court appoint an interpreter “[i]n all civic and criminal cases, when a court determines that a party or witness, or an interested parent or guardian of a minor party in a Family Court proceeding, is unable to understand and communicate in English to the extent that he or she cannot meaningfully participate in the court proceedings.” (Uniform Rules for Trial Cts [22 NYCRR] § 217.1 [a].)

A court through its administrative arm may employ qualified interpreters for assignment as necessary and, upon doing so, have them take an oath or affirmation to make a true translation. (See Judiciary Law §§ 386-390.) If the interpreter is not an employee of the court and has not been given the oath or affirmation to make a true translation, the court must swear the interpreter. See *People v Fisher* (223 NY 459, 464-466 [1918]), wherein the Court of Appeals noted that an interpreter upon his or her appointment by the court must be sworn to interpret accurately. Nothing, including this rule or rule 6.02, requires or permits the interpreter to be sworn as a witness.

A court has the discretion to determine whether the interpreter is qualified to serve and whether an interpreter, once appointed, is biased in favor of a party or witness, is not effectively communicating with a witness, or is not accurately conveying what a witness is saying, thereby necessitating removal. (See *People v Lee*, 21 NY3d 176, 179 [2013]; *People v Pavao*, 59 NY2d 282, 293 [1983].)

**6.05. Oath or Affirmation for a Witness to Testify
(CPLR 2309; CPL 60.20 [2]; Family Court Act § 152 [b])**

(1) Except as otherwise provided in subdivision two and subdivision three, before testifying, a witness must declare that he or she will testify truthfully by oath or affirmation administered in a form calculated to awaken the conscience and impress the mind of the witness in accordance with that witness's religious or ethical beliefs.

(2) In a criminal proceeding:

(a) A witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath.

(b) A witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath.

(c) A witness understands the nature of an oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished.

(d) A witness ineligible to testify under oath pursuant to paragraph (a) or (b) may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof.

(3) In a Family Court proceeding, a judge may dispense with the formality of placing a minor under oath before taking the minor's testimony.

Note

Subdivision (1). This rule is derived from Court of Appeals precedent that holds that requiring a witness to take an oath or make an affirmation is a “traditional safeguard[] to truthfulness” (*Matter of Hecht v Monaghan*, 307 NY 461, 474 [1954]). The requirement of an oath or affirmation, the Court has observed, serves two functions: “(1) to awaken the witness to his moral duty to tell the truth, and (2) to deter false testimony by providing a legal ground for perjury prosecutions” (*see Matter of Brown v Ristich*, 36 NY2d 183,189 [1975]). The form of the oath or affirmation as stated in this rule is taken substantially verbatim from CPLR 2309 (b).

The choice whether to take an oath or affirmation rests with the witness. As to this choice, the Court of Appeals has observed that as a general proposition “any attempt to discredit or otherwise penalize a witness because of his . . . exercise of his right to affirm the truth of his testimony is improper” (*People v Wood*, 66 NY2d 374, 378 [1985]).

Whether the witness has sufficient intelligence to understand the nature of an oath or affirmation raises an issue of competency to be decided by the court before the witness is sworn (*see* Guide to NY Evid rule 6.01 and Note).

Subdivision (2). This rule restates verbatim CPL 60.20 (2). Of note, CPL 60.20 (3) provides a defendant may not be convicted of an offense solely upon unsworn evidence given pursuant to CPL 60.20 (2).

Subdivision (3). This rule is taken substantially verbatim from Family Court Act § 152 (b). Appellate Division decisions hold that this statutory provision applies to Family Court proceedings that are civil in nature (*see e.g. Matter of Danielle M.*, 151 AD2d 240 [1st Dept 1989]; *Matter of Elizabeth D.*, 139 AD2d 66 [4th Dept 1988] [child protective proceedings]). In quasi-criminal proceedings in Family Court, however, the Appellate Division has held that CPL 60.20 (3)’s requirement of corroboration of an unsworn witness applies (*see Matter of Wade H.*, 41 AD2d 817 [1st Dept 1973]; *Matter of Steven B.*, 30 AD2d 442, 444 [1st Dept 1968] [juvenile delinquency proceedings]).

6.10. Scope & Manner of Examination of Witnesses

(1) Subject to subdivisions two and three, as well as rule 4.01 (Relevant Evidence) and a defendant's rights to confrontation and to present a defense in a criminal proceeding, the scope and manner of examining witnesses is committed to the sound discretion of the court.

(2) Cross-examination of a witness should ordinarily be limited to the subject matter of the direct examination and matters affecting credibility. The court may in its discretion, however, permit examination into additional matters and may be required to do so in a criminal case.

(3) Redirect and re-cross-examination of a witness is limited to the matters covered on the witness's cross-examination or redirect examination, respectively.

(4) Leading Questions.

(a) A court should not permit leading questions during the direct examination of a witness, except a court may permit leading questions, for example, with respect to introductory matters; examination of a child; expediting a proceeding as to matters that are not in dispute; when necessary to clarify a witness's testimony; when examining a witness about a prior inconsistent statement; or as provided in paragraph (b).

(b) When a party calls (i) an adverse party, (ii) a witness identified with an adverse party, or (iii) a witness who is hostile or becomes hostile during examination, the court may permit leading questions in conducting the direct examination.

(c) A court shall permit leading questions during the cross-examination of a witness.

(d) When on cross-examination, a court permits inquiry into matters that were not covered on direct examination, the cross-examination is subject to the provisions of subdivisions (4) (a) and (b).

Note

Subdivision (1) restates a rule often referred to by the Court of Appeals (*Bernstein v Bodean*, 53 NY2d 520, 529 [1981] [(W)ith respect to the examination of all witnesses, the scope and manner of interrogation are committed to the Trial Judge in the exercise of his responsibility to supervise and to oversee the conduct of the trial"]; *Matter of Friedel v Board of Regents of Univ. of State of N.Y.*, 296 NY 347, 352 [1947] [“Once the right has been accorded, the extent of cross-examination rests largely in the discretion of the tribunal, whose exercise thereof is not reviewable unless abused”]; *People v Schwartzman*, 24 NY2d 241, 244 [1969] [“The nature and extent of cross-examination is subject to the sound discretion of the Trial Judge”]).

The scope of the trial court’s discretion includes the responsibility to protect a witness from harassment, undue embarrassment, or physical danger (*People v Stanard*, 42 NY2d 74, 84 [1977] [There is a duty to protect a witness from questions which “harass, annoy, humiliate or endanger him”]).

In a criminal proceeding, the trial court in its exercise of sound discretion must respect the boundaries drawn by a defendant’s constitutional right to present a defense (*e.g. Davis v Alaska*, 415 US 308, 316 [1974] [“Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness’ story to test the witness’ perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.” Trial court erred in not permitting the defense to cross-examine a witness about possible bias]; *California v Trombetta*, 467 US 479, 485 [1984] [“Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense”]; *Crane v Kentucky*, 476 US 683, 687 [1986] [An evidentiary ruling may not deprive a defendant “of his fundamental constitutional right to a fair opportunity to present a defense.” Thus, it was error for the trial court to preclude the jury from considering the credibility of a confession that the trial judge found to be voluntary]; *People v Carroll*, 95 NY2d 375, 385 [2000] [“A court’s discretion in evidentiary rulings is circumscribed by

the rules of evidence and the defendant's constitutional right to present a defense"]; *People v Robinson*, 89 NY2d 648, 650 [1997] [Defendant's "constitutional right to due process requires the admission of hearsay evidence consisting of Grand Jury testimony when the declarant has become unavailable to testify at trial," and "the hearsay testimony is material, exculpatory and has sufficient indicia of reliability"]; *People v Hudy*, 73 NY2d 40, 56 [1988] [While the ex post facto part of the decision was abrogated by *Carmell v Texas* (529 US 513 [2000]), the Court "also conclude(d) that defendant was improperly denied the right to present his case by the trial court's ruling foreclosing examination of the two investigating officers about the manner in which the child-witnesses were first questioned"]].

Subdivision (2) in its first sentence restates New York law that cross-examination should ordinarily be limited to an examination into matters affecting the witness's credibility and matters testified to on direct examination (e.g. *People v Chin*, 67 NY2d 22, 28 [1986] ["(C)ross-examiner may delve deep in order to attack credibility and present an alternate view of the facts"]; *People v Giblin*, 115 NY 196, 199 [1889] ["It is an office of cross-examination to exhibit the improbabilities of the witness' story"]; *People ex rel. Phelps v Court of Oyer & Terminer of County of N.Y.*, 83 NY 436, 460 [1881] ["As a general rule the range and extent of such an examination is within the discretion of the trial judge, subject, however, to the limitation that it must relate to matters pertinent to the issue, or to specific facts which tend to discredit the witness or impeach his moral character"]]).

A trial court's discretion should ordinarily be exercised to preclude examination into matters that were not elicited on direct examination (see e.g. *Goff v Paul*, 8 AD3d 971, 972 [4th Dept 2004]; *Hall v Allemannia Fire Ins. Co. of Pittsburgh*, 175 App Div 289, 292 [4th Dept 1916]). This rule exists primarily "to prevent the cross-examiner from cluttering up the direct examiner's case with unfavorable and extraneous facts when he could make the witness his own" (*People v Hadden*, 95 AD2d 725, 725-726 [1st Dept 1983]). The courts have, however, cautioned that cross-examination is not strictly limited "to the precise details brought out on direct examination" (*Crawford v Nilan*, 264 App Div 46, 51 [3d Dept 1942], *revd on other grounds* 289 NY 444 [1943]). Rather, the examination may seek an explanation and clarification of matters that were not fully disclosed on direct (*People v Ayala*, 194 AD2d 547, 547 [2d Dept 1993]). Thus, cross-examination into inferences, implications, and explanations suggested by or arising from the direct examination is permitted (see *Barker & Alexander*, *Evidence in New York State and Federal Courts* § 6:72 at 628 [2d ed]).

The second sentence of subdivision (2) restates New York law that nonetheless permits a court in an appropriate case to allow inquiry into matters that were not at all the subject of direct examination (*Neil v Thorn*, 88 NY 270, 275-276 [1882]; see *White v McLean*, 57 NY 670 [1874] [abstract; text at 47 How Prac 193, 198 (1874)] ("It makes no difference that the witness under examination

was the opposite party to the action. He is but a witness, and the general rules applicable to adverse witnesses govern the case. Though a broader range of cross-examination than is usual is allowable, it is still subject to the discretion of the court”)).

In a civil proceeding, a court’s exercise of discretion to permit a cross-examination to go beyond direct examination may be proper only when it relates to an issue in the case and examination into that issue does not frustrate the orderly presentation of a party’s proof (*cf. American Motorists Ins. Co. v Schindler El. Corp.*, 291 AD2d 467, 468-469 [2d Dept 2002]; *Grcic v City of New York*, 139 AD2d 621, 626 [2d Dept 1988]).

In a criminal proceeding, the Appellate Division has indicated that a trial court should exercise its discretion to permit inquiry into a relevant issue, regardless whether the issue was raised on direct (*see People v Casiano*, 148 AD3d 1044, 1046 [2d Dept 2017] [The “defense is permitted to exceed the scope of a direct examination in order to prove a relevant proposition such as the justification defense”]; *People v Joslyn*, 103 AD3d 1254, 1256 [4th Dept 2013] [(I)n a criminal case, a party may prove through cross-examination any relevant proposition, regardless of the scope of direct examination”]; *People v Kennedy*, 70 AD2d 181, 186 [2d Dept 1979] [(I)t is well settled that in a criminal case a party may prove through cross-examination any relevant proposition, regardless of the scope of the direct examination”]).

Where cross-examination of the witness on matters not raised on direct is permitted, the court also has the discretion to rule that the cross-examiner has made the witness the cross-examiner’s own witness to that extent. In that situation, the rules governing direct examination, including the restriction on leading questions set forth in subdivision (4) (a) and the rule limiting impeachment of one’s own witness set forth in rule 6.11 (3) of the Guide to New York Evidence, apply (*see Bennett v Crescent Athletic-Hamilton Club*, 270 NY 456, 458 [1936]; *People ex rel. Phelps*, 83 NY at 459-460).

Subdivision (3) is derived from *People v Buchanan* (145 NY 1, 24 [1895] [A “witness may be re-examined by the party calling him upon all topics on which he has been cross-examined, for the purpose of explaining any new facts which came out; but the re-examination must be confined to the subject-matter of the cross-examination”]; *People v Zigouras*, 163 NY 250, 256 [1900] [“While the range in details to which the re-examination may extend should rest largely in the discretion of the court, to the end that immaterial issues may not arise, enough should be permitted to prevent a part of the truth from conveying a false impression”]; *People v Regina*, 19 NY2d 65, 78 [1966] [(T)he prosecution’s question on redirect examination was properly within the scope of matters gone into on cross-examination and did no more than to explain, clarify and fully elicit a question only partially examined by the defense”]; *accord People v Ochoa*, 14

NY3d 180, 186-187 [2010]; *Feblot v New York Times Co.*, 32 NY2d 486, 498 [1973]).

Subdivision (4) governs the use of leading questions in examining witnesses. The New York courts have traditionally considered a question to be leading if it suggests to the witness the answer the examiner wants (*see e.g. People v Mather*, 4 Wend 229, 247 [Sup Ct of Judicature 1830] [“A question is leading which puts into a witness’ mouth the words that are to be echoed back, or plainly suggests the answer which the party wishes to get from him”]). Whether a leading question may be used in examining a witness is committed to the court’s discretion (*see Downs v New York Cent. R.R. Co.*, 47 NY 83, 88 [1871] [“It was within the discretion of the judge at the trial to suffer a question, leading in form, to be put”]).

Subdivision (4) (a) restates New York’s rule that leading questions are ordinarily not permitted on direct examination (*see e.g. People v Blauvelt*, 156 AD3d 1333, 1335 [4th Dept 2017]; *People v Cuttler*, 270 AD2d 654, 655 [3d Dept 2000]).

“The general rule is that leading questions may not be used during the direct examination of a witness. This rule is explained by the likelihood that a witness will be friendly, or at least nonhostile, toward the party who called her and therefore susceptible to mouthing the version of events sought to be proved by that party. Thus, to help ensure that the fact-finder hears the facts as they are known by the witness, not by counsel, leading questions are generally prohibited on direct” (Barker & Alexander § 6:70 at 622).

A court may allow leading questions, however, when appropriate in particular circumstances, e.g., examination on introductory matters (*Mather*, 4 Wend at 247); examination of a child (*People v Martina*, 48 AD3d 1271, 1272 [2008] [sexual abuse case]; *People v Graham*, 171 AD3d 1566, 1570 [4th Dept 2019]); expediting a trial as to matters that are not in dispute (*Cope v Sibley*, 12 Barb 521, 524-525 [Sup Ct General Term 1850]); when necessary to clarify a witness’s testimony (*People v Brizen*, 118 AD3d 590, 590-591 [2014]; *People v Williams*, 242 AD2d 469, 469 [1st Dept 1997] [clarify testimony of person who had displayed a difficulty with the language]); and when examining a witness about an inconsistent statement (*Sloan v New York Cent. R.R. Co.*, 45 NY 125, 127 [1871]). A court may also permit leading questions to avoid having the witness testify to matters the court has ruled inadmissible.

Subdivision (4) (b) restates New York law when the witness is an adverse party or closely identified with an adverse party or has demonstrated hostility to the party or the party’s attorney. Leading questions may be used during the examination of such witnesses (*Becker v Koch*, 104 NY 394, 401 [1887]; *Jordan*

v Parrinello, 144 AD2d 540, 540 [2d Dept 1988]), but the court may disallow the use of leading questions when the witness shows no sign of hostility (*Matter of Argila v Edelman*, 174 AD3d 521, 524 [2d Dept 2019]; *Matter of Giaquinto*, 164 AD3d 1527, 1530-1531 [3d Dept 2018]; *Jackson v Montefiore Med. Ctr.*, 109 AD3d 762, 763 [1st Dept 2013]). Factors suggestive of hostility include reluctance to testify and evasiveness in answering questions (e.g. *Matter of Ostrander v Ostrander*, 280 AD2d 793, 793-794 [3d Dept 2001]).

Subdivision (4) (c) restates familiar New York law that permits leading questions during the cross-examination of a witness (Barker & Alexander § 6:70 at 622 [“(O)n cross-examination a witness usually is of an uncooperative frame of mind and is more likely to resist the suggestions of the cross-examiner. Therefore, leading questions ordinarily are allowed on cross-examination”]). When in a civil proceeding, however, one party on its direct case calls an adverse party, the court may preclude the attorney for that party-witness from asking leading questions on the “cross-examination” (*id.* § 6:70 at 622 n 6).

Subdivision (4) (d) restates New York law recognizing cross-examination into matters not the subject of direct examination, as permitted under subdivision (2), is in effect direct examination and therefore is subject to the rules governing leading questions on direct examination, as set forth in subdivision (4) (a) and (b) (see *People ex rel. Phelps*, 83 NY at 459).

6.07. Nonexpert Witness Limited to Personal Knowledge Testimony

Except for an expert witness giving an expert opinion, a witness may testify to a matter only if the witness has personal knowledge of the matter. Personal knowledge is knowledge based on the exercise of the witness's own senses. Evidence of a witness's personal knowledge may be apparent from the testimony of the witness or may be attested to by the witness.

Note

This rule sets forth New York's well settled law that a witness is incompetent to testify to a specific matter when the witness lacks personal knowledge of the matter. The definition of personal knowledge stated in the rule's second sentence is drawn from *Hallenbeck v Vogt* (9 AD2d 836 [3d Dept 1959]).

The rule's first sentence is derived from decisions of the Court of Appeals and the Appellate Divisions and states a fundamental proposition of the law of evidence (*e.g. People v Regina*, 19 NY2d 65, 68-70 [1966] [witness's testimony that he saw perpetrators during a five second time period fire two shots properly admitted]; *Senecal v Drollette*, 304 NY 446, 448-449 [1952] [witness's testimony as to the make of the car that struck him should have been admitted as the witness said he "got a glance at it just before it hit him"]; *Matter of Rios v Selsky*, 32 AD3d 632, 633 [3d Dept 2006] [hearing officer properly denied request of respondent to call certain witnesses as the witnesses had no personal knowledge of the incident]; *Overseas Trust Bank v Poon*, 181 AD2d 762, 763 [2d Dept 1992] [testimony of husband concerning wife's overseas trips during a relevant time period properly excluded as it was "clear" the husband lacked personal knowledge]).

The trial court is charged with making the determination of whether the witness has personal knowledge. In essence, this rule of personal knowledge is an application of Guide to New York Evidence rules 4.01 (Relevant Evidence) and 4.05 (Conditional Relevance).

The rule's third sentence is derived from *Regina* (19 NY2d at 68-70) and *Senecal* (304 NY at 448-449).

The expert witness exception is derived from *Cassano v Hagstrom* (5 NY2d 643, 646 [1959] [expert opinion may be based on the expert’s personal knowledge or upon facts in evidence made known to the expert]) and *Hambusch v New York City Tr. Auth.* (63 NY2d 723, 726 [1984] [expert opinion can be based in part on inadmissible evidence if it is “of a kind accepted in the profession as reliable in forming a professional opinion” and the evidence is established to be reliable]).

It must also be noted that the rule’s requirement of personal knowledge does not prohibit a witness from testifying to an out-of-court statement that is not barred by the hearsay rules set forth in article 8 of this Guide, provided the witness heard or read the statement. In such circumstances, the witness has the requisite personal knowledge of the “matter,” i.e., the out-of-court statement.

6.09 Refreshing Recollection¹

(1) A witness may use any writing or other matter to refresh the witness's memory while testifying. Matter used to refresh a witness's recollection and not received in evidence shall not, however, be disclosed to the finder of fact, except as provided in subdivision two.

(2) If a witness, while testifying, uses a writing or other matter to refresh the witness's memory, an adverse party is entitled to inspect the writing or other matter and to cross-examine the witness about the writing or other matter.

Note

Subdivision (1). The rule stated in subdivision (1) is derived from *Huff v Bennett* (6 NY 337, 339 [1852] [a witness “is permitted to assist his memory by the use of any written instrument, memorandum or entry in a book, and it is not necessary that such writing should have been made by the witness himself, or that it should be an original writing, provided after inspecting it he can speak to the facts from his own recollection”]); *Howard v McDonough* (77 NY 592, 593 [1879] [“A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed”]); and *People v Ferraro* (293 NY 51, 56 [1944] [“These statements were regarded as more strongly indicative of defendant's guilt than the statements given by the witnesses on the trial. It was proper to use such statements to refresh the recollection of the witness”]).

As the writing is only being used to refresh recollection, the writing is not admitted, nor are its contents disclosed to the finder of fact except as provided by subdivision (2). (*Howard*, 77 NY at 593 [noting that when the witness's “memory has thus been refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence”]; *see also* CPL 60.35 [3].) Whether the writing may be used for substantive evidence will turn upon whether it is otherwise admissible, e.g., admissible under Guide to New York Evidence rule 8.25, as a past recollection recorded.

The foundation for invoking this rule is a showing that the witness is having difficulty recalling a fact that the witness had perceived. (*See People v Gezzo*, 307 NY 385, 390 [1954] [police inspector testified he had “no independent recollection” of his interview of the defendant]; *People v Oddone*, 22 NY3d 369, 377 [2013] [“When a witness, describing an incident more than a year in the past, says that it ‘could have’ lasted ‘a minute or so,’ and adds ‘I don’t know,’ the inference that her recollection could benefit from being refreshed is a compelling one”].)

Whether objects or matters other than a writing can be used to refresh a witness's recollection has not been addressed by the Court of Appeals. The First and Second Departments have upheld the use of sound recordings to refresh a witness's recollection. (*See People v Reger*, 13 AD2d 63, 70 [1st Dept 1961]; *Seaberg v North Shore Lincoln-Mercury, Inc.*, 85 AD3d 1148, 1151 [2d Dept 2011].)

The court retains discretion to control the refreshing recollection process. (*See McCarthy v Meaney*, 183 NY 190, 193-194 [1905].) This discretion is to be exercised in determining whether the witness's recollection has in fact been refreshed and whether the witness is not just relating what he or she has just read or perceived. (*Id.* at 193-194.)

Subdivision (2). The rule stated in subdivision (2) is derived from *People v Gezzo* (307 NY at 393-394 [“ ‘The right of a party to protection against the introduction against him of false, forged or manufactured evidence, which he is not permitted to inspect, must not be invaded a hair's breadth. It is too valuable to be trifled with, or to permit the court to enter into any calculation as to how far it may be encroached upon without injury to the party’. . . . ‘The defendant had the right to see, and to use on cross-examination, any memorandum or writing which had served to refresh the memory of the witness on his direct examination. . . . As the conversation was material, the defendant might possibly have been prejudiced by this limitation upon his cross-examination’ ” (quoting *Tibbetts v Sternberg*, 66 Barb 201, 203 [Sup Ct, NY County 1870], and *Schwickert v Levin*, 76 App Div 373, 375 [2d Dept 1902]))).

Whether, as provided in Federal Rules of Evidence rule 612 (a), this production rule extends to writings used by the witness to refresh the witness's recollection before testifying has not been addressed by the Court of Appeals, albeit relevant writings of a witness are subject to pretrial disclosure in criminal proceedings. (*See CPL 245.20* [1] [b], [e]; [4] [a]); *People v Rosario*, 9 NY2d 286 [1961], and its progeny.) Appellate Division decisions consistently hold that the right of inspection extends to writings or objects used by a witness prior to testifying. (*See e.g. Merrill Lynch Realty Commercial Servs. v Rudin Mgt. Co.*, 94 AD2d 617 [1st Dept 1983]; *Doxtator v Swarthout*, 38 AD2d 782 [4th Dept 1972].)

The Court of Appeals has also not addressed the issue of whether the use of a privileged writing for refreshing recollection purposes effects a waiver of the privilege otherwise applicable to the writing. Appellate Division decisions addressing this issue are conflicting. (*Compare Grieco v Cunningham*, 128 AD2d 502 [2d Dept 1987] [“any” privilege waived], *with Beach v Touradji Capital Mgt., LP*, 99 AD3d 167, 171 [1st Dept 2012] [attorney work product privilege not waived].)

For a discussion of the issues relating to the application of the refreshing recollection rule to writings used by a witness to refresh the witness's recollection before testifying, and privilege waiver resulting from the use of a privileged writing to refresh recollection, either while testifying or before testifying (*see* Michael J. Hutter, *Review of Privileged Documents in Trial and Deposition Preparation of*

Witnesses in New York: When, if Ever, Will the Privilege be Lost?, 38 Pace L Rev 437 [2018]).

¹ In December 2021, this rule was revised (1) to add the second sentence to subdivision (1) of the rule, which had previously just been included in the Note; and (2) to delete references to repealed sections of CPL article 240 and to insert the appropriate sections of CPL article 245.

6.10 Corroboration of Accomplice Testimony (CPL 60.22)

1. A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense. The corroborative evidence need not, by itself, prove that a crime was committed or that the defendant is guilty. What the law requires is that there be evidence that tends to connect the defendant with the commission of the crime charged in such a way as may reasonably satisfy the finder of fact that the accomplice is telling the truth about the defendant's participation in that crime.

2. An “accomplice” means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in:

(a) The offense charged; or

(b) An offense based upon the same or some of the same facts or conduct which constitute the offense charged.

3. A witness who is an accomplice as defined in subdivision two is no less such because a prosecution or conviction of himself would be barred or precluded by some defense or exemption, such as infancy, immunity or previous prosecution, amounting to a collateral impediment to such a prosecution or conviction, not affecting the conclusion that such witness engaged in the conduct constituting the offense with the mental state required for the commission thereof.

Note

This rule states verbatim CPL 60.22 except for sentence two of subdivision (1). That sentence is drawn from CJI2d(NY) Accomplice as a Matter of Law and incorporates the applicable statutory and decisional law (*e.g. People v Breland*, 83 NY2d 286, 292, 294 [1994] [“ ‘The corroborative evidence need . . . not establish all the elements of the offense (CPL 60.22 [1])’ ” nor need the corroboration

evidence “lead exclusively to the inference of the defendant’s guilt” (citations omitted)]; *People v Reome*, 15 NY3d 188, 192 [2010] [the “ ‘role of the additional evidence is only to connect the defendant with the commission of the crime, not to prove that he committed it. The accomplice testimony, if credited by the jury, may serve the latter purpose’ ” (citation omitted)]]).

Penal Law § 20.00 defines an “accomplice” for purposes of criminal liability (*see* CJI2d[NY] Accessorial Liability). CPL 60.22 defines when a witness who gives testimony that incriminates a defendant will be deemed an accomplice for purposes of requiring corroboration of that witness’s testimony. As *People v Fielding* (39 NY2d 607, 610 [1976]) explained:

“CPL 60.22 (subds 2, 3) were enacted to broaden the rule . . . which had defined an accomplice as one who at common law might have been convicted of the offense either as a principal or as an accessory before the facts. . . . [T]his ‘definition was unduly restrictive and at odds with the purpose of the accomplice doctrine: namely, preclusion of conviction solely upon the testimony of persons who are in some way criminally implicated in, and possibly subject to, prosecution for the general conduct or factual transaction on trial.’

“Thus, under the . . . statute, one would not avoid accomplice status merely because he was not a principal or an accessory. Nor would he avoid such status because a defense in bar, such as infancy, was available to him as an impediment to prosecution. But, nevertheless, to be an accomplice, he would have to be in some way criminally implicated in, and possibly subject to, prosecution for the general conduct or factual transaction on trial. Put another way, to be an accomplice, one would necessarily have to be at least potentially subject to sanctions of a penal character for his participation in the crimes of the defendant on trial” (internal quotation marks and citations omitted; *see also People v Wing*, 77 NY2d 851, 852 [1991]; *People v Jones*, 73 NY2d 902, 903 [1989]; *People v Cobos*, 57 NY2d 798, 801 [1982]; *People v Dorta*, 46 NY2d 818, 820 [1978]).

Once a witness is declared an accomplice as a “matter of law” (*see* CJI2d[NY] Accomplice as a Matter of Law) or as a “matter of fact” for the finder of fact to decide (*see* CJI2d[NY] Accomplice as a Matter of Fact) and the finder of fact decides the witness was an accomplice, CPL 60.22 (1) and this rule require that the defendant “may not be convicted of any offense upon the testimony of [the] accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.”

While the governing standard on what will satisfy that “corroborative evidence” requirement varied over the years, *Reome* (15 NY3d 188 [2010]), in

overruling *People v Hudson* (51 NY2d 233 [1980]), appeared to have settled the governing standard:

“The text of CPL 60.22 (1), requiring ‘corroborative evidence tending to connect the defendant with the commission of such offense,’ need not be read, as it was in *Hudson*, to require that all corroboration that depends to any degree on the accomplice’s testimony be ignored. . . . There can be corroborative evidence that, read with the accomplice’s testimony, makes it more likely that the defendant committed the offense, and thus tends to connect him to it. . . .

“As early as 1921, we said, in language we have repeatedly echoed since then: ‘Matters in themselves of seeming indifference or light trifles of the time and place of persons meeting may so *harmonize* with the accomplice’s narrative as to have a tendency to furnish the necessary connection between defendant and the crime.’ . . . And we have held that some evidence may be considered corroborative even though it simply supports the accomplice testimony, and does not independently incriminate the defendant. Thus, in *Breland*, we relied on forensic evidence as to the location of a body and the gunshot wounds found in it that ‘corresponded with the details’ supplied by an accomplice (83 NY2d at 293). . . .

“Courts may consider harmonizing evidence as well as [evidence independent of the accomplice’s testimony], while giving due weight to the difference between the two. Some evidence that is not independent will obviously be worthless: If an accomplice testifies that the defendant committed a crime next to a tree in Central Park, the prosecution cannot ‘corroborate’ this testimony by proving the existence of the tree. But in other cases, as in this one, harmonizing evidence may provide a substantial basis for crediting accomplice testimony” (*Reome*, 15 NY3d at 194 [citations omitted]).

6.10.1 Missing Witness

(1) A party normally is expected to produce witnesses who are available to be called, are knowledgeable about a material issue, and would be expected to testify favorably on behalf of that party.

(2) (a) A party's failure to call a person to testify who is knowledgeable about a material issue and can be expected to testify favorably for that party may warrant an "adverse inference" that permits the finder of fact to infer that, had the witness been called to testify, the witness's testimony on the issue of which the witness possessed knowledge would not have supported the position of the party that failed to call the witness.

(b) A request for the adverse inference specified in paragraph (a) may be defeated by satisfactorily accounting for the witness's absence: by demonstrating that the witness is not knowledgeable about the issue; that the issue is not material or relevant; that, although the issue is material or relevant, the testimony would be "cumulative" of other evidence; that the witness is not "available"; or that the witness is not under the party's "control," meaning that the witness would not be expected to testify in the party's favor.

(3) A request for the adverse inference must be timely, that is, it must be made as soon as practicable. Whether a request is timely depends on when the requesting party knew or should have known that a basis for a missing witness charge existed, and any prejudice that may have been suffered by the other party as a result of the delay.

(4) The failure to request or the denial of the missing witness (adverse inference) charge does not preclude fair comment in summation on the failure of a party who presented evidence to call a witness.

(5) (a) When a witness, who may have knowledge about a material issue and would be expected to testify favorably for a party, will not be called as a witness by that party, the court may in its discretion permit that party to present evidence that purports to explain the witness's absence.

(b) Should a witness be unavailable as a matter of law to testify, the court should instruct the jury that the witness has become unavailable for reasons beyond the party's control and that, consequently, no adverse inferences may be drawn from the witness's failure to appear.

Note

Subdivision (1) is derived from decisional law about what constitutes a “missing witness” in both criminal and civil proceedings, the seminal case being *People v Gonzalez* (68 NY2d 424 [1986]), discussed in this Note. (See *DeVito v Feliciano*, 22 NY3d 159, 165-166 [2013] [the “preconditions for (a missing witness) charge (are) applicable to both criminal and civil trials”]; see generally PJI 1:75; CJI2d[NY] General Applicability, A Party's Failure to Call a Witness.)

Subdivision (2) draws substantially from *Gonzalez*, which has been reaffirmed repeatedly. (See *People v Smith*, 33 NY3d 454, 458-459 [2019]; *People v Hall*, 18 NY3d 122, 131 [2011]; *People v Savinon*, 100 NY2d 192, 196 [2003].) As *Gonzalez* (at 427-428) explains:

“Once the party seeking the charge has established prima facie that an uncalled witness is knowledgeable about a pending material issue and that such witness would be expected to testify favorably to the opposing party, it becomes incumbent upon the opposing party, in order to defeat the request to charge, to account for the witness' absence or otherwise demonstrate that the charge would not be appropriate. This burden can be met by demonstrating that the

witness is not knowledgeable about the issue, that the issue is not material or relevant, that although the issue is material or relevant, the testimony would be cumulative to other evidence, that the witness is not ‘available’, or that the witness is not under the party’s ‘control’ such that he would not be expected to testify in his or her favor.”

The meaning of “materiality,” “control,” “availability” and “cumulative testimony,” as articulated by *Gonzalez*, needs to be further explained and distinguished.

“Materiality” requires an identifiable witness who can give testimony on an issue that is relevant to the case. (*Gonzalez*, 68 NY2d at 428.) The failure to identify a particular witness will preclude application of the rule. (1A NY PJI3d 1:75 at 124 [2021].)

“Control” refers to the relationship (not availability) between a party and a witness. As the Court explained in *Savinon* (100 NY2d at 200): “Where there is ‘a relationship, in legal status or on the facts, as to make it natural to expect the party to have called the witness to testify in his [or her] favor,’ the so-called control element is satisfied.” While a witness may be “available” to both sides, one party may have a relationship to the witness that makes the witness “favorable to or under the influence of one party and hostile to the other” such that the witness would be expected to testify favorably for that party. (*Gonzalez* at 429.) It matters not that the testimony may prove not favorable; it is the relationship between the party and the witness that gives rise to the expectation that the witness’s testimony would be favorable and thus the witness must be called, or the finder of fact instructed on the adverse inference. “Thus, the fact that a witness is ‘equally available’ to both sides, standing alone, is insufficient to defeat a timely request for the charge. Rather, it must also be demonstrated that the witness is not in the ‘control’ of the party who would have been expected to call him [or her]—that is, the witness, by nature of his [or her] status or otherwise, would not be expected to testify favorably to one party and adversely to the other.” (*Gonzalez* at 429; *see Hall*, 18 NY3d at 131; *People v Fields*, 76 NY2d 761, 763 [1990] [a police officer would be “expected to testify favorably to the People”]; *People v Rodriguez*, 38 NY2d 95, 98 n 1 [1975] [“A spouse or relative (of a defendant) is perforce deemed to be under the defendant’s control”].)

“Availability” is a “separate and distinct” consideration from “control.” (*People v Keen*, 94 NY2d 533, 540 [2000].) It refers to the ability to call a witness to the stand who is competent to testify. (Guide to NY Evid rule 6.01.) “Though a genuine inability to locate a witness will foreclose a missing witness instruction, a witness may be readily accessible and even in the courtroom but still be unavailable

within the meaning of the rule. Thus, a witness who on Fifth Amendment grounds refuses to testify will be considered ‘unavailable’ although the witness’s presence is known and apparent.” (*Savinon* at 198.)

“Cumulative” testimony refers to testimony favoring the party controlling the uncalled witness; that testimony, however, is not necessarily cumulative simply because it would provide additional testimony on a material issue. If the additional testimony would serve a meaningful purpose, such as to confirm or contradict testimony on a disputed material issue, it is not cumulative. (*Gonzalez* at 430 [the missing witness’s testimony on the identification of the perpetrator would not have been cumulative because the “prosecution’s case rested entirely upon the complainant’s testimony and identification of the defendant (and) complainant’s credibility had been impeached on cross-examination such that corroboration of her testimony was crucial”]; *People v Fields*, 76 NY2d at 763 [“there was evidence that if (the detective) were called, his testimony (about the interrogation of the defendant) would have been inconsistent with (Detective) D’Ambrosio’s testimony” and was accordingly not cumulative]; *DeVito v Feliciano*, 22 NY3d at 166 [“our holding is that an uncalled witness’s testimony may properly be considered cumulative only when it is cumulative of testimony or other evidence favoring the party controlling the uncalled witness. . . . (A) witness’s testimony may not be ruled cumulative simply on the ground that it would be cumulative of the opposing witness’s testimony”]; compare *People v Macana*, 84 NY2d 173, 180 [1994] [“There is nothing in the record to indicate that the missing officer would have testified differently or in accordance with defendant’s claim that the gun was retrieved from the living room hutch. It is not incumbent upon the prosecution to call at trial every witness to a crime or to make a complete and detailed accounting to the defense of all law enforcement investigatory work, and there is ample support in the record that the missing officer’s testimony would have been cumulative and therefore not a proper subject of a missing witness charge” (internal quotation marks and citations omitted)].)

Notably, *People v Smith* (33 NY3d at 459) held that it is not the burden of the proponent of the adverse inference “to negate cumulativeness to meet the prima facie burden” for a missing witness instruction. “The proponent of the charge typically lacks the information necessary to know what the uncalled witness would have said and, thus, whether the testimony would have been cumulative. The party opposing the charge is in a superior position to demonstrate that the uncalled witness’s testimony would be cumulative. The opposing party therefore appropriately bears the initial burden with respect to cumulativeness.” (*Id.* at 459-460; see Hutter, ‘*People v. Smith*’: *Missing Witness Charge as Applied in Criminal and Civil Actions Revisited*, NYLJ, July 31, 2019.)

In a criminal proceeding, the defense that presents evidence may, like the People, be subject to the consequences attending the failure to call a noncumulative

witness, with knowledge of a material issue, who would be expected to testify favorably for the defense. (*Rodriguez*, 38 NY2d at 98 [“Ordinarily, a court may not comment upon a defendant’s failure to testify or otherwise to come forward with evidence, but, once a defendant does so, his failure to call an available witness who is under defendant’s control and has information material to the case may be brought to the jurors’ attention for their consideration”]; *People v Wilson*, 64 NY2d 634, 635-636 [1984] [“Although defendant had no burden to come forward with alibi evidence, once he did so, his failure to call an available witness to support the alibi could be brought to the jury’s attention inasmuch as it appeared that the witness, defendant’s wife, would be favorable to him and hostile to the prosecution and the testimony would not be trivial or cumulative”].)

An exception to applying the missing witness rule to the defendant “obtains where the person not called as a witness by defendant is a codefendant, an accomplice not presently on trial, or one already adjudged guilty of perpetrating the same act or offense as that for which defendant is being prosecuted” (*People v De Jesus*, 42 NY2d 519, 525 [1977]), or a witness who would invoke the Fifth Amendment. (*Macana*, 84 NY2d at 178.)

Once a prima facie showing of a “missing witness” is established, a statement by the opposing party that the witness’s testimony would be cumulative or that the witness is not available, which is not supported by the record, does not rebut the prima facie showing. (*Smith*, 33 NY3d at 460 [the People’s “conclusory argument” that the “missing witness” would not “be able to provide anything that wasn’t provided by (the victim)” was “insufficient to satisfy the People’s burden in response to defendant’s prima facie showing”]; *People v Savinon*, 100 NY2d 192, 200 [2003] [“If unavailability could be established by a pro forma or unsupported assertion, a party (be it the defendant or the prosecution) might merely go through the motions of asking a witness to testify, or might ask with a ‘wink and a nod.’ The witness would thus be free to decline and thereby serve the party’s ulterior goal of keeping the witness off the stand”]; *Macana*, 84 NY2d at 178-179 [verification may be required “when the defendant is the only source of proof of either the existence of the uncalled witness or that favorable testimony of that witness would be self-incriminating”].)

People v Paylor (70 NY2d 146, 149 [1987]) set forth the inference the finder of fact may draw from a missing witness: “if the witness had been called [the witness] would not have supported the . . . testimony [of the party who did not call the witness] on the issue of which [the witness] possessed knowledge. If the fact finder elects to draw an inference from the failure to produce a witness, it may not speculate about what the witness would have said, nor may it assume that the witness could have provided positive evidence corroborating or filling gaps in the People’s proof. The inference is merely negative and allows the fact finder to infer

that the missing witness would not have supported or corroborated defendant's evidence."

For specific examples of where courts have held that the granting or denying of a "missing witness" instruction was proper, see PJI 1:75; Donnino, New York Court of Appeals on Criminal Law (ch 17, Evidence, part XII, Missing Witness [3d ed]).

Subdivision (3) is derived principally from *People v Carr* (14 NY3d 808, 809 [2010]), which held:

"A party seeking a missing witness instruction has the burden of making the request 'as soon as practicable.' Whether such a request is timely is a question to be decided by the trial court in its discretion, taking into account both when the requesting party knew or should have known that a basis for a missing witness charge existed, and any prejudice that may have been suffered by the other party as a result of the delay" (citation omitted).

See *Gonzalez* (at 427-428), explaining that in "some instances, [the information about a 'missing witness'] may be available prior to trial; at other times, it may not become apparent until there has been testimony of a witness at trial. In all events, the issue must be raised as soon as practicable so that the court can appropriately exercise its discretion and the parties can tailor their trial strategy to avoid 'substantial possibilities of surprise' " (citation omitted). A timely request may provide the respondent an opportunity to call the "missing witness" to avoid the adverse inference.

In *Carr*, the defendant's request for the adverse inference was not timely where the "defendant knew at the outset of the trial that the People did not intend to call three of the victim's relatives who were present at the time of the alleged crime" and the defendant made the request "more than a week after the People provided their witness list, and after the People had rested their case-in-chief." (*Carr* at 809; see *People v Gumbs*, 195 AD3d 450, 451 [1st Dept 2021] [defendant's request, made after the People had rested their case-in-chief, was properly denied as untimely]; *People v Torres*, 169 AD3d 506, 506-507 [1st Dept 2019] ["Although defendant was made aware at the end of jury selection that the People did not plan to call this witness, defendant waited until both sides had rested to make his request. Accordingly, the request was untimely"]; *People v Pearson*, 151 AD3d 1455, 1457 [3d Dept 2017] [the defendant was "aware that the CI would not testify at the conclusion of the People's case, but did not make this charge request until after the close of proof and, thus, the request was untimely"].)

Subdivision (4) sets forth a decisional law rule that the failure to request or the denial of the missing witness (adverse inference) charge does not preclude fair comment in summation on the failure of a party who presented evidence to call a witness.

Thus, the Court of Appeals has explained that, where a defendant introduced evidence in his defense, the prosecutor's comments in summation about the defendant's failure to call "significant witnesses" who were available and had material noncumulative information relevant to the defense "did not constitute an impermissible effort to shift the burden of proof," and the People were not "obliged" to satisfy the burden required for a missing witness charge because the summation "comments were not made in bad faith and were merely efforts to persuade the jury to draw inferences that supported the People's position." (*People v Tankleff*, 84 NY2d 992, 994-995 [1994]; see *People v Floyd*, 97 AD3d 837, 837 [2d Dept 2012] [where the defendant presented an alibi defense, "his failure to call significant witnesses in support of his defense may be brought to the jury's attention by the prosecutor, provided that the prosecutor's comments are not made in bad faith and are merely efforts to persuade the jury to draw inferences supporting the People's position"]; *People v Cochran*, 29 AD3d 365, 366 [1st Dept 2006] [fair comment on missing alibi witness]; see also *People v Katzman*, 161 AD3d 770, 771-772 [2d Dept 2018] [The prosecutor's comment highlighting the defendant's failure to produce documentary evidence that he testified established the truth of his defense was not improper].)

Similarly, even though a defendant may not be entitled to a "missing witness" charge, the defendant "may nonetheless try to persuade the jury to draw inferences from the People's failure to call an available witness with material, noncumulative information about the case." (*People v Williams*, 5 NY3d 732, 734 [2005].) Thus, in *Williams*, the defendant "was entitled to argue that the jurors should consider the People's failure to call the ghost [backup] officer to corroborate the single-witness identification in support of his defense that the People's evidence was uncorroborated and 'skeletal.'" (*Id.* at 734-735; *People v Thomas*, 21 NY3d 226, 231 [2013] [defense counsel had "no obligation to make an offer of proof as a predicate for a missing witness argument (in summation). It is a premise of such an argument, as it is of a missing witness instruction, that the witness is in the control of the party that failed to call him" (citation omitted)]; but see *People v Vega*, 37 AD3d 351, 352 [1st Dept 2007] [the "court properly precluded defendant from commenting in summation on the People's failure to call the buyer (of drugs) as a witness, and properly instructed the jury to disregard the buyer's absence from the proceedings. Defendant had no good faith basis for such a comment. The buyer's sole connection with the prosecution was adversarial" (citation omitted)].)

People v Modeste (1 Misc 3d 315, 316 [Sup Ct, Kings County 2003]) is instructive. There the defendant stabbed her boyfriend (the complainant) with a knife. Neither the prosecution nor the defendant called the complainant. The court ruled that neither was entitled to a “missing witness” charge: “The boyfriend’s status as a complainant would infer that he would provide testimony favorable to the prosecution’s version of the events. The family and living relationship between the defendant and her boyfriend indicate control by the defendant.” (*Id.* at 320 [citations omitted].) Instead, the court permitted the defense to comment on the missing complainant, and, if the defense did, the prosecutor to comment on “the boyfriend’s living and familial relationship with the defendant as well as his immigration issues.” (*Id.*)

Subdivision (5), paragraph (a), allows the trial court in its discretion to permit a party who may have an explanation for the absence of a favorable witness to introduce evidence of that explanation. (CJI2d[NY] General Applicability, A Party’s Failure to Call a Witness; PJI 1:75.)

A witness is clearly unavailable when the witness has died or become mentally or otherwise incapacitated or is unavailable as a matter of law, for instance, when the witness will invoke the privilege against compelled self-incrimination. In contrast, where a foundational requirement for the “missing witness” charge or the inference a party on summation asks the finder of fact to draw is in dispute, the finder of fact will need to resolve that issue, and thus have the information necessary to do so. (*See Gonzalez* at 431 [The party against whom the “missing witness” charge is directed “can seek to explain the witness’ absence by reference to evidence in the record”]; *People v Berg*, 59 NY2d 294, 300 [1983] [where the complainant in an assault case refused to testify, the Court held that the trial court’s decision to permit the People to call the complainant was not an abuse of discretion, “given the State’s strong interest both in attempting to induce this witness to testify and to avoid the unfavorable inference arising from a failure to produce the victim of the assault, coupled with the curative instruction concerning (the complainant’s) refusal to testify”].) In *Keen* (94 NY2d at 539-540), the court properly granted the People a “missing witness” instruction but left it to the jury to decide whether the witness was in “control” of the defendant.

Paragraph (b) is derived from *People v Thomas* (51 NY2d 466, 473-474 [1980]). In *Thomas*, the jury became aware that a witness for the defense “might possess information that would be helpful to the defendant’s case.” (*Id.* at 473.) That witness, however, was prepared to invoke the privilege against compelled self-incrimination. In that instance, the Court of Appeals held that “the trial court should, upon request, give the jurors a neutral instruction advising them that the witness has become unavailable for reasons beyond the defendant’s control and

that, consequently, no adverse inferences may be drawn from the witness' failure to appear." (*Id.* at 473-474.)

6.11. Impeachment in General

(1) The credibility of a witness may be impeached by evidence that has a tendency in reason to discredit the truthfulness or accuracy of the witness's testimony.

(2) Evidence of impeachment may be used in the cross-examination of a witness. The party examining the witness is bound by the witness's answer unless the evidence of impeachment is not collateral. Evidence is not collateral when it is directly relevant to one or more issues in the action, or to the capacity of the witness to testify pursuant to rule 6.01 (Competency to Testify) and rule 6.03 (Oath or Affirmation) or is evidence admissible pursuant to rule 6.13 (Impeachment by Bias, Hostility, Interest) or rule 6.15 (Impeachment by Prior Inconsistent Statement). Evidence of impeachment which is not collateral may be proved by extrinsic evidence.

(3) Except as set forth in rule 6.15 (Impeachment by Prior Inconsistent Statement), a party may not impeach its own witness. A party may, however, through examination, elicit testimony that an adverse party is expected to argue impeaches the witness's credibility, and a party is not precluded from presenting a witness whose testimony is not consistent with one of that party's other witnesses.

Note

Subdivision (1). The rule stated in this subdivision is derived from Court of Appeals precedent. Impeachment evidence is designed "to discredit the witness and to persuade the fact finder that the witness is not being truthful." (*People v*

Walker, 83 NY2d 455, 461 [1994].) It may be accomplished on cross-examination or in particular instances by extrinsic evidence.

The Court of Appeals has commented that the credibility of a witness is “a many faceted concept, of course, requiring a careful assessment of a number of subtle factors before testimony can be labeled as believable or unbelievable.” (*People v Wise*, 46 NY2d 321, 325 [1978].) The Court has explained that whether particular facts or matters are a proper subject of impeachment is an issue of relevance, namely, whether “[a]s a matter of reason and common experience” they bear on the witness’s credibility. (See *Walker*, 83 NY2d at 462.)

Subdivision (2). Subdivision (2) sets forth the general rule that permits the use of evidence of impeachment to cross-examine a witness and that the party examining the witness is bound by the witness’s answers unless the evidence of impeachment is not collateral. (See *e.g. Badr v Hogan*, 75 NY2d 629, 635 [1990]; *People v Pavao*, 59 NY2d 282, 288-289 [1983]; *Halloran v Virginia Chems.*, 41 NY2d 386, 390, 393 [1977]; *People v Schwartzman*, 24 NY2d 241, 245 [1969]; *Potter v Browne*, 197 NY 288, 293 [1910].) Impeaching evidence is not collateral when directly relevant to one or more issues in the case (see *People v Cade*, 73 NY2d 904 [1989]); or independently admissible to impeach the witness, *e.g.* show the witness’s bias, hostility or impaired ability to perceive or understand the nature of an oath or affirmation. (See *Badr*, 75 NY2d at 635; *Schwartzman*, 24 NY2d at 245.)

Thus, if the matter is collateral, the cross-examiner may inquire into it, but must take the witness’s answer and is not free to put in independent proof about the collateral matter. (*Wise*, 46 NY2d at 328.) “This rule,” the Court of Appeals has observed, “is premised on sound policy considerations for if extrinsic evidence which is otherwise inadmissible is allowed to be introduced to contradict each and every answer given by a witness solely for the purpose of impeaching that witness, numerous collateral minitrials would arise involving the accuracy of each of the witness’ answers. The resulting length of the trial would by far outweigh the limited probative value of such evidence.” (*Pavao*, 59 NY2d at 289.)

Evidence that charges on trial had already been determined adversely to the defendant by another tribunal, however, is inadmissible for impeachment of the defendant or otherwise. See Guide to NY Evidence rule 6.16(4).

Impeachment is subject to the control of the trial court's exercise of sound discretion. (See *Schwartzman*, 24 NY2d at 245; *Langley v Wadsworth*, 99 NY 61, 63 [1885] [noting when the object of cross-examination "is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial judge, and unless abused, its exercise is not the subject of review"].) While the Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees the defendant in a criminal trial an opportunity for cross-examination, it does not guarantee a cross-examination "that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v Fensterer*, 474 US 15, 20 [1985]; *People v Burns*, 6 NY3d 793, 795 [2006].) Thus, it is generally within the court's sound discretion to limit the scope of cross-examination of the criminal defendant when questions are irrelevant, concern collateral issues, or risk misleading the jury. (*Ibid.*).

Subdivision (3). The first portion of subdivision (3) is derived from Court of Appeals precedent that sets forth a rule against a party impeaching the party's own witnesses upon any credibility ground, except as the rule has been statutorily modified with respect to impeachment by use of the witness's prior inconsistent statement. (See *e.g. People v Fitzpatrick*, 40 NY2d 44, 49-53 [1976]; *Carlisle v Norris*, 215 NY 400, 408-409 [1915]; *Cross v Cross*, 108 NY 628, 629 [1888] [rule is applicable when a party calls an adverse party]; *Becker v Koch*, 104 NY 394, 401-402 [1887].) This rule "descends to us from the ancient time when a party's witnesses were brought into court not to swear to facts in a case but rather to a party's own credibility. Not surprisingly, it then was considered ill befitting for a party to question the veracity of his own witnesses." (*Fitzpatrick*, 40 NY2d at 49; see also *People v Minsky*, 227 NY 94, 99-100 [1919] ["A party should not be permitted, after having unsuccessfully taken a chance to secure favorable testimony, to attack his own witness and ask the jury to infer the contrary of what has been sworn to, because the falsity of the evidence is to be presumed from the general character of the witness"]; *Carlisle*, 215 NY at 409 [by calling a witness the party "vouched for his reliability and credibility"].)

The remaining portions of the subdivision are also derived from Court of Appeals precedent. Thus, the Court has cautioned that the party is not bound by the testimony of a witness the party calls and that the party may always contradict the witness's testimony on a relevant issue by proof from other sources. (See *Spampinato v A.B.C. Consol. Corp.*, 35 NY2d 283, 287 [1974]; *Carlisle*, 215 NY at 410 [rule does not prevent the party from asking to have the "truthfulness or accuracy" of the witness's testimony submitted to the jury].) The Court has also

held the rule against impeaching the party's own witness does not prohibit a party from preemptively bringing out on direct examination facts to take the "sting" out of an expected cross-examination. (*See Minsky*, 227 NY at 98 ["The law does not . . . compel a party to conceal the bad record of his witnesses from the jury, to have it afterwards revealed by the opposing party with telling effect. Such a rule would be unfair alike to the party calling the witness and the jury"].)

6.25 Impeachment by Alibi Testimony

(1) Neither a defendant nor a defense witness who gives testimony, inconsistent with a notice of alibi filed pursuant to statute but withdrawn before trial or disavowed at trial, may be impeached by that notice of alibi on cross-examination or by introduction of that notice in rebuttal.

(2) A defendant or witness who gives alibi testimony may be impeached by a statement the defendant or witness, as the case may be, made prior to or following the filing of a notice of alibi inconsistent with the alibi testimony.

(3) (a) A witness who testifies at trial to an alibi may be impeached for failure to have timely presented the alibi to law enforcement authorities, provided the witness's failure to do so was not pursuant to the advice of defense counsel and the court has so determined before permitting questions.

(b) The foundation for the impeachment will normally include demonstrating that the witness was aware of the nature of the charges pending against the defendant, had reason to recognize that he possessed exculpatory information, had a reasonable motive for acting to exonerate the defendant, and was familiar with the means to make such information available to law enforcement authorities.

Note

Subdivision (1) is derived from *People v Burgos-Santos* (98 NY2d 226 [2002] [where the notice of alibi had been withdrawn prior to trial it was error to use that notice of alibi to cross-examine the defendant in order to impeach his testimony that he was present at the crime scene but was an innocent victim of an assault rather than the perpetrator]) and *People v Rodriguez* (3 NY3d 462 [2004] [where the notice of alibi was disavowed at trial on defendant's case, it was error to introduce the notice of alibi in rebuttal to impeach the defendant's alibi witnesses who testified to an alibi other than the one in the notice]; see also *People v Gray*,

125 AD3d 1107, 1107 [3d Dept 2015] [“The Court of Appeals has unequivocally established that the People may not use a defendant’s notice of alibi for impeachment purposes on cross-examination where the defendant has withdrawn such notice prior to trial”]; see Fed Rules Crim Pro rule 12.1 [f] [“Evidence of an intention to rely on an alibi defense, later withdrawn, or of a statement made in connection with that intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention”)].

By CPL 250.20, a defendant who intends to present an alibi defense is compelled to file a notice of alibi within 20 days of arraignment. That “compulsion” is not in violation of the Federal Constitution because, “[a]t most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the [defendant] from the beginning planned to divulge at trial” (*Williams v Florida*, 399 US 78, 85-86 [1970]). Use of that compelled notice of alibi to impeach a defendant or the defendant’s defense when it has been withdrawn or disavowed, however, raised a constitutional concern in both *Burgos-Santos* and *Rodriguez*. The Court did not decide the constitutional issue. Instead, the Court disallowed the notice as impeachment evidence, explaining that CPL 250.20 specified the remedies for a violation of the statutory requirements and those remedies did not include impeachment of the defendant or defendant’s witnesses.

The facts in *Rodriguez* suggest a broad definition of what constitutes a disavowal of an alibi notice and when that disavowal is timely. In *Rodriguez*, the defendant did not withdraw the notice of alibi; instead “it became obvious from the [defense witness’s] surprise testimony that defendant was presenting a new and different alibi” (*Rodriguez* at 465).

Subdivision (2) is derived from *People v McGraw* (40 AD3d 302, 302-303 [1st Dept 2007]). Absent the compulsion inherent in the filing of a notice of alibi, a defendant or defense witness who testifies to an alibi may be impeached by a statement, made prior to the filing of a notice of alibi, that is inconsistent with the testimony given at trial. As *McGraw* explained:

“The court properly admitted the rebuttal testimony of defendant’s former counsel concerning preindictment statements made by him to the District Attorney’s Office with defendant’s consent, regarding defendant’s whereabouts at the time of the robbery, which directly conflicted with the alibi defendant presented at trial. A statement made by an agent of a party, acting within the scope of his authority, is admissible as an admission against the party. This is not a case of using defendant’s withdrawn alibi notice to impeach him or his case, since there never was an alibi notice relating to the first alibi; instead, the first alibi was volunteered in an effort to forestall indictment. We reject defendant’s argument that the statement made by defendant’s original attorney to the prosecutor’s office was the

equivalent of an alibi notice. On the contrary, counsel did not provide this statement as a form of disclosure mandated by CPL 250.20” (*McGraw* at 302-303 [citations omitted]; see *People v Johnson*, 46 AD3d 276, 278 [1st Dept 2007] [absent a notice of alibi having been filed, the defendant was properly impeached during cross-examination by her attorney’s statements made at a prior bail application given “a reasonable inference that such statements were attributable to defendant, and they significantly contradicted her trial testimony”]; cf. Guide to NY Evid rules 8.03, Admission by Party and 6.14, Impeachment by Evidence Improperly Obtained).

Subdivision (3) is derived from *People v Dawson* (50 NY2d 311 [1980]). While permitting cross-examination of an alibi witness for failure to come forward before trial to law enforcement authorities, *Dawson* added some cautionary notes:

“[T]he Trial Judge should inform the jurors, upon request, that the witness has no civic or moral obligation to volunteer exculpatory information to law enforcement authorities and that they may consider the witness’ prior failure to come forward only insofar as it casts doubt upon the witness’ in-court statements by reason of its apparent inconsistency. Finally, when such questioning begins, the Trial Judge should call a bench conference to ascertain whether the witness refrained from speaking under the advice of defense counsel, for in such a case examination on the issue of the witness’ postconsultation silence would be improper and could well result in a mistrial” (*Dawson* at 322-323; see *People v Jenkins*, 88 NY2d 948, 950 [1996] [an alibi witness was properly impeached because a close relative or friend’s “knowledge that defendant is incarcerated pending trial may be reasonably found to be inconsistent with the witness’ failure to come forward with exculpatory evidence which might result in the accused’s being freed”]; cf. *People v Burgos*, 50 NY2d 992, 993-994 [1980] [“It was error for the Trial Judge to refuse to advise the jury that defendant’s alibi witnesses had no duty to volunteer exculpatory information to law enforcement authorities” and it would have been “best had the court stricken the entire line of questioning” when it was apparent that defense counsel had advised the witness that the witness had no duty to advise the authorities of the alibi]).

Dawson at 321 n 4 sets forth the foundational elements for a cross-examination:

“In most cases, the District Attorney may lay a ‘proper foundation’ for this type of cross-examination by first demonstrating that the witness was aware of the nature of the charges pending against the defendant, had reason to recognize that he possessed exculpatory

information, had a reasonable motive for acting to exonerate the defendant and, finally, was familiar with the means to make such information available to law enforcement authorities.”

Impeachment of an alibi witness may include rebuttal testimony (*see People v Knight*, 80 NY2d 845, 848 [1992] [The People properly presented rebuttal evidence “to rebut the alibi witnesses’ testimony about their postarrest statements to police by calling the police officer to testify that such statements were never made”]; *People v Patterson*, 194 AD2d 570, 571 [2d Dept 1993] [“Under *People v Knight*, extrinsic evidence is not admissible if offered solely on the issue of the witness’s general credibility but may be admitted to the extent that it bears on the truthfulness of the alibi if it is used to challenge the validity of the alibi, a material issue in the case. If this (threshold) is met, the fact that the evidence also tends to impeach the witness’ credibility does not render the evidence collateral” (citation and internal quotation marks omitted)]).

6.13. Impeachment by Bias, Hostility, Interest

The credibility of a witness may be impeached by asking the witness on cross-examination about the witness's bias, hostility, or interest for or against any party to the proceeding and by extrinsic evidence of such bias, hostility, or interest.

Note

This rule is derived from decisions of the Court of Appeals that recognize that a witness's partiality for or against a party in the proceeding may be shown to impeach the witness's credibility. (See *e.g. Coleman v New York City Tr. Auth.*, 37 NY2d 137, 142 [1975] [noting "the relevancy of all facts which bear on the probable partiality" of a witness for impeachment purposes]; *Schultz v Third Ave. R.R. Co.*, 89 NY 242, 248-249 [1882] ["It is always competent to show that a witness produced upon the trial of an action is hostile in his feelings toward the party against whom he is called to testify or that he entertains malice toward that party, and so it has been held in many cases"].) Illustrative examples of partiality recognized by the Court include a witness's bias in favor of the party calling the witness (see *People v Webster*, 139 NY 73, 85 [1893] ["bias is always of importance in determining credibility" and noting that bias may arise from family, business or close social relationships]; *People v Brown*, 26 NY2d 88, 94-95 [1970]); hostility to the party against whom the witness testifies (see *Brink v Stratton*, 176 NY 150, 152 [1903] ["it was competent to prove the hostility of any or all of these witnesses towards the defendants"]; *People v Brooks*, 131 NY 321, 325-326 [1892]); or the witness's interest in the case, personal, financial or other (see *People v Jackson*, 74 NY2d 787, 790 [1989] [witness who cooperated with prosecutor only after receiving a reduced sentence on a pending charge had an "obvious interest"]; *Coleman*, 37 NY2d at 142 ["an interest in a cause being a circumstance available for impeachment"]).

The rule as stated reflects the Court of Appeals holdings that evidence of partiality may be brought out on cross-examination and, as partiality is not a collateral matter, by extrinsic evidence. (See *People v Chin*, 67 NY2d 22, 31 [1986] ["interest or bias is not collateral"]; *Potter v Browne*, 197 NY 288, 293 [1910] ["The well-settled rule invoked by counsel for the plaintiff is that which permits a party to show the hostility of a witness toward him. This may be done by proving the hostile acts or declarations of the witness, either out of his own mouth or from the lips of others"]; *Brink*, 176 NY at 152 [hostility of witnesses may be shown "by their cross-examination or by other testimony"].) Extrinsic evidence of partiality may be admitted without first cross-examining the witness about the matter. (See *e.g. People v Michalow*, 229 NY 325, 331 [1920] ["It is not necessary to first examine the witness as to his hostility"]; *Brink*, 176 NY at 152.)

The Court of Appeals has noted that the trial court has discretion to control the presentation of evidence of partiality. (See *People v Corby*, 6 NY3d 231, 234-237 [2005]; *Brooks*, 131 NY at 325-327.) While such discretion may be exercised to limit the extent of the evidence admitted, the trial court may not completely exclude the offered evidence unless the inference of impartiality is remote or speculative, or the party who seeks to impeach the witness lacks a good faith basis for the question, or the evidence would be cumulative. (See *People v Hudy*, 73 NY2d 40, 57 [1988]; *People v Chin*, 67 NY2d 22, 28-29 [1986]; *People v Thomas*, 46 NY2d 100, 105 [1978]; *People v McDowell*, 9 NY2d 12, 15 [1961].) In essence, the court must weigh the probative value of the evidence against the danger that its admission would unduly prejudice a party, confuse an issue, or be cumulative. (See Guide to NY Evid rule 4.07, Exclusion of Relevant Evidence).

In criminal proceedings, both the United States Supreme Court and the Court of Appeals have cautioned that the exercise of discretion to limit or exclude evidence of partiality of witnesses testifying against defendants must be exercised in light of the Sixth Amendment's right of confrontation guaranteed to the defendant. (*Davis v Alaska*, 415 US 308, 318 [1974] ["While counsel was permitted to ask (the witness) whether he was biased, counsel was unable to make a record from which to argue why (the witness) might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial"; thus, defendant's right of confrontation was denied]; *Hudy*, 73 NY2d at 57 ["both the constitutional and the evidentiary rules" were breached when the trial court precluded defense counsel from questioning the police officers in the manner proposed; defendant had been prevented from cross-examining them about their questioning of complaining witnesses that may have shown possible fabrication by those witnesses].)

6.14 Impeachment by Evidence Improperly Obtained

(1) A voluntary statement of a defendant obtained by law enforcement in violation of (a) the required pre-interrogation warnings or (b) the defendant's right to counsel may be used to impeach the credibility of a defendant who gives testimony inconsistent with the statement.

(2) A voluntary statement or other evidence that is the product of an illegal seizure of or from a defendant may provide a basis for impeachment of a defendant who testifies in a manner inconsistent with his or her connection to the seized evidence.

(3) While the use of an inconsistent statement or other evidence taken in violation of a constitutional directive may be used to impeach the testimony of a defendant, it may not be used, directly or indirectly, to establish the People's case.

Note

Introduction. The rationale underlying this rule is that, absent the rule, a “defendant’s constitutional shield against having illegally seized evidence used against him could be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances” or other evidence illegally seized from the defendant (*United States v Havens*, 446 US 620, 626 [1980] [internal quotation marks omitted]; see *People v Johnson*, 27 NY2d 119, 122 [1970] [“the constitutional privilege ought to shield a man against unfairness by the State in using such a statement in his prosecution, but should not immunize him from inquiry when he affirmatively proffers testimony as part of a strategy in contested litigation in which truth is a critical ingredient”])). The use of an inconsistent statement or other evidence taken in violation of a constitutional directive, however, is limited to impeachment of a defendant who testifies on his or her behalf and “may not be used, directly or indirectly, to establish the People’s case” (*People v Ricco*, 56 NY2d 320, 323 [1982]).

Subdivision (1) is derived from both United States Supreme Court and New York Court of Appeals decisions.

The principal decisions in the United States Supreme Court are *Harris v New York* (401 US 222 [1971], *affg* *People v Harris*, 25 NY2d 175 [1969] [a

defendant's voluntary statement made to police that was inadmissible on the prosecution's case in chief because it was taken in violation of the required pre-interrogation warnings of *Miranda v Arizona* (384 US 436 [1966]) may be used to impeach the defendant's credibility]) and *Oregon v Hass* (420 US 714, 714-715 [1975] [the *Harris* holding was reaffirmed where the only difference between the two cases was that Harris received defective pre-interrogation warnings and Hass received proper warnings but thereafter asked to telephone a lawyer before making the statement used for impeachment])).

In *Harris*, the prior inconsistent statement was elicited during cross-examination of the defendant (*Harris*, 401 US at 223). In *Hass*, the Court held that the trial court erred in denying the prosecutor's application to call a rebuttal witness to testify to the inconsistent statement (*Hass*, 420 US at 723-724).

The Court of Appeals has long held that "[o]ur rule permits the use for impeachment not only of statements obtained in violation of a defendant's *Miranda* rights, but also of those obtained in violation of his right to counsel under the State Constitution" (*People v Maerling*, 64 NY2d 134, 140 [1984] [citations omitted]).

The principal decisions in the Court of Appeals on permitting impeachment of a defendant by a voluntary statement taken in violation of the defendant's pre-interrogation warnings include: *Harris* (25 NY2d at 177 [on cross-examination of the defendant, the prosecutor properly used a statement taken from the defendant in violation of the required pre-interrogation warnings that was at "complete variance" with the defendant's direct testimony to impeach the defendant]) and *People v Wilson* (28 NY3d 67, 72 [2016] [the prosecutor properly used the defendant's statements made to police after he had invoked his right to remain silent to impeach the defendant's testimony]).

The principal decisions in the Court of Appeals on permitting impeachment of a defendant by a voluntary statement taken in violation of the defendant's right to counsel include: *People v Kulis* (18 NY2d 318, 322 [1966] [a statement was taken after the defendant requested an attorney]); *People v Boodie* (26 NY2d 779, 781 [1970] [statement taken from defendant after arraignment in the absence of counsel]); *Maerling* (statements to a jail guard made while in custody in absence of counsel); and *People v Meadows* (64 NY2d 956, 958 [1985] [statement taken after the right to counsel attached by virtue of the commencement of the action by the filing of a complaint and issuance of a warrant]).

The defendant must have given the prior statement voluntarily (*Maerling*, 64 NY2d at 140 ["If the statement was voluntary, it may be used to impeach; if it was not, it may not be admitted, even though it may be reliable"]; *People v Walker*, 67 NY2d 776 [1986] [a judicial finding that the defendant's statement was involuntary precluded its use to impeach the defendant's testimony]). The People bear the burden of showing that statements were made voluntarily, i.e., that the "statements were not products of coercion," either physical or psychological (which

includes the use of “deception” in the service of “psychologically oriented interrogation” that “eclipse[s] individual will”); in other words the statements must be given as a result of a “ ‘free and unconstrained choice by [their] maker’ ” (*People v Thomas*, 22 NY3d 629, 641-642 [2014]). Also, a statement obtained by a grant of immunity is involuntary (*New Jersey v Portash*, 440 US 450, 459 [1979] [“Testimony given in response to a grant of legislative immunity is the essence of coerced testimony”]).

Harris authorized the use of the defendant’s prior statement for impeachment “provided of course that the trustworthiness of the evidence satisfies legal standards” (401 US at 224). That proviso, however, was not intended to require a judicial determination of trustworthiness; the purported inconsistent statement, as with any purported inconsistent statement, presents an issue of fact and credibility for the jury to decide (*People v Washington*, 51 NY2d 214, 221 [1980]).

The defendant opens the door to impeachment once the defendant “recounts the events to which the prior inconsistent statement relates” (*People v Wise*, 46 NY2d 321, 327 [1978]; see Guide to NY Evid rule 4.08, “Open Door” Evidence)]. As *Wise* further explained: “where a defendant’s trial testimony offers one version of the events in question, and his prior remark to a police officer suggests a contrary view of those events, the jury is entitled to hear the previous statement so that it may fully assess the witness’ credibility” (*Wise* at 327-328; compare *People v Rahming*, 26 NY2d 411, 418 [1970] [in this case, the prosecutor erred in ranging “beyond the defendant’s direct examination ‘in order to lay a foundation for the tainted evidence (i.e., statement taken in violation of pre-interrogation warnings) on rebuttal’ ” (citations omitted)]; see *Havens*, 446 US 620).

Subdivision (2) is derived from the holdings of the United States Supreme Court. (See *Walder v United States*, 347 US 62, 64 [1954] [the defendant’s testimony on direct examination that he had never possessed any narcotics opened the door, solely for the purpose of attacking the defendant’s credibility, to evidence of the heroin unlawfully seized from him in connection with a prior case that was dismissed due to the illegal seizure of the heroin]; *Havens*, 446 US at 627-628 [holding that “a defendant’s statements made in response to proper cross-examination reasonably suggested by the defendant’s direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained and that is inadmissible on the government’s direct case, or otherwise, as substantive evidence of guilt”]; see *United States v Leon*, 468 US 897, 910 [1984] [“Evidence obtained in violation of the Fourth Amendment and inadmissible in the prosecution’s case in chief may be used to impeach a defendant’s direct testimony”].)

“It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which

evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths" (*Walder* at 65).

The Court of Appeals has relied on the Supreme Court holdings in its decisions permitting impeachment of a defendant by a voluntary statement taken in violation of the defendant's pre-interrogation warnings or right to counsel (*Kulis*, 18 NY2d at 322-323; *Johnson*, 27 NY2d at 121-122; *Maerling*, 64 NY2d at 140-141). The Appellate Division has applied the holding in *Havens* to the facts of individual cases (*People v LaFontant*, 46 AD3d 840, 841-842 [2d Dept 2007] [when the defendant testified that he had not possessed a gun prior to the day of the incident, a photograph of the defendant holding a gun that was the product of an illegal search of his cell phone was properly admitted as impeachment evidence]; *People v Donnelly*, 103 AD2d 941, 941-942 [3d Dept 1984] [when the defendant testified concerning his consumption of alcohol prior to the accident, the results of a blood alcohol test that had been suppressed was properly admitted]; see *People v Dash*, 126 AD2d 737, 737 [2d Dept 1987] ["While illegally obtained physical evidence is inadmissible as substantive proof in the People's case-in-chief, it may be used for purposes of impeaching a defendant who testifies in his own behalf"]).

Method of Impeachment. The traditional requirements for proving an inconsistent statement of a defendant are to raise the statement and circumstances of its making with the defendant on cross-examination and, if the defendant denies making the statement, to introduce it through rebuttal evidence (Guide to NY Evid rule 6:15, Impeachment by Prior Inconsistent Statement).

More than a century ago, however, in *Blossom v Barrett* (37 NY 434, 438 [1868]), the Court of Appeals held that the foundation for a prior inconsistent statement "does not apply when the admission sought to be proved is that of a party to the suit. The party's confessions are competent without interrogating him at all in regard to it." *Mindlin v Dorfman* (197 App Div 770, 772 [1st Dept 1921]) explained the rationale for *Blossom* as follows:

"The reason for the difference in the rule relating to witnesses and parties is that the only object of requiring the warning is to provide a fair opportunity of explanation before the witnesses' departure, whereas a party is in theory present during the trial, and has in fact ample opportunity to protect himself by taking the stand for any explanations which he may deem necessary after hearing the testimony of his alleged admissions."

The United States Supreme Court, in *Oregon v Hass* (420 US 714 [1975]), approved the introduction of a statement, taken in violation of *Miranda*, solely in rebuttal, to impeach the credibility of the defendant's testimony. The defendant accordingly was not at first cross-examined about the statement. Consistent with the rationale of *Blossom* as explained in *Mindlin*, the defendant then "again took

the stand” (*id.* at 717) to address the rebuttal evidence, at which point the trial court instructed the jury that the statement bore only on the defendant’s credibility.

Some Appellate Division decisions, without considering *Blossom*, have held that it is error not to employ the traditional foundation requirements for a statement improperly obtained from the defendant, and, upon the failure to confront the defendant on cross-examination with the statement, rebuttal evidence of the inconsistent statement is not authorized (*People v Robinson*, 267 AD2d 1031, 1031 [4th Dept 1999]; *People v Watford*, 146 AD2d 590 [2d Dept 1989]; *People v Jones*, 134 AD2d 915 [4th Dept 1987]; *People v Grainger*, 114 AD2d 285, 290 [4th Dept 1986]).

Since *Blossom*, it appears that the Court of Appeals has not been asked whether the failure to question the defendant on cross-examination about an improperly obtained inconsistent statement precludes its use as rebuttal evidence. The Court has been presented with cases in which the traditional foundation requirements were employed, and, of course, there was no error in doing so. *Wise*, for example, states that the “law pertaining to prior inconsistent statements is well developed” and then lists the traditional foundation requirements that were utilized in that case; but *Wise* also stated that “[p]rimarily at issue here is whether defendant’s previous utterance was sufficiently inconsistent with his trial testimony to warrant its use on cross-examination” (*Wise* at 326).

There are, however, dicta, particularly in *People v Washington* (51 NY2d 214 [1980]), suggesting that *Blossom* still may represent current law and the presentation of an inconsistent statement improperly obtained from a testifying defendant may be admissible on rebuttal, without first confronting the defendant on cross-examination with the statement. *Washington* (at 220) states: “It is also apparent that the prosecutor may use the statements on cross-examination of the defendant (*Harris v New York, supra*) or on rebuttal by calling another witness to testify that the defendant made them (*Oregon v Hass, supra*)” (emphasis added).

Thus, *Washington* states, “or on rebuttal,” and cites to *Hass*, which approved introduction of the inconsistent statement *solely* on rebuttal, with the right of the defendant to resume the stand to address the rebuttal (as authorized by *Blossom*), and with an instruction to the jury that the statement related only to the credibility of the defendant (*Oregon* at 717).

Wise also makes a point of explaining that the evidence of the statement presented in rebuttal in that case met the requirements for rebuttal evidence, not simply that the statement was admissible on rebuttal because the defendant denied making the statement on cross-examination. (*Wise* at 328; *cf. People v Knight*, 80 NY2d 845, 847 [1992] [“the rule prohibiting the use of extrinsic evidence to impeach a witness on a matter that is merely collateral . . . has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the jury must decide”]; *People v Patterson*, 194 AD2d 570, 571

[2d Dept 1993] [“Under *People v Knight*, extrinsic evidence is not admissible if offered solely on the issue of the witness’s general credibility but may be admitted to the extent that it bears on the truthfulness of the alibi if it is used to challenge the validity of the alibi, a material issue in the case. If this threshold is met, the fact that the evidence also tends to impeach the witness’ credibility does not render the evidence collateral” (citation and internal quotation marks omitted)].)

Subdivision (3) states the undisputed holding of decisional law that any authorized use of evidence improperly obtained is solely for the purposes of impeachment (*People v Ricco*, 56 NY2d at 323).

**6.15. Impeachment by Prior Inconsistent Statement
(CPLR 4514; CPL 60.35 [2])**

(1) A witness's credibility may be impeached by evidence that the witness has made a statement, whether written or not, inconsistent with the witness's present testimony.

(2) In examining a witness concerning a prior inconsistent statement, the examining party must first show the statement or disclose its contents to the witness before asking the witness to affirm or deny the statement.

(3) If the witness denies making the prior inconsistent statement or is unable to recall making the statement, extrinsic evidence of the statement is admissible. If the witness admits making the prior inconsistent statement, whether to admit extrinsic evidence of the statement is committed to the discretion of the court.

(4) A party may not impeach its own witness by evidence of the witness's prior inconsistent statement, except as follows:

(a) In a civil proceeding, any party may introduce proof that any witness has made a prior statement inconsistent with the witness's testimony if the statement was made in a writing signed by the witness or was made under oath.

(b) In a criminal proceeding, when a witness, upon examination by the party who called the witness, gives testimony upon a material issue of the case which tends to disprove the party's position, the party may introduce evidence that the witness has previously made either a written statement signed by the witness or an oral

statement under oath contradictory to the witness's testimony.

(5) The credibility of a witness may be impeached by showing that the witness omitted to state a relevant fact or to state it more fully prior to testifying, at a time when the witness's attention was called to the matter and the witness was specifically asked about the facts embraced in the question asked at a hearing or trial. Even though the matter was not called to the attention of the witness, the credibility of the witness may be impeached by showing that the circumstances surrounding the omission made it most unnatural for the witness to have omitted the information from what the witness said.

(6) Except in a civil case, as provided in rule 8.33 (1), an inconsistent statement is not admissible for the truth of the contents of the statement; rather, it is admissible solely for the purpose of determining the credibility of the witness.

Note

Subdivision (1). The rule set forth in subdivision (1) is derived from the seminal decision on the subject, *Larkin v Nassau Elec. R.R. Co.* (205 NY 267, 268-269 [1912]), wherein the Court of Appeals held:

“Any statement of a witness made out of court, orally or in writing, if contradictory of a material part of his testimony, may be, if properly proven, introduced in evidence, not as substantive proof of the truth of such statement, but as tending to discredit him. If it is sought to prove the expression of an opinion inconsistent with the testimony, it is enough if the opinion is so incompatible with the facts testified to by the witness that an honest mind knowing the facts would not be likely to entertain the opinion. Repugnant statements or contraries cannot be true and the fact that the witness has made them tends to show that he is untrustworthy through carelessness, an uncertain memory or dishonesty.” (*See also Sloan v New York Cent. R.R. Co.*, 45 NY 125, 127 [1871] [prior inconsistent statement “is competent, for the purpose of impeachment, to prove that a witness has made statements out of

court in conflict with his evidence in court upon a material question in the case”].)

Those holdings are embedded in a statute governing a criminal case: “Evidence concerning a prior contradictory statement . . . may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. Upon receiving such evidence at a jury trial, the court must so instruct the jury.” (CPL 60.35 [2].)

Thus, as the relevance of the prior inconsistent statement is predicated upon the fact that it was made, and not for its truth, the hearsay rule does not bar the statement.

In the limited circumstance set forth in rule 8.33, however, decisional law permits a prior inconsistent statement to be admitted for its truth. (*See* rule 8.33 and the Note thereto.)

For a prior statement to be inconsistent for purposes of the rule, it is not necessary that “there be a direct and positive contradiction. It is enough that the testimony and the statements are inconsistent and tend to prove differing facts.” (*Larkin*, 205 NY at 269.) In *People v Wise* (46 NY2d 321, 327 [1978]), the Court of Appeals noted that where there is some doubt as to whether a statement is “inconsistent,” the “balance should be struck in favor of admissibility, leaving to the jury the function of determining what weight should be assigned the impeachment evidence. Applied in this fashion, the law of previous contradictory statements will advance rather than impede the truth-seeking process.”

Where a prior inconsistent statement of a defendant in a criminal proceeding is involved, a statement made in violation of the defendant’s federal or state right to counsel or the pre-interrogation warnings of *Miranda v Arizona* (384 US 436 [1966]) may, if otherwise voluntarily made, be used to impeach a defendant who testifies on his or her own behalf. (*People v Maerling*, 64 NY2d 134, 140 [1984]; *People v Wilson*, 28 NY3d 67 [2016]; *People v Harris*, 25 NY2d 175 [1969], *aff’d* 401 US 222 [1971].) It must be noted that the statement must be voluntary; an involuntary statement may never be used for impeachment. Similarly, evidence seized in violation of the Fourth Amendment may be used to impeach a defendant who testifies on his or her own behalf. (*United States v Havens*, 446 US 620 [1980]; *People v Maerling*, 64 NY2d 134 [1984].)

Subdivision (2). Subdivision (2) recites the foundation warning required for inquiring of a prior inconsistent statement, as derived from *Larkin v Nassau Elec. R.R. Co.* (205 NY 267, 269 [1912] [citations omitted]):

“In case the statements are oral, the warning is given by asking the witness, in substance and effect, if he did not at a given time and

place in the presence of or to a person or persons specified make the alleged contradictory statements. In case the statements are in writing and unsubscribed, the paper must be shown or read to the witness and marked for identification, and, if subscribed, the signature and in case he so demands the paper must be shown to him.” (*See also Wise*, 46 NY2d at 326 [“To set the stage for the prior inconsistency, the questioner must first inform the witness of the circumstances surrounding the making of the statement, and inquire of him whether he in fact made it”].)

The foundation requirement does not apply where the witness who made the prior statement is a party to the proceeding. (*Blossom v Barrett*, 37 NY 434, 438 [1868] [“The (foundation) rule insisted on does not apply when the admission sought to be proved is that of a party to the suit. The party’s confessions are competent without interrogating him at all in regard to it”]. *But see* Guide to NY Evid rule. 6.14, Impeachment by Evidence Improperly Obtained; Method of Impeachment.)

Subdivision (3). The rule set forth in subdivision (3) is also derived from *Larkin v Nassau Elec. R.R. Co.*:

“The attention of a witness having been thus called to the contradictory statements, they may be proven and introduced in evidence in the regular course of the trial. They may, of course, be proved by the admissions of the witness made at the time his attention was called to them. If he fully and clearly admits the making of them as provable by the impeaching party, further proof of them is unnecessary.” (205 NY at 269-270; *see also Hanlon v Ehrich*, 178 NY 474, 480 [1904] [“If . . . the witness denies having made the statement, or does not remember having made it, he may then be contradicted by any person who heard him make it (or documentary evidence”].)

Whether to admit the extrinsic evidence when the witness has admitted the inconsistency is committed to the sound discretion of the trial court. (*See People v Piazza*, 48 NY2d 151, 163-165 [1979]; *People v Schainuck*, 286 NY 161, 165 [1941].) In deciding on the admissibility of a prior inconsistent statement a court may consider whether the statement relates to a collateral matter and would not be admissible pursuant to rule 6.11 (Impeachment in General). (*Cf. People v Knight*, 80 NY2d 845, 847 [1992] [“the rule prohibiting the use of extrinsic evidence to impeach a witness on a matter that is merely collateral . . . has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the jury must decide”].)

Subdivision (4) (a) and (b) are taken virtually verbatim from CPLR 4514 and CPL 60.35, respectively. They were enacted “to correct the inequities

occasioned by the fact that in many cases both sides were unfairly hampered by their inability to impeach unreliable witnesses upon whom they were compelled to rely.” (*People v McCormick*, 278 App Div 410, 413 [1st Dept 1951], *aff’d* 303 NY 403 [1952].)

Subdivision (5). This subdivision is derived from two Court of Appeals decisions that address whether an omission in a prior statement may render the statement inconsistent, *People v Bornholdt* (33 NY2d 75, 88 [1973]) and *People v Savage* (50 NY2d 673, 679 [1980]). The Court of Appeals has instructed that “a witness may not be impeached simply by showing that he omitted to state a fact, or to state it more fully at a prior time.” (*Bornholdt*, 33 NY2d at 88.) Impeachment by omission in a prior statement, however, is permissible where it is shown that “at the prior time the witness’ attention was called to the matter and that he was specifically asked about the facts embraced in the question propounded at trial.” (*Bornholdt*, 33 NY2d at 88.) This rule, the Court observed, “accords with human experience recognizing that unless asked directly about a matter a person may quite normally omit it from a narrative description.” (*Ibid.* at 89.) The Court has also held that impeachment by omission in a prior statement is permissible “when given circumstances make it most unnatural to omit certain information.” (*People v Savage*, 50 NY2d 673, 679 [1980]; *see also People v Chery*, 28 NY3d 139, 145 [2016] [where defendant testified at trial that the complainant assaulted him, his failure to relate an exculpatory fact in a statement to police at the time of his arrest in which he described the complainant’s conduct as relatively minor misconduct was an “unnatural omission”].) In such circumstances, the witness’s attention need not have been drawn to the matter at the time the statement was made. This rule, too, as the Court stated, “is firmly imbedded in behavioral expectations.” (*Savage*, 50 NY2d at 679.) As to the application of *Savage* and *Bornholdt* to grand jury testimony, *see People v Dismel* (16 Misc 3d 1120[A], 2007 NY Slip Op 51519[U] [Sup Ct, Kings County 2007]).

Subdivision (6). See the commentary for subdivision (1).

6.16 Impeachment of a Law Enforcement Officer

(1) A law enforcement witness is subject to the same rules governing the impeachment of any witness, as set forth in Guide to New York Evidence rule 6.11. The credibility of a law enforcement witness therefore may be impeached by evidence that has a tendency in reason to discredit the truthfulness or accuracy of the witness's testimony.

(2) The foundational requirements include:

(a) the showing of a good faith basis for the impeachment inquiry. A good faith basis for an impeachment inquiry requires that the inquiring party have a reasonable basis for believing the truth of things about which counsel seeks to ask.

(b) identification of specific allegations, credibility determinations, or acts of misconduct that are relevant to the credibility of the witness in the current proceeding.

(c) the trial court's assessment as to whether the proffered impeachment inquiry would confuse or mislead the jury or create a substantial risk of undue prejudice to the parties. Upon a finding that it would, the court may in the exercise of its discretion preclude or limit the scope of the inquiry.

(3) Sources of a good faith basis for impeachment of a law enforcement officer include:

(a) Civil lawsuit.

(i) Specific acts of misconduct lodged in a lawsuit against a testifying member of law enforcement constitutes a good faith basis for an impeachment inquiry of the

allegations asserted in that lawsuit that are relevant to the witness's credibility in the action in which the witness is testifying.

(ii) If the lawsuit did not result in an adverse finding against a witness, on cross-examination, it is not permitted to ask the witness if he or she has been sued, or if the case was settled (unless there was an admission of wrongdoing), or if the criminal charges related to the plaintiffs in those actions were dismissed. However, pursuant to paragraph (a) of this subdivision, questions based on the specific allegations of the lawsuit may be asked.

(b) A judicial determination that a law enforcement witness testified falsely in a proceeding, while not binding on the question of the witness's credibility in the proceeding in which the witness is testifying, constitutes a good faith basis for an impeachment inquiry of that witness with respect to that determination.

(c) Other misconduct of the witness, whether proved in a court proceeding or not, including, for example, acts of dishonesty and misstatements about an event or the officer's conduct made to a prosecutor, constitutes a good faith basis for an impeachment inquiry of the witness.

(4) Evidence that charges on trial had already been determined adversely to the defendant by another tribunal is inadmissible for impeachment of the defendant or otherwise.

Note

This rule is derived from the holdings of *People v Smith* (27 NY3d 652 [2016]) and *People v Rouse* (34 NY3d 269 [2019]).

Subdivision (1) is derived from *Smith*, which held that “law enforcement witnesses should be treated in the same manner as any other witness for purposes of cross-examination. The same standard for good faith basis and specific allegations relevant to credibility applies—as does the same broad latitude to preclude or limit cross-examination” (*Smith* at 661-662; *Rouse* at 273).

Subdivision (2) is drawn from the “logical framework” *Smith* set forth for deciding whether *to permit* the impeachment inquiry:

“First, counsel must present a good faith basis for inquiring, namely, the lawsuit relied upon; second, specific allegations that are relevant to the credibility of the law enforcement witness must be identified; and third, the trial judge exercises discretion in assessing whether inquiry into such allegations would confuse or mislead the jury, or create a substantial risk of undue prejudice to the parties” (*Smith* at 662).

Rouse declared that a good faith basis “requires only that counsel have some reasonable basis for believing the truth of things about which counsel seeks to ask” (*Rouse* at 277 [internal quotation marks and citation omitted]).

Subdivision (3) (a) (i) is derived from the facts of the three cases decided in the *Smith* opinion (*Smith*; *Ingram*; *McGhee*). In all three cases, the Court held that a lawsuit alleging misconduct by the testifying officers constituted a good faith basis for the inquiry and that specific allegations in those lawsuits about which the defense sought to question the officers were relevant to the case on trial and the credibility of the witness.

In *Ingram*, for example, the defense was that the officers had “fabricated evidence and concocted a false story” of the events (27 NY3d at 666). The officers were subject to a pending civil suit that alleged some of the same conduct; that civil suit provided the good faith basis for the inquiry and for the inquiry of “specific allegations” that were relevant to the officers’ credibility (*id.* at 667). The trial court had denied the application to cross-examine the officers because the civil action was pending. That, the Court of Appeals held, was an abuse of discretion.

It was not relevant that the action was pending or that the lawsuits had not been resolved, given the long-standing rule of impeachment that a good faith basis for inquiry about bad acts is permitted irrespective of whether the prior bad act has been proved in a court proceeding (*Smith* at 661; *Rouse* at 273).

Subdivision (3) (a) (ii) sets forth the limitation on cross-examination that *Smith* pronounced:

“Where a lawsuit has not resulted in an adverse finding against a police officer, as is the case with these three appeals, defendants should not be permitted to ask a witness if he or she has been sued, if the case was settled (unless there was an admission of wrongdoing) or if the criminal charges related to the plaintiffs in those actions were dismissed. However, subject to the trial court’s discretion, defendants should be permitted to ask questions based on the specific allegations of the lawsuit if the allegations are relevant to the credibility of the witness” (*Smith* at 662).

Subdivision (3) (b) and (c) are principally derived from *Rouse*. *Rouse* confirmed the holding and scope of *Smith* by recognizing that, subject to the analytical framework set forth in *Smith*, misstatements of a testifying officer made to a federal prosecutor in a different matter and a prior judicial determination in which a testifying officer was found to have given unreliable testimony constituted a good faith basis for inquiry (*Rouse*, 34 NY3d at 276-278).

The officer in *Rouse* had “misled” a federal prosecution with respect to his involvement in a ticket-fixing scheme about which the defense should have been permitted to cross-examine him, given that dishonesty is conduct bearing on a person’s truthfulness. (*Id.* at 276 [“even where a prior bad act by a law enforcement officer is not criminal, it may be a proper subject for impeachment questioning where it demonstrates an untruthful bent or significantly reveals a willingness . . . to place the advancement of his individual self-interest ahead of principle or of the interests of society” (internal quotation marks and citation omitted)].)

Also, in *Rouse*, there were federal court rulings that the police officers testifying in the state court proceeding had given testimony “incredible in a manner which suggested that the officers may have falsely testified in order to obtain a desired result” (*id.* at 280). Those determinations, held *Rouse*,

“were probative of the officers’ credibility in the current prosecution, where defendant’s entire defense was aimed at convincing the jury that the officers were incorrectly identifying him as the shooter in order to avoid backlash for allegedly assaulting defendant upon arrest or for capturing an innocent bystander. The only countervailing prejudice articulated by the court in precluding defense counsel from this line of inquiry was concern that the jury *may* view the prior judicial determinations of credibility as binding. Such concern, however, could be mitigated by providing the jury with clarifying or limiting instructions, and that prejudice does not outweigh the probative and impeaching value of the inquiry.” (*Id.* at 280-281.)

Other examples where the trial court properly allowed or should have allowed cross-examination include: *People v Enoe* (144 AD3d 1052, 1054 [2d Dept 2016] [An officer who testified about having witnessed the defendant possessing a gun in the back seat of a livery cab was properly subject to cross-examination about specific allegations in a federal lawsuit that the officer had falsely arrested an individual “on a weapon possession charge” in order to gain overtime compensation and “ ‘credit’ for a gun-related arrest”]) and *People v Conner* (184 AD3d 431, 431 [1st Dept 2020] [defendant should have been permitted to cross-examine an officer about allegations in a civil lawsuit that charged him with the lodging of false charges, given that the complaint contained “allegations of falsification specific to this officer (and another officer), which bore on his credibility at the trial”]).

By comparison, examples where the trial court properly denied the impeachment inquiry include: *People v Watson* (163 AD3d 855, 860-861 [2d Dept 2018] [the trial court properly exercised its discretion in precluding defense counsel from inquiring into the underlying facts of two federal lawsuits because the “complaints in those actions only contained broad conclusory allegations of unlawful police action by large groups of officers, and did not set forth specific acts of misconduct against [the testifying officer] individually”]); *People v Williams* (184 AD3d 442, 442 [1st Dept 2020] [“The court providently exercised its discretion in precluding defendant from cross-examining a Department of Correction captain about a pending disciplinary investigation. The allegations underlying the pending investigation involved a violation of Department policy that had no bearing on the officer’s credibility, whether in general or in this case”]) and *People v Barnes* (173 AD3d 565, 566 [1st Dept 2019] [The court properly denied defense counsel’s motion to cross-examine a police witness based on a federal action against him “and other officers” that had been settled without any admission of wrongdoing, where the federal “ ‘complaint did not allege, or even support an inference, that (the witness) personally engaged in any specific misconduct or acted with knowledge of the misconduct of other officers’ ” (quoting *Smith* at 663))]).

In light of the repeal of Civil Rights Law § 50-a (L 2020, ch 96 [eff June 12, 2020]), issues have arisen regarding the scope of required disclosure of police internal affairs bureau (IAB) files and the corresponding availability of those records for impeachment. One court has directed the disclosure of “substantiated” and “unsubstantiated” IAB files of police officers involved in a case with the further holding that “exonerated” or “unfounded” files need not be produced on the theory that as a threshold matter there is an insufficient good faith basis for cross-examination by defense counsel of the latter files. The ultimate issue regarding the scope of permissible cross-examination of such witnesses, however, remains unsettled and will probably be resolved by in limine motions directed to the trial judge’s discretion. (See *People v Randolph*, 69 Misc 3d 770 [Sup Ct, Suffolk County 2020].)

Subdivision (4) is derived from *People v Rosenfeld* (11 NY2d 290, 297-

298 [1962]) where the Court explained that it had “held it to be serious error to bring to the jury’s attention in a criminal case the fact that the charges on trial had already been determined adversely to the defendant by another tribunal.” Thus, *Rosenfeld* held it was error for the prosecutor in cross-examining defendants who were police officers to elicit that they had been suspended from police duty for the conduct for which they were on trial. (*Id.* at 297-299.)

6.17 Impeachment by Instances of Misconduct¹

(1) Subject to paragraph (c),

(a) the credibility of a witness may be impeached on cross-examination by asking the witness about prior specific criminal, vicious, or immoral conduct of the witness; and

(b) the credibility of a witness who gives evidence of a person's character also may be cross-examined about whether the witness has heard of prior specific criminal, vicious, or immoral conduct of the person who was the subject of the character testimony.

(c) Cross-examination authorized by paragraphs (a) and (b) is permissible only if:

(i) the nature of the conduct or the circumstances in which it occurred bear logically and reasonably on the witness's credibility;

(ii) the question has a good faith basis;

(iii) the question does not relate to conduct underlying a criminal charge of which the witness was acquitted; and

(iv) in a criminal case, a question directed to a testifying defendant about the defendant's alleged prior criminal, vicious, or immoral conduct was authorized by the court prior to trial or during trial upon a defense objection.

(2) Except for the admission of a criminal conviction pursuant to Guide to New York Evidence rule 6.19, extrinsic evidence is not admissible to prove prior criminal, vicious, or immoral conduct.

(3) A defendant in a criminal proceeding does not, by the act of testifying, waive the privilege against self-incrimination with respect to questions concerning pending unrelated criminal charges.

(4) When a witness is impeached pursuant to subdivision one, the party who offered that witness may in rebuttal present evidence of that witness's character for truthfulness pursuant to Guide to New York Evidence rule 6.23 (2).

Note

Subdivision (1). The rule in subdivision (1) (a) on cross-examination of the witness regarding prior instances of misconduct committed by the witness is derived from substantial Court of Appeals precedent. (See *e.g. People v Smith*, 27 NY3d 652, 660, 662 [2016] [“witnesses—and indeed, even a testifying defendant—may be cross-examined on ‘prior specific criminal, vicious or immoral conduct,’ provided that ‘the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility’ ” and “a good faith basis for inquiring” is established]; *People v Sorge*, 301 NY 198, 200 [1950] [“A defendant, like any other witness, may be ‘interrogated upon cross-examination in regard to any vicious or criminal act of his life’ that has a bearing on his credibility as a witness”]; *People v Webster*, 139 NY 73, 84 [1893] [“It is now an elementary rule that a witness may be specially interrogated upon cross-examination in regard to any vicious or criminal act of his life”].) Whether the specific instance of conduct in issue logically and reasonably relates to the witness’s credibility is committed to the sound discretion of the court. (See *People v Coleman*, 56 NY2d 269, 273 [1982].) It should be noted that misconduct that demonstrates an “untruthful bent,” even though perhaps falling outside the “conventional category of immoral, vicious or criminal acts,” may be a proper subject of impeachment. (*People v Walker*, 83 NY2d 455, 461 [1994] [impeachment by defendant’s use of alias].)

Subdivision (1) (b) states New York’s rule permitting the cross-examination of a character witness about whether the witness had heard about prior specific instances of conduct at odds with the reputation attributed to the person who was the subject of the character testimony. (See *People v Kennedy*, 47 NY2d 196, 206 [1979] [“Assuming, *arguendo*, that Mrs. Kennedy did indeed serve as a character witness, any impeachment cross-examination should have been limited to her knowledge of defendant’s reputation, and should not have extended to her personal knowledge of the underlying acts”]; *People v Kuss*, 32 NY2d 436, 443 [1973] [when the credibility of character witnesses is at issue, “it is well established that they may be asked as to the existence of rumors or reports of particular acts allegedly committed by the defendant which are inconsistent with the reputation they have attributed to him. However(,) as the defendant indicates, there are certain limitations. The inquiry cannot be used to prove the truth of the rumors, but only to

show the ability of the witness to accurately reflect the defendant's reputation in the community. And the prosecutor must act in good faith; there must be some basis for his questions" (citation omitted)]; *see also People v Alamo*, 23 NY2d 630 [1969].) Of note, both *Kuss* and *Alamo* cite with approval *Michelson v United States* (335 US 469 [1948]), with the Court in *Alamo* stating that *Michelson* is the

"leading modern case on character testimony and the cross-examination of a character witness . . . There, the policy problem of allowing this type of evidence at all was examined exhaustively by Justice Jackson, including a number of New York cases, and it was held that when a defendant introduces the subject of his good character it 'throw[s] open the entire subject' of his good name through cross-examination of the witnesses called as to contrary reports and rumors and by independent proof adversely affecting the reputation of defendant. The court felt that the archaic disadvantages of the rule could be overcome by 'discretionary controls in the hands of a wise and strong trial court.' " (*Alamo*, 23 NY2d at 634 [citation omitted].)

Since use of this impeachment method has the potential for unfair prejudice, especially to a defendant in a criminal proceeding, and may confuse or mislead the jury, the nature and extent of the cross-examination are subject to the sound discretion of the court. (*Smith*, 27 NY3d 652.)

When exercising its discretion regarding the potential cross-examination of a defendant in a criminal proceeding, whether with respect to a prior criminal conviction or any other criminal, vicious or immoral conduct, the trial court must, upon a request of the defendant, prior to trial, exercise its discretion in accord with the dictates of *People v Sandoval* (34 NY2d 371 [1974]), and *People v Kennedy* (47 NY2d at 205-206). *Sandoval* explained that

"[t]o the extent . . . that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand." (*Sandoval*, 34 NY2d at 377.)

And, the Court of Appeals has added that in the court's exercise of discretion "there are no per se rules requiring preclusion because of the age, nature, and number" of crimes or acts of misconduct sought to be examined about. (*People v Walker*, 83 NY2d at 459.)

Subdivision (1) (c) (i) restates the Court of Appeals holdings in *People v Smith* (27 NY3d at 662) and *People v Coleman* (56 NY2d 269, 273 [1982]) that the specific instance of conduct must logically and reasonably relate to the witness's credibility and that whether it does is committed to the sound discretion of the court.

Subdivision (1) (c) (ii) is derived from *People v Smith* (27 NY3d at 662).

Subdivision (1) (c) (iii) is derived from *People v Santiago* (15 NY2d 640, 641 [1964] [“prejudicial error was committed when the prosecutor on cross-examination questioned defendant about a criminal charge on which he had been acquitted”]). A witness may, however, be subject to impeachment by the underlying facts of a charge dismissed by the grand jury. (*People v Alamo*, 23 NY2d 630 [1969] [dismissal by the grand jury].)

Subdivision (1) (c) (iv) was derived from *People v Sandoval* (34 NY2d 371 [1974]) and former CPL 240.43, which was replaced by CPL 245.20 (3). *Sandoval* set forth a procedure and criteria for a pretrial determination as to whether any of the defendant’s criminal convictions or prior instances of misconduct may be used for impeachment purposes. *People v Syposs* (122 AD2d 600, 600-601 [4th Dept 1986]), however, held that *Sandoval* “neither enlarged nor diminished the court’s inherent and pre-existing power to exercise general control over the range of cross-examination; consequently, a defendant retains the right to object *at trial* to prejudicial cross-examination, and when his objection challenges inquiry into his prior misconduct, he is entitled to a ruling based upon the same criteria as would have been applied had the issue been raised before trial” (internal quotation marks and citations omitted).

CPL 245.20 (3) requires the prosecution to “disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, superior court information, prosecutor’s information, information, or simplified information, which the prosecution intends to use at trial for purposes of (a) impeaching the credibility of the defendant, or (b) as substantive proof of any material issue in the case.” (*See* CPL 245.10 [1] [b] on the timing of the disclosure.) The defendant has the burden “of demonstrating that the prejudicial effect of the admission of evidence thereof for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion.” (*Sandoval* at 378.)

Sandoval set forth the various criteria a court may consider in exercising its discretion as follows:

“Evidence of prior specific criminal, vicious or immoral conduct should be admitted if the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility. Lapse of time, however, will affect the materiality if not the relevance of previous conduct. The commission of an act of impulsive violence, particularly if remote in time, will seldom have any logical bearing on the defendant’s credibility, veracity or honesty at the time of trial. . . . To the extent, however, that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of

society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand. A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity. On the other hand, crimes or conduct occasioned by addiction or uncontrollable habit, as with alcohol or drugs . . . may have lesser probative value as to lack of in-court veracity. . . .

“Commission of perjury or other crimes or acts of individual dishonesty, or untrustworthiness (e.g., offenses involving theft or fraud, bribery, or acts of deceit, cheating, breach of trust) will usually have a very material relevance, whenever committed. By contrast, questions as to traffic violations should rarely, if ever, be permitted.” (*Sandoval* at 376-377.)

Subdivision (2). The rule stated in subdivision (2) is derived from substantial Court of Appeals precedent. (*See e.g. Badr v Hogan*, 75 NY2d 629, 635 [1990] [“Unlike material facts in dispute, or matters such as a witness’s bias, hostility, or impaired ability to perceive which may be proved independently for impeachment, plaintiff’s alleged prior misconduct had no direct bearing on any issue in the case other than credibility. If proven, it would show only that plaintiff had acted deceitfully on a prior *unrelated* occasion. The matter was, therefore, collateral and, under the settled rule, could not be pursued by the cross-examiner with extrinsic evidence to refute plaintiff’s denial” (citation omitted)]; *People v Zabrocky*, 26 NY2d 530, 535 [1970]; *Sorge*, 301 NY at 200.) In *Sorge*, the Court noted that this rule barring the admissibility of extrinsic evidence did not preclude further questioning of the witness when the witness denied committing the act, stating: “[A] negative response will not fob off further interrogation of the witness himself, for, if it did, the witness would have it within his power to render futile most cross-examination. The rule is clear that while a witness’[s] testimony regarding collateral matters may not be refuted by the calling of other witnesses or by the production of extrinsic evidence, there is no prohibition against examining the witness himself further on the chance that he may change his testimony or his answer.” (*Id.* at 200-201 [citations omitted]; *compare* Guide to NY Evid rule 8.35, Prior Judgment of Conviction.)

Subdivision (3). The rule stated in subdivision (3) is derived from *People v Betts* (70 NY2d 289, 295 [1987] [“The policy of protecting the defendant’s opportunity to testify, while allowing the prosecution a balanced evidentiary response, is well served by the rule that the defendant’s choice to testify in the case on trial does not, by itself, effect a waiver of the privilege against self-incrimination as to pending unrelated charges. This rule will not, on the other hand, preclude prosecutors from inquiry into pending criminal charges if a defendant, in taking the stand, makes assertions that open the door and render those charges relevant for contradiction and response”]); and *People v Cantave* (21 NY3d 374, 381 [2013] [“We hold that the prosecution may not cross-examine a defendant about the underlying facts of an unrelated criminal conviction on appeal, for the purpose of impeaching his credibility”]; *People v Smith*, 87 NY2d 715, 721 [1996] [“a prospective defendant who elects to testify before the Grand Jury does not waive

the privilege against self-incrimination as to credibility questioning regarding unrelated pending charges”]; *compare People v Brady*, 97 NY2d 233, 235 [2002] [defendant in a criminal proceeding may be cross-examined regarding his “admissions at the guilty plea allocution” to an unrelated charge for which he was awaiting sentencing]).

Subdivision (4). See commentary in the Note to Guide to New York Evidence rule 6.23 (2).

¹ In December 2021, this rule was revised: (1) to substitute in the rule of subdivision (1) (b) the word “person” for “witness” in in the phrase “conduct of the person who was the subject of the character testimony”; (2) to substitute in the rule of subdivision (1) (c) (iv) the phrase “a question directed to a testifying defendant about the defendant’s alleged. . .” for the phrase: “the question about”; (3) to add at the end of the rule in subdivision (1) (c) (iv) “or during trial upon a defense objection” per the holding in *People v Syposs* (122 AD2d 600, 600-601 [1986]) that is summarized in the third sentence of the Note to that subdivision; and (4) to explain in the first sentence of the Note to subdivision (1) (c) (iv) that CPL 240.43 was repealed and replaced by CPL 245.20 (3).

6.19. Impeachment by Conviction

(1) The credibility of a witness may be impeached:

(a) in a civil proceeding, by asking the witness in good faith on cross-examination whether the witness has been convicted of a crime or by introducing into evidence a certified copy of the judgment of conviction for a crime.

(b) in a criminal proceeding:

(i) except as provided in subparagraph two, by asking the witness in good faith on cross-examination whether the witness has been convicted of a specified offense;

(ii) when the witness is the defendant, by asking the defendant in good faith on cross-examination about a prior conviction of a specified offense to the extent authorized by the court prior to trial;

(iii) if a witness denies the conviction or answers in an equivocal manner, the conviction may be proved by introducing into evidence a certified copy of the judgment of conviction.

(2) A witness's adjudication as a youthful offender under article 720 of the Criminal Procedure Law or an adjudication as a juvenile delinquent under article 3 of the Family Court Act is not admissible to impeach the witness's credibility; the conduct underlying the adjudication may, however, be used to cross-examine the witness, subject to rule 6.17 (1) (Impeachment by Instances of Misconduct).

(3) When a witness is impeached pursuant to subdivision one, the party who offered that witness may in rebuttal present evidence of that witness's character for truthfulness pursuant to rule 6.23 (2).

Note

Subdivision (1). The rule set forth in subdivision (1) governs impeachment of a witness in civil and criminal proceedings by evidence of a conviction of a crime. The rule is derived from CPLR 4513 and CPL 60.40 (1). The underlying premise of this rule is that “[e]vidence of conviction thus impeaches the general character for [the witness’s] truth and veracity.” (*Derrick v Wallace*, 217 NY 520, 525 [1916]; *see also People v Sandoval*, 34 NY2d 371, 377 [1974] [conviction of a crime shows a “demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others (which) goes to the heart of honesty and integrity”].)

In both civil and criminal proceedings, the method of impeachment by conviction is subject to the discretion of the court, exercised in accord with the dictates of *People v Sandoval* (34 NY2d 371 [1974] [defendant in a criminal proceeding as witness]) and of *People v Ocasio* (47 NY2d 55 [1979] [non-criminal defendant witness]).

The Court of Appeals has stressed that a good faith basis for the impeaching question is required. (*See People v D'Abate*, 37 NY2d 922, 923 [1975] [“it was improper for the prosecutor here on cross-examination to question defendant as to three out-of-State convictions with respect to which the prosecutor . . . had no certificates of conviction”].)

As to what convictions are admissible for purposes of the rule, CPLR 4513, governing civil proceedings, provides:

“A person who has been convicted of a *crime* is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer.” (Emphasis added.)

Impeachment by conviction of a “crime” includes only “a misdemeanor or a felony” (Penal Law § 10.00 [6]) and thus excludes a “violation” and a “traffic infraction.” (*See also Vehicle and Traffic Law* § 155 [“A traffic infraction is not a crime and the punishment imposed therefor shall not be deemed for any purpose a penal or criminal punishment and shall not affect or impair the credibility as a witness or otherwise of any person convicted thereof”].)

By its terms, CPLR 4513 permits the judgment of conviction to be admitted into evidence even if the witness admits the conviction. (*See Moore v Leventhal*, 303 NY 534, 538 [1952].) However, extrinsic proof other than the judgment of conviction is not permitted. (*See People v Cardillo*, 207 NY 70, 71-71 [1912] [interpreting former Penal Law § 2444 from which CPLR 4513 is derived].)

CPL 60.40 (1) provides:

“If in the course of a criminal proceeding, any witness, including a defendant, is properly asked whether he was previously convicted of a specified offense and answers in the negative or in an equivocal manner, the party adverse to the one who called him may independently prove such conviction. If in response to proper inquiry whether he has ever been convicted of any offense the witness answers in the negative or in an equivocal manner, the adverse party may independently prove any previous conviction of the witness.”

The term “offense” includes violations as well as felonies and misdemeanors. (Penal Law § 10.00 [1] [“ ‘Offense’ means conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same”].) As in civil proceedings, convictions of traffic infractions may not be used for impeachment purposes. (Vehicle and Traffic Law § 155.)

Unlike a conviction being used to impeach a witness in a civil proceeding, in a criminal proceeding extrinsic evidence of the judgment of conviction is not authorized by CPL 60.40 to prove the conviction unless the witness has denied the conviction or is equivocal in answering the question about the conviction. Furthermore, this statutory provision recognizes that, unlike in civil proceedings, the permissible extrinsic evidence is, in the discretion of the court, not limited to the judgment of conviction.

For the purposes of the rule, in both civil and criminal proceedings a conviction includes a plea of guilty entered pursuant to *North Carolina v Alford* (400 US 25 [1970]). (*People v Miller*, 91 NY2d 372, 378 [1998]; *see also People v Serrano*, 15 NY2d 304 [1965].) In an *Alford* plea, the defendant enters a plea of guilty without admitting factual guilt of the offense but in the face of strong evidence of guilt, often to avoid the consequences of a conviction of a more serious offense. (*Matter of Silmon v Travis*, 95 NY2d 470, 472, 475 [2000].) The Court of Appeals held such a plea is not constitutionally proscribed, and “may generally be used for the same purposes as any other conviction.” (*Id.* at 475.) New York recognizes the validity of an *Alford* plea, and the Court of Appeals has held that it has the same consequences as a plea that admits factual guilt. (*Id.*)

Subdivision (1) (b) (ii) is derived from *People v Sandoval* (34 NY2d 371 [1974]) and its progeny. *Sandoval* requires a pretrial determination as to whether any of the defendant's criminal convictions or prior instances of misconduct may be used for impeachment purposes. The defendant has the burden "of demonstrating that the prejudicial effect of the admission of evidence thereof for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion." (*Id.* at 378.)

Sandoval also set forth the various criteria a court may consider in exercising its discretion as follows:

"Evidence of prior specific criminal, vicious or immoral conduct should be admitted if the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility. Lapse of time, however, will affect the materiality if not the relevance of previous conduct. The commission of an act of impulsive violence, particularly if remote in time, will seldom have any logical bearing on the defendant's credibility, veracity or honesty at the time of trial. . . . To the extent, however, that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand. A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity. On the other hand, crimes or conduct occasioned by addiction or uncontrollable habit, as with alcohol or drugs . . . , may have lesser probative value as to lack of in-court veracity

"Commission of perjury or other crimes or acts of individual dishonesty, or untrustworthiness (e.g., offenses involving theft or fraud, bribery, or acts of deceit, cheating, breach of trust) will usually have a very material relevance, whenever committed. By contrast, questions as to traffic violations should rarely, if ever, be permitted." (*Sandoval*, 34 NY2d at 376-377; *see also People v Williams*, 12 NY3d 726 [2009]; *People v Smith*, 18 NY3d 588 [2012].)

The *Sandoval* procedure is discretionary, rather than mandatory, for a witness who is not the defendant in a criminal proceeding. As stated by the Court of Appeals: "we take the opportunity presented by this case to make explicit that it is inapplicable to witnesses who are not defendants. That is not to say, with respect to a witness who is not a defendant, that a trial court is precluded, in its sound

discretion, from either entertaining an application for a ruling *in limine* on the permissible scope of cross-examination concerning a nonparty's prior misdeeds, or, if it believes it best, from refusing to do so in advance of the time when the question presents itself in regular course." (*Ocasio*, 47 NY2d at 59.)

Subdivision (2). The rule set forth is derived from *People v Duffy* (36 NY2d 258, 264 [1975] ["Although it would be impermissible to use a youthful offender adjudication to impeach, the illegal and immoral acts underlying the adjudication may be employed for such a purpose" (citations omitted)]) and *People v Gray* (84 NY2d 709, 712 [1995] ["It is . . . impermissible to use a youthful offender or juvenile delinquency adjudication as an impeachment weapon, because these adjudications are not convictions of a crime"])). Whether the underlying acts may be used for impeachment is subject to a pretrial *Sandoval* determination pursuant to rule 6.17.

Subdivision (3). See commentary in the Note to rule 6.23 (2).

6.20 Impeachment by Recent Fabrication

(1) A claim of “recent fabrication” means that a party is charging a witness not with mistake or confusion, but with making up a false story to meet the exigencies of the case.

(2) Provided there is a good faith basis for introducing evidence of recent fabrication, a party may elicit the evidence from a witness on cross-examination, and present extrinsic proof tending to establish that the witness testified to a false story and the reason therefor.

(3) When a party creates the inference of, or directly characterizes the testimony of a witness as, a recent fabrication, a prior consistent statement of the witness, made at a time when there was no motive to fabricate, is admissible to aid in establishing the witness’s credibility.

Note

Subdivision (1)’s definition of “recent fabrication” is drawn from *People v Singer* (300 NY 120, 124 [1949]):

“[Recent fabrication means] that the defense is charging the witness not with mistake or confusion, but with making up a false story . . . ‘Recently fabricated’ means the same thing as fabricated to meet the exigencies of the case” (citation omitted; *see Nelson v Friends of Associated Beth Rivka Sch. for Girls*, 119 AD3d 536, 538 [2d Dept 2014] [“Here, the focus of the defense was not merely that the infant plaintiff was mistaken or that she was confused or could not recall her accident, but that she was coached to tell a ‘false story well after the event’ and, as such, it was a recent fabrication”; thus, the infant’s prior statement in a medical record that was consistent with her testimony was admissible]).

“Recent fabrication” is not limited to fabrication of evidence after an event. In *People v Davis* (44 NY2d 269, 277-278 [1978]), for example, the Court noted that the “the only questions on cross-examination addressed to motive to fabricate related to a fabrication of the entire case from, and perhaps before, its very inception.”

Subdivision (2) is derived from *People v Spencer* (20 NY3d 954 [2012]), and *People v Hudy* (73 NY2d 40 [1988], *abrogated on other grounds by Carmell v Texas*, 529 US 513 [2000]). Perhaps the most important aspect of the rule on “recent fabrication” evidence drawn from those cases is that evidence of recent fabrication is not collateral, because it may go to the heart of the truthfulness of a witness’s testimony and the validity of a claim; as a result, regardless of whether a witness is cross-examined about a claim of “recent fabrication,” competent and relevant extrinsic evidence of “recent fabrication” is admissible. (*See Spencer* at 956 [provided that counsel has a “good faith basis” for eliciting the evidence, “extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground”]; *Hudy* at 56 [“extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground”].)

The extrinsic evidence of “recent fabrication,” as with any evidence, needs to be competent and relevant. (*Cf. People v Thomas*, 46 NY2d 100, 105 [1978] [evidence of hostility (which is also not collateral) was here properly excluded as “too remote”].) At the same time, “the trial court’s discretion in this area is circumscribed by the defendant’s constitutional rights to present a defense and confront his accusers.” (*Hudy* at 57.)

Subdivision (3) is derived from *Davis* (44 NY2d at 277) which authorized the admission of a witness’s “antecedent consistent statements” when the “cross-examiner has created the inference of, or directly characterized the testimony as, a recent fabrication.” For further commentary, see the Note to subdivision (2) of Guide to New York Evidence rule 8.31 (Prior Consistent Statement).

6.21. Religious Beliefs or Opinions

Evidence of a witness's religious beliefs or opinions is not admissible to impeach or support the witness's credibility.

Note

This rule is derived from substantial Court of Appeals precedent. (See *e.g.* *Matter of State of New York v Andrew O.*, 16 NY3d 841, 844 [2011]; *People v Wood*, 66 NY2d 374, 379 [1985]; *Brink v Stratton*, 176 NY 150, 154-156 [1903].) As stated by the Court in *Wood*: “[A]ny attempt to discredit . . . a witness because of his religious beliefs or for the exercise of his right to affirm the truth of his testimony is improper, because those factors are irrelevant to the issue of credibility.” (*Wood*, 66 NY2d at 378; see also *Saunders v Champlain Bus Corp.*, 263 App Div 683, 684 [3d Dept 1942] [“The basic principle of our jurisprudence is that every citizen regardless of his position, his property, his race or his creed, is entitled to equal and exact justice”].)

This rule does not prevent the admission of evidence of religious beliefs or opinions when such evidence is relevant for a purpose other than attacking or supporting the witness's credibility. (See *e.g.* *Toomey v Farley*, 2 NY2d 71, 82 [1956] [“This . . . is that rare case in which proof of plaintiffs' piety and devotion to the tenets of their religion and of their prominence and activity in their church was pertinent to show the circumstances surrounding (plaintiffs), and as bearing upon the hurtful tendency of the libel, and the general damage to which (they were) exposed” (internal quotation marks omitted)]; *United States v Teicher*, 987 F2d 112, 118 [2d Cir 1993] [inquiry into a witness's religious beliefs “ ‘for the purpose of showing interest or bias because of them’ ” is not barred].)

6.23. Impeachment by Reputation for Untruthfulness and Rebuttal

(1) The credibility of a witness who has given substantive evidence may be impeached by evidence of the witness's reputation for untruthfulness in the community. A witness who testifies to another witness's reputation for untruthfulness may be asked whether the witness has heard of prior specific conduct that bears on the truthfulness of the witness who was the subject of the character testimony.

(2) When a witness's character for truthfulness is impeached by reputation evidence or otherwise, the party who called the witness may, in the discretion of the court, introduce evidence, in rebuttal, of that witness's reputation for truthfulness in the community. In the exercise of its discretion, the court may consider whether permitting the rebuttal evidence may result in confusion or cause the trial to be unduly extended in length. On cross-examination of the rebuttal witness, the witness may be asked whether the witness has heard of prior specific conduct that bears on the untruthfulness of the witness who was the subject of the character testimony.

Note

Subdivision (1). The rule stated in subdivision (1) is derived from *People v Hanley* (5 NY3d 108, 112 [2005]) and *People v Pavao* (59 NY2d 282 [1983]), where the Court of Appeals explained that “ ‘a party has a right to call a witness to testify that a key opposing witness, who gave substantive evidence and was not called for the purposes of impeachment, has a bad reputation in the community for truth and veracity’ ” (*Hanley* at 112, quoting *Pavao* at 290; *see also People v Fernandez*, 17 NY3d 70, 76 [2011]; *People v Hinksman*, 192 NY 421, 432 [1908]). The purpose of this rule is to “ensure[] that the jury is afforded a full picture of the witnesses presented, allowing it to give the proper weight to the testimony of such witnesses.” (*Hanley*, 5 NY3d at 112; *see also Pavao*, 59 NY2d at 290 [the rule provides “an effective means of testing and assessing the credibility of witnesses and reaching a proper verdict”].) The Court has noted that this form of impeachment is limited to a “key witness” or “key prosecution witness.” (*Pavao*, 59 NY2d at 290-291.)

The Court of Appeals has instructed that proof of a witness's untruthful character must be confined strictly to reputation evidence, rather than opinion testimony. (*Hanley*, 5 NY3d at 112; *Carlson v Winterson*, 147 NY 652, 656 [1895].) In this connection, the character witness may not testify to specific acts of untruthful character by the witness being impeached. (*Pavao*, 59 NY2d at 290.) Furthermore, the reputation evidence must also be confined strictly to reputation for "truth and veracity." (*Hanley*, 5 NY3d at 112; *Hinksman*, 192 NY at 435 ["We think that evidence of general bad character, which is nothing but evidence of general reputation, should not be considered competent to decide the issue whether a defendant who testifies in his own behalf is worthy of belief . . ."].)

Guide to New York Evidence rule 8.39 (Reputation Evidence) sets forth the rule on the evidence authorized to prove reputation.

The reputation evidence need not refer to the witness's reputation for untruthfulness at the time of the trial but may refer to a time prior to trial, provided that time is not so remote as to negate the probative value of an inference of a reputation of untruthfulness at the requisite time. (See Guide to NY Evid rule 4.07, Exclusion of Relevant Evidence; *Dollner v Lintz*, 84 NY 669, 669 [1881] ["General reputation is not usually the growth of a day or month, but results in most cases from a course of life or conduct for a period of time. . . . The trial judge may control the range of the inquiry"].)

The Court of Appeals in dictum has approved the practice of asking witnesses called to impeach another whether, from their knowledge of the testified to bad reputation for truthfulness, they would believe the witness about whom they testified under oath. (See *Carlson*, 147 NY at 656; *Elmendorf v Ross*, 221 App Div 376, 377 [3d Dept 1927]; *Spira v Holoschutz*, 38 Misc 754, 755 [App Term 1902].)

The instant rule is simply one specific form of impeachment of a witness for untruthfulness. It doesn't exclude using any other rule of evidence to impeach the untruthful witness. For example, untruthful character can be shown by prior acts of misconduct; criminal convictions; as well as by an untruthful reputation.

Subdivision (2). The rule stated in subdivision (2) is derived from Court of Appeals decisions which hold that when a witness's character for truthfulness is impeached, the party calling the witness may, in the discretion of the court, seek to support the witness's credibility by evidence of the witness's character for truthfulness in the community. (See *e.g.* *Pavao*, 59 NY2d at 290 ["Whether the opposing party may call witnesses to rebut the impeaching witness' statement is a question best left to the discretion of the Trial Judge for it is he who can best assess whether doing so may result in confusion or cause the trial to be unduly extended in length"]; *Derrick v Wallace*, 217 NY 520, 525 [1916] [rebuttal evidence of good reputation]; *Stape v People*, 85 NY 390, 393 [1881].) This rule permits such character witness to testify that the witness has never heard the impeached witness's veracity questioned (see *People v Van Gaasbeck*, 189 NY 408, 419-420 [1907];

People v Davis, 21 Wend 309, 315 [Sup Ct of Judicature 1839]) and that the witness would believe the impeached witness under oath. (*See Adams v Greenwich Ins. Co.*, 70 NY 166, 170-171 [1877].)

The Court of Appeals has emphasized that the “court’s discretion arises only when a party seeks to rebut [the testimony of untruthfulness]. It is at that point that the judge may determine whether the admission of further testimony or the calling of additional witnesses is proper. This assures that the court will not be inundated with competing witnesses that will cause undue delay in bringing a trial to conclusion.” (*Hanley*, 5 NY3d at 114 [citation omitted]; *see also Pavao*, 59 NY2d at 290.)

Reasons for the introduction of rebuttal evidence of reputation evidence for truthfulness include not only when a witness is impeached by reputation for untruthfulness (*Stape*, 85 NY at 393) but also when a witness is impeached by criminal conviction or other instances of misconduct (*Derrick*, 217 NY at 525 [“Evidence of conviction thus impeaches the general character for truth and veracity and may be met by evidence of general good character”]).

Impeachment by proof of prior inconsistent statements, however, does not permit the admission of evidence of the witness’s reputation for truthfulness. (*See Frost v McCarger*, 29 Barb 617, 620, 621 [Sup Ct, Gen Term 1859].) Similarly, the New York courts have held that evidence contradicting a witness’s factual testimony does not permit evidence of the witness’s reputation for truthfulness. (*Kravitz v Long Is. Jewish-Hillside Med. Ctr.*, 113 AD2d 577, 584 [2d Dept 1985] [“contradictions and improbabilities . . . did not constitute an attempt to prove bad character”]; *People v Rector*, 19 Wend 569, 586 [Sup Ct of Judicature 1838]; *see Derrick*, 217 NY at 525.)

GUIDE TO NEW YORK EVIDENCE

ARTICLE 7

OPINION

EVIDENCE Table

of Contents

7.01 Opinion of Expert Witness

7.03 Opinion of Lay Witness

7.05 Rape Trauma Syndrome

7.06 Abused Person's Syndrome

7.08 Child Abuse Syndrome

7.15 False Confession Expert

7.17 Identification Evidence Expert

7.19 Scientific Evidence

7.01 Opinion of Expert Witness

(1) A person qualified as an expert by knowledge, skill, experience, training, or education, may testify to an opinion or information concerning scientific, technical, medical, or other specialized knowledge when:

(a) the subject matter is beyond the knowledge or understanding, or will dispel misconceptions, of a typical finder of fact; and

(b) the testimony will help the finder of fact to understand the evidence or determine a fact in issue, especially when the facts cannot be stated or described in such a manner as to enable the finder of fact to form an accurate judgment about the subject matter.

(2) Where the subject matter of the testimony is not based on the personal training or experience of the witness but rather is based on scientifically developed procedures, tests, or experiments, it must also be (or have been) established that: (a) there is general acceptance within the relevant scientific community of the validity of the theory or principle underlying the procedure, test, or experiment; (b) there is general acceptance within the relevant scientific community that the procedure, test, or experiment is reliable and produces accurate results; and (c) the particular procedure, test, or experiment was conducted in such a way as to yield an accurate result.

(3) Testimony in the form of an opinion or inference that meets the foregoing criteria for admissibility is admissible even if it embraces an ultimate issue to be decided by the trier of fact.

(4) An expert need not assert a conclusion with certainty, so long as the expert demonstrates a degree

of confidence in the conclusion sufficient to satisfy accepted standards of reliability in the expert's field.

(5) (a) Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form. The expert may base an opinion on facts in the record or known to the witness, and the expert may state an opinion and reasons without first specifying the data upon which it is based; however, an expert who relies on facts within personal knowledge that are not contained in the record is required to testify to those facts prior to rendering the opinion.

(b) An expert also may rely on out-of-court material if:

(i) it is of a kind accepted in the profession as reliable in forming a professional opinion, provided that there is evidence establishing the reliability of the out-of-court material.

(ii) it comes from a witness subject to full cross-examination by the opposing party.

(c) In a criminal case, while an expert may rely upon hearsay statements in formulating an opinion, the constitutional right of confrontation precludes the expert from testifying on direct examination to a statement made by a person who was not available for cross-examination.

(d) Defense of lack of criminal responsibility (CPL 60.55)

(i) When, in connection with the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, a psychiatrist or licensed psychologist testifies at a trial concerning the defendant's mental condition at the time of the conduct charged to constitute a crime, he [or she] must be

permitted to make a statement as to the nature of any examination of the defendant, the diagnosis of the mental condition of the defendant and his [or her] opinion as to the extent, if any, to which the capacity of the defendant to know or appreciate the nature and consequence of such conduct, or its wrongfulness, was impaired as a result of mental disease or defect at that time. The psychiatrist or licensed psychologist must be permitted to make any explanation reasonably serving to clarify his [or her] diagnosis and opinion, and may be cross-examined as to any matter bearing on his [or her] competency or credibility or the validity of his diagnosis or opinion.

(ii) Any statement made by the defendant to a psychiatrist or licensed psychologist during his [or her] examination of the defendant shall be inadmissible in evidence on any issue other than that of the affirmative defense of lack of criminal responsibility by reason of mental disease or defect. The statement shall, however, be admissible upon the issue of the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, whether or not it would otherwise be deemed a privileged communication.

(e) Sex Offender Civil Case. In a sex offender civil management case under article 10 of the Mental Hygiene Law, an expert may testify to hearsay offered to explain the basis of the expert's opinion when the proponent demonstrates through evidence that the hearsay is reliable and that its probative value in helping the jury evaluate the expert's opinion substantially outweighs its prejudicial effect.

Note

Subdivision (1). Subdivision (1) reflects the basic New York rule that it is for the jury to determine the facts and that they “may be aided, but not displaced,” by expert testimony “where there is reason to suppose that such testimony will elucidate some material aspect of the case that would otherwise resist comprehension by jurors of ordinary training and intelligence.” (*People v Inoa*, 25 NY3d 466, 472 [2015]; *People v Cronin*, 60 NY2d 430, 432 - 433 [1983] [“For testimony regarding both the ultimate questions and those of lesser significance, admissibility turns on whether, given the nature of the subject, ‘the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable’ ”]; cf. *People v Clyde*, 18 NY3d 145, 154 [2011]) [in responding to the defendant’s argument that “physicians were improperly allowed to testify as to their conclusions” regarding injuries, the Court held that “admissibility turns on whether, given the nature of the subject, the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon” [citing *Cronin*]. The facts that underlie physical injury and risk of serious physical injury can readily be stated to a jury so as to enable the jurors to form an accurate judgment concerning the elements of assault and unlawful imprisonment. It was therefore error to overrule [the defendant’s] objections and permit this expert testimony”].)

What distinguishes New York from other jurisdictions is its emphasis on opinion evidence being “necessary” to properly describe the subject matter. (See *Ferguson v Hubbell*, 97 NY 507, 514 [1884] [The rules admitting opinions of experts should not be unnecessarily extended]; *Teerpenning v Corn Exch. Ins. Co.*, 43 NY 279, 281 [1871].) That “necessity” requirement in recent times appears subsumed by the requirement that the subject matter be beyond the knowledge or understanding of a typical juror or will dispel misconceptions a juror may hold and thereby help a juror to understand the evidence or determine a fact in issue. (*People v Rivers*, 18 NY3d 222, 228 [2011] [“ ‘The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror’ ”]; *People v LeGrand*, 8 NY3d 449, 455 - 456 [2007] [“A court’s exercise of discretion depends largely on whether jurors, after the court considers their ‘day-to-day experience, their common observation and their knowledge,’ would benefit from the specialized knowledge of an expert witness”]; *People v Keindl*, 68 NY2d 410, 422 [1986] [“Opinion testimony of an expert witness is admissible where the conclusions to be drawn ‘depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence’ ”]; *People v Lee*, 96 NY2d 157, 162 [2001] [“Despite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror”].)

In the end, it is for the trial court “to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness.” (*People v Cronin*, 60 NY2d at 433; *People v Keindl*, 68 NY2d at 422; *People v Lee*, 96 NY2d at 162 [2001].)

Subdivision (2). Subdivision (2) sets forth New York’s continued adherence to the rule of *Frye v United States* (293 F 1013 [DC Cir 1923]). (*People v Wesley*, 83 NY2d 417 [1994]). “Absent a novel or experimental scientific theory, a *Frye* hearing is generally unwarranted.” (*People v Brooks*, 31 NY3d 939, 941 [2018].)

The *Frye* rule does not apply where experts base their testimony on personal training or experience of the expert. (*People v Oddone*, 22 NY3d 369, 375 [2013].) In *Oddone*, the court permitted a doctor to testify that the deceased’s neck had been compressed for “something in the range of 2, 3, 4 minutes.” The defendant claimed that the doctor “was advancing a scientific principle that had not gained general acceptance in its field, in violation of the rule of *Frye* The flaw in defendant’s reasoning is that [the doctor] did not claim to rely on any established scientific principle. He made clear that his testimony was based on his personal ‘experience’—meaning what he had observed, heard and read about particular cases. Such evidence is not barred by *Frye*” (*Oddone*, 22 NY3d at 375 - 376).

The *Oddone* court added a caveat:

“We acknowledge that it may not be possible to draw a neat line between scientific principles and experience-based testimony. Indeed, it has been observed that the many cases applying *Frye* to evidence based on scientific principles shed little light on exactly what a ‘scientific principle’ is We do not imply that an expert is allowed to say anything he or she likes to a jury if the statement is prefaced by the words ‘in my experience.’ To allow an expert to say, based only on his or her alleged experience, that smoking does not cause lung cancer or that baldness is related to the phases of the moon would be to tolerate the admission of junk science and to undermine the basic purpose of *Frye*.” (*Oddone*, 22 NY3d at 376).

The Court of Appeals has stressed that a *Frye* inquiry, whether required or not, is “separate and distinct from the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case” (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 447 [2006]). The foundation is lacking if the trial court determines that “ ‘there is simply too great an analytical gap between the data and the opinion proffered.’ ” (*Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 781 [2014], quoting *General Electric Co. v Joiner*, 522 US 136, 146 [1997].) The question boils down to whether the expert’s opinion sufficiently relates to existing

data or, to the contrary, “is connected to existing data only by the *ipse dixit* [unproven word] of the expert.” (*Joiner*, 522 US at 137; *see Brooks*, 31 NY3d at 941.)

Examples of accepted expert testimony include testimony that explains the following: the terminology used in the illegal drug trade (*People v Garcia*, 83 NY2d 817 [1994]; the inconsistency of the quantity of drugs recovered and packaging with personal use (*People v Hicks*, 2 NY3d 750 [2004]); the significance of the absence of the buy money in an undercover “buy and bust” when the reason for its absence is not inferable from the circumstances (*People v Brown*, 97 NY2d 500 [2002]; *cf. People v Gonzalez*, 99 NY2d 76 [2002]; *People v Smith*, 2 NY3d 8 [2004]); the impact on the ability to act with the requisite intent when a defendant had consumed up to a case of beer, smoked several marijuana cigarettes, and ingested 5 to 10 Valium (*People v Cronin*, 60 NY2d 430, 432 [1983]); the “range of psychological reactions of child victims who suffer from sexual abuse at the hands of their stepparents” (*People v Keindl*, 68 NY2d 410, 422 [1986]); the “sexually abused child syndrome” (*Matter of Nicole V.*, 71 NY2d 112 [1987]); whether a fire was intentionally set (*People v Rivers*, 18 NY3d 222 [2011]); an estimated time of a victim’s death (*People v Miller*, 91 NY2d 372 [1998]; GPS evidence (*Carniol v New York City Taxi & Limousine Commn.*, 126 AD3d 409, 410 - 411 [1st Dept 2015]); and the mechanism of an injury or physiological process by which an injury occurs (*Sadek v Wesley*, 117 AD3d 193, 201 [1st Dept 2014], *affd* 27 NY3d 982, 983 - 984 [2016]).

Subdivision (3). Subdivision (3) is derived from Court of Appeals cases that indicate that, once the criteria for admissibility are demonstrated, it matters not that the testimony may appear to invade the province of the jury or constitute evidence of the “ultimate” issue in the case. (*People v Hicks*, 2 NY3d 750, 751 [2004] [“Since the expert testimony was beyond the ken of the average juror, it matters not whether the testimony related to the ultimate issue in the case”]; *People v Cronin*, 60 NY2d at 433 [trial court erred in precluding an opinion on the grounds that it “went to the ultimate question and would usurp the jury’s function”]; *Dufel v Green*, 84 NY2d 795, 797 [1995] [It was not error for plaintiff’s doctors to testify to “two of the statutory components of the ‘serious injury’ threshold as defined by Insurance Law § 5102 (d)”]; *see People v Jones*, 73 NY2d 427, 430 - 431 [1989] [“Expert opinion testimony is used in partial substitution for the jury’s otherwise exclusive province which is to draw ‘conclusions from the facts’ . . . It is a kind of authorized encroachment in that respect”]; *People v Lee*, 96 NY2d 157, 162 [2001]; *People v Hicks*, 2 NY3d 750, 751 [2004]; *People v Rivers*, 18 NY3d at 228.)

Subdivision (4). Subdivision (4) is taken from *Matter of Anthony M.* (63 NY2d 270, 280 - 281 [1984] [“Though sometimes perceptible to lay witnesses . . . the progression from injury to death, often unseen and not readily comprehended, will generally be a subject for expert medical opinion. To establish a causal connection, conclusions which are only “contingent, speculative, or merely possible” . . . will not suffice, but neither is absolute certainty and the exclusion of

every other possibility required”)). A reasonable degree of certainty within the subject field of the testimony should suffice (*Matott v Ward*, 48 NY2d 455, 459 - 460 [1979] [“Granted that ‘a reasonable degree of medical certainty’ is one expression of such a standard . . . it is not, however, the only way in which a level of certainty that meets the rule may be stated. . . . (A)ny formulation from which it can be said that the witness’ ‘whole opinion’ reflects an acceptable level of certainty (will suffice),” and the weight of the testimony is then to be assessed by the trier of fact]; *People v Brown*, 67 NY2d 555, 560 [1986]).

Subdivision (5). Subdivision (5) derives primarily from a series of Court of Appeals cases.

- Subdivision (5) (a): The first sentence is taken verbatim from CPLR 4515. The second sentence is a combination of decisional law (*Cassano v Hagstrom* (5 NY2d 643, 646 [1959] [“opinion evidence must be based on facts in the record or personally known to the witness”]; *Hambusch v New York City Tr. Auth.*, 63 NY2d 723, 725 - 726 [1984] [same]), and the portion of CPLR 4515 that reads “the witness may state his opinion and reasons without first specifying the data upon which it is based.” The Court of Appeals has qualified that latter portion of CPLR 4515 in two ways.

The first qualification is as set forth in the rule’s exception for an expert who relies on facts within personal knowledge. (*People v Jones*, 73 NY2d 427, 430 [1989] [an expert who relies on necessary facts within personal knowledge which are not contained on the record is required to testify to those facts prior to rendering the opinion]; *Mandel v Geloso*, 206 AD2d 699, 700 [3d Dept 1994].)

Second, while the expert may state an opinion without first specifying the data that would support that opinion, the expert’s testimony or the record must supply the data. (*Jones*, at 431 [“In failing to supply an evidentiary predicate for their own chemist expert’s ultimate conclusion [that a particular drug was a controlled substance], the People presented an insufficient case”].) That the opposing party under CPLR 4515 may of course cross-examine the expert does not shift the burden to that party to fill in the missing data. (*Id.*; see Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4515; Barker and Alexander, Evidence in New York State and Federal Courts § 716 [2d ed].)

- Subdivision (5) (b): *People v Sugden* (35 NY2d 453, 460 - 461 [1974] [“The psychiatrist may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion. . . . He may also rely on material, which if it does not qualify under the professional test, comes from a witness subject to

full cross-examination on the trial”]); *People v Stone* (35 NY2d 69, 73 [1974] [“the Trial Judge was very careful to satisfy himself that an independent, legally competent basis existed for the [expert] opinion in the doctor's interviews with the defendant and in the medical records in evidence”]); *Hambusch v New York City Tr. Auth.* (63 NY2d 723, 726 [1984] [“In order to qualify for the [*Sugden*] ‘professional reliability’ exception, there must be evidence establishing the reliability of the out-of-court material . . . Plaintiff presented no such evidence in the instant case and therefore the physician’s opinion was inadmissible”]); *People v Jones* (73 NY2d 427, 430 [1989] [“an expert who relies on necessary facts within personal knowledge which are not contained on the record is required to testify to those facts prior to rendering the opinion . . . Conversely, expert opinions of the kind needing material evidentiary support for which there is none otherwise in the direct evidence or in some equivalently admissible evidentiary form have been excluded”]).

The Appellate Division, while confirming the rule set forth in (5) (b) has added an additional requirement, namely, that the out-of-court material “does not constitute the sole or principal basis for the expert’s opinion” (*Tornatore v Cohen*, 162 AD3d 1503, 1505 [4th Dept 2018] [internal quotation marks omitted]). The Court of Appeals has yet to rule on that issue.

- Subdivision (5) (c): *People v Goldstein* (6 NY3d 119, 129 [2005] [“the statements made to [the expert] by her interviewees were testimonial. . . . [The interviewees] knew they were responding to questions from an agent of the State engaged in trial preparation. None of them was making ‘a casual remark to an acquaintance’; all of them should reasonably have expected their statements ‘to be used prosecutorially’ or to ‘be available for use at a later trial.’ . . . Responses to questions asked in interviews that were part of the prosecution’s trial preparation are ‘formal’ in much the same sense as ‘depositions’ and other materials that the Supreme Court identified as testimonial”]). *Goldstein* also viewed the statements in question as hearsay because they were effectively being offered for their truth; if they were not being offered for their truth, the Confrontation Clause would not normally be implicated. In *Matter of State of New York v Floyd Y.* (22 NY3d 95, 107 [2013]), however, the Court of Appeals in a civil case under New York’s sex offender civil management statute (Mental Hygiene Law art 10) held that “basis hearsay [hearsay offered to explain the basis of an expert’s opinion] does not come into evidence for its truth, but rather to assist the factfinder with its essential article 10 task of evaluating the experts’ opinions.” That holding seemingly creates a criminal-civil dichotomy on whether the statements are hearsay. Thus far, *Floyd Y.*’s holding has not been applied in any reported decision other than cases under article 10 of the Mental Hygiene Law.

- Subdivision (5) (d) is taken verbatim from CPL 60.55. That section includes a requirement that the court give the jury the following limiting instruction: “Upon receiving the statement [of the defendant] in evidence, the court must instruct the jury that the statement is to be considered only on the issue of such affirmative defense and may not be considered by it in its determination of whether the defendant committed the act constituting the crime charged” (CPL 60.55 [2]).
- Subdivision (5) (e): *Matter of State of New York v Floyd Y.* (22 NY3d 95 [2013]). Using the terminology “hearsay basis evidence” to refer to hearsay offered to explain the basis of an expert’s opinion, the Court held (at 109): “Due process requires any hearsay basis evidence to meet minimum requirements of reliability and relevance before it can be admitted at [a Mental Hygiene Law] article 10 proceeding. In article 10 trials, hearsay basis evidence is admissible if it satisfies two criteria. First, the proponent must demonstrate through evidence that the hearsay is reliable. Second, the court must determine that the ‘probative value in helping the jury evaluate the [expert’s] opinion substantially outweighs [its] prejudicial effect.’ ”

7.01 Opinion of Expert Witness

(1) A person qualified as an expert by knowledge, skill, experience, training, or education, may testify to an opinion or information concerning scientific, technical, medical, or other specialized knowledge when:

(a) the subject matter is beyond the knowledge or understanding, or will dispel misconceptions, of a typical finder of fact; and

(b) the testimony will help the finder of fact to understand the evidence or determine a fact in issue, especially when the facts cannot be stated or described in such a manner as to enable the finder of fact to form an accurate judgment about the subject matter.

(2) Where the subject matter of the testimony is not based on the personal training or experience of the witness but rather is based on scientifically developed procedures, tests, or experiments, it must also be (or have been) established that: (a) there is general acceptance within the relevant scientific community of the validity of the theory or principle underlying the procedure, test, or experiment; (b) there is general acceptance within the relevant scientific community that the procedure, test, or experiment is reliable and produces accurate results; and (c) the particular procedure, test, or experiment was conducted in such a way as to yield an accurate result.

(3) Testimony in the form of an opinion or inference that meets the foregoing criteria for admissibility is admissible even if it embraces an ultimate issue to be decided by the trier of fact.

(4) An expert need not assert a conclusion with certainty, so long as the expert demonstrates a degree

of confidence in the conclusion sufficient to satisfy accepted standards of reliability in the expert's field.

(5) (a) Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form. The expert may base an opinion on facts in the record or known to the witness, and the expert may state an opinion and reasons without first specifying the data upon which it is based; however, an expert who relies on facts within personal knowledge that are not contained in the record is required to testify to those facts prior to rendering the opinion.

(b) An expert also may rely on out-of-court material if:

(i) it is of a kind accepted in the profession as reliable in forming a professional opinion, provided that there is evidence establishing the reliability of the out-of-court material.

(ii) it comes from a witness subject to full cross-examination by the opposing party.

(c) In a criminal case, while an expert may rely upon hearsay statements in formulating an opinion, the constitutional right of confrontation precludes the expert from testifying on direct examination to a statement made by a person who was not available for cross-examination.

(d) Defense of lack of criminal responsibility (CPL 60.55)

(i) When, in connection with the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, a psychiatrist or licensed psychologist testifies at a trial concerning the defendant's mental condition at the time of the conduct charged to constitute a crime, he [or she] must be

permitted to make a statement as to the nature of any examination of the defendant, the diagnosis of the mental condition of the defendant and his [or her] opinion as to the extent, if any, to which the capacity of the defendant to know or appreciate the nature and consequence of such conduct, or its wrongfulness, was impaired as a result of mental disease or defect at that time. The psychiatrist or licensed psychologist must be permitted to make any explanation reasonably serving to clarify his [or her] diagnosis and opinion, and may be cross-examined as to any matter bearing on his [or her] competency or credibility or the validity of his diagnosis or opinion.

(ii) Any statement made by the defendant to a psychiatrist or licensed psychologist during his [or her] examination of the defendant shall be inadmissible in evidence on any issue other than that of the affirmative defense of lack of criminal responsibility by reason of mental disease or defect. The statement shall, however, be admissible upon the issue of the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, whether or not it would otherwise be deemed a privileged communication.

(e) Sex Offender Civil Case. In a sex offender civil management case under article 10 of the Mental Hygiene Law, an expert may testify to hearsay offered to explain the basis of the expert's opinion when the proponent demonstrates through evidence that the hearsay is reliable and that its probative value in helping the jury evaluate the expert's opinion substantially outweighs its prejudicial effect.

Note

Subdivision (1). Subdivision (1) reflects the basic New York rule that it is for the jury to determine the facts and that they “may be aided, but not displaced,” by expert testimony “where there is reason to suppose that such testimony will elucidate some material aspect of the case that would otherwise resist comprehension by jurors of ordinary training and intelligence.” (*People v Inoa*, 25 NY3d 466, 472 [2015]; *People v Cronin*, 60 NY2d 430, 432 - 433 [1983] [“For testimony regarding both the ultimate questions and those of lesser significance, admissibility turns on whether, given the nature of the subject, ‘the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable’ ”]; cf. *People v Clyde*, 18 NY3d 145, 154 [2011]) [in responding to the defendant’s argument that “physicians were improperly allowed to testify as to their conclusions” regarding injuries, the Court held that “admissibility turns on whether, given the nature of the subject, the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon” [citing *Cronin*]. The facts that underlie physical injury and risk of serious physical injury can readily be stated to a jury so as to enable the jurors to form an accurate judgment concerning the elements of assault and unlawful imprisonment. It was therefore error to overrule [the defendant’s] objections and permit this expert testimony”].)

What distinguishes New York from other jurisdictions is its emphasis on opinion evidence being “necessary” to properly describe the subject matter. (See *Ferguson v Hubbell*, 97 NY 507, 514 [1884] [The rules admitting opinions of experts should not be unnecessarily extended]; *Teerpenning v Corn Exch. Ins. Co.*, 43 NY 279, 281 [1871].) That “necessity” requirement in recent times appears subsumed by the requirement that the subject matter be beyond the knowledge or understanding of a typical juror or will dispel misconceptions a juror may hold and thereby help a juror to understand the evidence or determine a fact in issue. (*People v Rivers*, 18 NY3d 222, 228 [2011] [“ ‘The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror’ ”]; *People v LeGrand*, 8 NY3d 449, 455 - 456 [2007] [“A court’s exercise of discretion depends largely on whether jurors, after the court considers their ‘day-to-day experience, their common observation and their knowledge,’ would benefit from the specialized knowledge of an expert witness”]; *People v Keindl*, 68 NY2d 410, 422 [1986] [“Opinion testimony of an expert witness is admissible where the conclusions to be drawn ‘depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence’ ”]; *People v Lee*, 96 NY2d 157, 162 [2001] [“Despite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror”].)

In the end, it is for the trial court “to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness.” (*People v Cronin*, 60 NY2d at 433; *People v Keindl*, 68 NY2d at 422; *People v Lee*, 96 NY2d at 162 [2001].)

Subdivision (2). Subdivision (2) sets forth New York’s continued adherence to the rule of *Frye v United States* (293 F 1013 [DC Cir 1923]). (*People v Wesley*, 83 NY2d 417 [1994]). “Absent a novel or experimental scientific theory, a *Frye* hearing is generally unwarranted.” (*People v Brooks*, 31 NY3d 939, 941 [2018].)

The *Frye* rule does not apply where experts base their testimony on personal training or experience of the expert. (*People v Oddone*, 22 NY3d 369, 375 [2013].) In *Oddone*, the court permitted a doctor to testify that the deceased’s neck had been compressed for “something in the range of 2, 3, 4 minutes.” The defendant claimed that the doctor “was advancing a scientific principle that had not gained general acceptance in its field, in violation of the rule of *Frye* The flaw in defendant’s reasoning is that [the doctor] did not claim to rely on any established scientific principle. He made clear that his testimony was based on his personal ‘experience’—meaning what he had observed, heard and read about particular cases. Such evidence is not barred by *Frye*” (*Oddone*, 22 NY3d at 375 - 376).

The *Oddone* court added a caveat:

“We acknowledge that it may not be possible to draw a neat line between scientific principles and experience-based testimony. Indeed, it has been observed that the many cases applying *Frye* to evidence based on scientific principles shed little light on exactly what a ‘scientific principle’ is We do not imply that an expert is allowed to say anything he or she likes to a jury if the statement is prefaced by the words ‘in my experience.’ To allow an expert to say, based only on his or her alleged experience, that smoking does not cause lung cancer or that baldness is related to the phases of the moon would be to tolerate the admission of junk science and to undermine the basic purpose of *Frye*.” (*Oddone*, 22 NY3d at 376).

The Court of Appeals has stressed that a *Frye* inquiry, whether required or not, is “separate and distinct from the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case” (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 447 [2006]). The foundation is lacking if the trial court determines that “ ‘there is simply too great an analytical gap between the data and the opinion proffered.’ ” (*Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 781 [2014], quoting *General Electric Co. v Joiner*, 522 US 136, 146 [1997].) The question boils down to whether the expert’s opinion sufficiently relates to existing

data or, to the contrary, “is connected to existing data only by the *ipse dixit* [unproven word] of the expert.” (*Joiner*, 522 US at 137; *see Brooks*, 31 NY3d at 941.)

Examples of accepted expert testimony include testimony that explains the following: the terminology used in the illegal drug trade (*People v Garcia*, 83 NY2d 817 [1994]); the inconsistency of the quantity of drugs recovered and packaging with personal use (*People v Hicks*, 2 NY3d 750 [2004]); the significance of the absence of the buy money in an undercover “buy and bust” when the reason for its absence is not inferable from the circumstances (*People v Brown*, 97 NY2d 500 [2002]; *cf. People v Gonzalez*, 99 NY2d 76 [2002]; *People v Smith*, 2 NY3d 8 [2004]); the impact on the ability to act with the requisite intent when a defendant had consumed up to a case of beer, smoked several marijuana cigarettes, and ingested 5 to 10 Valium (*People v Cronin*, 60 NY2d 430, 432 [1983]); the “range of psychological reactions of child victims who suffer from sexual abuse at the hands of their stepparents” (*People v Keindl*, 68 NY2d 410, 422 [1986]); the “sexually abused child syndrome” (*Matter of Nicole V.*, 71 NY2d 112 [1987]); whether a fire was intentionally set (*People v Rivers*, 18 NY3d 222 [2011]); an estimated time of a victim’s death (*People v Miller*, 91 NY2d 372 [1998]); GPS evidence (*Carniol v New York City Taxi & Limousine Commn.*, 126 AD3d 409, 410 - 411 [1st Dept 2015]); and the mechanism of an injury or physiological process by which an injury occurs (*Sadek v Wesley*, 117 AD3d 193, 201 [1st Dept 2014], *affd* 27 NY3d 982, 983 - 984 [2016]).

Subdivision (3). Subdivision (3) is derived from Court of Appeals cases that indicate that, once the criteria for admissibility are demonstrated, it matters not that the testimony may appear to invade the province of the jury or constitute evidence of the “ultimate” issue in the case. (*People v Hicks*, 2 NY3d 750, 751 [2004] [“Since the expert testimony was beyond the ken of the average juror, it matters not whether the testimony related to the ultimate issue in the case”]; *People v Cronin*, 60 NY2d at 433 [trial court erred in precluding an opinion on the grounds that it “went to the ultimate question and would usurp the jury’s function”]; *Dufel v Green*, 84 NY2d 795, 797 [1995] [It was not error for plaintiff’s doctors to testify to “two of the statutory components of the ‘serious injury’ threshold as defined by Insurance Law § 5102 (d)”]; *see People v Jones*, 73 NY2d 427, 430 - 431 [1989] [“Expert opinion testimony is used in partial substitution for the jury’s otherwise exclusive province which is to draw ‘conclusions from the facts’ . . . It is a kind of authorized encroachment in that respect”]; *People v Lee*, 96 NY2d 157, 162 [2001]; *People v Hicks*, 2 NY3d 750, 751 [2004]; *People v Rivers*, 18 NY3d at 228.)

Subdivision (4). Subdivision (4) is taken from *Matter of Anthony M.* (63 NY2d 270, 280 - 281 [1984] [“Though sometimes perceptible to lay witnesses . . . the progression from injury to death, often unseen and not readily comprehended, will generally be a subject for expert medical opinion. To establish a causal connection, conclusions which are only “contingent, speculative, or merely possible” . . . will not suffice, but neither is absolute certainty and the exclusion of

every other possibility required”)). A reasonable degree of certainty within the subject field of the testimony should suffice (*Matott v Ward*, 48 NY2d 455, 459 - 460 [1979] [“Granted that ‘a reasonable degree of medical certainty’ is one expression of such a standard . . . it is not, however, the only way in which a level of certainty that meets the rule may be stated. . . . (A)ny formulation from which it can be said that the witness’ ‘whole opinion’ reflects an acceptable level of certainty (will suffice),” and the weight of the testimony is then to be assessed by the trier of fact]; *People v Brown*, 67 NY2d 555, 560 [1986]).

Subdivision (5). Subdivision (5) derives primarily from a series of Court of Appeals cases.

- Subdivision (5) (a): The first sentence is taken verbatim from CPLR 4515. The second sentence is a combination of decisional law (*Cassano v Hagstrom* (5 NY2d 643, 646 [1959] [“opinion evidence must be based on facts in the record or personally known to the witness”]; *Hambusch v New York City Tr. Auth.*, 63 NY2d 723, 725 - 726 [1984] [same]), and the portion of CPLR 4515 that reads “the witness may state his opinion and reasons without first specifying the data upon which it is based.” The Court of Appeals has qualified that latter portion of CPLR 4515 in two ways.

The first qualification is as set forth in the rule’s exception for an expert who relies on facts within personal knowledge. (*People v Jones*, 73 NY2d 427, 430 [1989] [an expert who relies on necessary facts within personal knowledge which are not contained on the record is required to testify to those facts prior to rendering the opinion]; *Mandel v Geloso*, 206 AD2d 699, 700 [3d Dept 1994].)

Second, while the expert may state an opinion without first specifying the data that would support that opinion, the expert’s testimony or the record must supply the data. (*Jones*, at 431 [“In failing to supply an evidentiary predicate for their own chemist expert’s ultimate conclusion [that a particular drug was a controlled substance], the People presented an insufficient case”].) That the opposing party under CPLR 4515 may of course cross-examine the expert does not shift the burden to that party to fill in the missing data. (*Id.*; see Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4515; Barker and Alexander, Evidence in New York State and Federal Courts § 716 [2d ed].)

- Subdivision (5) (b): *People v Sugden* (35 NY2d 453, 460 - 461 [1974] [“The psychiatrist may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion. . . . He may also rely on material, which if it does not qualify under the professional test, comes from a witness subject to

full cross-examination on the trial”]); *People v Stone* (35 NY2d 69, 73 [1974] [“the Trial Judge was very careful to satisfy himself that an independent, legally competent basis existed for the [expert] opinion in the doctor's interviews with the defendant and in the medical records in evidence”]); *Hambusch v New York City Tr. Auth.* (63 NY2d 723, 726 [1984] [“In order to qualify for the [*Sugden*] ‘professional reliability’ exception, there must be evidence establishing the reliability of the out-of-court material . . . Plaintiff presented no such evidence in the instant case and therefore the physician’s opinion was inadmissible”]); *People v Jones* (73 NY2d 427, 430 [1989] [“an expert who relies on necessary facts within personal knowledge which are not contained on the record is required to testify to those facts prior to rendering the opinion . . . Conversely, expert opinions of the kind needing material evidentiary support for which there is none otherwise in the direct evidence or in some equivalently admissible evidentiary form have been excluded”]).

The Appellate Division, while confirming the rule set forth in (5) (b) has added an additional requirement, namely, that the out-of-court material “does not constitute the sole or principal basis for the expert’s opinion” (*Tornatore v Cohen*, 162 AD3d 1503, 1505 [4th Dept 2018] [internal quotation marks omitted]). The Court of Appeals has yet to rule on that issue.

- Subdivision (5) (c): *People v Goldstein* (6 NY3d 119, 129 [2005] [“the statements made to [the expert] by her interviewees were testimonial. . . . [The interviewees] knew they were responding to questions from an agent of the State engaged in trial preparation. None of them was making ‘a casual remark to an acquaintance’; all of them should reasonably have expected their statements ‘to be used prosecutorially’ or to ‘be available for use at a later trial.’ . . . Responses to questions asked in interviews that were part of the prosecution’s trial preparation are ‘formal’ in much the same sense as ‘depositions’ and other materials that the Supreme Court identified as testimonial”]). *Goldstein* also viewed the statements in question as hearsay because they were effectively being offered for their truth; if they were not being offered for their truth, the Confrontation Clause would not normally be implicated. In *Matter of State of New York v Floyd Y.* (22 NY3d 95, 107 [2013]), however, the Court of Appeals in a civil case under New York’s sex offender civil management statute (Mental Hygiene Law art 10) held that “basis hearsay [hearsay offered to explain the basis of an expert’s opinion] does not come into evidence for its truth, but rather to assist the factfinder with its essential article 10 task of evaluating the experts’ opinions.” That holding seemingly creates a criminal-civil dichotomy on whether the statements are hearsay. Thus far, *Floyd Y.*’s holding has not been applied in any reported decision other than cases under article 10 of the Mental Hygiene Law.

- Subdivision (5) (d) is taken verbatim from CPL 60.55. That section includes a requirement that the court give the jury the following limiting instruction: “Upon receiving the statement [of the defendant] in evidence, the court must instruct the jury that the statement is to be considered only on the issue of such affirmative defense and may not be considered by it in its determination of whether the defendant committed the act constituting the crime charged” (CPL 60.55 [2]).
- Subdivision (5) (e): *Matter of State of New York v Floyd Y.* (22 NY3d 95 [2013]). Using the terminology “hearsay basis evidence” to refer to hearsay offered to explain the basis of an expert’s opinion, the Court held (at 109): “Due process requires any hearsay basis evidence to meet minimum requirements of reliability and relevance before it can be admitted at [a Mental Hygiene Law] article 10 proceeding. In article 10 trials, hearsay basis evidence is admissible if it satisfies two criteria. First, the proponent must demonstrate through evidence that the hearsay is reliable. Second, the court must determine that the ‘probative value in helping the jury evaluate the [expert’s] opinion substantially outweighs [its] prejudicial effect.’ ”

7.03 Opinion of Lay Witness

(1) The testimony of a witness not testifying as an expert may be given in the form of an opinion or inference when that testimony:

(a) is rationally based on the witness's personal perception;

(b) is within the ambit of common experience or that of a particular witness; and

(c) would be helpful to the finder of fact in understanding the witness's testimony or in determining a fact in issue, especially when facts cannot be stated or described in such a manner as to enable the finder of fact to form an accurate judgment about the subject matter of the opinion or inference.

(2) Testimony in the form of an opinion or inference that meets the foregoing criteria for admissibility is admissible even if it embraces an ultimate issue to be decided by the trier of fact.

Note

Subdivision (1). The law recognizes that in their daily lives individuals communicate in part by the expression of statements that constitute an opinion or inference; e.g., “it was snowing,” rather than “white flakes were falling from the sky.” Beyond those self-evident examples of warranted opinions and inferences, the law has developed parameters within which a lay witness may testify to an opinion, as opposed to a statement of facts upon which the trier of fact will draw a conclusion.

The first requirement for admissibility of a lay witness's opinion or inference, as set forth in paragraph (a), is for the testimony to be rationally based on the witness's personal perception. In other words, it would be reasonable for the witness, on the basis of the perceived facts, to form the opinion or inference. (See *People v Caccese*, 211 AD2d 976, 977 [3d Dept 1995] [where the witness was a nurse who was familiar with calamine lotion, a lay opinion as to the identity of the substance covering marks and bruises was permissible]; *People v Smith*, 194 AD2d

874, 876 [3d Dept 1993] [where the witness was familiar by experience with the odor of blood, he properly rendered a lay opinion about smelling the odor of blood]; *Tulin v Bostic*, 152 AD2d 887, 888 [3d Dept 1989] [“While a lay witness testifying as to value must have some acquaintance with the particular property at issue, as well as knowledge of its market value, that does not mean that he must therefore qualify as an expert”].)

A close corollary to the first requirement, as set forth in paragraph (b), is that the testimony be within the ambit of common experience or that of a particular witness. Matters within the ambit of experience of a particular witness will normally require foundational testimony establishing the witness’s experience with the question presented; matters within the ambit of common experience, such as, color, weight, taste, or observed demeanor of another person, may not. (See Jerome Prince, *Richardson on Evidence* §§ 363, 364 [10th ed 1973]; *People v Eastwood*, 14 NY 562, 566 [1856] [“A child six years old may answer whether a man (whom it has seen) was drunk or sober; . . . the child could not, probably, describe the conduct of the man, so that, from its description, others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him than by their description of his conduct. Many persons cannot describe particulars; if their testimony were excluded, great injustice would frequently ensue”]; *Teerpenning v Corn Exch. Ins. Co.*, 43 NY 279, 281 - 282 [1871] [“On questions of value, a witness must often be permitted to testify to an opinion as to value, but the witness must be shown competent to speak upon the subject. He must have dealt in, or have some knowledge of the article concerning which he speaks”]; *People v Leonard*, 8 NY2d 60, 61 - 62 [1960] [Lay testimony that a beverage referred to as “rye and ginger ale was ordered, served and paid for was sufficient at least to present a jury question as to whether an alcoholic beverage was served,” given that what constituted an alcoholic beverage was a “matter of common knowledge”]; *Senecal v Drollette*, 304 NY 446, 448 [1952] [a 12-year-old boy who “often rode in automobiles and watched their speedometers” was competent to testify to the speed of a car that hit his companion]; *People v Olsen*, 22 NY2d 230 [1968] [speed]; *Soto v New York City Tr. Auth.*, 6 NY3d 487, 493 - 494 [2006] [“The trial court also properly permitted plaintiff to testify regarding an estimate of his running speed. Plaintiff established a sufficient foundation demonstrating the basis of his knowledge In comparable situations, both police and civilian witnesses with an appropriate basis for knowledge have been permitted to give testimony estimating the speed of moving motor vehicles”]; *People v Christopher*, 161 AD2d 896, 897 [1990] [“In situations where the illegal substance is not available for analysis, drug users who can demonstrate a knowledge of the narcotic are competent to testify”].)

Next, as exemplified by the foregoing cases, the opinion or inference must assist the trier of fact in understanding the testimony or determining an issue of fact. (See *People v Boyd*, 151 AD3d 641, 641 [1st Dept 2017] [Three witnesses who were not eyewitnesses but were familiar with the defendant could properly “give

lay opinion testimony . . . that defendant was the man depicted in surveillance videotapes firing a handgun. This testimony ‘served to aid the jury in making an independent assessment regarding whether the man in the (videos) was indeed the defendant’ ”].)

Last, what distinguishes New York from other jurisdictions is, as set forth in paragraph (c), its requirement that the opinion or inference of a lay (or expert) witness must be “necessary” to properly describe the subject matter. (*Teerpenning v Corn Exch. Ins. Co.*, 43 NY 279, 281 [1871] [“As a rule, witnesses must state facts, and not draw conclusions, or give opinions. . . . The cases in which opinions of witnesses are allowable, constitute exceptions to the general rule, and the exceptions are not to be extended or enlarged, so as to include new cases, except as a necessity to prevent a failure of justice, and when better evidence cannot be had”]; *Collins v New York Cent. & Hudson Riv. R.R. Co.*, 109 NY 243, 249 [1888] [“We know of no other way in which the witness could have stated his observation” than by the expression of his opinion “as to the fact that the one or the other emitted the most sparks, and hence it was proper that he should have been permitted to answer questions of that nature”]; *People v Gatewood*, 91 NY2d 905 [1998] [testimony of the defendant’s wife concerning the alleged effects of the drug Prozac upon the defendant was permissible], citing *People v Cronin*, 60 NY2d 430, 433 [1983].)

Examples of acceptable opinions or inferences of a lay witness, subject to relevance and in some instances a proper foundation as to the qualification of the witness to offer the opinion, include matters of “color, weight, size, quantity, light and darkness, and inferences of identity as to race, language, persons, visibility, [and] sounds” (Jerome Prince, *Richardson on Evidence* § 364 [a] at 329 [10th ed 1973]); “taste, smell, and touch” (*id.* subd [b]); the “state of emotion exhibited by a person; e.g., whether he appeared to be angry or jesting” (*id.* subd [c]); the “apparent physical condition of a person, which is open to ordinary observation” (*id.* subd [d]); the “[i]dentity and likeness” of a person (*id.* subd [e] at 330); the “identification of a person by his voice” (*id.* subd [f]); intoxication (*id.* subd [h] at 332); ownership of property (*id.* subd [i] at 333); the speed of a vehicle (*id.* subd [j]); the estimated age of a person (*id.* subd [k] at 334); one’s “own intent or belief” (*id.* subd [l]); the “rational or irrational nature of a person’s conduct” (but not whether the person was of “sound of unsound mind”) (*id.* subd [m]); the “value of property or services” (*id.* subd [n] at 335); and the “genuineness of the handwriting of another” (*id.* subd [o] at 337).

Subdivision (2). Subdivision (2) is derived from Court of Appeals cases that indicate that, once the criteria for admission are demonstrated, it matters not that the testimony may appear to invade the province of the jury or constitute evidence of the “ultimate” issue in the case. (*See People v Eastwood*, 14 NY at 566 [testimony that a person was drunk]; *Senecal v Drollette*, 304 NY at 448 [testimony about the speed of a car]; *cf. People v Hicks*, 2 NY3d 750, 751 [2004] [“Since the expert testimony was beyond the ken of the average juror, it matters not whether the testimony related to the ultimate issue in the case”]; *People v Cronin*, 60 NY2d

at 433 [trial court erred in precluding an opinion of an expert on the grounds that it “went to the ultimate question and would usurp the jury’s function”]; *People v Jones*, 73 NY2d 427, 430 - 431 [1989] [“Expert opinion testimony is used in partial substitution for the jury’s otherwise exclusive province which is to draw ‘conclusions from the facts.’ It is a kind of authorized encroachment in that respect” (citation omitted)]; *People v Lee*, 96 NY2d 157, 162 [2001]; *People v Rivers*, 18 NY3d 222, 228 [2011]).

7.03 Opinion of Lay Witness

(1) The testimony of a witness not testifying as an expert may be given in the form of an opinion or inference when that testimony:

(a) is rationally based on the witness's personal perception;

(b) is within the ambit of common experience or that of a particular witness; and

(c) would be helpful to the finder of fact in understanding the witness's testimony or in determining a fact in issue, especially when facts cannot be stated or described in such a manner as to enable the finder of fact to form an accurate judgment about the subject matter of the opinion or inference.

(2) Testimony in the form of an opinion or inference that meets the foregoing criteria for admissibility is admissible even if it embraces an ultimate issue to be decided by the trier of fact.

Note

Subdivision (1). The law recognizes that in their daily lives individuals communicate in part by the expression of statements that constitute an opinion or inference; e.g., “it was snowing,” rather than “white flakes were falling from the sky.” Beyond those self-evident examples of warranted opinions and inferences, the law has developed parameters within which a lay witness may testify to an opinion, as opposed to a statement of facts upon which the trier of fact will draw a conclusion.

The first requirement for admissibility of a lay witness's opinion or inference, as set forth in paragraph (a), is for the testimony to be rationally based on the witness's personal perception. In other words, it would be reasonable for the witness, on the basis of the perceived facts, to form the opinion or inference. (See *People v Caccese*, 211 AD2d 976, 977 [3d Dept 1995] [where the witness was a nurse who was familiar with calamine lotion, a lay opinion as to the identity of the substance covering marks and bruises was permissible]; *People v Smith*, 194 AD2d

874, 876 [3d Dept 1993] [where the witness was familiar by experience with the odor of blood, he properly rendered a lay opinion about smelling the odor of blood]; *Tulin v Bostic*, 152 AD2d 887, 888 [3d Dept 1989] [“While a lay witness testifying as to value must have some acquaintance with the particular property at issue, as well as knowledge of its market value, that does not mean that he must therefore qualify as an expert”].)

A close corollary to the first requirement, as set forth in paragraph (b), is that the testimony be within the ambit of common experience or that of a particular witness. Matters within the ambit of experience of a particular witness will normally require foundational testimony establishing the witness’s experience with the question presented; matters within the ambit of common experience, such as, color, weight, taste, or observed demeanor of another person, may not. (See Jerome Prince, *Richardson on Evidence* §§ 363, 364 [10th ed 1973]; *People v Eastwood*, 14 NY 562, 566 [1856] [“A child six years old may answer whether a man (whom it has seen) was drunk or sober; . . . the child could not, probably, describe the conduct of the man, so that, from its description, others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him than by their description of his conduct. Many persons cannot describe particulars; if their testimony were excluded, great injustice would frequently ensue”]; *Teerpenning v Corn Exch. Ins. Co.*, 43 NY 279, 281 - 282 [1871] [“On questions of value, a witness must often be permitted to testify to an opinion as to value, but the witness must be shown competent to speak upon the subject. He must have dealt in, or have some knowledge of the article concerning which he speaks”]; *People v Leonard*, 8 NY2d 60, 61 - 62 [1960] [Lay testimony that a beverage referred to as “rye and ginger ale was ordered, served and paid for was sufficient at least to present a jury question as to whether an alcoholic beverage was served,” given that what constituted an alcoholic beverage was a “matter of common knowledge”]; *Senecal v Drollette*, 304 NY 446, 448 [1952] [a 12-year-old boy who “often rode in automobiles and watched their speedometers” was competent to testify to the speed of a car that hit his companion]; *People v Olsen*, 22 NY2d 230 [1968] [speed]; *Soto v New York City Tr. Auth.*, 6 NY3d 487, 493 - 494 [2006] [“The trial court also properly permitted plaintiff to testify regarding an estimate of his running speed. Plaintiff established a sufficient foundation demonstrating the basis of his knowledge In comparable situations, both police and civilian witnesses with an appropriate basis for knowledge have been permitted to give testimony estimating the speed of moving motor vehicles”]; *People v Christopher*, 161 AD2d 896, 897 [1990] [“In situations where the illegal substance is not available for analysis, drug users who can demonstrate a knowledge of the narcotic are competent to testify”].)

Next, as exemplified by the foregoing cases, the opinion or inference must assist the trier of fact in understanding the testimony or determining an issue of fact. (See *People v Boyd*, 151 AD3d 641, 641 [1st Dept 2017] [Three witnesses who were not eyewitnesses but were familiar with the defendant could properly “give

lay opinion testimony . . . that defendant was the man depicted in surveillance videotapes firing a handgun. This testimony ‘served to aid the jury in making an independent assessment regarding whether the man in the (videos) was indeed the defendant’ ”].)

Last, what distinguishes New York from other jurisdictions is, as set forth in paragraph (c), its requirement that the opinion or inference of a lay (or expert) witness must be “necessary” to properly describe the subject matter. (*Teerpenning v Corn Exch. Ins. Co.*, 43 NY 279, 281 [1871] [“As a rule, witnesses must state facts, and not draw conclusions, or give opinions. . . . The cases in which opinions of witnesses are allowable, constitute exceptions to the general rule, and the exceptions are not to be extended or enlarged, so as to include new cases, except as a necessity to prevent a failure of justice, and when better evidence cannot be had”]; *Collins v New York Cent. & Hudson Riv. R.R. Co.*, 109 NY 243, 249 [1888] [“We know of no other way in which the witness could have stated his observation” than by the expression of his opinion “as to the fact that the one or the other emitted the most sparks, and hence it was proper that he should have been permitted to answer questions of that nature”]; *People v Gatewood*, 91 NY2d 905 [1998] [testimony of the defendant’s wife concerning the alleged effects of the drug Prozac upon the defendant was permissible], citing *People v Cronin*, 60 NY2d 430, 433 [1983].)

Examples of acceptable opinions or inferences of a lay witness, subject to relevance and in some instances a proper foundation as to the qualification of the witness to offer the opinion, include matters of “color, weight, size, quantity, light and darkness, and inferences of identity as to race, language, persons, visibility, [and] sounds” (Jerome Prince, *Richardson on Evidence* § 364 [a] at 329 [10th ed 1973]); “taste, smell, and touch” (*id.* subd [b]); the “state of emotion exhibited by a person; e.g., whether he appeared to be angry or jesting” (*id.* subd [c]); the “apparent physical condition of a person, which is open to ordinary observation” (*id.* subd [d]); the “[i]dentity and likeness” of a person (*id.* subd [e] at 330); the “identification of a person by his voice” (*id.* subd [f]); intoxication (*id.* subd [h] at 332); ownership of property (*id.* subd [i] at 333); the speed of a vehicle (*id.* subd [j]); the estimated age of a person (*id.* subd [k] at 334); one’s “own intent or belief” (*id.* subd [l]); the “rational or irrational nature of a person’s conduct” (but not whether the person was of “sound of unsound mind”) (*id.* subd [m]); the “value of property or services” (*id.* subd [n] at 335); and the “genuineness of the handwriting of another” (*id.* subd [o] at 337).

Subdivision (2). Subdivision (2) is derived from Court of Appeals cases that indicate that, once the criteria for admission are demonstrated, it matters not that the testimony may appear to invade the province of the jury or constitute evidence of the “ultimate” issue in the case. (*See People v Eastwood*, 14 NY at 566 [testimony that a person was drunk]; *Senecal v Drollette*, 304 NY at 448 [testimony about the speed of a car]; *cf. People v Hicks*, 2 NY3d 750, 751 [2004] [“Since the expert testimony was beyond the ken of the average juror, it matters not whether the testimony related to the ultimate issue in the case”]; *People v Cronin*, 60 NY2d

at 433 [trial court erred in precluding an opinion of an expert on the grounds that it “went to the ultimate question and would usurp the jury’s function”]; *People v Jones*, 73 NY2d 427, 430 - 431 [1989] [“Expert opinion testimony is used in partial substitution for the jury’s otherwise exclusive province which is to draw ‘conclusions from the facts.’ It is a kind of authorized encroachment in that respect” (citation omitted)]; *People v Lee*, 96 NY2d 157, 162 [2001]; *People v Rivers*, 18 NY3d 222, 228 [2011]).

7.05 Rape Trauma Syndrome

(1) Rape trauma syndrome is a therapeutic concept encompassing identifiable behavioral, somatic, and psychological reactions a person may experience after a rape or attempted rape.

(2) The admissibility of expert testimony about an identifiable rape trauma syndrome reaction depends on the reason the evidence is offered. It is admissible to dispel juror misconceptions regarding the ordinary responses of a victim of rape or attempted rape. Thus, for example:

(a) rape trauma syndrome evidence that a rape victim who knows her assailant is more fearful of disclosing the assailant's name to the police and is in fact less likely to report the rape at all is admissible to explain why the complainant may have been initially unwilling to report that the defendant had been the man who attacked her.

(b) rape trauma syndrome evidence that half of all women who have been forcibly raped are controlled and subdued following the attack is admissible to dispel misconceptions that jurors might possess regarding the ordinary responses of rape victims in the first hours after their attack.

(c) rape trauma syndrome evidence is admissible to assist the jury in understanding why the victim told her boyfriend about the rape the day after it occurred but refrained from telling her mother and the police until two weeks later as consistent with patterns of response exhibited by rape victims.

(3) Evidence of rape trauma syndrome is not admissible when it bears solely on proving that a rape occurred or when its purpose is solely to bolster the credibility of the complainant's testimony.

Note

This rule is derived from the seminal Court of Appeals decision in *People v Taylor* (75 NY2d 277 [1990]).

Subdivision (1) provides a description of the syndrome drawn from *Taylor*. *Taylor* noted that the syndrome was a “therapeutic” concept, described as “ ‘the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape. This syndrome of behavioral, somatic, and psychological reactions is an acute stress reaction to a life-threatening situation’ (Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am J Psychiatry 981, 982 [1974])” (*Taylor* at 285).

Subdivision (2) (a) and (b) is drawn from the following part of the *Taylor* opinion:

“[E]vidence of rape trauma syndrome can assist jurors in reaching a verdict by dispelling common misperceptions about rape [T]he reason why the testimony is offered will determine its helpfulness, its relevance and its potential for prejudice. . . .

“[I]n *Taylor* [the complaining witness] had initially told the police that she could not identify her assailant. Approximately two hours after she first told her mother that she had been raped and sodomized, she told her mother that she knew the defendant had done it. The complainant had known the defendant for years and had seen him the night before the assault. . . . [E]xpert testimony explaining that a rape victim who knows her assailant is more fearful of disclosing his name to the police and is in fact less likely to report the rape at all was relevant to explain why the complainant may have been initially unwilling to report that the defendant had been the man who attacked her. Behavior of this type is not within the ordinary understanding of the jury and testimony explaining this behavior assists the jury in determining what effect to give to the complainant’s initial failure to identify the defendant. This evidence provides a possible explanation for the complainant’s behavior that is consistent with her claim that she was raped. As such, it is relevant.

“Rape trauma syndrome evidence was also introduced in *Taylor* in response to evidence that revealed the complainant had not seemed upset following the attack. We note again in this context that the reaction of a rape victim in the hours following her attack is not something within the common understanding of the average lay juror. Indeed, the defense would clearly want the jury to infer that

because the victim was not upset following the attack, she must not have been raped. This inference runs contrary to the studies . . . which suggest that half of all women who have been forcibly raped are controlled and subdued following the attack. Thus, we conclude that evidence of this type is relevant to dispel misconceptions that jurors might possess regarding the ordinary responses of rape victims in the first hours after their attack” (*Taylor* at 292-293 [citations omitted]).

Subdivision (2) (c) recites the holding in *People v Maymi* (198 AD2d 153 [1st Dept 1993]).

Subdivision (3) is a dictate of *Taylor*’s companion case, *People v Banks* (75 NY2d at 293 [“evidence of rape trauma syndrome is inadmissible when it inescapably bears solely on proving that a rape occurred”]; *People v Bennett*, 79 NY2d 464, 473 [1992] [“expert opinion is inadmissible when introduced merely to prove that a sexual assault took place or bolster a witness’ credibility” (citation omitted)]; *Maymi*, 198 AD2d at 153 [in finding that the rape trauma syndrome evidence specified in subdivision (3) was admissible for an appropriate purpose, the Court rejected the idea that the evidence was admitted “for purposes of bolstering the victim’s testimony”]; *see People v Spicola*, 16 NY3d 441, 466 [2011] [in explaining that the expert on Child Sexual Abuse Accommodation Syndrome did not impermissibly bolster the child’s credibility, the Court stated that “the expert’s testimony certainly supported the boy’s credibility by supplying explanations other than fabrication for his post-molestation behavior. It was offered, after all, for purposes of just such rehabilitation. But . . . the expert did not express an opinion on the boy’s credibility”]; *People v Kukon*, 275 AD2d 478, 478-479 [3d Dept 2000] [in rejecting a claim that the expert on “child sexual abuse syndrome” “impermissibly bolstered” the credibility of the complainant, the Court stated that the “expert, who testified that she had not met or examined the victim in this case, did not impermissibly suggest that the victim had been sexually abused or that she exhibited signs similar to individuals who have been abused”]).

7.05 Rape Trauma Syndrome

(1) Rape trauma syndrome is a therapeutic concept encompassing identifiable behavioral, somatic, and psychological reactions a person may experience after a rape or attempted rape.

(2) The admissibility of expert testimony about an identifiable rape trauma syndrome reaction depends on the reason the evidence is offered. It is admissible to dispel juror misconceptions regarding the ordinary responses of a victim of rape or attempted rape. Thus, for example:

(a) rape trauma syndrome evidence that a rape victim who knows her assailant is more fearful of disclosing the assailant's name to the police and is in fact less likely to report the rape at all is admissible to explain why the complainant may have been initially unwilling to report that the defendant had been the man who attacked her.

(b) rape trauma syndrome evidence that half of all women who have been forcibly raped are controlled and subdued following the attack is admissible to dispel misconceptions that jurors might possess regarding the ordinary responses of rape victims in the first hours after their attack.

(c) rape trauma syndrome evidence is admissible to assist the jury in understanding why the victim told her boyfriend about the rape the day after it occurred but refrained from telling her mother and the police until two weeks later as consistent with patterns of response exhibited by rape victims.

(3) Evidence of rape trauma syndrome is not admissible when it bears solely on proving that a rape occurred or when its purpose is solely to bolster the credibility of the complainant's testimony.

Note

This rule is derived from the seminal Court of Appeals decision in *People v Taylor* (75 NY2d 277 [1990]).

Subdivision (1) provides a description of the syndrome drawn from *Taylor*. *Taylor* noted that the syndrome was a “therapeutic” concept, described as “ ‘the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape. This syndrome of behavioral, somatic, and psychological reactions is an acute stress reaction to a life-threatening situation’ (Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am J Psychiatry 981, 982 [1974])” (*Taylor* at 285).

Subdivision (2) (a) and (b) is drawn from the following part of the *Taylor* opinion:

“[E]vidence of rape trauma syndrome can assist jurors in reaching a verdict by dispelling common misperceptions about rape [T]he reason why the testimony is offered will determine its helpfulness, its relevance and its potential for prejudice. . . .

“[I]n *Taylor* [the complaining witness] had initially told the police that she could not identify her assailant. Approximately two hours after she first told her mother that she had been raped and sodomized, she told her mother that she knew the defendant had done it. The complainant had known the defendant for years and had seen him the night before the assault. . . . [E]xpert testimony explaining that a rape victim who knows her assailant is more fearful of disclosing his name to the police and is in fact less likely to report the rape at all was relevant to explain why the complainant may have been initially unwilling to report that the defendant had been the man who attacked her. Behavior of this type is not within the ordinary understanding of the jury and testimony explaining this behavior assists the jury in determining what effect to give to the complainant’s initial failure to identify the defendant. This evidence provides a possible explanation for the complainant’s behavior that is consistent with her claim that she was raped. As such, it is relevant.

“Rape trauma syndrome evidence was also introduced in *Taylor* in response to evidence that revealed the complainant had not seemed upset following the attack. We note again in this context that the reaction of a rape victim in the hours following her attack is not something within the common understanding of the average lay juror. Indeed, the defense would clearly want the jury to infer that

because the victim was not upset following the attack, she must not have been raped. This inference runs contrary to the studies . . . which suggest that half of all women who have been forcibly raped are controlled and subdued following the attack. Thus, we conclude that evidence of this type is relevant to dispel misconceptions that jurors might possess regarding the ordinary responses of rape victims in the first hours after their attack” (*Taylor* at 292-293 [citations omitted]).

Subdivision (2) (c) recites the holding in *People v Maymi* (198 AD2d 153 [1st Dept 1993]).

Subdivision (3) is a dictate of *Taylor*’s companion case, *People v Banks* (75 NY2d at 293 [“evidence of rape trauma syndrome is inadmissible when it inescapably bears solely on proving that a rape occurred”]; *People v Bennett*, 79 NY2d 464, 473 [1992] [“expert opinion is inadmissible when introduced merely to prove that a sexual assault took place or bolster a witness’ credibility” (citation omitted)]; *Maymi*, 198 AD2d at 153 [in finding that the rape trauma syndrome evidence specified in subdivision (3) was admissible for an appropriate purpose, the Court rejected the idea that the evidence was admitted “for purposes of bolstering the victim’s testimony”]; *see People v Spicola*, 16 NY3d 441, 466 [2011] [in explaining that the expert on Child Sexual Abuse Accommodation Syndrome did not impermissibly bolster the child’s credibility, the Court stated that “the expert’s testimony certainly supported the boy’s credibility by supplying explanations other than fabrication for his post-molestation behavior. It was offered, after all, for purposes of just such rehabilitation. But . . . the expert did not express an opinion on the boy’s credibility”]; *People v Kukon*, 275 AD2d 478, 478-479 [3d Dept 2000] [in rejecting a claim that the expert on “child sexual abuse syndrome” “impermissibly bolstered” the credibility of the complainant, the Court stated that the “expert, who testified that she had not met or examined the victim in this case, did not impermissibly suggest that the victim had been sexually abused or that she exhibited signs similar to individuals who have been abused”]).

7.01 Opinion of Expert Witness¹

(1) A person qualified as an expert by knowledge, skill, experience, training, or education, may testify to an opinion or information concerning scientific, technical, medical, or other specialized knowledge when:

(a) the subject matter is beyond the knowledge or understanding, or will dispel misconceptions, of a typical finder of fact; and

(b) the testimony will help the finder of fact to understand the evidence or determine a fact in issue, especially when the facts cannot be stated or described in such a manner as to enable the finder of fact to form an accurate judgment about the subject matter.

(2) Where the subject matter of the testimony is not based on the personal training or experience of the witness but rather is based on scientifically developed procedures, tests, or experiments, it must also be (or have been) established that: (a) there is general acceptance within the relevant scientific community of the validity of the theory or principle underlying the procedure, test, or experiment; (b) there is general acceptance within the relevant scientific community that the procedure, test, or experiment is reliable and produces accurate results; and (c) the particular procedure, test, or experiment was conducted in such a way as to yield an accurate result.

(3) Testimony in the form of an opinion or inference that meets the foregoing criteria for admissibility is admissible even if it embraces an ultimate issue to be decided by the trier of fact.

(4) An expert need not assert a conclusion with certainty, so long as the expert demonstrates a degree

of confidence in the conclusion sufficient to satisfy accepted standards of reliability in the expert's field.

(5) (a) Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form. The expert may base an opinion on facts in the record or known to the witness, and the expert may state an opinion and reasons without first specifying the data upon which it is based; however, an expert who relies on facts within personal knowledge that are not contained in the record is required to testify to those facts prior to rendering the opinion.

(b) An expert also may rely on out-of-court material if:

(i) it is of a kind accepted in the profession as reliable in forming a professional opinion, provided that there is evidence establishing the reliability of the out-of-court material; or the out-of-court material comes from a witness in the proceeding who was subject to full cross-examination by the opposing party; and

(ii) it is a link in the chain of data and accordingly not exclusively relied upon for the expert's opinion.

(c) In a criminal case, while an expert may rely upon hearsay statements in formulating an opinion, the constitutional right of confrontation precludes the expert from testifying on direct examination to a statement made by a person who was not available for cross-examination.

(d) Defense of lack of criminal responsibility (CPL 60.55)

(i) When, in connection with the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, a psychiatrist or licensed psychologist testifies at a trial concerning the defendant's mental condition at the time of the conduct charged to constitute a crime, he [or she] must be permitted to make a statement as to the nature of any examination of the defendant, the diagnosis of the mental condition of the defendant and his [or her] opinion as to the extent, if any, to which the capacity of the defendant to know or appreciate the nature and consequence of such conduct, or its wrongfulness, was impaired as a result of mental disease or defect at that time. The psychiatrist or licensed psychologist must be permitted to make any explanation reasonably serving to clarify his [or her] diagnosis and opinion, and may be cross-examined as to any matter bearing on his [or her] competency or credibility or the validity of his [or her] diagnosis or opinion.

(ii) Any statement made by the defendant to a psychiatrist or licensed psychologist during his [or her] examination of the defendant shall be inadmissible in evidence on any issue other than that of the affirmative defense of lack of criminal responsibility by reason of mental disease or defect. The statement shall, however, be admissible upon the issue of the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, whether or not it would otherwise be deemed a privileged communication.

(e) Sex Offender Civil Case. In a sex offender civil management case under article 10 of the Mental Hygiene Law, an expert may testify to hearsay

offered to explain the basis of the expert's opinion when the proponent demonstrates through evidence that the hearsay is reliable and that its probative value in helping the jury evaluate the expert's opinion substantially outweighs its prejudicial effect.

Note

Subdivision (1) reflects the basic New York rule that it is for the jury to determine the facts and that they “may be aided, but not displaced,” by expert testimony “where there is reason to suppose that such testimony will elucidate some material aspect of the case that would otherwise resist comprehension by jurors of ordinary training and intelligence” (*People v Inoa*, 25 NY3d 466, 472 [2015]; *People v Cronin*, 60 NY2d 430, 432-433 [1983] [“For testimony regarding both the ultimate questions and those of lesser significance, admissibility turns on whether, given the nature of the subject, ‘the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable’ ”]; *cf. People v Clyde*, 18 NY3d 145, 154 [2011] [in responding to the defendant’s argument that “physicians were improperly allowed to testify as to their conclusions” regarding injuries, the Court held that “admissibility turns on whether, given the nature of the subject, the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon. The facts that underlie physical injury and risk of serious physical injury can readily be stated to a jury so as to enable the jurors to form an accurate judgment concerning the elements of assault and unlawful imprisonment. It was therefore error to overrule (the defendant’s) objections and permit this expert testimony” (citing *Cronin*)]).

What distinguishes New York from other jurisdictions is its emphasis on opinion evidence being “necessary” to properly describe the subject matter. (*See Ferguson v Hubbell*, 97 NY 507, 514 [1884] [the rules admitting opinions of experts should not be unnecessarily extended]; *Teerpenning v Corn Exch. Ins. Co.*, 43 NY 279, 281 [1871].) That “necessity” requirement in recent times appears subsumed by the requirement that the subject matter be beyond the knowledge or understanding of a typical juror or will dispel misconceptions a juror may hold and thereby help a juror to understand the evidence or determine a fact in issue. (*People v Rivers*, 18 NY3d 222, 228 [2011] [“ ‘The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror’ ”]; *People v LeGrand*, 8 NY3d 449, 455-456 [2007] [“A court’s exercise of discretion depends largely on whether jurors, after the court considers their ‘day-to-day experience, their common observation and their knowledge,’ would benefit from the specialized knowledge of an expert witness”]; *People v Keindl*, 68 NY2d 410, 422 [1986] [“Opinion testimony of an expert witness is admissible where the

conclusions to be drawn ‘depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence’ ”]; *People v Lee*, 96 NY2d 157, 162 [2001] [“Despite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror”].) In the end, it is for the trial court “to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness.” (*People v Cronin*, 60 NY2d at 433; *People v Keindl*, 68 NY2d at 422; *People v Lee*, 96 NY2d at 162.)

As also specified in subdivision (1), the proffered expert witness must be qualified to provide expert testimony, that is, the witness “should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable.” (*Matott v Ward*, 48 NY2d 455, 459 [1979]; see *Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 398 [1941].) The proponent of the witness is entitled to a reasonable opportunity to demonstrate that the person is qualified to testify as an expert (see *Werner v Sun Oil Co.*, 65 NY2d 839, 840 [1985]) and the opposing party is entitled to a reasonable opportunity to demonstrate otherwise. The trial court decides in the exercise of its discretion whether the witness is qualified to testify as an expert. (*Price v New York City Hous. Auth.*, 92 NY2d 553, 558 [1998]; Guide to NY Evid rule 1.09 [1].) As stated in *Meiselman*: “The prevailing rule is that the question of the qualification of a witness to testify as an expert is for determination, in his [or her] reasonable discretion, by the trial court, which discretion, when exercised, is not open to review unless in deciding the question the trial court has made a serious mistake or committed an error of law or has abused his [or her] discretion.” (285 NY at 398-399.)

Subdivision (2) sets forth New York’s continued adherence to the rule of *Frye v United States* (293 F 1013 [DC Cir 1923]; *People v Wesley*, 83 NY2d 417 [1994]). “Absent a novel or experimental scientific theory, a *Frye* hearing is generally unwarranted.” (*People v Brooks*, 31 NY3d 939, 941 [2018].)

The *Frye* rule does not apply where experts base their testimony on personal training or experience of the expert. (*People v Oddone*, 22 NY3d 369, 375 [2013].) In *Oddone*, the Court permitted a doctor to testify that the deceased’s neck had been compressed for “something in the range of 2, 3, 4 minutes.” The defendant claimed that the doctor “was advancing a scientific principle that had not gained general acceptance in its field, in violation of the rule of *Frye* The flaw in defendant’s reasoning is that [the doctor] did not claim to rely on any established scientific principle. He made clear that his testimony was based on his personal ‘experience’—meaning what he had observed, heard and read about particular cases. Such evidence is not barred by *Frye*” (*Oddone*, 22 NY3d at 375-376).

The *Oddone* Court added a caveat:

“We acknowledge that it may not be possible to draw a neat line between scientific principles and experience-based testimony. Indeed, it has been observed that the many cases applying *Frye* to evidence based on scientific principles shed little light on exactly what a ‘scientific principle’ is . . . We do not imply that an expert is allowed to say anything he or she likes to a jury if the statement is prefaced by the words ‘in my experience.’ To allow an expert to say, based only on his or her alleged experience, that smoking does not cause lung cancer or that baldness is related to the phases of the moon would be to tolerate the admission of junk science and to undermine the basic purpose of *Frye*” (*Oddone*, 22 NY3d at 376).

The Court of Appeals has stressed that a *Frye* inquiry, whether required or not, is “separate and distinct from the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case” (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 447 [2006]). The foundation is lacking if the trial court determines that “ ‘there is simply too great an analytical gap between the data and the opinion proffered.’ ” (*Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 781 [2014], quoting *General Electric Co. v Joiner*, 522 US 136, 146 [1997].) The question boils down to whether the expert’s opinion sufficiently relates to existing data or, to the contrary, “is connected to existing data only by the *ipse dixit* [unproven word] of the expert.” (*Joiner*, 522 US at 146; see *Brooks*, 31 NY3d at 941.)

Examples of accepted expert testimony include testimony that explains the following: the terminology used in the illegal drug trade (*People v Garcia*, 83 NY2d 817 [1994]); the inconsistency of the quantity of drugs recovered and packaging with personal use (*People v Hicks*, 2 NY3d 750 [2004]); the significance of the absence of the buy money in an undercover “buy and bust” when the reason for its absence is not inferable from the circumstances (*People v Brown*, 97 NY2d 500 [2002]; cf. *People v Gonzalez*, 99 NY2d 76 [2002]; *People v Smith*, 2 NY3d 8 [2004]); the impact on the ability to act with the requisite intent when a defendant had consumed up to a case of beer, smoked several marijuana cigarettes, and ingested 5 to 10 Valium (*People v Cronin*, 60 NY2d 430, 432 [1983]); the “range of psychological reactions of child victims who suffer from sexual abuse at the hands of their stepparents” (*People v Keindl*, 68 NY2d 410, 422 [1986]); the “sexually abused child syndrome” (*Matter of Nicole V.*, 71 NY2d 112 [1987]); whether a fire was intentionally set (*People v Rivers*, 18 NY3d 222 [2011]); an estimated time of a victim’s death (*People v Miller*, 91 NY2d 372 [1998]); GPS evidence (*Matter of Carniol v New York City Taxi & Limousine Commn.*, 126 AD3d 409, 410-411 [1st Dept 2015]); and the mechanism of an injury or physiological process by which an injury occurs (*Sadek v Wesley*, 117 AD3d 193, 201 [1st Dept 2014], *affd* 27 NY3d 982, 983-984 [2016]).

Notwithstanding that expert evidence on a particular subject has been accepted, the Court of Appeals has explained that “our *Frye* jurisprudence accounts for the fact that evolving views and opinions in a scientific community may occasionally require the scrutiny of a *Frye* hearing with respect to a familiar technique. There is no absolute rule as to when a *Frye* hearing should or should not be granted, and courts should be guided by the current state of scientific knowledge and opinion in making such determinations. Indeed, admissibility even after a finding of general acceptance through a *Frye* hearing is not always automatic. Recent questioning of previously accepted techniques related to hair comparisons, fire origin, comparative bullet lead analysis, bite mark matching, and bloodstain-pattern analysis illustrates that point; all of those analyses have long been accepted within their relevant scientific communities but recently have come into varying degrees of question” (*People v Williams*, 35 NY3d 24, 43 [2020]).

Subdivision (3) is derived from Court of Appeals cases that indicate that, once the criteria for admissibility are demonstrated, it matters not that the testimony may appear to invade the province of the jury or constitute evidence of the “ultimate” issue in the case. (*People v Hicks*, 2 NY3d 750, 751 [2004] [“Since the expert testimony was beyond the ken of the average juror, it matters not whether the testimony related to the ultimate issue in the case”]; *People v Cronin*, 60 NY2d at 433 [trial court erred in precluding an opinion on the grounds that it “went to the ultimate question and would usurp the jury’s function”]; *Dufel v Green*, 84 NY2d 795, 797 [1995] [It was not error for plaintiff’s doctors to testify to “two of the statutory components of the ‘serious injury’ threshold as defined by Insurance Law § 5102 (d)”]; see *People v Jones*, 73 NY2d 427, 430-431 [1989] [“Expert opinion testimony is used in partial substitution for the jury’s otherwise exclusive province which is to draw ‘conclusions from the facts’ . . . It is a kind of authorized encroachment in that respect”]; *People v Lee*, 96 NY2d 157, 162 [2001]; *People v Hicks*, 2 NY3d 750, 751 [2004]; *People v Rivers*, 18 NY3d at 228.)

Subdivision (4) is taken from *Matter of Anthony M.* (63 NY2d 270, 280-281 [1984] [“Though sometimes perceptible to lay witnesses . . . the progression from injury to death, often unseen and not readily comprehended, will generally be a subject for expert medical opinion. To establish a causal connection, conclusions which are only ‘contingent, speculative, or merely possible’ . . . will not suffice, but neither is absolute certainty and the exclusion of every other possibility required”]). A reasonable degree of certainty within the subject field of the testimony should suffice (*Matott v Ward*, 48 NY2d 455, 459-460 [1979] [“Granted that ‘a reasonable degree of medical certainty’ is one expression of such a standard . . . it is not, however, the only way in which a level of certainty that meets the rule may be stated. . . . (A)ny formulation from which it can be said that the witness’ ‘whole opinion’ reflects an acceptable level of certainty (will suffice),” and the weight of the testimony is then to be assessed by the trier of fact]; *People v Brown*, 67 NY2d 555, 560 [1986]).

Subdivision (5) derives primarily from a series of Court of Appeals cases.

- **Subdivision (5) (a):** The first sentence is taken verbatim from CPLR 4515. The second sentence is a combination of decisional law (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959] [“opinion evidence must be based on facts in the record or personally known to the witness”]; *Hambusch v New York City Tr. Auth.*, 63 NY2d 723, 725-726 [1984] [same]), and the portion of CPLR 4515 that reads “the witness may state his opinion and reasons without first specifying the data upon which it is based.” The Court of Appeals has qualified that latter portion of CPLR 4515 in two ways.

The first qualification is as set forth in the rule’s exception for an expert who relies on facts within personal knowledge. (*People v Jones*, 73 NY2d 427, 430 [1989] [an expert who relies on necessary facts within personal knowledge which are not contained on the record is required to testify to those facts prior to rendering the opinion]; *Mandel v Geloso*, 206 AD2d 699, 700 [3d Dept 1994].)

Second, while the expert may state an opinion without first specifying the data that would support that opinion, the expert’s testimony or the record must supply the data. (*Jones* at 431 [“In failing to supply an evidentiary predicate for their own chemist expert’s ultimate conclusion (that a particular drug was a controlled substance), the People presented an insufficient case”].) That the opposing party under CPLR 4515 may of course cross-examine the expert does not shift the burden to that party to fill in the missing data. (*Id.*; see Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4515; Barker & Alexander, Evidence in New York State and Federal Courts § 716 [2d ed].)

- **Subdivision (5) (b) (i)** is derived from a series of Court of Appeals cases: *People v Sugden* (35 NY2d 453, 460-461 [1974] [“The psychiatrist may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion. . . . He may also rely on material, which if it does not qualify under the professional test, comes from a witness subject to full cross-examination on the trial”]); *People v Stone* (35 NY2d 69, 73 [1974] [“(T)he Trial Judge was very careful to satisfy himself that an independent, legally competent basis existed for the (expert) opinion in the doctor’s interviews with the defendant and in the medical records in evidence”]); *Hambusch v New York City Tr. Auth.* (63 NY2d 723, 726 [1984] [“In order to qualify for the (*Sugden*) ‘professional reliability’ exception, there must be evidence establishing the reliability of the out-of-court material . . . Plaintiff presented no such evidence in the instant case and therefore the physician’s opinion was inadmissible”]); *People*

v Jones (73 NY2d 427, 430 [1989] [(“A)n expert who relies on necessary facts within personal knowledge which are not contained on the record is required to testify to those facts prior to rendering the opinion . . . Conversely, expert opinions of the kind needing material evidentiary support for which there is none otherwise in the direct evidence or in some equivalently admissible evidentiary form have been excluded”])).

- Subdivision (5) (b) (ii) is derived from a series of cases, principally *Ciocca v Park* (21 AD3d 671 [3d Dept 2005], *affd* 5 NY3d 835 [2005]). The Appellate Division in *Ciocca* held that an “MRI was properly excluded because [the expert] exclusively relied upon the radiologist’s report, ‘not merely [as] a link in the chain of data,’ but rather as the entire foundation for his opinion” (*Ciocca* at 672-673 [citations omitted]). The Court of Appeals affirmed holding: “Plaintiff did not lay an adequate foundation for the testimony of his experts” (*Ciocca*, 5 NY3d at 836; *see also Borden v Brady*, 92 AD2d 983, 984 [3d Dept 1983] [error was committed where a neurologist’s report “constituted an expression of opinion on the crucial issue of the permanency of plaintiff’s injuries and formed the principal basis for the expert witness’ opinion on the same issue, not merely a link in the chain of data upon which that witness relied”]; *O’Shea v Sarro*, 106 AD2d 435, 437 [2d Dept 1984] [expert witnesses “may not rely primarily upon the opinions by physicians who were not called as witnesses at trial” (citing *Borden*)]; *Sigue v Chemical Bank*, 284 AD2d 246, 247 [1st Dept 2001] [error where an arthrogram report “formed the principal basis for the neurologist’s opinion . . . ‘not merely a link in the chain of data upon which that witness relied’ ” (citing *Borden*)]; *Tornatore v Cohen*, 162 AD3d 1503, 1505 [4th Dept 2018] [out-of-court material may be relied upon “provided that it does not constitute the sole or principal basis for the expert’s opinion” (internal quotation marks omitted, citing *Borden*)])).
- **Subdivision (5) (c):** *People v Goldstein* (6 NY3d 119, 129 [2005] [(“the statements made to (the expert) by her interviewees were testimonial. . . (The interviewees) knew they were responding to questions from an agent of the State engaged in trial preparation. None of them was making ‘a casual remark to an acquaintance’; all of them should reasonably have expected their statements ‘to be used prosecutorially’ or to ‘be available for use at a later trial.’ . . . Responses to questions asked in interviews that were part of the prosecution’s trial preparation are ‘formal’ in much the same sense as ‘depositions’ and other materials that the Supreme Court identified as testimonial”])). *Goldstein* also viewed the statements in question as hearsay because they were effectively being offered for their truth; if they were not being offered for their truth, the Confrontation Clause would not normally be

implicated. In *Matter of State of New York v Floyd Y.* (22 NY3d 95, 107 [2013]), however, the Court of Appeals in a civil case under New York’s sex offender civil management statute (Mental Hygiene Law art 10) held that “basis hearsay [hearsay offered to explain the basis of an expert’s opinion] does not come into evidence for its truth, but rather to assist the factfinder with its essential article 10 task of evaluating the experts’ opinions.” That holding seemingly creates a criminal-civil dichotomy on whether the statements are hearsay. Thus far, *Floyd Y.*’s holding has not been applied in any reported decision other than cases under article 10 of the Mental Hygiene Law.

- **Subdivision (5) (d)** is taken verbatim from CPL 60.55. That section includes a requirement that the court give the jury the following limiting instruction: “Upon receiving the statement [of the defendant] in evidence, the court must instruct the jury that the statement is to be considered only on the issue of such affirmative defense and may not be considered by it in its determination of whether the defendant committed the act constituting the crime charged” (CPL 60.55 [2]).
- **Subdivision (5) (e):** *Matter of State of New York v Floyd Y.* (22 NY3d 95 [2013]). Using the terminology “hearsay basis evidence” to refer to hearsay offered to explain the basis of an expert’s opinion, the Court held (at 109): “Due process requires any hearsay basis evidence to meet minimum requirements of reliability and relevance before it can be admitted at [a Mental Hygiene Law] article 10 proceeding. In article 10 trials, hearsay basis evidence is admissible if it satisfies two criteria. First, the proponent must demonstrate through evidence that the hearsay is reliable. Second, the court must determine that the ‘probative value in helping the jury evaluate the [expert’s] opinion substantially outweighs [its] prejudicial effect.’ ”

¹ In June 2022, this rule was amended: (1) to combine former subparagraphs (i) and (ii) of subdivision (5) (b) into subparagraph (i) of that subdivision; (2) to add subdivision (5) (b) (ii) and a corresponding Note; (3) to add a paragraph in the Note to subdivision (1) on the court determining whether a proffered witness is an expert; and (4) to add a paragraph in the Note to subdivision (2) to include the admonition set forth in *People v Williams* (35 NY3d 24, 43 [2020]).

7.03 Opinion of Lay Witness

(1) The testimony of a witness not testifying as an expert may be given in the form of an opinion or inference when that testimony:

(a) is rationally based on the witness's personal perception;

(b) is within the ambit of common experience or that of a particular witness; and

(c) would be helpful to the finder of fact in understanding the witness's testimony or in determining a fact in issue, especially when facts cannot be stated or described in such a manner as to enable the finder of fact to form an accurate judgment about the subject matter of the opinion or inference.

(2) Testimony in the form of an opinion or inference that meets the foregoing criteria for admissibility is admissible even if it embraces an ultimate issue to be decided by the trier of fact.

Note

Subdivision (1). The law recognizes that in their daily lives individuals communicate in part by the expression of statements that constitute an opinion or inference; e.g., "it was snowing," rather than "white flakes were falling from the sky." Beyond those self-evident examples of warranted opinions and inferences, the law has developed parameters within which a lay witness may testify to an opinion, as opposed to a statement of facts upon which the trier of fact will draw a conclusion.

The first requirement for admissibility of a lay witness's opinion or inference, as set forth in paragraph (a), is for the testimony to be rationally based on the witness's personal perception. In other words, it would be reasonable for the witness, on the basis of the perceived facts, to form the opinion or inference. (See *People v Caccese*, 211 AD2d 976, 977 [3d Dept 1995] [where the witness was a nurse who was familiar with calamine lotion, a lay opinion as to the identity of the substance covering marks and bruises was permissible]; *People v Smith*, 194 AD2d

874, 876 [3d Dept 1993] [where the witness was familiar by experience with the odor of blood, he properly rendered a lay opinion about smelling the odor of blood]; *Tulin v Bostic*, 152 AD2d 887, 888 [3d Dept 1989] [“While a lay witness testifying as to value must have some acquaintance with the particular property at issue, as well as knowledge of its market value, that does not mean that he must therefore qualify as an expert”].)

A close corollary to the first requirement, as set forth in paragraph (b), is that the testimony be within the ambit of common experience or that of a particular witness. Matters within the ambit of experience of a particular witness will normally require foundational testimony establishing the witness’s experience with the question presented; matters within the ambit of common experience, such as, color, weight, taste, or observed demeanor of another person, may not. (See Jerome Prince, *Richardson on Evidence* §§ 363, 364 [10th ed 1973]; *People v Eastwood*, 14 NY 562, 566 [1856] [“A child six years old may answer whether a man (whom it has seen) was drunk or sober; . . . the child could not, probably, describe the conduct of the man, so that, from its description, others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him than by their description of his conduct. Many persons cannot describe particulars; if their testimony were excluded, great injustice would frequently ensue”]; *Teerpenning v Corn Exch. Ins. Co.*, 43 NY 279, 281 - 282 [1871] [“On questions of value, a witness must often be permitted to testify to an opinion as to value, but the witness must be shown competent to speak upon the subject. He must have dealt in, or have some knowledge of the article concerning which he speaks”]; *People v Leonard*, 8 NY2d 60, 61 - 62 [1960] [Lay testimony that a beverage referred to as “rye and ginger ale was ordered, served and paid for was sufficient at least to present a jury question as to whether an alcoholic beverage was served,” given that what constituted an alcoholic beverage was a “matter of common knowledge”]; *Senecal v Drollette*, 304 NY 446, 448 [1952] [a 12-year-old boy who “often rode in automobiles and watched their speedometers” was competent to testify to the speed of a car that hit his companion]; *People v Olsen*, 22 NY2d 230 [1968] [speed]; *Soto v New York City Tr. Auth.*, 6 NY3d 487, 493 - 494 [2006] [“The trial court also properly permitted plaintiff to testify regarding an estimate of his running speed. Plaintiff established a sufficient foundation demonstrating the basis of his knowledge In comparable situations, both police and civilian witnesses with an appropriate basis for knowledge have been permitted to give testimony estimating the speed of moving motor vehicles”]; *People v Christopher*, 161 AD2d 896, 897 [1990] [“In situations where the illegal substance is not available for analysis, drug users who can demonstrate a knowledge of the narcotic are competent to testify”].)

Next, as exemplified by the foregoing cases, the opinion or inference must assist the trier of fact in understanding the testimony or determining an issue of fact. (See *People v Boyd*, 151 AD3d 641, 641 [1st Dept 2017] [Three witnesses who were not eyewitnesses but were familiar with the defendant could properly “give

lay opinion testimony . . . that defendant was the man depicted in surveillance videotapes firing a handgun. This testimony ‘served to aid the jury in making an independent assessment regarding whether the man in the (videos) was indeed the defendant’ ”].)

Last, what distinguishes New York from other jurisdictions is, as set forth in paragraph (c), its requirement that the opinion or inference of a lay (or expert) witness must be “necessary” to properly describe the subject matter. (*Teerpenning v Corn Exch. Ins. Co.*, 43 NY 279, 281 [1871] [“As a rule, witnesses must state facts, and not draw conclusions, or give opinions. . . . The cases in which opinions of witnesses are allowable, constitute exceptions to the general rule, and the exceptions are not to be extended or enlarged, so as to include new cases, except as a necessity to prevent a failure of justice, and when better evidence cannot be had”]; *Collins v New York Cent. & Hudson Riv. R.R. Co.*, 109 NY 243, 249 [1888] [“We know of no other way in which the witness could have stated his observation” than by the expression of his opinion “as to the fact that the one or the other emitted the most sparks, and hence it was proper that he should have been permitted to answer questions of that nature”]; *People v Gatewood*, 91 NY2d 905 [1998] [testimony of the defendant’s wife concerning the alleged effects of the drug Prozac upon the defendant was permissible], citing *People v Cronin*, 60 NY2d 430, 433 [1983].)

Examples of acceptable opinions or inferences of a lay witness, subject to relevance and in some instances a proper foundation as to the qualification of the witness to offer the opinion, include matters of “color, weight, size, quantity, light and darkness, and inferences of identity as to race, language, persons, visibility, [and] sounds” (Jerome Prince, *Richardson on Evidence* § 364 [a] at 329 [10th ed 1973]); “taste, smell, and touch” (*id.* subd [b]); the “state of emotion exhibited by a person; e.g., whether he appeared to be angry or jesting” (*id.* subd [c]); the “apparent physical condition of a person, which is open to ordinary observation” (*id.* subd [d]); the “[i]dentity and likeness” of a person (*id.* subd [e] at 330); the “identification of a person by his voice” (*id.* subd [f]); intoxication (*id.* subd [h] at 332); ownership of property (*id.* subd [i] at 333); the speed of a vehicle (*id.* subd [j]); the estimated age of a person (*id.* subd [k] at 334); one’s “own intent or belief” (*id.* subd [l]); the “rational or irrational nature of a person’s conduct” (but not whether the person was of “sound of unsound mind”) (*id.* subd [m]); the “value of property or services” (*id.* subd [n] at 335); and the “genuineness of the handwriting of another” (*id.* subd [o] at 337).

Subdivision (2). Subdivision (2) is derived from Court of Appeals cases that indicate that, once the criteria for admission are demonstrated, it matters not that the testimony may appear to invade the province of the jury or constitute evidence of the “ultimate” issue in the case. (*See People v Eastwood*, 14 NY at 566 [testimony that a person was drunk]; *Senecal v Drollette*, 304 NY at 448 [testimony about the speed of a car]; *cf. People v Hicks*, 2 NY3d 750, 751 [2004] [“Since the expert testimony was beyond the ken of the average juror, it matters not whether the testimony related to the ultimate issue in the case”]; *People v Cronin*, 60 NY2d

at 433 [trial court erred in precluding an opinion of an expert on the grounds that it “went to the ultimate question and would usurp the jury’s function”]; *People v Jones*, 73 NY2d 427, 430 - 431 [1989] [“Expert opinion testimony is used in partial substitution for the jury’s otherwise exclusive province which is to draw ‘conclusions from the facts.’ It is a kind of authorized encroachment in that respect” (citation omitted)]; *People v Lee*, 96 NY2d 157, 162 [2001]; *People v Rivers*, 18 NY3d 222, 228 [2011]).

7.05 Rape Trauma Syndrome

(1) Rape trauma syndrome is a therapeutic concept encompassing identifiable behavioral, somatic, and psychological reactions a person may experience after a rape or attempted rape.

(2) The admissibility of expert testimony about an identifiable rape trauma syndrome reaction depends on the reason the evidence is offered. It is admissible to dispel juror misconceptions regarding the ordinary responses of a victim of rape or attempted rape. Thus, for example:

(a) rape trauma syndrome evidence that a rape victim who knows her assailant is more fearful of disclosing the assailant's name to the police and is in fact less likely to report the rape at all is admissible to explain why the complainant may have been initially unwilling to report that the defendant had been the man who attacked her.

(b) rape trauma syndrome evidence that half of all women who have been forcibly raped are controlled and subdued following the attack is admissible to dispel misconceptions that jurors might possess regarding the ordinary responses of rape victims in the first hours after their attack.

(c) rape trauma syndrome evidence is admissible to assist the jury in understanding why the victim told her boyfriend about the rape the day after it occurred but refrained from telling her mother and the police until two weeks later as consistent with patterns of response exhibited by rape victims.

(3) Evidence of rape trauma syndrome is not admissible when it bears solely on proving that a rape occurred or when its purpose is solely to bolster the credibility of the complainant's testimony.

Note

This rule is derived from the seminal Court of Appeals decision in *People v Taylor* (75 NY2d 277 [1990]).

Subdivision (1) provides a description of the syndrome drawn from *Taylor*. *Taylor* noted that the syndrome was a “therapeutic” concept, described as “ ‘the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape. This syndrome of behavioral, somatic, and psychological reactions is an acute stress reaction to a life-threatening situation’ (Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am J Psychiatry 981, 982 [1974])” (*Taylor* at 285).

Subdivision (2) (a) and (b) is drawn from the following part of the *Taylor* opinion:

“[E]vidence of rape trauma syndrome can assist jurors in reaching a verdict by dispelling common misperceptions about rape [T]he reason why the testimony is offered will determine its helpfulness, its relevance and its potential for prejudice. . . .

“[I]n *Taylor* [the complaining witness] had initially told the police that she could not identify her assailant. Approximately two hours after she first told her mother that she had been raped and sodomized, she told her mother that she knew the defendant had done it. The complainant had known the defendant for years and had seen him the night before the assault. . . . [E]xpert testimony explaining that a rape victim who knows her assailant is more fearful of disclosing his name to the police and is in fact less likely to report the rape at all was relevant to explain why the complainant may have been initially unwilling to report that the defendant had been the man who attacked her. Behavior of this type is not within the ordinary understanding of the jury and testimony explaining this behavior assists the jury in determining what effect to give to the complainant’s initial failure to identify the defendant. This evidence provides a possible explanation for the complainant’s behavior that is consistent with her claim that she was raped. As such, it is relevant.

“Rape trauma syndrome evidence was also introduced in *Taylor* in response to evidence that revealed the complainant had not seemed upset following the attack. We note again in this context that the reaction of a rape victim in the hours following her attack is not something within the common understanding of the average lay juror. Indeed, the defense would clearly want the jury to infer that

because the victim was not upset following the attack, she must not have been raped. This inference runs contrary to the studies . . . which suggest that half of all women who have been forcibly raped are controlled and subdued following the attack. Thus, we conclude that evidence of this type is relevant to dispel misconceptions that jurors might possess regarding the ordinary responses of rape victims in the first hours after their attack” (*Taylor* at 292-293 [citations omitted]).

Subdivision (2) (c) recites the holding in *People v Maymi* (198 AD2d 153 [1st Dept 1993]).

Subdivision (3) is a dictate of *Taylor*’s companion case, *People v Banks* (75 NY2d at 293 [“evidence of rape trauma syndrome is inadmissible when it inescapably bears solely on proving that a rape occurred”]; *People v Bennett*, 79 NY2d 464, 473 [1992] [“expert opinion is inadmissible when introduced merely to prove that a sexual assault took place or bolster a witness’ credibility” (citation omitted)]; *Maymi*, 198 AD2d at 153 [in finding that the rape trauma syndrome evidence specified in subdivision (3) was admissible for an appropriate purpose, the Court rejected the idea that the evidence was admitted “for purposes of bolstering the victim’s testimony”]; *see People v Spicola*, 16 NY3d 441, 466 [2011] [in explaining that the expert on Child Sexual Abuse Accommodation Syndrome did not impermissibly bolster the child’s credibility, the Court stated that “the expert’s testimony certainly supported the boy’s credibility by supplying explanations other than fabrication for his post-molestation behavior. It was offered, after all, for purposes of just such rehabilitation. But . . . the expert did not express an opinion on the boy’s credibility”]; *People v Kukon*, 275 AD2d 478, 478-479 [3d Dept 2000] [in rejecting a claim that the expert on “child sexual abuse syndrome” “impermissibly bolstered” the credibility of the complainant, the Court stated that the “expert, who testified that she had not met or examined the victim in this case, did not impermissibly suggest that the victim had been sexually abused or that she exhibited signs similar to individuals who have been abused”]).

7.06 Abused Person Syndrome

(1) (a) The “abused person syndrome” has historically been referred to as the “battered women’s syndrome.” The syndrome, however, is not limited to a “battered” woman or indeed to “women”; rather the syndrome refers to a constellation of medical and psychological symptoms of a person of any gender who, at the hands of a “member of the complainant’s family or household” has suffered physical, sexual, or emotional abuse or has been coerced to do something contrary to their right not to do so.

(b) The term “member of the complainant’s family or household” is defined in the Criminal Procedure Law and Family Court Act to include:

(i) persons related by consanguinity or affinity;

(ii) persons legally married to one another;

(iii) persons formerly married to one another regardless of whether they still reside in the same household;

(iv) persons who have a child in common, regardless of whether such persons have been married or have lived together at any time; and

(v) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.

(2) The admissibility of expert testimony about an identifiable syndrome reaction depends on meeting the criteria of Guide to New York Evidence rule 7.01 and

on the reason given that the evidence would be relevant and helpful to a jury to understand an issue in the proceeding.

(3) The expert may not testify that the complainant should be believed or that the conduct at issue in the case constituted abuse; the expert may describe the general behavior patterns of domestic violence perpetrators and victims in order to explain behaviors of an abused person that might be beyond the ken of the average juror.

(4) The syndrome is not per se a defense to a criminal charge. Evidence of the syndrome may, however, be admissible in support of a defense. In a prosecution for assault or homicide, for example, evidence of the syndrome may be admissible when relevant and probative of an issue presented by the defense of justification.

(5) The reasons evidence of the syndrome may be admissible include, but are not necessarily limited to:

(a) when relevant, to place before the finder of fact a reason for a complainant's: (i) delayed reaction to abuse; or (ii) inability to leave the marital home; or (iii) recantation of allegations of abuse; or (iv) failure to testify at defendant's domestic violence trial;

(b) when, in a child sexual abuse and neglect proceeding, the mother asserts she was the victim of the "domestic violence syndrome," in order to place before the finder of fact a reason why she could not be said to have "allowed" the sexual abuse of her child by the person who abused her.

Note

Introduction

Expert testimony relating to what the decisional law has historically referred to as the “battered women’s syndrome” has been held admissible as set forth in this Guide to New York Evidence rule. The “battered women’s syndrome” terminology, however, has been found wanting because the syndrome is gender neutral, not limited to abused women, and the syndrome may involve sexual and emotional abuse that is not reflected in the term “battering.” Decisional law has moved towards referring to expert evidence of the syndrome under the umbrella of “domestic violence” evidence, which is gender neutral and encompasses abuse that is other than just physical. (*People v Shoshi*, 177 AD3d 779, 781 [2d Dept 2019] [the trial court properly permitted “an expert in the field of domestic violence to testify on the subject of domestic violence generally. The expert’s testimony was relevant to explain the behavior patterns of victims of domestic violence that might appear unusual or that jurors might not be expected to understand”]; *People v Levasseur*, 133 AD3d 411, 412 [1st Dept 2015] [“The court also correctly admitted expert testimony describing typical features of the cycle of domestic violence”]; *People v Walters*, 127 AD3d 889, 889 [2d Dept 2015] [“the expert described the general behavior patterns of domestic violence perpetrators and victims in order to explain behaviors of a battered woman that might be beyond the ken of the average juror”].)

This Guide to New York Evidence rule relates to the testimony of an expert with respect to an “abused person syndrome” whether under the historical terminology of “battered women’s syndrome” or under the present-day “domestic violence” terminology. There are other types of evidence that may be admitted in a “domestic violence” case that are not the subject of this rule. (See Guide to NY Evid rule 4.28, Evidence of Crimes and Wrongs (*Molineux*); *People v Frankline*, 27 NY3d 1113, 1115, 1117 [2016] [“Previous acts of intimate partner violence may be nonpropensity evidence ‘probative of (a defendant’s) motive and intent to assault (the) victim’ and which ‘provide(s) necessary background information on the nature of the (defendant and victim’s) relationship’ (*People v Dorm*, 12 NY3d 16, 19 [2009])”].)

The Court of Appeals has not expressly addressed the admissibility of expert testimony on a syndrome related to domestic violence although the nature of the syndrome and reasons for admissibility are analogous to the “rape trauma syndrome” and the “child abuse syndrome” that the Court of Appeals has recognized. Other courts have accordingly held admissible expert testimony of the syndrome under the circumstances set forth in this rule.

The Rule

Subdivision (1) (a) is derived in part from a portion of the definition of “battered-woman syndrome” set forth in Black’s Law Dictionary (11th ed 2019) (“A constellation of medical and psychological symptoms of a woman who has suffered physical, sexual, or emotional abuse at the hands of a spouse or partner”); and in part from Psychological and Scientific Evidence in Criminal Trials § 7:3 (defining a “battered woman” in part as “ ‘a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights’ ” [citation omitted]). (See *People v Ellis*, 170 Misc 2d 945, 950 [Sup Ct, NY County 1996] [“The battered woman syndrome is described as ‘a series of common characteristics found in women who are abused both physically and emotionally by the dominant male figures in their lives over a prolonged length of time’ ”]; see generally R. Keith Perkins, Domestic Torts: Civil Lawsuits Arising From Criminal Conduct Within Family Relationships §§ 2:18 [“Battered woman syndrome”], 2:21 [“Battered husbands”]; 1 NY Law of Domestic Violence § 2:98 [3d ed].)

Subdivision (1) (b) attempts to provide guidance on the type of relationship that may involve an “abused person,” as may be testified to by an expert in a particular case. The stated definition recites verbatim the definition of “members of the same family or household” as it appears in both CPL 530.11 (1) (a) to (e) and Family Court Act § 812 (1) (a) to (e). With respect to subdivision (1) (b) (v) of this rule, CPL 530.11 (1) (e) and Family Court Act § 812 (1) (e) add:

“Factors the court may consider in determining whether a relationship is an ‘intimate relationship’ include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an ‘intimate relationship’.”

There is, however, no uniform definition in decisional or statutory law. Other statutory definitions may be found in: Real Property Law § 227-d (1) (for the purposes of the law addressing discrimination based on “domestic violence victim status,” defining the term “domestic violence victim”); Social Services Law § 459-a (1) (for purposes of the “Domestic Violence Prevention Act,” defining “victim of domestic violence”); and Executive Law § 292 (34) (for purposes of the “Human Rights Law,” defining the term “victim of domestic violence” to have the same meaning as defined in the Social Services Law). (See also CPL 440.47 [2] [c])

[allowing an application for resentencing where the defendant was a “victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household” as defined in CPL 530.11 (1)].)

Subdivision (2) recognizes that the syndrome has been held to meet the criteria for expert opinion testimony (*see* Guide to NY Evid rule 7.01 [1]) and is thus admissible when the proffered reason for the expert testimony is relevant and helpful to the finder of fact to understand a litigated issue. (*People v Byrd*, 51 AD3d 267, 274 [1st Dept 2008] [holding that it was not necessary for the trial court to hold a *Frye* hearing before admitting the expert testimony because: “Battered person syndrome is not novel or experimental. The courts of this state have accepted it since 1985”]; *People v Johnson*, 22 AD3d 600, 601 [2d Dept 2005] [expert testimony about “battered women’s syndrome” was properly admitted “to aid the jury in understanding the unusual behavior of one of the female victims after the attack”]; *Matter of Pratt v Wood*, 210 AD2d 741, 743 [3d Dept 1994] [“it has come to be recognized that expert testimony in the field of domestic violence is admissible since the psychological and behavioral characteristics typically shared by victims of abuse in a familial setting are not generally known by the average person”].)

Subdivision (3) states a rule commonly governing the admissibility of syndrome evidence and is derived principally from the following decisions: *People v Walters* (127 AD3d at 889 [in approving the receipt of evidence of the syndrome, the Appellate Division noted: “The court did not allow the expert to offer an opinion as to whether the conduct at issue constituted domestic violence or whether the complainant exhibited symptoms of battered women’s syndrome. Instead, the expert described the general behavior patterns of domestic violence perpetrators and victims in order to explain behaviors of a battered woman that might be beyond the ken of the average juror”]); *People v Anglin* (178 AD3d 839, 840 [2d Dept 2019] [the expert “did not testify as to the particular facts of the case or offer an opinion as to whether the conduct at issue constituted domestic violence”]); *People v Whitson* (166 AD3d 663, 664 [2d Dept 2018] [noting with approval that the trial court “did not allow the expert to testify regarding the particular facts of the case or offer an opinion as to whether the conduct at issue constituted domestic violence. Instead, the expert described the general behavior patterns of domestic violence perpetrators and victims in order to explain behaviors of a battered woman that might be beyond the ken of the average juror”]); and *People v Thompson* (119 AD3d 966, 966-967 [2d Dept 2014] [“The court did not allow the expert to offer an opinion as to whether the conduct at issue constituted domestic violence, or to testify regarding any prior bad acts by the defendant”]).

Subdivision (4) sets forth decisional law holdings that “battered women’s syndrome is not itself a defense” to a criminal charge. (*People v Wilcox*, 14 AD3d 941, 943 [3d Dept 2005]; see *People v Bryant*, 278 AD2d 7, 7 [1st Dept 2000] [“battered women’s syndrome” evidence was properly excluded where “there was overwhelming evidence that defendant personally inflicted vicious abuse and severe injuries upon the deceased, her four-year-old child, entirely of her own volition and ill-will toward the child, and that the purported abuser, defendant’s husband, was not even present during some of this abuse”]; *People v Neathway*, 43 Misc 3d 1235[A], 2014 NY Slip Op 50936[U], *7 [Sup Ct, NY County 2014] [“battered women’s syndrome” evidence was properly excluded where the defendant was charged with “grand larceny,” “falsifying business records” and “offering a false instrument for filing,” noting that: “All three crimes, like the vast majority of other crimes in the Penal Law, require that the State prove the Defendant acted with a particular mental state. Mental culpability under the Penal Law, however, is obviously distinguishable from the motivation an offender may have to commit a crime”].)

As subdivision (4) further states, however, evidence of the syndrome may be admissible in support of a defense, such as a defense of justification. In a defense of justification, for example: “To have been justified in the use of deadly physical force, the defendant must have honestly believed that it was necessary to defend himself/herself [or someone else] from what he/she honestly believed to be the use or imminent use of such force by [the person injured or killed], and a ‘reasonable person’ in the defendant’s position, knowing what the defendant knew and being in the same circumstances, would have believed that too.” (CJI2d[NY] Defenses—Justification: Use of Deadly Physical Force in Defense of a Person [last rev Jan. 2018].) Thus, coupled with the defendant’s testimony, expert testimony of what constitutes an “abused person syndrome” may be relevant and probative.

Some trial courts in a justification defense case have even permitted an expert to testify that the defendant was in fact a battered person, but those decisions were not reviewed by an appellate court. (*People v Seeley*, 186 Misc 2d 715, 723 [Sup Ct, Kings County 2000]; *People v Torres*, 128 Misc 2d 129, 135 [Sup Ct, Bronx County 1985]; *People v Colberg*, 182 Misc 2d 798, 802 [Sullivan County Ct 1999]; compare *People v De Sarno*, 121 AD2d 651, 654-655 [2d Dept 1986] [in a case involving a defense of justification and proffered expert testimony on a defendant’s personality disorder as it bore on his state of mind, the trial court properly allowed an expert to testify about the “impact such a personality disorder has upon a person’s perception, state of mind and behavior” and properly precluded the expert from opining that the defendant believed the decedent was going to kill the defendant because “the explanation of the defendant’s alleged ‘personality disorder with explosive and paranoid features’ would have furnished a sufficient basis to aid the jury in forming an accurate conclusion as to the defendant’s

subjective belief and the reasonableness of the belief”]; *People v Hamel*, 96 AD2d 644, 645 [3d Dept 1983] [in a case involving a defense of justification and proffered expert psychiatric testimony regarding “past psychological trauma involving instances when (the defendant) had been sexually assaulted and threatened,” the trial court did not err in precluding the expert testimony, given that the “defendant testified fully about her thoughts and actions on the evening of the shooting and her unfortunate personal history. In light of this testimony, the jury could properly fulfill its function of making the required judgment based upon objective standards. Injection of psychiatric testimony into the normal case where justification is claimed would effectively usurp the jury’s role in determining what is reasonable”].)

Subdivision (5) sets forth some examples of where evidence of the syndrome has thus far been accepted; it is not designed to place limitations on the application of the syndrome in other appropriate circumstances.

Subdivision (5) (a) is derived from the following: *People v Roblee* (83 AD3d 1126, 1128 [3d Dept 2011] [the expert testimony was properly allowed “to explain the victim’s delay in seeking aid or attention immediately following the attack, to the extent that it was otherwise unexplained”]); *Matter of Pratt v Wood* (210 AD2d 741, 743 [3d Dept 1994] [in a child custody case, evidence of the syndrome should have been admitted to explain the failure of the child’s mother “to tell anyone about the abuse or to seek help (since that) is a characteristic typically shared by victims of domestic violence”]); *Matter of V.C. v H.C.* (257 AD2d 27, 35 [1st Dept 1999] [Family Court should have admitted evidence of the syndrome which, “according to petitioner’s offer of proof, would have helped explain her delayed reaction to the abuse inflicted upon her, her inability to leave the marital home on her own, and the impact of her deafness on her ability to function under hostile circumstances”]); *Matter of Erin R. v Ronald R.* (36 Misc 3d 1213[A], 2012 NY Slip Op 51263[U], *3 [Fam Ct, Kings County 2012] [“Testimony from an ‘expert on battered women’s syndrome who can explain a victim’s delayed reaction to the abuse inflicted, her inability to leave the marital home on her own, and her ability to function under hostile circumstances’ will be relevant and material evidence admissible at fact-finding as well as disposition”]); *People v Byrd* (51 AD3d at 269 [a complainant’s grand jury testimony was admissible after the trial court determined at a hearing that “the complainant was unavailable to testify at trial because of battered person syndrome”]); and *People v Ellis* (170 Misc 2d at 955 [“It is now accepted that ‘it is not common knowledge that one reason for a recantation may be the existence of battered woman’s syndrome’ ”]).

Subdivision (5) (b) is derived from *Matter of Glenn G.* (154 Misc 2d 677 [Fam Ct, Kings County 1992], *affd sub nom. Matter of Josephine G.*, 218 AD2d 656 [2d Dept 1995]).

7.08 Child Sexual Abuse Syndrome

(1) Child Sexual Abuse Syndrome (CSAS), like Rape Trauma Syndrome, is a therapeutic concept encompassing identifiable behavioral, somatic, and psychological reactions a person may experience after sexual abuse or attempt thereof.

(2) The admissibility of expert testimony about an identifiable CSAS reaction depends on meeting the criteria of Guide to New York Evidence rule 7.01 and on the reason given that the evidence would be relevant and helpful to a jury to understand an issue in the proceeding.

(a) In general, in the exercise of a trial court's discretion, expert testimony may be admissible to explain the behavior of a complainant that might appear unusual or that jurors may not be expected to understand.

(b) In particular, in the exercise of a trial court's discretion, expert testimony may, for example, be admissible to dispel juror misconceptions regarding the ordinary responses of a victim; to explain a child's delay in reporting sexual abuse or a child's recantation; to explain why a child's behavior was not inconsistent with having been molested; why some children want to live with the person who abused them; why a child might appear "emotionally flat" following sexual assault; and why a child might run away from home.

(3) An expert may not testify that the child should be believed, or that the conduct at issue in the case constituted abuse; the expert may describe the relevant

general behavior patterns of an abused child that might be beyond the ken of the average juror.

Note

Subdivision (1), as well as the remainder of this rule, is derived from the seminal Court of Appeals decision in *People v Taylor* (75 NY2d 277 [1990]) that allowed for expert testimony on the analogous Rape Trauma Syndrome, as well as the Court of Appeals cases that specifically address the Child Sexual Abuse Syndrome (CSAS), also known as the Child Sexual Abuse Accommodation Syndrome (CSAAS). (*People v Carroll*, 95 NY2d 375, 387 [2000]; *People v Spicola*, 16 NY3d 441, 460-466 [2011]; *People v Williams*, 20 NY3d 579, 584 [2013]; *People v Nicholson*, 26 NY3d 813, 827-829 [2016].)

Although the admission of CSAS evidence has recently been challenged, it continues to be admissible under New York law. (*People v Austen*, 197 AD3d 861, 862 [4th Dept 2021] [“We reject defendant’s contention that CSAAS is no longer generally accepted in the relevant scientific community. Although a small number of other state courts do not allow expert testimony on CSAAS (*see e.g. State of New Jersey v J.L.G.*, 234 NJ 265, 289, 303, 190 A3d 442, 456, 464 [2018]), the record here provides no basis for us to reach a similar conclusion (*see Spicola*, 16 NY3d at 466)”].)

Subdivision (2). Expert testimony concerning CSAS is admissible in “the sound discretion of the trial court” (*Nicholson* at 828) and parallels the reasons for admissibility of expert testimony concerning Rape Trauma Syndrome. (Guide to NY Evid rule 7.05.) As *Carroll* declared: “We have long held that expert testimony regarding rape trauma syndrome, abused child syndrome or similar conditions may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand (*see, People v Taylor*, 75 NY2d 277).” (*Carroll* at 387; *see Spicola* at 465 [“we have ‘long held’ evidence of psychological syndromes affecting certain crime victims to be admissible for the purpose of explaining behavior that might be puzzling to a jury (*see Carroll*, 95 NY2d at 387)”].)

In *People v Keindl* (68 NY2d 410, 422 [1986]), as *Carroll* explained, “expert testimony was permitted to ‘rebut defendant’s attempt to impair the credibility of [sexually abused children] by evidence that they had not promptly complained’ of the sexual abuse (*People v Taylor, supra*, 75 NY2d, at 288).” (*Carroll* at 387.) Similarly, in *Carroll*, the expert referred to CSAS “only generally insofar as it provides an understanding of why children may delay in reporting sexual abuse.” (*Id.*)

Spicola confirmed the admissibility of CSAS evidence and provided further illustrations of when it may be admissible, noting that “the majority of states ‘permit expert testimony to explain delayed reporting, recantation, and inconsistency,’ as well as ‘to explain why some abused children are angry, why some children want to live with the person who abused them, why a victim might appear “emotionally flat” following sexual assault, why a child might run away from home, and for other purposes’ (see 1 Myers on Evidence § 6.24, at 416-422 [collecting cases . . .]).” (*Spicola* at 465; *Nicholson* at 828 [“The expert educates the jury on a scientifically-recognized ‘pattern of secrecy, helplessness, entrapment (and) accommodation’ experienced by the child victim. This includes assisting the jury to understand ‘why a child may wait a long time before reporting the alleged abuse,’ fail to report at all, and deny or recant claims of sexual assault” (citations omitted)].)

In explaining the “accommodation syndrome,” the expert may give “testimony concerning abusers’ behavior” that is relevant to explain the syndrome. (*Williams* at 584 [“That testimony assisted in explaining victims’ subsequent behavior that the factfinder might not understand, such as why victims may accommodate abusers and why they wait before disclosing the abuse”].)

Subdivision (3) is at the core of the admissibility of syndrome evidence when it states that: “An expert may not testify that the child should be believed, or that the conduct at issue in the case constituted abuse; the expert may describe the relevant general behavior patterns of an abused child that might be beyond the ken of the average juror.” (*See Carroll* at 387 [the expert testimony “did not attempt to impermissibly prove that the charged crimes occurred”]; *Spicola* at 465 [the expert “confirmed that the presence or absence of any particular behavior was not substantive evidence that sexual abuse had, or had not, occurred. He made it clear that he knew nothing about the facts of the case before taking the witness stand; that he was not venturing an opinion as to whether sexual abuse took place in this case; that it was up to the jury to decide whether the boy was being truthful”]; *People v Williams*, 20 NY3d 579, 584 [2013] [“the expert’s testimony exceeded permissible bounds when the prosecutor tailored the hypothetical questions to include facts concerning the abuse that occurred in this particular case. Such testimony went beyond explaining victim behavior that might be beyond the ken of a jury, and had the prejudicial effect of implying that the expert found the testimony of this particular complainant to be credible—even though the witness began his testimony claiming no knowledge of the case before the court”]; *People v Duell*, 124 AD3d 1225, 1229 [4th Dept 2015] [the “expert never opined that defendant committed the crimes; that the victim was, in fact, sexually abused; or that the victim’s behavior was consistent with such abuse”].)

While it is not permissible to permit the expert testimony solely to bolster the complainant's credibility, particularly by testimony that the expert credits the complainant (*Williams* at 584), CSAS is admissible to counter an inference from the complainant's behavior that the complainant "is not credible." (*Nicholson* at 828.) For example, in *Nicholson*, the complainant did not disclose the sexual assaults until 10 years after the first assault. The CSAS expert testimony was therefore "appropriate to assist the jury in assessing [the complainant's] credibility by 'explaining victims' subsequent behavior that the factfinder might not understand, such as why victims may accommodate abusers and why they wait before disclosing the abuse.'" (*Nicholson* at 828; see *Spicola* at 465 [the expert had not met the complainant and the CSAS testimony was not to be construed as an opinion on the complainant's credibility as to whether the abuse took place]; *Williams* at 584.)

7.15 Expert Testimony on Confessions

(1) Expert testimony regarding the reliability of a confession may be admitted, limited, or denied in the discretion of the trial court.

(2) In the exercise of its discretion, the trial court should consider (a) whether the proposed expert testimony is based on principles that are generally accepted within the relevant scientific community; (b) whether the proffered testimony meets the general requirements for the admission of expert testimony (Guide to NY Evid rule 7.01 [1]), in particular, whether the testimony is beyond the ken of the jury and would aid the jury in reaching a verdict; (c) whether the proffered testimony is relevant to the defendant and interrogation before the court; and (d) the extent to which the People's case relies on the confession.

(3) Expert testimony regarding the reliability of a confession generally falls within the following parameters: (a) testimony that purports to identify those "dispositional factors" of an individual that make it more likely that he or she may be coerced into giving a false confession (e.g. individuals who are highly compliant or intellectually impaired, suffer from a diagnosable psychiatric disorder, or are for some other reason psychologically or mentally fragile) or (b) testimony that purports to identify conditions or characteristics of an interrogation ("situational factors") that might induce someone to confess falsely to a crime.

(4) An expert who testifies may not render an opinion as to the truth or falsity of the confession.

(5) To the extent the proffered testimony involves novel scientific theories and techniques not yet found by courts to be generally accepted by the relevant

scientific community, the trial court should conduct a *Frye* hearing to determine the issue. (Guide to NY Evid rule 7.01 [2].)

Note

This rule is derived from Court of Appeals decisions. (*People v Bedessie*, 19 NY3d 147 [2012]; *People v Powell*, 37 NY3d 476 [2021].)

In the words of *Bedessie*:

“False confessions that precipitate a wrongful conviction manifestly harm the defendant, the crime victim, society and the criminal justice system. And there is no doubt that experts in such disciplines as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions.” (*Bedessie* at 161; *see also Powell* at 491 [“There is a difference between the classically, inherently coercive interrogation that produces an involuntary confession—an issue that the jury is well-equipped to understand . . . and the phenomenon of false confessions involving the interplay of situational and dispositional factors that produce a coercive compliant false confession from an innocent suspect, an occurrence that the jury may find counterintuitive”].)

The rules applicable to the admissibility of an expert on the reliability of a confession parallel the rules applicable to an expert on the reliability of identification evidence. (*See Bedessie* at 156 [analogizing to the law on the reliability of expert identification testimony set forth in *People v Lee* (96 NY2d 157 [2001])]; Guide to NY Evid rule 7.17.)

Subdivision (1) states the rule of *Bedessie* and *Powell* that “ ‘admissibility and limits of expert testimony’ ” on the reliability of a confession “ ‘lie primarily in the sound discretion of the trial court.’ ” (*Bedessie* at 156, quoting *Lee* at 162; *Powell* at 489 [the “admissibility and scope of expert testimony are subject to the discretion of the trial court”]; *cf. People v Santiago*, 17 NY3d 661, 668 [2011] [a “trial court may, in its discretion, admit, limit, or deny the testimony of an expert on the reliability of eyewitness identification”].)

A trial court’s exercise of discretion in denying or limiting an expert’s testimony on the reliability of a confession is subject to appellate review for an abuse of discretion. (*Powell* at 489 [“The admissibility and scope of expert testimony are subject to the discretion of the trial court . . . (thereby) limiting our scope of review to whether the determination to exclude the proffered expert testimony was an abuse of that discretion as a matter of law”]; *Bedessie* at 161 [the

trial court did not “abuse his discretion” when “he excluded the proposed testimony” by an expert on the reliability of confessions]; *cf. People v McCullough*, 27 NY3d 1158, 1161 [2016] [summing up the criterion for appellate review of the exercise of discretion in denying or limiting expert identification evidence by stating: “Courts reviewing (the exercise of discretion) simply examine whether the trial court abused its discretion in applying the standard balancing test of prejudice versus probative value (*People v Powell*, 27 NY3d 523, 531 [2016])” (internal quotation marks omitted)]; *see* Guide to NY Evid rule 4.07.)

Subdivision (2) recites factors a trial court should consider in determining whether to admit expert testimony on the reliability of a confession which are reflected primarily in the opinions of *Bedessie* and *Powell*.

Bedessie summed up the “broad principles” for determining admissibility; namely, a trial court’s discretion should be guided by “whether the proffered expert testimony would aid a lay jury in reaching a verdict; courts should be wary not to exclude such testimony merely because, to some degree, it invades the jury’s province; [d]espite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of the evidence at issue, it cannot be said that psychological studies bearing on reliability are within the ken of the typical juror; and since the expert testimony may involve novel scientific theories and techniques, a trial court may need to determine whether the proffered expert testimony is generally accepted by the relevant scientific community.” (*Bedessie* at 156-157 [internal quotation marks and citation omitted].) In addition, “the expert’s proffer must be relevant to the defendant and interrogation before the court.” (*Id.* at 161.)

Powell added that “the scientific principles involve more complexity than the general conclusion that false confessions do occur, and the expert is supposed to articulate those principles so a jury can apply the information to the actual evidence in the case—not merely speculate in the absence of that evidence. We therefore hold that there is no abuse of discretion when the trial court disallows expert psychological testimony as to false confessions when it is not relevant to the circumstances of the custodial interrogation in the case at hand.” (*Powell* at 495.)

Neither *Bedessie* nor *Powell* quoted the criterion included for consideration in determining whether to allow expert identification testimony, namely, whether “there is little or no corroborating evidence connecting the defendant to the crime.” (*People v LeGrand*, 8 NY3d 449, 452 [2007].)

Bedessie, however, discussed the nature of the non-confession evidence, which appeared to rest solely on the identification by the complainant, noting that “certainly this is not a case where there was corroboration by verifiable evidence supplied in a defendant’s confession itself and previously unknown to the police”

and, regardless of the evidence of corroboration, the expert's "proffer had nothing to say that was relevant to the circumstances of this case." (*Bedessie* at 157.) Thus, the trial judge did not abuse his discretion when he excluded the proposed testimony, "even assuming that the confession was not corroborated." (*Id.* at 161.)

Powell observed that the defendant was identified via a lineup as the perpetrator of a robbery, and that video surveillance evidence supported the identification but did not conclusively show the perpetrator's face. As in *Bedessie*, *Powell*'s holding that the court did not abuse its discretion in denying the motion for an expert on the reliability of confessions rested on a determination that the proffered expert testimony was "not relevant to the circumstances of the custodial interrogation in the case at hand." (*Powell* at 495.)

The Appellate Division cases following *Bedessie* have weighed the "extent to which the People's case relied on the confession" in determining whether the trial court abused its discretion in denying a motion for expert testimony on the reliability of confessions. (*People v Evans*, 141 AD3d 120, 126 [1st Dept 2016] [*Bedessie* "asks us to examine whether the proffered expert testimony is warranted based on the nature of the interrogation, the applicability of the science of false confessions to the defendant and the extent to which the People's case relied on the confession. All three factors must be considered and weighed to determine the admissibility of the expert testimony on false confessions"]; *People v Jeremiah*, 147 AD3d 1199, 1205 [3d Dept 2017]; see *People v Roman*, 125 AD3d 515, 516 [1st Dept 2015] ["this is not a case that turns on the accuracy of defendant's confession"].)

Evans, for example, accepted that "the relevant inquiry here is whether the confession was corroborated by overwhelming evidence, thereby undermining the usefulness of expert testimony on the issue of false confessions." On the facts of the case, however, the Court held that "the confession was a central component of the People's case, and thus does not undermine the usefulness of expert testimony on the issue of false confessions." (*Evans* at 126.)

Jeremiah, on the other hand, found that "the People's case was not premised exclusively or primarily upon defendant's statement" and ruled that "the required showing of relevancy was not made." (*Jeremiah* at 1204-1205.)

Subdivision (3) sets forth a summary of the scope of expert testimony that is drawn from *Bedessie*, which began by declaring: "That the phenomenon of false confessions is genuine has moved from the realm of startling hypothesis into that of common knowledge, if not conventional wisdom" (*Bedessie* at 156), and then identified the expert testimony normally proffered on the issue of a false confession as follows:

"Research in the area of false confessions purports to show that certain types of defendants are more likely to be coerced into

giving a false confession—e.g., individuals who are highly compliant or intellectually impaired or suffer from a diagnosable psychiatric disorder, or who are for some other reason psychologically or mentally fragile

“Research also purports to identify certain conditions or characteristics of an interrogation which might induce someone to confess falsely to a crime.” (*Bedessie* at 159-160; *see also Powell* at 485 [noting that, at a *Frye* hearing, the defense expert “set forth the three types of false confessions: voluntary (not coerced—could be offered to protect another or attain notoriety), coerced compliant (where the suspect’s will is overborne) and internalized (through deceptive interrogation techniques, the suspect comes to believe he or she is guilty). (The expert) also set forth the paradigm of a series of dispositional and situational factors that have been recognized as contributing to the risk of false confessions”]; *Evans*, 141 AD3d at 124-125 [finding that the expert’s testimony was relevant with respect to the dispositional factors which the expert concluded the defendant exhibited]; *People v Days*, 131 AD3d 972, 979, 981 [2d Dept 2015] [“it cannot be said that psychological studies bearing on the reliability of a confession are, as a general matter, ‘within the ken of the typical juror,’ ” and “the defendant made a thorough proffer that he was ‘more likely to be coerced into giving a false confession’ than other individuals. His proffer clearly indicated that he was intellectually impaired, highly compliant, and suffered from a diagnosable psychiatric disorder, and also that the techniques used during the interrogation were likely to elicit a false confession from him Further, there was little evidence to corroborate the defendant’s confession in this case, and his conviction turned almost entirely on his videotaped confession”].)

Subdivision (4) recites the rule set forth in both *Bedessie* (at 161 [the expert may not testify as to whether a particular defendant’s confession was or was not reliable]) and *Powell* (at 491 [“the proffered testimony would not have been admissible for the purpose of establishing that a false confession occurred”]).

Subdivision (5) recognizes the standard procedure for determining the admissibility of novel scientific theories and techniques not yet found by courts to be generally accepted by the relevant scientific community. (*See Bedessie* at 156-157 [“since the expert testimony may involve novel scientific theories and techniques, a trial court may need to determine whether the proffered expert testimony is generally accepted by the relevant scientific community” (internal quotation marks omitted)].)

Powell (at 495 n 15) explained that “even where there is general acceptance for a particular phenomenon . . . that does not mean that all evidence related to that field will be admissible. The court still has a gatekeeping function to perform in determining whether specific research areas relating to that field are generally accepted.”

On scientific evidence generally, the Court of Appeals has noted that a trial court “need not hold a *Frye* hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony. ‘Once a scientific procedure has been proved reliable, a *Frye* inquiry need not be conducted each time such evidence is offered [and courts] may take judicial notice of reliability of the general procedure.’ ” (*LeGrand*, 8 NY3d at 458; *but see People v Williams*, 35 NY3d 24, 43 [2020] [“our *Frye* jurisprudence accounts for the fact that evolving views and opinions in a scientific community may occasionally require the scrutiny of a *Frye* hearing with respect to a familiar technique. There is no absolute rule as to when a *Frye* hearing should or should not be granted, and courts should be guided by the current state of scientific knowledge and opinion in making such determinations”].)

7.17 Expert Testimony on Identification

(1) Expert testimony regarding the reliability of identification evidence may be admitted, limited, or denied in the discretion of the trial court.

(2) In the exercise of its discretion, the trial court should consider the following factors: (a) whether the eyewitness identification is a central element of the proof; (b) whether there is little or no corroborating evidence connecting the defendant to the crime; (c) whether the proffered expert testimony is relevant to the eyewitness identification of the defendant on the facts of the case; (d) whether the eyewitness testimony is based on principles that are generally accepted within the relevant scientific community; and (e) whether the proffered testimony meets the general requirements for the admission of expert testimony (Guide to NY Evid rule 7.01 [1]), in particular, whether the witness is a qualified expert and the testimony is beyond the ken of the jury and would aid the jury in reaching a verdict.

(3) (a) The principles upon which expert identification testimony has been recognized by the Court of Appeals as generally accepted within the relevant scientific community include:

confidence-accuracy correlation (a lack of correlation between the confidence the eyewitness expresses in the identification and the accuracy of the eyewitness's identification);

confidence malleability (an eyewitness's confidence in an identification can be influenced by factors that are unrelated to identification accuracy); and

postevent information (eyewitness testimony about an event often reflects not only what the

eyewitness actually saw but information the witness obtained later on).

(b) The principles upon which expert identification testimony has been recognized by other New York courts as generally accepted within the relevant scientific community include:

event stress (a stressful event can impair the ability of a person to recognize an unfamiliar face accurately);

exposure time or event duration (the amount of time available for viewing a perpetrator affects the witness's ability to identify the perpetrator accurately); and

unconscious transference (a witness may identify an individual familiar to them from other situations or contexts);

weapon focus (a victim's focus on the weapon used in an assault can affect ability to observe and remember the attacker).

(4) To the extent the proffered testimony involves novel scientific theories and techniques not yet found by courts to be generally accepted by the relevant scientific community, the trial court should conduct a *Frye* hearing to determine the issue. (Guide to NY Evid rule 7.01 [2].)

Note

This rule is derived from a series of Court of Appeals decisions. (*People v Berry*, 27 NY3d 10 [2016]; *People v McCullough*, 27 NY3d 1158 [2016]; *People v Muhammad*, 17 NY3d 532 [2011]; *People v Santiago*, 17 NY3d 661 [2011]; *People v Abney* [and *Allen*], 13 NY3d 251 [2009]; *People v LeGrand*, 8 NY3d 449 [2007]; *People v Young*, 7 NY3d 40 [2006]; *People v Lee*, 96 NY2d 157 [2001]; see also *People v Mooney*, 76 NY2d 827, 833 [1990] [dissenting opinion].) *LeGrand* is the leading case on the exposition of the standards to be

observed and *Abney* summarizes and contrasts the Court's previous decisions, as does *Santiago*.

A guiding theme of the Court of Appeals decisions is that “[b]ecause mistaken eyewitness identifications play a significant role in many wrongful convictions, and expert testimony on the subject of eyewitness recognition memory can educate a jury concerning the circumstances in which an eyewitness is more likely to make such mistakes, ‘courts are encouraged . . . in appropriate cases’ to grant defendants’ motions to admit expert testimony on this subject.” (*Santiago*, 17 NY3d at 669.)

Subdivision (1). The Court of Appeals decisions are uniform in holding that the admissibility of expert identification testimony is in the discretion of the trial judge. (*E.g. Santiago*, 17 NY3d at 668 [a “trial court may, in its discretion, admit, limit, or deny the testimony of an expert on the reliability of eyewitness identification”]; *LeGrand*, 8 NY3d at 456 [“it is clear that expert testimony regarding the factors that affect the accuracy of eyewitness identifications, in the appropriate case, may be admissible in the exercise of a court’s discretion”]; *Lee*, 96 NY2d at 162 [“the admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court”].)

A trial court’s exercise of discretion in denying or limiting an expert’s testimony on the reliability of an identification is subject to appellate review for an abuse of discretion. (*E.g. LeGrand*, 8 NY3d at 456 [“there are cases in which it would be an abuse of a court’s discretion to exclude expert testimony on the reliability of eyewitness identifications”]; *People v Young*, 7 NY3d at 44.)

And *Berry* (27 NY3d at 19) noted that “ ‘where [a] case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for [the] trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness’s identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror’ (*People v LeGrand*, 8 NY3d 449, 452 [2007]).” *McCullough* (27 NY3d at 1161) summed up the criterion for appellate review by stating: “Courts reviewing [the exercise of discretion] simply examine whether the trial court abused its discretion in applying the ‘standard balancing test of prejudice versus probative value’ (*People v Powell*, 27 NY3d 523, 531, [2016]).” (*See* Guide to NY Evid rule 4.07.)

In *People v Drake* (7 NY3d 28 [2006]), the trial court “ruled that the expert [on the reliability of eyewitness identifications] would be permitted to testify as to certain psychological factors that may influence the accuracy of an eyewitness identification, but held that ‘[t]o prevent any possibility that the expert testimony will infringe upon the jury’s fact-finding function, the witness will not

be permitted to give opinion testimony regarding the credibility or reliability of any witness. In addition, the expert may not opine as to whether any of the specific psychological factors outlined [in the trial court's opinion] actually influenced the identifications. In short, the testimony of the expert is limited to setting forth the relevant psychological factors and interpreting the research data that demonstrate an effect on memory and perception.' ” (*Id.* at 31-32.) The Court of Appeals, however, held: “Since defendant raised no objection to these limitations, the propriety of the [trial] court’s ruling in this regard is not before us.” (*Id.* at 32.) The Court has not since expressly resolved the questions presented by those limitations. (*Compare People v Bedessie*, 19 NY3d 147 [2012] [an expert who testifies to factors that may result in a false confession may not testify as to whether a particular defendant’s confession was or was not reliable]; *People v Carroll*, 95 NY2d 375, 387 [2000] [the expert’s testimony, explaining “child sexual abuse accommodation syndrome,” “did not attempt to impermissibly prove that the charged crimes occurred”]; *People v Banks*, 75 NY2d 277, 293 [1990] [“evidence of rape trauma syndrome is inadmissible when it inescapably bears solely on proving that a rape occurred”].)

Subdivision (2). The Court of Appeals decisions are uniform on the factors for a trial court to consider in determining the admissibility of expert identification testimony. There is, however, one caveat.

Until the decision in *McCullough* (27 NY3d 1158) the Court, beginning with *LeGrand*, had divided consideration of the factors into a “two-stage inquiry,” the first stage deciding whether the eyewitness identification is a central element of the proof and whether little or no corroborating evidence connects the defendant to the crime, and the second stage considering the remaining factors. In *McCullough* (27 NY3d at 1161), however, the Court held that “[t]o the extent *LeGrand* has been understood to require courts to apply a strict two-part test that initially evaluates the strength of the corroborating evidence, it should instead be read as enumerating factors for trial courts to consider in determining whether expert testimony on eyewitness identification would aid a lay jury in reaching a verdict” (quotation marks omitted).

Nonetheless, to date, key determining factors with respect to whether the testimony of an identification expert is warranted **have been as specified in subdivision (2): (a)** whether the eyewitness identification is a central element of the proof, and **(b)** whether little or no corroborating evidence connects the defendant to the crime.

In the words of the Court of Appeals: “In the event that sufficient corroborating evidence is found to exist, an exercise of discretion excluding eyewitness expert testimony would not be fatal to a jury verdict convicting defendant.” (*LeGrand*, 8 NY3d at 459.)

For example, in *Lee* (96 NY2d 157), the complainant's car was stolen at gunpoint; both the complainant and defendant were in close proximity to each other and exchanged words; and, two months after the theft, the defendant was arrested driving the stolen car. Given that corroborative evidence, the trial court did not abuse its discretion in denying expert identification testimony. In *Young* (7 NY3d at 45-46), in a robbery committed by a male, identified by a witness as the defendant, the stolen property was found in the possession of two of defendant's female acquaintances "and one of them pointed to defendant as the person from whom she got the property"; thus, "the corroboration was strong enough for the trial court reasonably to conclude that the expert's testimony would be of minor importance." In *Allen* (13 NY3d at 269), the corroborating evidence of the eyewitness was the identification of the defendant by an individual who knew the defendant and recognized him during the course of the robbery.

By contrast, where the key proof of guilt rests upon an identification (or identifications that are questionable) and there is "little or no corroborating evidence" (*People v LeGrand*, 8 NY3d at 452), upon a defendant's application, expert identification testimony about one or more of the scientific principles relevant to the case has been required.

For example, in *LeGrand* (8 NY3d at 457), the case turned solely on the accuracy of the "eyewitness identifications" and, "unlike *Lee* and *Young*, there was no corroborating evidence connecting defendant to the commission of the crime charged"; thus, the defendant's application for expert identification testimony should have been granted. In *Abney* (13 NY3d at 268), there was no corroborating evidence of the identification, and the trial judge therefore "abused his discretion when he did not allow [the expert] to testify on the subject of witness confidence. As for the remaining relevant proposed areas of expert testimony—the effect of event stress, exposure time, event violence and weapon focus, and cross-racial identification—the trial judge should have conducted a *Frye* hearing before making a decision on admissibility."

Uniquely, eyewitness identification with little or no corroboration may not warrant expert identification testimony where the complainant and the defendant are known to each other. (*People v Muhammad*, 17 NY3d at 546 [the victim knew the defendant for over a decade; so that "prior relationship took any issue regarding human memory formation and recollection out of the case, rendering the victim's ability to perceive his attacker as the only aspect on which expert testimony was even potentially relevant. . . . (A)n average juror would have been capable of assessing whether a person in the victim's situation had an adequate opportunity to observe someone he had known for so long. Moreover, the defense never directly challenged the victim's ability to observe or recall who shot him, but instead sought to characterize his testimony implicating defendant as a lie, thereby further removing the scope of the proposed expert testimony from the issues presented to the jury"]; cf. *People v Zohri*, 82 AD3d 493, 494 [1st Dept 2011] [the trial court did not abuse its discretion in excluding expert testimony on

eyewitness identification where, in addition to some corroboration, “(b)etween the crime and defendant’s apprehension, the victim continuously kept defendant in sight, except for very brief periods under circumstances that would render mistaken identity highly unlikely”].)

A trial court that denies pretrial an application for an expert identification witness may need to reconsider, upon a defense request, once the trial has produced evidence that may not have been known or appreciated before trial. (*Santiago*, 17 NY3d at 673 [the trial court “abused its discretion when, after the defense had rested, the court denied defendant’s renewed request to call an expert witness on eyewitness identification”]; *People v Austin*, 46 AD3d 195, 198-199 [1st Dept 2007] [based on the pretrial proffer for an expert, the trial court did not abuse its discretion in denying the application, and, while the expert may have been warranted after evidence had been received, the defense did not renew its motion].) *Austin* noted that “[p]erhaps the better practice would [be] to reserve decision or deny the motion with leave to renew during presentation of the People’s case, at which time both the defense and the court would have been in a better position to consider the relevance of any expert testimony proffered on the effect of various factors on the reliability of eyewitness identification.”

With respect to factor (c) (i.e., “whether the proffered expert testimony is relevant to the eyewitness identification of the defendant on the facts of the case”). *Santiago* (17 NY3d at 672-673) provides an example of testimony on identification factors found irrelevant upon the pretrial defense application and then relevant in part after the defense rested and renewed its application. Thus, on the pretrial application, the Court noted that: “weapon focus, the effects of lineup instructions, wording of questions, and unconscious transference” were irrelevant, given that the “victim was not aware that her assailant had a weapon, and the record contains no evidence of improper lineup instructions, suggestive wording, or the presence of defendant’s image in photographs the victim saw prior to identifying him in the photographic array she viewed.” In the ruling on the defense’s second application, the trial court “should have given specific consideration to the proposed testimony concerning unconscious transference. That testimony would have been relevant, given that [at the trial, an eyewitness (not the victim)] saw a photograph of [the defendant], and [another eyewitness (not the victim)] saw a sketch of the perpetrator based on the victim’s description, and familiarity with these images may have influenced these eyewitnesses’ identifications.” (*Id.* at 673.)

With respect to factor (d) (“whether the eyewitness testimony is based on principles that are generally accepted within the relevant scientific community”), see subdivision (3) of this rule and the Note thereto.

With respect to factor (e) (“whether the proffered testimony meets the general requirements for the admission of expert testimony [Guide to NY Evid rule 7.01 (1)]), in particular, whether the witness is a qualified expert and the

testimony is beyond the ken of the jury and would aid the jury in reaching a verdict”), the Court of Appeals has noted that “it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror.” (*Lee*, 96 NY2d at 162; *but see People v Fratello*, 92 NY2d 565, 572 [1998] [“It was well within the trial court’s sound discretion to reject expert testimony on a matter (night visibility) that is a subject of common experience of lay triers of fact”].)

In the end, the trial court’s exercise of discretion may depend on “whether the ‘specialized knowledge’ of the expert can give jurors more perspective than they get from ‘their day-to-day experience, their common observation and their knowledge’ In other words, could the expert tell the jury something significant that jurors would not ordinarily be expected to know already?” (*Young*, 7 NY3d at 45.)

Subdivision (3) lists the scientific principles related to an expert identification witness that the Court of Appeals and other courts have found generally accepted by the relevant scientific community.

Thus, in *LeGrand* (8 NY3d at 458), the Court of Appeals held that as to the first three factors listed in subdivision (3)—“correlation between confidence and accuracy of identification, the effect of postevent information on accuracy of identification and confidence malleability—the defense expert’s testimony contained sufficient evidence to confirm that the principles upon which the expert based his conclusions are generally accepted by social scientists and psychologists working in the field. Accordingly, defendant met his burden under *Frye*.” (*See Abney*, 13 NY3d at 268 [followed *LeGrand* with respect to “witness confidence”]; *Santiago*, 17 NY3d at 672 [held it was error to exclude expert testimony “showing that eyewitness confidence is a poor predictor of identification accuracy and on studies regarding confidence malleability” and the effects of “postevent information on eyewitness memory”].)

With respect to cross-racial identification, in *People v Boone* (30 NY3d 521, 535-536 [2017]) the Court of Appeals held that “a trial court is required to give, upon request, during final instructions, a jury charge on the cross-race effect, instructing (1) that the jury should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and (2) that, if so, the jury should consider (a) that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race and (b) whether the difference in race affected the accuracy of the witness’s identification.” (*See* CJI2d[NY] Identification.)

In coming to that conclusion, the *Boone* Court explained that “[t]he cross-race effect is ‘generally accepted’ by experts in the fields of cognitive and social psychology, a point that the People do not dispute. Indeed, in a survey of psychologists with expertise in eyewitness identification, 90% of the experts

believed that empirical evidence of the cross-race effect was sufficiently reliable to be presented in court. The phenomenon has been described as ‘[o]ne of the best documented examples of face recognition errors’ ” (30 NY3d at 528-529 [citations to supporting studies omitted]).

With respect to expert testimony on cross-racial identification, the *Boone* Court made the point that the required jury instruction does not preclude expert testimony “explaining the studies to the jury . . . , because ‘it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror,’ with the decision to admit subject to the trial court’s discretion.” (*Id.* at 531 [citation omitted].) While, therefore, mandating the instruction, the Court left to the discretion of the trial court whether the criteria for expert testimony had been satisfied. In *People v Santiago* (17 NY3d at 672), the Court held: “Given that the People did not dispute that the victim is a non-Hispanic Caucasian, the proposed testimony on inaccuracy of identifications of Hispanic people by non-Hispanic Caucasians appears relevant, and is beyond the ken of the average juror.” In *Abney* (13 NY3d at 268), the Court held that the trial court should have held a *Frye* hearing, inter alia, on the effect of cross-racial identification. On remand, the trial court conducted the *Frye* hearing and held the expert testimony inadmissible because “[w]hile [the expert] opined that the own-race bias phenomenon extended to persons of Asian/Indian descent, she acknowledged that she was unable to point to any specific scientific studies to support such a conclusion.” (*People v Abney*, 31 Misc 3d 1231[A], 2011 NY Slip Op 50919[U], *50 [Sup Ct, NY County 2011]; see also *People v Banks*, 16 Misc 3d 929, 942 [Westchester County Ct 2007] [because the expert at a pretrial hearing “did not mention any studies demonstrating . . . a bias between Hispanics (the identification witness) and African Americans” (the defendant), the court excluded the testimony].)

With respect to other courts:

On remand from *Santiago* (17 NY3d 661), the prosecutor conceded that the proffered testimony related to identification factors was generally accepted by the relevant scientific community and the trial court accepted that concession and considered which identification factors were relevant to the case. (*People v Santiago*, 35 Misc 3d 1239[A], 2012 NY Slip Op 51043[U] [Sup Ct, NY County 2012].) The factors held relevant (in addition to those accepted by the Court of Appeals) included: “*unconscious transference*” (a witness may identify an individual familiar to them from other situations or contexts); “*high event stress*” (introduction of evidence that high stress negatively impacts the accuracy of eyewitness identification and recall of crime details); “*exposure time*” (because “the victim viewed her attacker’s partially obscured face for no more than 25 seconds, the subject of exposure time is certainly relevant” [2012 NY Slip Op 51043[U], *8]); and “*weapon focus*” (but only if the complainant testified to having seen the “boxcutter while viewing the perpetrator’s face” [*Id.* at *9]). With respect to “exposure time,” see CJI2d(NY), Identification (“the accuracy of a

witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person" followed by a listing of related factors). Testimony related to the conduct of a lineup was also found relevant; however, in 2017, New York amended its identification laws to account for some of the issues related to fairness in lineup procedure. (*See* Executive Law § 837 [21]; Identification Procedures: Photo Arrays and Line-ups Municipal Police Training Council Model Policy and Identification Procedures Protocol and Forms Promulgated by the Division of Criminal Justice Services Pursuant to Executive Law 837 [21] [June 2017].)

On remand from *Abney* (13 NY3d 251), the trial court held, after conducting a *Frye* hearing, that (in addition to the identification factors accepted by the Court of Appeals) expert identification testimony would be admissible with respect to the following factors: “*event stress*” (i.e., “a stressful event impairs the ability of a person to recognize an unfamiliar face accurately” and “the complainant was placed in a highly stressful situation as she was allegedly robbed in the subway at knife point by a complete stranger”); “*weapon focus*” (given the use of a knife during the robbery); and “*event duration*,” also known as “exposure duration” (refers to “‘the phenomenon that [the] longer a person is exposed to a face the more likely that person will make a correct identification at a later time’ [and conversely] an identification is likely to be less accurate if the perpetrator is viewed only for a brief period of time. In this case, as the charged crime took only seconds to complete this Court finds that the phenomenon of event duration is relevant to the identification of the defendant.”) (*People v Abney*, 31 Misc 3d 1231[A], 2011 NY Slip Op 50919[U] [Sup Ct, NY County 2011] [citations omitted]; *see also e.g. People v Norstrand*, 35 Misc 3d 367, 372-373 [Sup Ct, Monroe County 2011] [allowing expert testimony on a number of factors including: “identification of a stranger”; “exposure duration”; “event stress”; “recovered memories ([eyewitness] recalled more details regarding the event two days later following a dream)”]; *People v Banks*, 16 Misc 3d 929, 930 [Westchester County Ct 2007] [exposure time; weapons focus]; *People v Drake*, 188 Misc 2d 210, 213 [Sup Ct, NY County 2001] [admitting expert identification testimony on the “stress of the event” (emphasis omitted)]; *but see People v Banks*, 74 AD3d 1214, 1215 [2d Dept 2010] [the trial court “providently exercised its discretion in precluding, after a *Frye* hearing . . . , expert testimony on the effects of stress”]; *compare People v Berry*, 27 NY3d at 20-21 [there was no abuse of discretion in precluding expert testimony on “event stress” on the ground that it was “not relevant”].)

Ultimately, in the words of the Court of Appeals: “We have acknowledged that even when expert testimony is required, the trial court is ‘obliged to exercise its discretion with regard to the relevance and scope of such expert testimony’ and that ‘not all categories of such testimony are applicable or relevant in every case’ (*LeGrand*, 8 NY3d at 459).” (*Berry*, 27 NY3d at 20.)

Subdivision (4) recognizes the standard procedure for determining the admissibility of novel scientific theories and techniques not yet found by courts to be generally accepted by the relevant scientific community. (*Lee*, 96 NY2d at 162 [where expert testimony may “involve novel scientific theories and techniques, a trial court may need to determine whether the proffered expert testimony is generally accepted by the relevant scientific community”].)

The caveat here is that although the Court of Appeals has recognized the rule set forth in subdivision (4), the Court has also noted that a trial court “need not hold a *Frye* hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony. ‘Once a scientific procedure has been proved reliable, a *Frye* inquiry need not be conducted each time such evidence is offered [and courts] may take judicial notice of reliability of the general procedure.’ ” (*LeGrand*, 8 NY3d at 458; *but see People v Williams*, 35 NY3d 24, 43 [2020] [“our *Frye* jurisprudence accounts for the fact that evolving views and opinions in a scientific community may occasionally require the scrutiny of a *Frye* hearing with respect to a familiar technique. There is no absolute rule as to when a *Frye* hearing should or should not be granted, and courts should be guided by the current state of scientific knowledge and opinion in making such determinations”].)

7.19 Scientific Evidence

(1) Subject to the requirements identified in Guide to New York Evidence rule 4.01 (Relevant Evidence); rule 4.07 (Exclusion of Relevant Evidence); rule 7.01 (Opinion of Expert Witness), as limited by rule 8.02 (Admissibility Limited by Confrontation Clause); and subject to the establishment by foundation evidence of the authenticity of the materials and propriety of the procedure used, the following scientific evidence has been held admissible:

(a) Ballistics evidence used to show that a firearm is operable or that a bullet was fired from a particular firearm.

(b) Blood type evidence used to identify the type of blood a particular individual carries and to determine whether the blood of one person matches that of another.

(c) Fingerprint and palmprint evidence.

(d) The results of a medical or diagnostic procedure or test as provided in CPLR 4532-a.

(e) Photometric testimony, limited to measurements of footprints.

(f) Radar speedometer results.

(2) Scientific evidence that has been held admissible by the Court of Appeals but whose reliability has subsequently been questioned includes:

(a) Bite mark evidence as a means of identification.

(b) Comparative hair analysis evidence.

(3) Purported scientific evidence that has been held not admissible includes:

(a) The results of a polygraph examination.

(b) The results of voice spectrographic evidence.

(4) Notwithstanding that evidence of a particular subject has been accepted in a scientific community, the evolving views and opinions in a scientific community may occasionally require a *Frye* hearing with respect to previously accepted scientific evidence. Scientific evidence that has been previously accepted within the relevant scientific community but has since come into question includes: hair comparisons, fire origin, comparative bullet lead analysis, bite mark matching, and bloodstain-pattern analysis. At the same time, evolving views and opinions in the scientific community about a particular subject may justify the admission of such evidence notwithstanding that it has not been previously accepted.

Note

The admissibility of DNA evidence will be the subject of a separate rule.

Subdivision (1) (a) is derived from Court of Appeals decisions. (See *People v Knight*, 72 NY2d 481, 485 [1988] [there are a “variety of scientific methods routinely accepted in our courts for their general reliability, including . . . ballistic evidence”]; *People v Romeo*, 12 NY3d 51, 53 [2009] [“Ballistics evidence . . . indicated that a gun belonging to defendant was the murder weapon”]; *People v Vataj*, 69 NY2d 985, 987 [1987] [“A ballistics test matched a spent bullet recovered from the scene of the crime with a bullet from defendant’s gun”]; *People v Soper*, 243 NY 320, 325 [1926] [“The bullets found in the body of the deceased were fired from a revolver of the same calibre as the revolver which was found . . . (T)wo experts produced by the prosecution testified, in effect, that they found and measured certain marks on the bullets and that these marks corresponded exactly with so-called ‘grooves’ and ‘lands’ in the barrel of the revolver and that these bullets were fired from that particular revolver”].) In 2020, the Court of Appeals noted that the reliability of “comparative bullet lead analysis” (i.e. the comparing by chemical analysis of a bullet at a crime scene with a bullet found in possession of the defendant), while previously accepted by other courts, was presently questionable. (*People v Williams*, 35 NY3d 24, 43 [2020].)

Subdivision (1) (b) is derived from *People v Mountain* (66 NY2d 197, 202-203 [1985]), which held: “The scientific validity and reliability of tests used to identify the type of blood a particular individual carries and to determine whether the blood of one person matches that of another are well recognized in both the medical and legal communities . . . [T]he relative rarity of the assailant’s type of blood relegates arguments as to remoteness to the realm of weight rather than admissibility.” (*But see People v Rogers*, 8 AD3d 888, 891-892 [3d Dept 2004] [in a rape prosecution, a report of the victim’s blood alcohol content was improperly admitted because “the test was initiated by the prosecution and generated by the desire to discover evidence against defendant, the results were testimonial (and admission) of the blood test results without the ability to cross-examine the report’s preparer was a violation of defendant’s rights under the 6th Amendment’s Confrontation Clause”].)

Subdivision (1) (c) is derived from a long line of Court of Appeals decisions recognizing the admissibility of such evidence, as well as statutory law recognition via the required taking of fingerprints and palmprints of those arrested for a crime. (CPL 160.10; *see People v Gates*, 24 NY2d 666, 669 [1969] [“there can be no doubting the almost conclusive force of the fingerprint evidence”]; *but see People v Rawlins*, 10 NY3d 136, 157 [2008] [“fingerprint reports at issue were clearly testimonial because . . . a police detective (prepared the) reports solely for prosecutorial purposes and, most importantly, because they were accusatory and offered to establish defendant’s identity” and were thus inadmissible given that the detective was not a witness subject to cross-examination].)

Subdivision (1) (d) incorporates CPLR 4532-a (“Admissibility of graphic, numerical, symbolic or pictorial representations of medical or diagnostic tests”) as set forth in Guide to New York Evidence rule 9.09.

Subdivision (1) (e) is derived from *People v Bay* (67 NY2d 787, 789 [1986]), which held that the “receipt of the expert photometric testimony, limited to measurements of the footprints, was not an abuse of discretion.”

Subdivision (1) (f) is derived from *People v Magri* (3 NY2d 562, 566 [1958] [“the time has come when we may recognize the general reliability of the radar speedometer (also known as a radar speedometer) as a device for measuring the speed of a moving vehicle, and that it will no longer be necessary to require expert testimony in each case as to the nature, function or scientific principles underlying it”]). (*People v Knight*, 72 NY2d 481, 486 [1988] [“insofar as the underlying scientific principles of moving and stationary radar are the same, evidence derived from either should be admissible without the need for expert testimony”].)

Subdivision (2) (a) on the admissibility of bite mark evidence is derived from *People v Middleton* (54 NY2d 42, 45 [1981]) where the Court held: “The

reliability of bite mark evidence as a means of identification is sufficiently established in the scientific community to make such evidence admissible in a criminal case.” (See *People v Smith*, 63 NY2d 41, 64 [1984] [“no error was committed in permitting the photo-to-photo comparison” of a known bite mark of the defendant on human skin with a bite mark on the skin of the deceased].) In 2020, however, notwithstanding *Middleton* and *Smith*, the Court of Appeals noted that there had been “[r]ecent questioning of previously accepted techniques related to . . . bite mark matching.” (*People v Williams*, 35 NY3d 24, 43 [2020].)

Subdivision (2) (b) is derived from *People v Allweiss* (48 NY2d 40, 49-50 [1979] [comparative hair analysis was properly admitted where “(t)he People’s expert testified that he had microscopically compared the hair samples taken from the defendant’s head with the hair found at the scene of the crime. He stated that the test, like fingerprint analysis, involved comparing a number of characteristics, generally 15 to 20. He conceded that the results would not be as conclusive as fingerprinting, but stated that if a sufficient number of similarities could be found, it could be determined with a reasonable degree of certainty that a hair had come from a certain individual. He said that he was able to do that in this case”]). In 2020, however, notwithstanding *Allweiss*, the Court of Appeals noted that there had been “[r]ecent questioning of previously accepted techniques related to hair comparisons.” (*People v Williams*, 35 NY3d 24, 43 [2020].)

Subdivision (3) (a) is derived from well-established precedent, most recently *People v Shedrick* (66 NY2d 1015, 1018 [1985]), which stated that it was not “reversible error for the court to exclude results of a polygraph examination offered by defendant to indicate his own belief in his innocence. The reliability of the polygraph has not been demonstrated with sufficient certainty to be admissible in this State. (*People v Tarsia*, 50 NY2d 1, 7; *People v Leone*, 25 NY2d 511, 517.)” (*People v Forte*, 279 NY 204 [1938].)

Subdivision (3) (b) is derived *People v Jeter* (80 NY2d 818, 820-821 [1992]), which stated: “We do not agree that the court could properly have determined that voice spectrography is generally accepted as reliable based on the case law and existing literature on the subject. In this instance, there is marked conflict in the judicial and legal authorities as to the reliability of the procedure. New York courts are split on the issue of admissibility. Moreover, while several jurisdictions have held that voice spectrography evidence is sufficiently reliable to be admissible, others have reached just the opposite conclusion. The legal scholarship on the admissibility of voice spectrography is likewise conflicting. We conclude that the trial court lacked a proper basis to admit the voice spectrographic evidence without a preliminary inquiry into reliability” (citations omitted). (*But see People v Tyson*, 209 AD2d 354, 355 [1st Dept 1994] [“It was an abuse of discretion to deny defendant’s request for a reasonable expenditure to test whether a voice on a tape offered in evidence, in which defendant allegedly admitted the crime, was in fact defendant’s . . . A preliminary hearing must then be held to determine the

scientific reliability of the test should the expert conclude that the voice on the tape was not defendant's"].)

Subdivision (4) is derived from *People v Williams* (35 NY3d 24, 43 [2020]), which stated:

“[O]ur *Frye* jurisprudence accounts for the fact that evolving views and opinions in a scientific community may occasionally require the scrutiny of a *Frye* hearing with respect to a familiar technique. There is no absolute rule as to when a *Frye* hearing should or should not be granted, and courts should be guided by the current state of scientific knowledge and opinion in making such determinations.

“Indeed, admissibility even after a finding of general acceptance through a *Frye* hearing is not always automatic. Recent questioning of previously accepted techniques related to hair comparisons, fire origin, comparative bullet lead analysis, bite mark matching, and bloodstain-pattern analysis illustrates that point; all of those analyses have long been accepted within their relevant scientific communities but recently have come into varying degrees of question.”

GUIDE TO NEW YORK EVIDENCE
ARTICLE 8: HEARSAY
TABLE OF CONTENTS

8.00	DEFINITION OF HEARSAY
8.01	ADMISSIBILITY OF HEARSAY
8.02	ADMISSIBILITY LIMITED BY CONFRONTATION CLAUSE (CRAWFORD)
8.03	ADMISSION BY A PARTY
8.05	ADMISSION BY ADOPTED STATEMENT OR SILENCE
8.07	ANCIENT DOCUMENTS
8.08	BUSINESS RECORDS
8.09	COCONSPIRATOR STATEMENT
8.11	DECLARATION AGAINST INTEREST
8.13	DECLARATION OF FUTURE INTENT
8.15	DYING DECLARATION
8.17	EXCITED UTTERANCE (rev. May 2018)
8.19	FORFEITURE BY WRONGDOING
8.21	HEARSAY IN HEARSAY
8.23	JUDICIAL ADMISSIONS: INFORMAL & FORMAL
8.24	MARKET RECORDS
8.25	PAST RECOLLECTION RECORDED
8.27	PEDIGREE
8.29	PRESENT SENSE IMPRESSION
8.31	PRIOR CONSISTENT STATEMENT
8.33	PRIOR INCONSISTENT STATEMENT
8.35	PRIOR JUDGMENT OF CONVICTION
8.36	PRIOR TESTIMONY IN CIVIL PROCEEDING
8.36.1	PRIOR TESTIMONY IN CRIMINAL PROCEEDING
8.37	PROMPT OUTCRY
8.39	REPUTATION EVIDENCE
8.41	STATE OF MIND
8.43	STATEMENT FOR DIAGNOSIS or TREATMENT

ARTICLE 8. HEARSAY

8.00. Definition of Hearsay

(1) Hearsay is an out of court statement of a declarant offered in evidence to prove the truth of the matter asserted in the statement.

(2) The declarant of the statement is a person who is not a witness at the proceeding, or if the declarant is a witness, the witness uttered the statement when the witness was not testifying in the proceeding.

(3) A statement of the declarant may be written or oral, or non-verbal, provided the verbal or non-verbal conduct is intended as an assertion.

Note

This section sets forth the definition of hearsay which is generally applied by the courts. (See *People v Nieves*, 67 NY2d 125, 131 [1986] [the statements in issue “constituted hearsay evidence, as they were made out of court and were sought to be introduced for the truth of what she asserted. Accordingly, they were admissible only if the People demonstrated that they fell within one of the exceptions to the hearsay rule” (citations omitted)]; see also *People v Caviness*, 38 NY2d 227, 230 [1975]; *Felska v New York Cent. & Hudson Riv. R.R. Co.*, 152 NY 339, 342 [1897].)

Hearsay admitted without objection may properly be considered by the trier of fact and can be given such probative value as under the circumstances it may possess. (See *Matter of Findlay*, 253 NY 1, 11 [1930]; *Ford v Snook*, 205 App Div 194, 198 [4th Dept 1923], *affd* 240 NY 624 [1925].) However, the Appellate Division may in the interest of justice reverse or modify a judgment for error in admitting hearsay even though no objection was made at trial. (See *Alexander v State of New York*, 36 AD2d 777, 778 [3d Dept 1971] [“It is well established that in the interest of justice we have the right to reverse a judgment and grant a new trial where there is fundamental trial error, even though no objection was taken at the trial”]; *People v Clegg*, 18 AD2d 694 [2d Dept 1962]; CPL 470.15 [3] [c]; [6] [a].) The Court of Appeals review power is much more limited as it is precluded from reviewing a claim of error when no proper objection was made at trial except where the claim falls within “the narrow class

of mode of proceedings errors for which preservation is not required.” (*People v Mack*, 27 NY3d 534, 536 [2016].) The Court of Appeals has never held that a claim of error in the admission of hearsay to which no objection was made, much less a general claim of error in the admission of evidence generally, is a “mode of proceedings” error.

Subdivision (1). No statement made by a declarant is inherently hearsay. Whether the statement is hearsay turns on the purpose for which it is offered. Thus, where the statement is offered for its truth, or has no relevant purpose other than a truth purpose, the statement is deemed hearsay. (*See People v Steiner*, 30 NY2d 762, 763 [1972].)

However, a statement which is not offered to prove the truth of the matter asserted therein is not hearsay. (*See People v Salko*, 47 NY2d 230, 239 [1979] [“If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the hearsay rule does not apply” (internal quotation marks omitted)]; *People v Becoats*, 17 NY3d 643, 656 [2011] [there was no need for defendant to rely upon a hearsay exception because he was not offering the out-of-court statements for their truth].)

If the statement is not offered for its truth, and is offered merely to show that the words were uttered or the conduct was engaged in, the issue of admissibility then becomes whether it is relevant and whether its probative value is substantially outweighed by the potential of unfair prejudice to the party against whom the statement is admissible. (*See Guide to NY Evid rule 4.07.*) There are many non-truth purposes for statements offered into evidence which the Court of Appeals has recognized. For example:

- A statement of a declarant which is heard by another and provides evidence of the hearer’s state of mind. (*See People v Waters*, 90 NY2d 826 [1997]; *Ferrara v Galluchio*, 5 NY2d 16, 20 [1958].)
- A statement of a declarant which provides evidence of the declarant’s state of mind. (*See People v Ricco*, 56 NY2d 320 [1982]; *Loetsch v New York City Omnibus Corp.*, 291 NY 308, 310-311 [1943].)
- A statement of a testifying witness which may be inconsistent with the witness’s testimony and thereby tend to impeach the witness’s credibility. (*See Larkin v Nassau Elec. R.R. Co.*, 205 NY 267, 268-269 [1912].)
- A timely complaint of a sexual assault by the victim, known as “prompt outcry.” (*See People v McDaniel*, 81 NY2d 10, 16-17 [1993].)

- A statement of the victim of a crime describing the purported perpetrator of the crime. (*See People v Huertas*, 75 NY2d 487 [1990]; *People v Smith*, 22 NY3d 462 [2013].)
- A statement which provides an explanation of the conduct of a police investigation or simply completes the narrative of events leading to the defendant's arrest. (*See People v Gross*, 26 NY3d 689, 695 [2016]; *People v Ludwig*, 24 NY3d 221, 231 [2014].)
- A statement which has a legally operative effect under the substantive law (*see People v Caban*, 5 NY3d 143, 149-150 [2005] ["verbal act"]); or where conduct is ambiguous, which, accompanies the conduct and tends to explain or characterize it (*see People v Salko*, 47 NY2d 230, 239 [1979] ["verbal part of an act"]).
- A "flow diagram" offered as an aid to the jury to understand a doctor's testimony that he had followed a set of guidelines. (*See Hinlicky v Dreyfuss*, 6 NY3d 636 [2006].)

Subdivision (2). While no Court of Appeals decision has set forth a definition of "declarant," the term, in accord with its normal meaning, has been commonly used by the Court to mean a person who makes an extrajudicial statement. (*See People v James*, 93 NY2d 620, 630-631 [1999]; *People v Settles*, 46 NY2d 154, 166-167 [1978].) In connection with this definition, the courts have recognized that while the usual situation will involve the offered testimony of a witness who will testify about what he or she heard someone else say at a time prior to the trial or hearing, a declarant for purposes of the hearsay rule may also be a witness who seeks to testify about his or her own pre-trial statement. (*See People v Buie*, 86 NY2d 501 [1995] [witness permitted to testify to a statement she made prior to trial because it was admissible under the present sense impression hearsay exception].)

It should also be noted that since the declarant is defined to be a "person," any statement generated from mechanical sources, other than data inputted by humans and subsequently retrieved, will not constitute hearsay. (*See People v Towsley*, 85 AD3d 1549 [4th Dept 2011] [canine tracking evidence not barred by hearsay rule]; *People v Stultz*, 284 AD2d 350 [2d Dept 2001] [testimony regarding the telephone caller ID number displayed on victim's telephone not barred by hearsay rule since the number as displayed was not made by a person].)

Subdivision (3). As recognized by the courts, a statement within the hearsay definition can be verbal, written or oral, or non-verbal, provided the verbal or non-verbal conduct is intended as an assertion, e.g., an expressive communication. (*See e.g. People v Salko*, 47 NY2d 230, 238-241 [1979] [the hearsay rule has, "as a general rule, no application to an act which is not intended to serve as an expressive communication"]; *see also People v Spicola*, 16 NY3d 441, 452 n 2 [2011] [infant's flushed skin and elevated heart rate, as testified to,

not “statements”]; *People v Madas*, 201 NY 349, 354 [1911] [identifying perpetrator by pointing to him a communicative gesture and therefore hearsay but admissible as a dying declaration]; *Roche v Brooklyn City & Newtown R.R. Co.*, 105 NY 294 [1887] [involuntary expressions and exclamations of pain not hearsay].)

8.01. Admissibility of Hearsay

(1) (a) Hearsay is not admissible unless it falls within an exception to the hearsay rule as provided by decisional law or statute and is permissible under the Federal Constitution and New York Constitution as provided in rule 8.02, or as provided in subdivision (1)(b) below.

(b) The Federal and New York State Constitutions require the admission of hearsay not encompassed within a hearsay exception when the court finds that the declarant is unavailable to testify and the hearsay is material, exculpatory and has sufficient indicia of reliability.

(c) New York law does not currently recognize the “residual exception” to the hearsay rule set forth in Federal Rules of Evidence rule 807.

(2) The burden of establishing the applicability of an exception rests upon the proponent of the statement.

(3) A statement which is not offered for its truth is not barred by the hearsay rule.

Note

Subdivision (1) (a). This subdivision is derived from *Nucci v Proper* (95 NY2d 597, 602 [2001] [Hearsay statements “may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule”). It also reflects the Court of Appeals holdings that defendant has the constitutional right to introduce hearsay but under strict conditions set forth in subdivision (1) (b). (See e.g. *People v Robinson*, 89 NY2d 648, 650 [1997].)

New York evidence law provides for numerous hearsay exceptions, each with specific requirements which must be fulfilled before the statement is admissible. (See *People v James*, 93 NY2d 620, 634-635 [1999].) The source of these exceptions is both statutory and decision law. Statutory exceptions can be found in CPLR article 45 and CPL article 60, and throughout the consolidated

laws. The judicially created exceptions are part of New York's common law of evidence. (See *Fleury v Edwards*, 14 NY2d 334, 340 [1964 Fuld, J., concurring] ["The common law of evidence is constantly being refashioned by the courts of this . . . jurisdiction() to meet the demands of modern litigation. Exceptions to the hearsay rule are being broadened and created where necessary."]; see also *People v Lynes*, 64 AD2d 543 [1978], affd 49 NY2d 286 [1980] [the determination of preliminary questions of fact on the admissibility of evidence "is not restricted by the ordinary exclusionary rules of evidence"].)

Subdivision (1) (b). The applicability of a hearsay exception may be dictated by the Constitution of New York or the United States, which both recognize that "a [criminal] defendant has a constitutional right to present a defense." (*People v Hayes*, 17 NY3d 46, 53 ([2011]; *Chambers v Mississippi*, 410 US 284, 294 [1973]), and a "[criminal] defendant's right to due process requires admission of hearsay evidence when [the] declarant has become unavailable to testify and 'the hearsay testimony is material, exculpatory and has sufficient indicia of reliability'" (*People v Burns*, 6 NY3d 793, 795 [2006]), quoting *People v Robinson*, 89 NY2d at 650, *supra* [emphasis omitted]).

Subdivision (1) (c). This subdivision makes it clear that New York has not approved of a "residual exception" similar to Federal Rules of Evidence rule 807. (See *People v Nieves*, 67 NY2d 125, 131 [1986] ["we are not prepared at this time to abandon the well-established reliance on specific categories of hearsay exceptions in favor of an amorphous 'reliability' test, particularly in criminal cases where to do so could raise confrontation clause problems"].)

Subdivision (2). This subdivision restates New York's well established rule, as stated in *Tyrrell v Wal-Mart Stores* (97 NY2d 650, 652 [2001]), that "[t]he proponent of hearsay evidence must establish the applicability of a hearsay-rule exception."

Subdivision (3). This subdivision states expressly that which is implicit from the definition of hearsay set forth in Guide to New York Evidence rule 8.00 (1). (See *People v Ricco*, 56 NY2d 320, 328 [1982] ["a relevant extrajudicial statement introduced for the fact that it was made rather than for its contents . . . is not interdicted by the hearsay rule"].)

8.02. Admissibility Limited by Confrontation Clause (*Crawford*)

(1) Confrontation rule in a criminal prosecution. A “testimonial statement” of a person who does not testify at trial is not admissible against a defendant for the truth of the statement, unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination, or the defendant engaged or acquiesced in wrongdoing that was intended to and did procure the unavailability of the witness.

(2) Testimonial statement, in general.

A hearsay statement is testimonial when it consists of:

(a) prior testimony at a preliminary hearing, before a grand jury, or at a former trial;

(b) an out-of-court statement in which

(i) state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial; or

(ii) absent a formal interrogation, the circumstances demonstrate that the “primary purpose” of an exchange was to procure an out-of-court statement to prove criminal conduct or past events potentially relevant to a later criminal prosecution, or otherwise substitute for trial testimony.

(3) Statement to police.

A statement made to the police is not testimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. The

statement to the police is testimonial when the circumstances objectively indicate that there is no ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution. A statement obtained by the police in a formal station house interrogation for that stated purpose is thus testimonial.

(4) Statement to a court.

A defendant's guilty plea allocution that implicates a codefendant is a testimonial statement and may not therefore be admitted at the trial of the codefendant in the absence of an opportunity for the codefendant to cross-examine the defendant.

(5) Statement made for the safety or treatment of a person.

(a) A statement of a student made in response to an inquiry of an educator is not testimonial when the primary purpose of the inquiry was to provide for the safety of the child.

(b) A statement of a patient made in response to an inquiry by a physician is not testimonial when the primary purpose of the inquiry was to diagnose the patient's condition and administer medical treatment.

(6) Forensic Report.

(a) A forensic report is a testimonial statement when the primary purpose of the report is to provide evidence at trial that explicitly links the defendant to a crime. A testimonial forensic report includes one that identifies an item connected to the defendant as an illegal drug, or delineates the blood-alcohol content of a

defendant's blood, or identifies the defendant through a fingerprint analysis or through a DNA analysis of incriminating evidence.

(b) A testimonial forensic report entitles a defendant to be confronted, as defined in subdivision one, with either the person who made the forensic report or with a person who is a trained analyst who supervised, witnessed or observed the testing, even without having personally conducted it.

(c) A forensic report does not constitute a testimonial statement when the report does not explicitly link the defendant to a crime and simply recites objective facts existing at the time of its making. Nontestimonial reports include:

(i) an autopsy report prepared by a medical examiner and describing only the observations and measurements of the deceased;

(ii) documents pertaining to the routine inspection, maintenance, and calibration of a breathalyzer machine; and

(iii) a report setting forth raw data of a DNA profile generated from an item in the contents of a rape kit before the defendant was a suspect in the crime.

Note

Subdivision (1). The Confrontation Clause of the US Constitution Sixth Amendment requires that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” That Clause applies to the states through the Fourteenth Amendment of the US Constitution (*Pointer v Texas*, 380 US 400, 406 [1965]), and therefore limits the admissibility of “testimonial” hearsay statements that may otherwise be admissible under state law.

The parameters of “confrontation” are defined in subdivision (1) in accord with *Crawford v Washington* (541 US 36, 42 [2004]) and *Giles v California* (554 US 353, 367 [2008]).

In *Crawford*, the Supreme Court held that

“[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination” (*Crawford v Washington*, 541 US at 68).

Crawford, however, does not extend to a testimonial statement admitted “for purposes other than establishing the truth of the matter asserted” (*Crawford v Washington*, 541 US at 59 n 9; *Williams v Illinois*, 567 US 50, 57-58 [2012] [plurality op], and at 125-126 [dissenting op]; *People v Garcia*, 25 NY3d 77, 86 [2015]; *People v Reynoso*, 2 NY3d 820, 821 [2004]).

Nor does *Crawford* apply to the admission of testimonial statements at a sentencing proceeding (*People v Leon*, 10 NY3d 122, 125-126 [2008]), or in a grand jury proceeding.

Last, a defendant may forfeit the right of confrontation where the defendant engaged or acquiesced in wrongdoing that was intended to and did procure the witness’s unavailability (*Giles*; see also Guide to NY Evid rule 8.19, Forfeiture by Wrongdoing, http://www.courts.state.ny.us/judges/evidence/8-HEARSAY/8.19_FORFEITURE%20BY%20WRONGDOING.pdf; Fed Rules Evid rule 804 [b] [6]; see also *People v Geraci*, 85 NY2d 359, 366 [1995] [“out-of-court statements, including Grand Jury testimony, may be admitted as direct evidence where the witness is unavailable to testify at trial and the proof establishes that the witness’s unavailability was procured by misconduct on the part of the defendant”]).

Subdivision (2) (a) is derived from *Crawford*’s declaration that “[w]hatever else the term [testimonial evidence] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial” (*Crawford*, 541 US at 68).

Subdivision (2) (b) (i) is derived from *Crawford* (541 US at 68), which itself directly held inadmissible a witness’s statement obtained by formal station house interrogation (541 US at 68); and *Michigan v Bryant* (562 US 344, 358 [2011]), which declared that “the most important instances in which the [Confrontation] Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.” (See *People v Goldstein*, 6 NY3d 119, 129 [2005] [“the statements made to (the expert) by her interviewees were testimonial.

. . . (The interviewees) knew they were responding to questions from an agent of the State engaged in trial preparation. None of them was making ‘a casual remark to an acquaintance’; all of them should reasonably have expected their statements ‘to be used prosecutorially’ or to ‘be available for use at a later trial.’ . . . Responses to questions asked in interviews that were part of the prosecution’s trial preparation are ‘formal’ in much the same sense as ‘depositions’ and other materials that the Supreme Court identified as testimonial”).)

Subdivision (2) (b) (ii). The rule that, absent a formal investigation, a statement is testimonial when the “primary purpose” of questioning was to prove criminal conduct or past events relevant to a criminal prosecution is derived from *Davis v Washington* (547 US 813, 822 [2006] [statements “are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution”]; see *Michigan v Bryant*, 562 US 344, 358, 370 [2011] [“although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent” (citation and internal quotation marks omitted)]; *People v John*, 27 NY3d 294, 307 [2016] [deeming the primary purpose test essential to determining whether particular evidence is testimonial hearsay requiring the declarant to be a live witness at trial]).

That a statement is testimonial when its primary purpose is to create a substitute for trial testimony is derived from *Bryant* (562 US at 358 [“When . . . the primary purpose of an interrogation is to respond to an ‘ongoing emergency,’ its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute”]; accord *Ohio v Clark*, 576 US —, 135 S Ct 2173, 2177 [2015]; *People v John*, 27 NY3d at 307 [a “statement will be treated as testimonial only if it was procured with a primary purpose of creating an out-of-court substitute for trial testimony (*People v Pealer*, 20 NY3d 447, 453 [2013], quoting *Michigan v Bryant*” (internal quotation marks omitted)]; see *People v Pacer*, 6 NY3d 504, 512 [2006]; *Pealer* at 453 [an affidavit of an employee of the Department of Motor Vehicles attesting to the revocation of an accused’s license in a prosecution was testimonial because it “had an accusatory purpose in that it provided proof of an element of the crime and resembled testimonial hearsay”])).

Subdivision (3) is derived from *Davis v Washington* (547 US at 822) which decided two cases. In the first case, a 911 caller’s statements relating to an ongoing assault, including the identification of her assailant, were not testimonial, given that the “primary purpose” of the statements was to obtain help (*People v Nieves-Andino*, 9 NY3d 12, 17 [2007]; *People v Bradley*, 8 NY3d 124, 127 [2006]). In the second case, the police, responding to a “domestic disturbance” call, found no

ongoing emergency, and thus statements in response to their questions as to what happened were testimonial. (See *Michigan v Bryant*, 562 US at 349 [where the police found a mortally wounded person lying on the ground in a parking lot of a gas station, the victim’s statement identifying his assailant, in response to police questions, was admissible because the “ ‘primary purpose of the interrogation’ was ‘to enable police assistance to meet an ongoing emergency’ ”].)

Subdivision (4) is derived from *People v Hardy* (4 NY3d 192 [2005]) and *People v Douglas* (4 NY3d 777 [2005]).

Subdivision (5) (a) is derived from *Ohio v Clark* (576 US at —, 135 S Ct at 2183 [(M)andatory reporting (obligations) . . . cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution. It is irrelevant that the teachers’ questions and their duty to report the matter had the natural tendency to result in Clark’s prosecution”]).

Subdivision (5) (b) is derived from *People v Duhs* (16 NY3d 405, 408-409 [2011] [a child’s responses to a medical doctor questioning the child for purposes of treatment was not testimonial]).

Subdivision (6) (a) is derived from *Melendez-Diaz v Massachusetts* (557 US 305 [2009] [drug analysis]); *Bullcoming v New Mexico* (564 US 647 [2011] [blood-alcohol content]); *People v Rawlins* (10 NY3d 136, 157 [2008] [fingerprint report]); *People v John* (27 NY3d at 307-308 [DNA report that linked the defendant to possession of the weapon he was charged with possessing]); and *People v Austin* (30 NY3d 98, 104 [2017] [buccal swab was obtained and the resulting profile was compared with the DNA profile generated from the burglaries “with the primary (truly, the sole) purpose of proving a particular fact in a criminal proceeding—that defendant . . . committed the crime for which he was charged”]; cf. *People v Freycinet*, 11 NY3d 38, 41 [2008] [an autopsy report that did not link the defendant to the crime]).

Subdivision (6) (b) is derived from *Bullcoming* (564 US at 651 [holding that a surrogate analyst who was familiar with the laboratory’s testing procedures, but “had neither participated in nor observed the test,” did not satisfy the Confrontation Clause requirement]); and *People v Hao Lin* (28 NY3d 701, 705 [2017]) from which the language of subdivision (6) (b) is taken. (See *People v John*, 27 NY3d at 314 [“the claim of a need for a horde of analysts is overstated and a single analyst, particularly the one who performed, witnessed or supervised the generation of the critical numerical DNA profile, would satisfy the dictates of *Crawford* and *Bullcoming*”].)

Subdivision (6) (c) is derived from *People v Freycinet* (11 NY3d at 42 [autopsy report]); *People v Pealer* (20 NY3d at 455-456 [with respect to a breathalyzer machine, the Court noted that “*Melendez-Diaz* recognized the

possibility that records ‘prepared in the regular course of equipment maintenance’—precursors to an actual breathalyzer test of a suspect—‘may well qualify as nontestimonial records’ (557 US at 311 n 1). It may reasonably be inferred that the primary motivation for examining the breathalyzer was to advise the . . . Police Department that its machine was adequately calibrated and operating properly”]); *People v Meekins* (10 NY3d 136, 159-160 [2008] [decided with *Rawlins*]); and *People v Brown* (13 NY3d 332, 340 [2009] [a DNA raw data profile before the defendant was a suspect]). In *People v John*, however, the Court cautioned that "our focus in both of those cases was that extrajudicial facts were shepherded into evidence by a testifying expert whose subsequent independent analysis of that raw data provided the assurance that the DNA profile generated was accurate. Our sharpest focus was on the final stage of the DNA typing results, to wit, the generated DNA profile" (27 NY3d at 310; see *People v Austin*, 30 NY3d at 104).

8.03. Admission by Party

(1) A statement of a party which is inconsistent with the party's position in the proceeding is admissible against that party, if the statement is one of the following:

(a) made by a party in an individual or representative capacity and offered against the party in that capacity, irrespective of the party's lack of personal knowledge of the facts asserted by the party.

(b) made by a person in a relationship of privity with the party and the statement concerns the party's and the person's joint interest.

(c) made by an agent or employee of the party whom the party authorized to make a statement concerning the subject. The required authorization may be expressly given by the party or implied from the scope of the agent's duties or employment.

Note

Subdivision (1) (a) is derived from *Reed v McCord* (160 NY 330, 341 [1899]) which held that “admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made.” *Reed* further held that the absence of personal knowledge on the part of the party making the statement does not preclude the statement's admissibility under the admission's exception. (See *Reed v McCord*, 160 NY at 341, *supra*.)

Unlike Federal Rules of Evidence rule 801 (d) (2) (A), which permits a party's statement to be admitted against the party in either the party's individual or representative capacity, present New York law authorizes the use of a statement made by the party in a representative capacity to be admitted against the party only in that capacity. (See *Commercial Trading Co. v Tucker*, 80 AD2d 779 [1st Dept 1981].)

Subdivision (1) (b) is derived from a series of Court of Appeals decisions which adopted this privity-based admissions exception. (See *e.g. Murdock v*

Waterman, 145 NY 55 [1895] [joint obligor]; *Chadwick v Fonner*, 69 NY 404 [1877] [grantor]; *Hatch v Elkins*, 65 NY 489 [1875] [principal-surety].)

Subdivision (1) (c), which sets forth New York’s so-called “speaking agent” exception, is derived from *Tyrrell v Wal-Mart Stores* (97 NY2d 650, 652 [2001] [“The Appellate Division correctly concluded that plaintiff failed to establish that the unidentified employee was authorized to make the alleged statement; thus, the statement did not constitute an admission binding on the employer”]); *Loschiavo v Port Auth. of N.Y. & N.J.* (58 NY2d 1040, 1041 [1983] [“(T)he hearsay statement of an agent is admissible against his employer under the admissions exception to the hearsay rule only if the making of the statement is an activity within the scope of his authority”]); *Spett v President Monroe Bldg. & Mfg. Corp.* (19 NY2d 203, 206 [1967] [statement of defendant’s general foreman admissible against employer since he “was apparently the person who ran [his employer’s business], in whom complete managerial responsibility for the enterprise was vested”]); and *Merchant’s Natl. Bank of Gardner, Kennebec County, Me. v Clark* (139 NY 314, 319 [1893] [“Hearsay evidence of this character is only permissible when it relates to statements by the agent, which he was authorized by his principal to make”]).

Under this exception, where the requisite authority has not been given expressly to the employee by the employer, implied authority has been found to be present, as *Spett* recognizes, where the employee has been given extensive managerial responsibility over the employer’s business. Thus, implied authority to speak has been found to exist where the employee was placed “in full charge” of the business (see *Stecher Lithographic Co. v Inman*, 175 NY 124, 127 [1903]); the employee was the “general manager” of the business (see *Vaughn Mach. Co. v Quintard*, 165 NY 649 [1903], *affg* 37 App Div 368, 372 [1st Dept 1899]); and the employee was the superintendent of the job site or facility (see *Brusca v El Al Israel Airlines*, 75 AD2d 798, 800 [2d Dept 1980]). There are cases concluding that an employer’s general manager of one of the employer’s stores did not have implied authority from that position, cases that apparently turn upon the extent of the responsibilities given to the general manager. (See *e.g. Alvarez v First Natl. Supermarkets, Inc.*, 11 AD3d 572 [2d Dept 2004]; *Scherer v Golub Corp.*, 101 AD3d 1286 [3d Dept 2012]; compare *Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 247 [1st Dept 2002] [implied authority present]; *Bransfield v Grand Union Co.*, 24 AD2d 586 [2d Dept 1965], *affd* 17 NY2d 474 [1965] [implied authority present].)

New York is one of three states which does not recognize an exception comparable to Federal Rules of Evidence rule 801 (d) (2) (D), which creates an exception for statements of a party’s agent or employee made by the agent or employee in the scope of his or her relationship, even if the agent or employee does not have any authority to speak on behalf of the party. (See 4 Jones, Evidence § 27:22 [7th ed].) In *Loschiavo v Port Auth. of N.Y. & N.J.* (58 NY2d 1040, 1041-1042, *supra*), the Court of Appeals noted that New York’s rule has been widely

criticized but decided not to reconsider the rule due to a pending legislative modification of it.

This rule does not bar the admission of an employee's statement where it is admissible on other grounds. See, for example, the rules on declaration against interest (*Kelleher v F.M.E. Auto Leasing Corp.*, 192 AD2d 581, 583 [2d Dept 1993]); excited utterance (*Tyrell v Wal-Mart Stores*, 97 NY2d at 652 [recognizing potential but finding insufficient foundation for its admissibility]); and verbal act (*Giardino v Beranbaum*, 279 AD2d 282 [1st Dept 2001]).

8.05. Admission by Adopted Statement (rev. 12-2019¹)

(1) An out-of-court statement made by a person which is inconsistent with a party's position in the proceeding is admissible against that party, if the party heard and understood the statement and assented to the statement by word or conduct.

(2) Except as provided in subdivision three, an out-of-court statement made by a person that is inconsistent with a party's position in the proceeding is admissible against that party if the party heard and understood the statement and provided an equivocal or evasive response or remained silent when he or she would reasonably have been expected to deny the statement and had an opportunity to do so.

(3) In a criminal proceeding when, before or after a defendant's arrest, the defendant is silent following a statement made to the defendant by a person the defendant knows to be a member of law enforcement, during the performance of his or her duties, the defendant's silence is not admissible as an admission or to impeach the defendant's testimony, except as provided in paragraphs (a) and (b).

(a) The silence of a defendant, who at the time was a law enforcement officer, in the face of an accusation of criminal conduct by a fellow officer is admissible if the defendant was under a duty to inform his or her superiors of his or her activities.

(b) A defendant who, prior to trial, makes a voluntary statement relating to the criminal transaction at issue and then provides testimony at a criminal proceeding with respect to that transaction may be impeached by the defendant's omission of critical details from the

defendant's pretrial statement that would have been natural to include in that statement.

(4) A party's failure to respond to a written statement directed to the party may not be used to establish the party's assent to the statement.

(5) A person who understands and clearly expresses his or her assent to a statement of another that contains a statement against the interest of the assenting person adopts that statement as his or her own, and the statement is admissible in evidence as an adoptive admission.

Note

This rule addresses the adoptive admission hearsay exception. An adoptive admission occurs "when a party acknowledges and assents to something '*already* uttered by another person, which thus becomes effectively the party's own admission' " (*People v Campney*, 94 NY2d 307, 311 [1999], citing 4 John Henry Wigmore, Evidence § 1609 at 100 [James H. Chadbourn rev]). The other person's statement is then admissible against the party as a party admission. In effect, it is as if the party himself or herself made the statement. The manifestations of assent are also admissible to establish the "relevant demonstrative response of the affected party" (*People v Lourido*, 70 NY2d 428, 433 [1987]).

Subdivision (1) sets forth the adoptive admission rule in situations where the alleged manifestation of assent involves words or conduct by the party charged with the adoption. It recognizes that the assent may be by a verbalized response (*see e.g. Campney*, 94 NY2d at 312-313; *see also People v Vining*, 28 NY3d 686 [2017] [express assent may be based upon evasive or equivocal answers]), or by conduct (*e.g. People v Ferrara*, 199 NY 414, 430 [1910] [shrugging of shoulders]). Subdivision (2) and subdivision (3) set forth the rule where the alleged manifestation involves the party's evasive or equivocal responses or silence.

The Court of Appeals has cautioned that an adoptive admission is allowed only when the statement was "fully known and fully understood" by the party against whom it is being offered (*People v Koerner*, 154 NY 355, 374 [1897]; *see also People v Allen*, 300 NY 222, 225-226 [1949]). Whether these foundation elements for the admissibility of the statement have been established is to be decided by the trial court in light of "all the facts and circumstances surrounding the incident" (*Ferrara*, 199 NY at 430).

Subdivision (2). Except as set forth in subdivision (3), subdivision (2) sets forth the rule governing an adoption of a statement in circumstances involving a party's silence or evasive or equivocal response. The Court of Appeals has held that "[a]ssent can be manifested by silence, because '[a] party's silence in the face of an accusation, under circumstances that would prompt a reasonable person to protest, is generally considered an admission' " (*Vining*, 28 NY3d at 690). For purposes of this rule, the Court has held that silence may also encompass equivocal or evasive answers (*id.* ["an equivocal or evasive response may similarly be used against (a) party . . . as an adoptive admission by silence"]).

As to adoption by silence, the Court of Appeals has cautioned that while "accusatory statements, not denied, may be admitted against the one accused, as admissions," they are admissible "only when the accusation was 'fully known and fully understood' by defendant and when defendant was 'at full liberty to make answer thereto, and then only under such circumstances as would justify the inference of assent or acquiescence as to the truth of the statement by his remaining silent' " (*People v Allen*, 300 NY at 225 [citations omitted]; *see also Vining*, 28 NY3d at 691 ["To use a defendant's silence or evasive response as evidence against the defendant, the People must demonstrate that the defendant heard and understood the assertion, and reasonably would have been expected to deny it"]; *Koerner*, 154 NY at 374 [the circumstances must be "such as would properly or naturally call for some action or reply from (persons) similarly situated"])). Whether these foundation elements have been established is an issue for the trial court to determine (*Vining*, 28 NY3d at 691).

Of note, the Court of Appeals has stated that in criminal proceedings this rule "is to be applied with careful discrimination" as " '[r]eally it is most dangerous evidence' " (*Koerner*, 154 NY at 374) and that this evidence "should always be received with caution, and ought not to be admitted unless the evidence is of direct declarations of a kind which naturally call for contradiction, or some assertion made to a party with respect to [the party's] rights, in which, by silence, [the party] acquiesces" (*id.* at 374-375).

Subdivision (3). Subdivision (3) sets forth the rule governing the admissibility in a criminal proceeding of a defendant's silence during police questioning. Specifically, evidence of a criminal defendant's pre-arrest and post-arrest silence during police questioning may not be used in the People's direct case or for impeachment purposes, a rule derived from the State Constitution (*see e.g. People v De George*, 73 NY2d 614, 618 [1989] [pre-arrest silence]; *People v Von Werne*, 41 NY2d 584, 588 [1977] [post-arrest silence]; *People v Conyers*, 52 NY2d 454, 457 [1981] [post-arrest silence]).

In summing up New York law, the Court of Appeals has stated: "We hold, as a matter of state evidentiary law, that evidence of a defendant's selective silence generally may not be used by the People as part of their case-in-chief, either to allow the jury to infer the defendant's admission of guilt or to impeach

the credibility of the defendant's version of events when the defendant has not testified" (*People v Williams*, 25 NY3d 185, 188 [2015]).

Subdivision (3) (a). Subdivision (3) (a) is derived from *People v Rothschild* (35 NY2d 355, 360-361 [1974] ["The natural consequences of his status as a law enforcement officer would require him to promptly report any bribe or attempted bribe to his superiors, and certainly protest and reveal such an alleged scheme after his arrest to them, and to his fellow officers as well"]); and *People v De George* (73 NY2d 614, 619 [1989] ["we affirmed the (*Rothschild*) conviction because under the circumstances, the evidence of silence had an unusually high probative value. The officer was under a duty to inform his superiors of his undercover activities and thus his continued silence in the face of direct accusations by his fellow officers was probative of guilt"]).

Subdivision (3) (b). Subdivision (3) (b) is derived from *People v Savage* (50 NY2d 673, 676 [1980] ["a defendant who, having been given the warnings required by *Miranda v Arizona* (384 US 436 [1966]) and having elected to waive his right to silence, proceeds to narrate the essential facts of his involvement in the crime, may be cross-examined about his failure to inform the police at that time of exculpatory circumstances to which he later testifies at trial"]); and *People v Chery* (28 NY3d 139, 142, 145 [2016] [it was permissible for "the People to use defendant's selective silence, while making a spontaneous postdetention statement to the police, to impeach his trial testimony," given that the "defendant elected to provide some explanation of what happened at the scene, and it was unnatural to have omitted the significantly more favorable version of events to which he testified at trial"]).

Subdivision (4). This subdivision is derived from substantial Court of Appeals precedent (*see e.g. Talcott v Harris*, 93 NY 567, 571 [1883] ["While a party may be called upon in many cases to speak where a charge is made against him, and in failing to do so may be considered as acquiescing in its correctness, his omission to answer a written allegation, whether by affidavits or otherwise, cannot be regarded as an admission of the correctness thereof and that it is true in all respects"]; *Gray v Kaufman Dairy & Ice Cream Co.*, 162 NY 388, 397-398 [1900] [collecting cases]; *Viele v McLean*, 200 NY 260, 262 [1910]).

Subdivision (5) is derived from decisions holding that "[g]enerally, an adoptive admission is allowed when a party acknowledges and assents to something 'already uttered by another person, which thus becomes effectively the party's own admission' " (*People v Campney*, 94 NY2d 307, 311 [1999] [citation omitted]).

The foundation for holding that a statement was adopted includes finding, by direct or circumstantial evidence, that the "defendant had read or been informed of the contents of the statement, understood its implications, and affirmatively adopted the statement as his own" (*id.* at 313).

In *People v Woodward* (50 NY2d 922, 923 [1980]), for example, the police read to the defendant his codefendant's written confession, whereupon the defendant said: "Yes, that is what happened." In addition to holding that the statement was admissible at the joint trial of the defendants, the Court noted that "[e]ven at a separate trial . . . , the [codefendant's] statement would have been admissible since the jury could find that he had adopted it as his own" (*id.*).

¹ The December 2019 revision was for the purpose of adding subdivision (5).

8.07 Ancient Documents

A statement in a document is admissible if it is proved to be in existence for more than thirty years, and its authenticity is supported by its proper custody or otherwise accounted for, and it is free from any indication of fraud or invalidity.

Note¹

This common-law rule is referred to as the “ancient documents” exception to the hearsay rule. While the rule allows for the admission of these documents in evidence, the rule does not specify that the documents are “prima facie evidence” of their contents. (*Compare* CPLR 4522 [rendering properly filed maps, surveys, and official records affecting real property for more than ten years “prima facie evidence of their contents”]; Guide to NY Evid rule 8.52, Ancient Filed Maps, Surveys and Real Property Records; *cf.* Fed Rules Evid rule 803 [16] [providing a hearsay exception for a “statement in a document that was prepared before January 1, 1998, and whose authenticity is established”].)

The rule is derived primarily from Court of Appeals decisions dealing with certain recitals in documents affecting interests in real property. (*See e.g. Young v Shulenberg*, 165 NY 385 [1901] [statement in 81-year-old deed]; *McKinnon v Bliss*, 21 NY 206 [1860] [statement in “ancient” deed and will regarding title].)

The Court of Appeals explained the rule by noting that

“[i]t is usually impossible to establish a very ancient possession of property by the testimony of persons having knowledge of the fact, and when a deed forming part of a chain of title is so ancient that there can be, in the nature of things, no living persons who can testify to acts of ownership by the grantor or grantee, it may be received in evidence without such proof.” (*Greenleaf v Brooklyn, Flatbush & Coney Is. R.R. Co.*, 132 NY 408, 414 [1892].)

However, before receiving such documents in evidence, the Court of Appeals advised that “[c]are is first taken to ascertain their genuineness, and this may be shown *prima facie* by proof that the document came from the proper custody, or by otherwise accounting for it. The documents found in a place in which and under the care of persons with whom such papers might naturally and reasonably be expected to be found, or in possession of persons having an interest in them, are in precisely the custody which gives authenticity to documents found within it.” (*Dodge v Gallatin*, 130 NY 117, 133-134 [1891].)

¹ In December 2020, the note was amended by adding the first paragraph.

Later, the Appellate Division reaffirmed the “ancient document rule,” explaining that

“a record or document which is found to be more than 30 years of age and which is proven to have come from proper custody and is itself free from any indication of fraud or invalidity ‘proves itself’ (*Fairchild v Union Ferry Co.*, 121 Misc 513, 518 [1923], affd 212 App Div 823, affd 240 NY 666). This rule dispenses with the proof of the execution of a record or document on the proof of its antiquity. It presumes that the entrant of the record or document is dead after the passage of 30 years. (*Matter of Barney*, 185 App Div 782, 798, 799 [1919].) If the genuineness of an ancient document is established, it may be received to prove the truth of the facts that it recites.” (*Tillman v Lincoln Warehouse Corp.*, 72 AD2d 40, 44-45 [1st Dept 1979].)

In the *Fairchild* case, cited by *Tillman*, an action in which rights to docks and piers in New York harbor were in issue, the Supreme Court held that old writings and book entries were properly admitted under the ancient document rule, observing:

“This rule is that a record or document which is found to be more than thirty years of age and which is proven to have come from proper custody and is itself free from any indication of fraud or invalidity proves itself.” (*Fairchild*, 121 Misc at 518.)

While the Court of Appeals has not held that this exception applies to non-real-property documents, the Appellate Division has so held. (See *e.g. Estate of Essig v 5670 58 St. Holding Corp.*, 50 AD3d 948, 949 [2d Dept 2008] [“The stock certificates are more than 30 years old, are free from any indication of fraud or invalidity, and were discovered by the plaintiff . . . amongst the personal records of (the deceased) after her death. Under such circumstances, the stock certificates are self-authenticating pursuant to the ancient document rule”]; *Tillman*, 72 AD2d at 44-45 [inventory list; quoting the rule as set forth by the Supreme Court in *Fairchild*]; *Matter of Barney*, 185 App Div 782, 798 [1st Dept 1919] [psychiatric hospital records]; *Layton v Kraft*, 111 App Div 842, 847 [1st Dept 1906] [church records].)

8.08 Business Records

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

In addition, the writing or record must have been made upon the recorder's own personal knowledge or from information given to the recorder by someone with personal knowledge and a business duty to transmit the information accurately.

For a hospital or medical office record the entry must be germane to the patient's treatment or diagnosis.

The admission of an out-of-court statement that is included within a properly admitted business record is itself admissible for the truth of its contents only if the statement meets the requirements of an exception to the hearsay rule; otherwise the statement is admissible for having been made and not for its truth.

An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and

accurate representation of such electronic record.

All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

(b) Hospital bills. A hospital bill is admissible in evidence under this rule and is prima facie evidence of the facts contained, provided it bears a certification by the head of the hospital or by a responsible employee in the controller's or accounting office that the bill is correct, that each of the items was necessarily supplied and that the amount charged is reasonable. This subdivision shall not apply to any proceeding in a surrogate's court nor in any action instituted by or on behalf of a hospital to recover payment for accommodations or supplies furnished or for services rendered by or in such hospital, except that in a proceeding pursuant to section one hundred eighty-nine of the lien law to determine the validity and extent of the lien of a hospital, such certified hospital bills are prima facie evidence of the fact of services and of the reasonableness of any charges which do not exceed the comparable charges made by the hospital in the care of workmen's compensation patients.

(c) Other records. All records, writings and other things referred to in [CPLR] section 2306 and 2307 are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician.

Where a hospital record is in the custody of a warehouse as that term is defined by paragraph

(thirteen) of subsection (a) of section 7-102 of the uniform commercial code, pursuant to a plan approved in writing by the state commissioner of health, admissibility under this subdivision may be established by a certification made by the manager of the warehouse that sets forth (i) the authority by which the record is held, including but not limited to a court order, order of the commissioner, or order or resolution of the governing body or official of the hospital, and (ii) that the record has been in the exclusive custody of such warehouse or warehousemen since its receipt from the hospital or, if another has had access to it, the name and address of such person and the date on which and the circumstances under which such access was had. Any warehouse providing a certification as required by this subdivision shall have no liability for acts or omissions relating thereto, except for intentional misconduct, and the warehouse is authorized to assess and collect a reasonable charge for providing the certification described by this subdivision. Where a hospital record is located in a jurisdiction other than this state, admissibility under this subdivision may be established by either a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state or by an employee delegated for that purpose, or by a qualified physician.

(d) Any records or reports relating to the administration and analysis of a genetic marker or DNA test, including records or reports of the costs of such tests, administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law are admissible in evidence under this rule and are prima facie evidence of the facts contained therein provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee delegated for that purpose,

or by a qualified physician. If such record or report relating to the administration and analysis of a genetic marker test or DNA test or tests administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law indicates at least a ninety-five percent probability of paternity, the admission of such record or report shall create a rebuttable presumption of paternity, and shall, if unrebutted, establish the paternity of and liability for the support of a child pursuant to articles four and five of the family court act.

(e) Notwithstanding any other provision of law, a record or report relating to the administration and analysis of a genetic marker test or DNA test certified in accordance with subdivision (d) of this rule and administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law is admissible in evidence under this rule without the need for foundation testimony or further proof of authenticity or accuracy unless objections to the record or report are made in writing no later than twenty days before a hearing at which the record or report may be introduced into evidence or thirty days after receipt of the test results, whichever is earlier.

(f) Notwithstanding any other provision of law, records or reports of support payments and disbursements maintained pursuant to title six-A of article three of the social services law by the office of temporary and disability assistance or the fiscal agent under contract to the office for the provision of centralized collection and disbursement functions are admissible in evidence under this rule, provided that they bear a certification by an official of a social services district attesting to the accuracy of the content of the record or report of support payments and that in attesting to the accuracy of the record or report such official has received

confirmation from the office of temporary and disability assistance or the fiscal agent under contract to the office for the provision of centralized collection and disbursement functions pursuant to section one hundred eleven-h of the social services law that the record or report of support payments reflects the processing of all support payments in the possession of the office or the fiscal agent as of a specified date, and that the document is a record or report of support payments maintained pursuant to title six-A of article three of the social services law. If so certified, such record or report shall be admitted into evidence under this rule without the need for additional foundation testimony. Such records shall be the basis for a permissive inference of the facts contained therein unless the trier of fact finds good cause not to draw such inference.

(g) Pregnancy and childbirth costs. Any hospital bills or records relating to the costs of pregnancy or birth of a child for whom proceedings to establish paternity, pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law have been or are being undertaken, are admissible in evidence under this rule and are prima facie evidence of the facts contained therein, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee designated for that purpose, or by a qualified physician.

Note

Introduction. This rule restates verbatim CPLR 4518, except for paragraphs two, three, and four of subdivision (a) which incorporate the holdings of decisional law discussed in the “subdivision (a)” section of this note.

The key *statutory* provisions governing the hearsay exception for the admissibility of business records are contained in CPLR 4518 (a), as set forth in paragraphs one and six of subdivision (a). The fifth paragraph of this subdivision

(as set forth in CPLR 4518 [a]) addresses the admissibility of an “electronic record,” i.e., “information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities” (State Technology Law § 302 [2]).

Paragraphs two, three and four of subdivision (a), as noted, set forth additional *decisional law* rules governing business records.

The remaining subdivisions of this rule and CPLR 4518 provide separate hearsay exceptions for specified records as well as certification procedures that make it unnecessary to call a witness to lay the foundation for their admissibility.

Subdivision (a) initially sets forth the scope of the business records exception to the general prohibition on the admission of hearsay. (*See* Guide to NY Evid rule 8.01, Admissibility of Hearsay.) The exception encompasses any record of a business “made as a memorandum or record of any act, transaction, occurrence or event” (CPLR 4518 [a] [first sentence]). The term, “business,” is broadly defined as a “business, profession, occupation and calling of every kind” (CPLR 4518 [a] [last sentence]).

The Court of Appeals has included within the scope of this exception: government records (*Kelly v Wasserman*, 5 NY2d 425, 429 [1959] [welfare department records]; *Johnson v Lutz*, 253 NY 124 [1930] [police accident report]); hospital records (*Williams v Alexander*, 309 NY 283, 286 [1955]); and criminal enterprise records (*People v Kennedy*, 68 NY2d 569, 577 [1986] [loan shark records]). A record falls outside the scope of the exception if it contains purely personal, nonbusiness related activity (*Kennedy* at 577).

As to the form of the record, the subdivision provides that “[a]ny writing or record, whether in the form of an entry in a book or otherwise” may be admissible. The Appellate Division has interpreted that language broadly, holding that “ ‘[a]ny record designed to retain information and otherwise possessed of the characteristics of a business record should be admitted under the rule regardless of the form which the record takes,’ ” provided the record is intelligible (*Wilson v Bodian*, 130 AD2d 221, 231 [2d Dept 1987] [citation omitted]).

A business record stored in computerized format in a database is admissible under the exception through a computer printout of the stored information, provided it is shown that the printout is a fair and accurate representation of the electronic record (CPLR 4518 [a] [second sentence]). In *People v Kangas* (28 NY3d 984 [2016]), the Court of Appeals held that CPLR 4539 (b)’s requirement that reproductions of an original record must be authenticated by testimony or an affidavit does not apply when the record was created electronically in the first instance, that “CPLR 4539 (b) applies only when a document that originally existed in hard copy form is scanned to store a digital ‘image’ of the hard copy document,

and then a ‘reproduction’ of the digital image is printed in the ordinary course of business” (28 NY3d at 985).

Admissibility of a business record requires proof of four foundation elements. Three of those foundation elements are set forth in CPLR 4518 (a) and in the first paragraph of subdivision (a) of this rule. The fourth element is established in *Johnson v Lutz* (253 NY 124 [1930]) and is set forth in the second paragraph of subdivision (a) of this rule. *Williams v Alexander* (309 NY 283 [1955]) sets forth an additional requirement for hospital and medical records and that requirement is set forth in the third paragraph of subdivision (a) of this rule.

The three statutory elements as recited in *Kennedy* (68 NY2d at 579-580) are

“*first*, that the record be made in the regular course of business--essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business; *second*, that it be the regular course of such business to make the record (a double requirement of regularity)--essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record; and *third*, that the record be made at or about the time of the event being recorded--essentially, that recollection be fairly accurate and the habit or routine of making the entries assured.”

Notably, these elements provide the “probability of [the record’s] trustworthiness . . . , which justifies admission of the writing or record without the necessity of calling all the persons who may have had a hand in preparing it” (*Williams*, 309 NY at 286-287). Since the entry is routine, the regularity and continuity of making such entries develop habits of precision; the temporal requirement assures that the recollection of the information recorded is fairly accurate; and the existence of the recorder’s duty to record the information ensures that it is in the recorder’s own interest to accurately record the information (*Kennedy*, 68 NY2d at 579).

In *Johnson v Lutz*, the Court of Appeals imposed the fourth foundation requirement, namely that there must be a showing that the record was made upon the recorder’s own personal knowledge, or from information given to the recorder by someone with personal knowledge and a business duty to transmit the information accurately (253 NY at 128 [business records statute “was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto”]; see *People v Patterson*, 28 NY3d 544, 550 [2016] [reaffirming *Lutz*’s requirement that “ ‘admission may only be granted where it is demonstrated that the informant has personal knowledge of the act, event or condition and he (or she) is under a business duty to report it to the entrant’ ”]). This fourth requirement enhances the trustworthiness of the record (*Matter of Leon RR*, 48 NY2d 117, 123

[1979] [“it is essential to emphasize that the mere fact that the recording of third-party statements by the caseworker might be routine, imports no guarantee of the truth, or even reliability, of those statements. To construe these statements as admissible simply because the caseworker is under a business duty to record would be to open the floodgates for the introduction of random, irresponsible material beyond the reach of the usual tests for accuracy--cross-examination and impeachment of the declarant”]).

Thus, if the recorder had no personal knowledge about the information being recorded and the source of the information being recorded had no business duty to transmit the information accurately to the recorder, the record is inadmissible (*Cover v Cohen*, 61 NY2d 261, 274 [1984] [the investigating police officer’s accident report of the statement of the driver of a vehicle involved in an accident that “his accelerator stuck on him” was not admissible as the driver was under no duty to report to the police officer]; *Cox v State of New York*, 3 NY2d 693, 699 [1958] [hospital record containing an entry that a hospital patient stated she pushed another patient excluded on ground the declarant inmate was under no duty to impart such information])).

In essence, the rule derived from *Johnson v Lutz* and its progeny is an application of New York’s double hearsay rule (*see Patterson*, 28 NY3d at 550-551; Barker & Alexander, Evidence in New York State and Federal Courts § 8:94 at 204-205 [2d ed West’s NY Prac Series]; Guide to NY Evid rule 8.21, Hearsay or Nonhearsay Within Hearsay). That rule as applied to a business record is set forth in the fourth paragraph of subdivision (a) of this rule. The first level of hearsay is the record containing the statement; the second level of hearsay is the statement itself. The business records exception covers the first level; that is, if the four foundation elements are met, then the record comes in as proof that the statement was made. As to the admissibility of the statement itself (second level), if the maker of the record either had personal knowledge of the information being recorded or prepared the record with information provided by another person who had a duty to transmit the information accurately, then the record also comes in as some proof that the statement is true. The double hearsay is excused by the business records exception. However, if the source had no such duty, the information provided to the recorder must fall within another hearsay exception in order to overcome the double hearsay to be admissible for its truth. Alternatively, the statement itself could be admissible for a relevant non-truth purpose.

Where the record being offered is a hospital or medical office record, the Court of Appeals has imposed a special requirement in addition to the four foundation elements discussed thus far. As originally imposed in *Williams* (309 NY at 286-287) and reaffirmed in *People v Ortega (Benston)* (15 NY3d 610, 617-618 [2010]), the medical record entry must be germane to the patient’s treatment or diagnosis, that is, being germane to treatment or diagnosis is what makes the record a business record in the first instance. If the entry is not germane to treatment or diagnosis, it is not admissible under the exception.

In *Ortega (Benston)*, a consolidation of two appeals, an entry in a hospital record was in issue in each case. In the *Ortega* case, which involved a charge of drug possession, the entry stated the patient-complainant “was forced to smoke [a] white substance from [a] pipe”; that entry was found to be germane because “complainant would not have been in control over either the amount or the nature of the substance he ingested[,]” and “treatment of a patient who is the victim of coercion may differ from a patient who has intentionally taken drugs” (15 NY3d at 616, 620). In the *Benston* case, which involved a charge of assault of the defendant’s former girlfriend, the entry contained references to domestic violence committed against the patient-complainant and the existence of a safety plan for her; that entry was found to be germane because a victim of domestic violence will have a “host of . . . issues” that need to be treated in addition to the treatment of physical injuries (15 NY3d at 619).

As expressed in the note to Guide to NY Evidence rule 8.43 (Statement Made for Medical Diagnosis or Treatment), care must be exercised in determining whether an entry is germane because some details recorded in a medical record may not relate to treatment or diagnosis. For example, in *Williams*, the Court of Appeals held that information that the patient was struck by a motor vehicle was germane to his treatment but not the statement that the car that struck the patient was propelled into him when it was struck by another car (*Williams*, 309 NY at 288). As stated by the Court: “[W]hether the patient was hit by car A or car B, by car A under its own power or propelled forward by car B, or whether the injuries were caused by the negligence of the defendant or of another, cannot possibly bear on diagnosis or aid in determining treatment.” (*Id.*) Medical testimony about whether the information is germane to treatment or diagnosis will be helpful in making the determination. (See *People v Pham*, 118 AD3d 1159, 1162 [3d Dept 2014]; *Wright v New York City Hous. Auth.*, 273 AD2d 378, 379 [2d Dept 2000]; *Sanchez v Manhattan & Bronx Surface Tr. Operating Auth.*, 170 AD2d 402, 404 [1st Dept 1991].)

It bears repeating that entries in a medical record will not be admissible merely because they are determined to be germane to the patient’s diagnosis and treatment; like all other business records, the entry must be made upon the recorder’s personal knowledge or from information given by one with personal knowledge and a duty to transmit accurately the information to the recorder, or the information must fall within its own independent hearsay exception (see *Ortega*, 15 NY3d at 620-621 [Smith, J., concurring]).

The subject matter of any business record may be “any act, transaction, occurrence or event.” While opinions are not specifically enumerated as proper subject matter, the Court of Appeals held in *People v Kohlmeyer*, interpreting CPLR 4518 (a)’s predecessor, Civil Practice Act § 374-a, that a hospital entry recording an opinion of a physician is admissible under the business records exception (284 NY 366, 369 [1940]). Consistent with *Kohlmeyer*, the courts routinely admit records containing opinions provided a showing is made that the

opinion was rendered by a person qualified to give the opinion and was based on proper data (see Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C4518:4).

Reports or records received from another business and filed as part of the receiving business's business records are ordinarily not admissible as business records of the recipient business (see *People v Cratsley*, 86 NY2d 81, 90 [1995]). They may be qualified as business records of the recipient, however, upon a showing that the maker of the report prepared the report on behalf of the recipient and in accordance with its requirements, and the recipient relied on the report in conducting its business (*Cratsley*, 86 NY2d at 89-91; see also *People v DiSalvo*, 284 AD2d 547, 548-549 [2d Dept 2001]).

Records or reports prepared solely for litigation that are offered by the party responsible for making the record are not admissible under the exception (*People v Foster*, 27 NY2d 47, 52 [1970] ["Of course, records prepared solely for the purpose of litigation should be excluded"]; *Flaherty v American Turners N.Y.*, 291 AD2d 256, 257-258 [1st Dept 2002] [physician's report prepared for specific litigation purpose]; *Cornier v Spagna*, 101 AD2d 141, 148 [1st Dept 1984] [same]). The reason is that such records or reports are "not the systematic, routine, day-to-day type of record envisioned by the business records exception" (*Wilson v Bodian*, 130 AD2d 221, 229-230 [2d Dept 1987]).

The four foundation elements necessary for the admissibility of a record under the business record exception must be proven to the court's satisfaction by the offering party (*Kennedy*, 68 NY2d at 580). Traditionally, a witness is called for this purpose. While the person or persons involved in the preparation of the record is not required to be called, the witness must have personal knowledge of the record keeping practices of the business (see *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 208-210 [2d Dept 2019]). Alternatively, resort may be had to the certification procedure provided for certain records in the remaining subdivisions.

Where the record or report is offered against the defendant in a criminal action, the defendant's US Constitution Sixth Amendment right of confrontation may be implicated and the record or report may be inadmissible as a violation of that right (see Guide to NY Evid rule 8.02, Admissibility Limited by Confrontation Clause [*Crawford*]).

CPLR 3122-a allows for the certification of business records produced pursuant to a subpoena duces tecum for the discovery and production of documents pursuant to CPLR 3120. The certification's contents must include an attestation of the statutory foundation for the admission of business records. Once all the content requirements of the certification are fulfilled, the certification "is admissible as to the matters set forth therein and as to such matters shall be presumed true" (CPLR 3122-a [b]). Thus, the certification eliminates the need for foundation testimony for the record. The underlying certification procedure is discussed in detail in Patrick M.

Connors, Practice Commentaries to CPLR 3122-a (McKinney's Cons Laws of NY).

As mentioned earlier, a statement inadmissible for its truth as a business record may yet be admissible for a relevant non-truth purpose or pursuant to some other exception to the hearsay rule (*see Patterson*, 28 NY3d at 550-551; *Kelly v Wasserman*, 5 NY2d at 429-430). In *Patterson*, for example, the Court held that subscriber information in prepaid cell phone records provided by the person purchasing the phone was not admissible to prove the truth of the name of the subscriber because the subscriber was not under a duty to provide accurate information to the phone provider; but the record of the subscriber's name was admissible for the non-truth purpose of permitting other evidence to prove that the name listed as the subscriber in the record was, in fact, that of the defendant (28 NY3d at 552-553). In *Kelly*, the Court held a welfare investigator's report was admissible even though it contained a statement to the investigator by a welfare recipient's landlord, who had no duty to report, because the statement fell within the hearsay exception for the admission of a party (*see* Guide to NY Evid rule 8.03, Admission by Party).

Subdivision (b) creates a hearsay exception for hospital bills and also provides a certification procedure for their admission, thereby making it unnecessary to call a foundation witness. The certification must be made by the head of the hospital or by a responsible employee in the controller's office that the bill is correct, that each of the items was necessarily supplied and that the amount charged is reasonable. If properly certified, the hospital bill is "prima facie" evidence of the facts contained therein. As to the evidentiary effect of a hospital bill admitted as "prima facie" evidence, the Court of Appeals has interpreted "prima facie" in CPLR 4518 (c) as creating only a permissive inference (*Matter of Commissioner of Social Servs. v Philip De G.*, 59 NY2d 137, 140 [1983] ["In the absence of contradictory evidence, these hospital entries were sufficient to permit but not require the trier of fact to find in accordance with the record"]; *see also People v Mertz*, 68 NY2d 136, 148 [1986] [prima facie evidence is "not a presumption which must be rebutted but rather an inference"]).

Bills for medical services provided by physicians outside of a hospital may be admissible without a witness to lay a foundation pursuant to CPLR 4533-a (*see Matter of Haroche v Haroche*, 38 AD2d 957, 957 [2d Dept 1972] ["We note in passing that the evidentiary problem encountered as to the necessity for and reasonable value of most of the medical and dental expenses for which claim was made might have been avoided by the use of CPLR 4533-a"]).

A hospital bill may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception will need to be established by foundation testimony.

By the statute's terms, subdivision (b) does not apply in a Surrogate's Court proceeding or an action commenced by the hospital to recover payments for its

services. A certified hospital bill may be sued upon, however, by a hospital in a proceeding pursuant to Lien Law § 189.

Subdivision (c) creates a hearsay exception and a certification procedure for three types of business records described in CPLR 2306 and 2307, i.e., medical records of a hospital or government entity concerning the condition or treatment of a patient; records of a library; and records of a department or bureau of a municipal corporation or of the state. A 2017 amendment provides that out-of-state hospital records are admissible pursuant to the certification procedure (L 2017, ch 229, amending CPLR 4518 [c]).

The certification or authentication required must be made by the head of the hospital, laboratory, department, or bureau of a municipal corporation or of the state, or by an employee delegated for the purpose, or by a qualified physician. As to the certificate's contents, the Court of Appeals held in *Mertz* that the "admissibility [under CPLR 4518 (c)] is governed by the same standards as the general business record exception in subdivision (a)" (68 NY2d at 147). Of note, the certificate does not have to be dated near the time of the event reported in the record so long as the record itself was created at or near that time (*People v Kinne*, 71 NY2d 879 [1988]).

Records admitted pursuant to the certification procedure constitute "prima facie evidence" of the facts contained in the record. As noted, supra, the certification creates a permissive inference of the truth of the facts contained in the record (*see also Rodriguez v Triborough Bridge & Tunnel Auth.*, 276 AD2d 769, 770 [2d Dept 2000] [blood alcohol test results]; *LaDuke v State Farm Ins. Co.*, 158 AD2d 137, 138 [4th Dept 1990] [blood alcohol test result]).

Where the hospital record has been retrieved from a warehouse, as defined in UCC 7-102 (a) (13), a separate certification procedure allowing admission of the retrieved records without foundation evidence is set forth in subdivision (c).

Records encompassed by subdivision (c) may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception needs to be established by foundation testimony.

Subdivision (d) creates a hearsay exception and provides a certification procedure for the admission of records or reports on genetic marker tests or DNA tests administered pursuant to Family Court Act §§ 418 and 532 or Social Services Law §111-k, thereby making it unnecessary to call a foundation witness. The certification or authentication must be made by the head of the hospital, laboratory, or department or bureau of a municipal corporation or the state, or an employee designated for that purpose, or a qualified physician must make the certification or authorization. If properly certified, the records or reports are "prima facie" evidence of the facts contained therein; and if at least a 95 % probability of paternity is shown, the records or reports create a rebuttable presentation of paternity, and if unrebutted,

they “shall” establish paternity and liability for child support (*see Matter of Orleans County Dept. of Social Servs. v Aaron S.*, 281 AD2d 931, 931 [4th Dept 2001]). Records encompassed by subdivision (d) may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception needs to be established by foundation testimony.

Subdivision (e) provides that, “notwithstanding any other provision of law,” a record or report on genetic marker or DNA tests administered pursuant to Family Court Act §§ 418 and 532 or Social Services Law § 111-k, and certified in accordance with subdivision (d) is admissible into evidence without the need of a foundation witness or further proof of authenticity or accuracy unless a timely written objection is made. Specifically, any objection must be made no later than 20 days before the hearing at which the report may be introduced into evidence or 30 days after receipt of the test results, whichever is earlier.

Subdivision (f) creates a hearsay exception and provides a certification procedure for the admissibility of records of reports of specified support payments and disbursements maintained by the State Department of Social Services or the fiscal agent under contract to the Department for the provision of centralized collection and disbursement functions, thereby making it unnecessary to call a foundation witness. The certification must be made by an official of a social services district who must attest to the accuracy of the contents of the record or report, that the official has received a specified confirmation from the Office of Temporary and Disability Assistance or the fiscal agent under contract to the Office, and that confirmation is of a record or report maintained pursuant to title 6-A of article 3 of the Social Services Law. If properly certified, and admitted into evidence, a permissive inference of the facts contained therein may be drawn unless the trier of fact finds good cause not to do so. Records encompassed by subdivision (f) may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception needs to be established by foundation testimony.

Subdivision (g) creates a hearsay exception and provides a certification procedure for the admission of any hospital bill or record relating to the costs of pregnancy or birth of a child as to whom a paternity proceeding has been commenced, thereby making it unnecessary to call a foundation witness. The certification or authentication must be made by the head of the hospital, laboratory, or department or bureau of a municipal corporation or the state, or, by an employee designated for that purpose, or by a “qualified physician.” If properly certified, the bills or record are “prima facie” evidence of the facts contained therein. Bills and records encompassed by subdivision (g) may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception needs to be established by foundation testimony.

8.09. Coconspirator Statement

(1) A statement by a defendant's coconspirator made in furtherance of the conspiracy during the course of the defendant's involvement in the conspiracy, or prior to the defendant joining the conspiracy, or after the defendant's active involvement has ceased but the conspiracy continues, is admissible to prove the conspiracy and the crime that was the object of the conspiracy, irrespective of the availability of the coconspirator; provided that:

(a) there is a prima facie showing of the existence of the conspiracy, including an overt act and the party's participation in the conspiracy, without recourse to the statement sought to be introduced; and

(b) if the statement was made after the defendant's active involvement had ceased, the defendant had not unequivocally communicated his or her withdrawal from the conspiracy to the coconspirators.

(2) A statement accepting another's solicitation to commit a crime is a verbal act, not hearsay, when offered to prove a conspiracy to commit the underlying crime and is thus admissible without prima facie proof of the conspiracy.

(3) A charge of conspiracy in the accusatory instrument is not required when a statement of a coconspirator is otherwise admissible pursuant to subdivision one or two.

Note

Subdivision (1) is derived from *People v Caban* (5 NY3d 143, 149 [2005]) and *People v Flanagan* (28 NY3d 644 [2017]).

In *Caban*, the Court held:

“ ‘A declaration by a coconspirator during the course and in furtherance of the conspiracy is admissible against another coconspirator as an exception to the hearsay rule.’ The theory underlying the coconspirator’s exception is that all participants in a conspiracy are deemed responsible for each of the acts and declarations of the others. The exception ‘is not limited to permitting introduction of a conspirator’s declaration to prove that a coconspirator committed the crime of conspiracy, but, rather, may be invoked to support introduction of such declaration to prove a coconspirator’s commission of a substantive crime for which the conspiracy was formed.’ However, as defendant points out, such declarations may be admitted only when a prima facie case of conspiracy has been established. While the prima facie case of conspiracy ‘must be made without recourse to the declarations sought to be introduced,’ ‘the testimony of other witnesses or participants may establish a prima facie case’ ” (*Caban*, 5 NY3d at 148 [citations omitted]; see also *People v Wolf*, 98 NY2d 105, 118 [2002]; *People v Berkowitz*, 50 NY2d 333, 341 [1980]; *People v Salko*, 47 NY2d 230, 237-238 [1979]; cf. *People v Bac Tran*, 80 NY2d 170, 179-180 [1992] [prima facie case not established]).

In *Flanagan* (28 NY3d 644 [2017]), the Court of Appeals held: (1) “when a conspirator subsequently joins an ongoing conspiracy, any previous statements made by his or her coconspirators in furtherance of the conspiracy are admissible against the conspirator pursuant to the coconspirator exception to the hearsay rule”; and (2) “statements made after a conspirator’s alleged active involvement in the conspiracy has ceased, but the conspiracy continues, are admissible unless this conspirator has unequivocally communicated his or her withdrawal from the conspiracy to the coconspirators (see *United States v Brown*, 332 F3d 363, 373-374 [6th Cir 2003] [‘The defendant carries the burden of proving withdrawal, and must show that he took affirmative action to defeat or disavow the purpose of the conspiracy’]).”

It appears that the Court of Appeals has approved requiring that the prima facie case include proof of an overt act. (See *People v Bongarzone*, 69 NY2d 892, 896 [1987] [“We agree with the courts below that there was sufficient circumstantial evidence upon which to infer the performance of an overt act by the defendant and, in turn, establish a prima facie case of conspiracy. . . . This evidence being sufficient to establish a prima facie case that a conspiracy existed, the evidence concerning the mother’s and sister’s statements which established an overt act was properly received”). The Appellate Division, Third Department has consistently held that the proof of an overt act, as well as the conspiracy, is required for the admission of the coconspirator’s statement. (See e.g. *People v Portis* 129 AD3d 1300, 1301 [3d Dept 2015].)

In *People v Caban* (5 NY3d at 151), the Court of Appeals approved of admitting hearsay statements of coconspirators “subject to connection”—meaning,

“subject to later proof of a prima facie case of conspiracy. Although any statements admitted pursuant to the coconspirator’s exception must have been made after the formation of the conspiracy—that is, in the course and in furtherance of it—testimony establishing the prima facie case need not precede testimony about the hearsay statements. Inasmuch as the order of proof at trial is committed to the sound discretion of the trial court (*see e.g. People v Olsen*, 34 NY2d 349, 353 [1974]), a coconspirator’s statements are admissible as long as the People independently establish a conspiracy by the close of their case (*see e.g. People v McKane*, 143 NY 455, 473 [1894] [even if the coconspirator’s statements were objectionable at the time they were introduced, they were subsequently made competent by proof of the defendant’s admissions that the coconspirator was acting under his orders]; *People v Becker*, 215 NY 126, 148-149 [1915]).”

In *Crawford v Washington* (541 US 36, 56 [2004]), the United States Supreme Court recognized that at the time the Confrontation Clause was enacted, statements made in furtherance of a conspiracy were an established nontestimonial hearsay exception.

Consistent with *Crawford*, the Appellate Division has rejected challenges from defendants asserting that coconspirator statements introduced against them violated their right to confrontation under the United States Constitution. (*See e.g. People v Inoa*, 109 AD3d 765 [1st Dept 2013], *affd* 25 NY3d 466 [2015]; *People v Adames*, 53 AD3d 503 [2d Dept 2008].)

In a pre-*Crawford* decision, the Court of Appeals held that the admission of hearsay statements by an unavailable declarant pursuant to the coconspirator exception did not violate the Federal or State Constitutions’ Confrontation Clause. (*People v Sanders*, 56 NY2d 51 [1982].) The *Sanders* Court also held that no reason had been advanced “which would cause us to recognize a State constitutional right of confrontation broader than the Sixth Amendment guarantee as interpreted by the Supreme Court.” (*Id.* at 64-65.) The *Sanders* Court then applied the applicable federal standard for admission of a coconspirator statement when the declarant was unavailable; namely, that there must be some indicia of reliability of the proffered statement.

After *Sanders* and before *Crawford*, the United States Supreme Court declined to require a showing of the declarant’s unavailability (*see United States v Inadi*, 475 US 387 [1986]), or “independent indicia of reliability” (*see Bourjaily v United States*, 483 US 171, 182 [1987]) as prerequisites to the admission of a coconspirator statement.

Thereafter, the Appellate Division, First Department expressed concern about the reliability of coconspirator statements in light of the “combined effect of *Inadi* and *Bourjaily*.” (*People v Persico*, 157 AD2d 339, 345 [1st Dept 1990].) As a result, the First Department adopted the *Sanders* test as a matter of state constitutional law. In the words of the *Persico* court: “If the declarant is available,

he or she will testify and the hearsay will be admitted. If the declarant is unavailable, the hearsay will be admitted anyway, provided it is reliable.” (*Id.* at 349.)

The Court of Appeals has never expressly considered whether the Confrontation Clause of the New York Constitution requires that the coconspirator statement must be shown to be reliable if the declarant is unavailable; however, in *People v James* (93 NY2d 620 [1999]), decided after *Persico*, the Court cited with approval the United States Supreme Court’s holding in *Bourjaily*, that “ ‘a court need not independently inquire into . . . reliability’ ” of a coconspirator statement before admitting it into evidence. (*James*, 93 NY2d at 634.)

Subdivision (2) is derived from *People v Caban* (5 NY3d at 149 [2005]) [“with respect to the conspiracy charge, Garcia’s acceptance of defendant’s solicitation to murder Ortiz was relevant not for its truth, but rather as evidence of an agreement to commit the underlying crime—itsself an essential element of the crime of conspiracy. In other words, whether or not Garcia in fact killed Ortiz, his acceptance of defendant’s invitation to do so was a verbal act which rendered defendant and his coconspirators culpable for the inchoate crime of conspiracy, even if the planned substantive crime never came to fruition”)].

Subdivision (3) is derived from *People v Fiore* (12 NY2d 188, 200 [1962]) [“ ‘When a conspiracy is shown, or evidence on the subject given sufficient for the jury, then the acts and declarations of the conspirators, in furtherance of its purpose and object, are competent, and in a case like this it is not necessary, in order to make such proof competent, that the conspiracy should be charged in the indictment’ ” (citations omitted)]).

8.11. Statement Against Penal or Pecuniary Interest

(1) A statement made by a declarant based upon personal knowledge which at the time of its making the declarant knew was contrary to the declarant's pecuniary or proprietary interest, or tended to subject the declarant to criminal liability, is admissible, provided the declarant is unavailable as a witness.

(2) Notwithstanding subdivision (1), in a criminal proceeding:

(a) where the statement is testimonial, such as a plea allocution, it is not admissible against a defendant;

(b) where the statement is not testimonial and tends to expose the declarant to criminal liability and is offered against the defendant, the statement is admissible only as to that part which is disserving to the declarant and when evidence independent of the statement establishes that the statement was made under circumstances which render it highly probable that it is truthful; and

(c) where a statement tends to expose the declarant to criminal liability and is offered to exculpate the defendant, the statement is admissible only when evidence independent of the statement establishes a reasonable possibility that the statement might be true.

Note

Subdivision (1). Subdivision (1) is derived from Court of Appeals decisions which have created a hearsay exception, "declarations against interest," for certain statements that are disserving to the declarant at the time they were made. (*See People v Brown*, 26 NY2d 88, 91 [1970]; *Kittredge v Grannis*, 244 NY 168, 175 [1926].) The particular interests specified are ones identified by the Court. (*See Kittredge v Grannis*, 244 NY at 175 [pecuniary]; *Lyon v Ricker*, 141 NY 225, 231 [1894] [proprietary]; *People v Brown*, 26 NY2d 88 [1970], *supra* [penal].) As to

the knowledge element, the Court of Appeals has insisted that to invoke the exception there must be a showing that the declarant had to have been aware at the time the statement was made that it was against interest. (See e.g. *People v Maerling*, 46 NY2d 289, 298 [1978] [“the declarant must actually be conscious of the adversity” and “the knowledge of the facts on which its adversity hangs and the awareness of the adversity must act on one another and therefore must be contemporaneous”].) The declarant’s awareness that the statement was against his or her interest may be proved directly or inferred from the “nature of the adverse matter declared and its relationship to the declarant.” (*Maerling*, 46 NY2d at 298.)

In *People v Brown* (26 NY2d at 93), the Court of Appeals held that unavailability of the declarant must be established before a declaration against interest can be admitted and that unavailability may be established by the declarant’s death, absence beyond the jurisdiction, or privileged refusal to testify. However, the decision does not preclude the recognition of other grounds of unavailability for the exception.

Subdivision (2) (a). Subdivision (2) (a) is derived from *People v Hardy* (4 NY3d 192 [2005]) and *People v Douglas* (4 NY3d 777 [2005]) where the Court held that, in light of *Crawford v Washington* (541 US 36 [2004]), it was error to admit against the defendant on trial a declaration against penal interest set forth in the declarant’s plea allocution.

Subdivision (2) (b). Subdivision (2) (b) is derived from *People v Brensic* (70 NY2d 9 [1987]) wherein the Court stated “the trial court must determine, by evaluating competent evidence independent of the declaration itself, whether the declaration was spoken under circumstances which render it highly probable that it is truthful” (*id.* at 14-15); and “[i]f the court decides to allow such evidence, it should admit only the portion of that statement which is opposed to the declarant’s interest since the guarantee of reliability contained in declarations against penal interest exists only to the extent the statement is disserving to the declarant” (*id.* at 16).

Subdivision (2) (c). Subdivision (2) (c) is derived from *People v Settles* (46 NY2d 154, 168, 169-170 [1978]), wherein the Court of Appeals stated that “there must be some evidence, independent of the declaration itself . . . [which] establishes a reasonable possibility that the statement might be true.” See also *People v Soto* (26 NY3d 455, 457 [2015]) reaffirming *Settles* (“The central issue in this case is whether an unavailable witness’s statement to a defense investigator—that she, not defendant, was the driver at the time of the accident and that she fled the scene—should have been admitted as a declaration against interest. Because the witness was aware at the time she made the statement that it was against her interest, the four prongs of the test described in *People v Settles* [46 NY2d 154 (1978)] were met and the statement should have been admitted as a declaration against interest”).

8.13. Declaration of Future Intent

(1) Where an out-of-court statement of a declarant describes the declarant's then-existing intent and is offered to prove subsequent conduct, it is admissible as follows:

(a) A declarant's out-of-court statement of an intention to engage in particular conduct is admissible to prove that the declarant engaged in that conduct, provided there is independent evidence of the statement's reliability, i.e., a showing of circumstances which all but rule out a motive to falsify, and independent evidence that the declarant was at least likely to have engaged in that conduct.

(b) Where the statement also indicates an intention to engage in particular conduct with another person, such statement is admissible to prove that such other person engaged, in fact, in the conduct:

(i) if the declarant is unavailable;

(ii) if the statement of the declarant's intent unambiguously contemplated some future action by the declarant, either jointly with the non-declarant or which required the non-declarant's cooperation for its accomplishment;

(iii) to the extent that the declaration expressly or impliedly refers to a prior understanding or arrangement with the non-declarant, it must be inferable under the circumstances that the understanding or arrangement occurred in the recent past and that the declarant was a party to it or had competent knowledge of it; and

(iv) if there is independent evidence of reliability, i.e., a showing of circumstances which all but rule out a motive to falsify, and evidence that the intended future acts were at least likely to have actually taken place.

Note

This rule addresses specifically the situation where a statement of the declarant's then-existing intent, which is admissible under the exception set forth in Guide to New York Evidence rule 8.39, is offered as proof of subsequent conduct. It encompasses the doctrine as set forth in *Mutual Life Ins. Co. v Hillmon* (145 US 285 [1892]). The United States Supreme Court noted in *Hillmon* that a declarant's statements of current intent were admissible to show that the intended act occurred.

Subdivision (1) (a) is derived from several Court of Appeals decisions which followed *Hillmon*. In these decisions, the Court held that where the statement of current intent by the declarant is offered as proof that the declarant performed the intended act, the statement is admissible for that purpose. (See e.g. *Crawford v Nilan*, 289 NY 444, 448-449 [1943]; *People v Conklin*, 175 NY 333, 342 [1903].) The foundation for admissibility is derived from *People v James* (93 NY2d 620, 634-635 [1999]).

Subdivision (1) (b) is taken verbatim from *People v James* (93 NY2d at 634-635). Following dictum in *Hillmon*, the Court of Appeals held a declarant's statement of intent to participate in conduct with another person is admissible to prove that the other person engaged in the intended conduct, provided the four conditions in the rule were satisfied.

8.15. Dying Declaration

In a prosecution for homicide, a statement of the deceased is admissible when it is based upon personal knowledge, made by a declarant in extremis, while under a sense of impending death with no hope of recovery, concerning the cause or circumstances of the deceased's impending death.

Note

This rule is derived from *People v Nieves* (67 NY2d 125, 131-134 [1986]); *People v Allen* (300 NY 222, 227 [1949]); *People v Ludkowitz* (266 NY 233, 238-239 [1935]); and *People v Becker* (215 NY 126, 145-146 [1915]).

As noted in these decisions, the key elements for its invocation are that the declarant be “in extremis” *and* is conscious of “impending death without hope of recovery.” These elements are to be strictly construed. (See *People v Nieves*, 67 NY2d at 133; *People v Liccione*, 63 AD2d 305, 316 [4th Dept 1978, Simons, J.], *affd* 50 NY2d 850 [1980] [exception applied with “great care”]; *People v Kraft*, 148 NY 631, 634 [1896] [dying declaration is not regarded “as of the same value and weight as the evidence of a witness given in a court of justice”].) Additionally, the exception encompasses only those statements that relate to the cause or circumstances of the declarant’s death. (See *People v Smith*, 172 NY 210, 242-243 [1902] [“dying declarations are admissible . . . only [as to] the circumstances of the death . . . , and . . . they may not properly include narratives of past occurrences”].)

Where the statement is nothing more than the declarant’s speculation concerning the cause of the declarant’s impending death, it is not admissible. (See *People v Gumbs*, 143 AD3d 403, 404 [1st Dept 2016] [The trial “court erred in admitting, as dying declarations, the victim’s statements implicating defendants, since they were his ‘mere expression of belief and suspici(ons)’ that defendants were involved in his shooting rather than ‘statements of facts to which a living witness would have been permitted to testify, if placed upon the stand.’”] (*People v Shaw*, 63 NY 36, 40 [1875])”]; see also *People v Liccione*, 63 AD2d at 319-320, citing to *Shepard v United States*, 290 US 96, 101 [1933, Cardozo, J.].)

Historically, the exception has been limited to a prosecution for a homicide. (See *People v Becker*, 215 NY at 145 [noting that the Court had held “that dying declarations were admissible in cases of homicide only, where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations”].) *Becker* added that such restriction was “so clearly established,” that any expansion of the exception would require legislative action. (*Id.*) In other jurisdictions, the exception has been expanded to encompass civil actions and to non-homicide prosecutions. (See *e.g.*

Fed Rules Evid rule 804 [b] [2] [homicide and civil cases]; Cal Evid Code § 1242 [all cases]; Colo Rev Stat § 13-25-119 [all cases]; Fla Evid Code § 90.804 [2] [b] [all cases]; Ind Rules Evid rule 804 [b] [2] [all cases]; NJ Rules Evid rule 804 [b] [2] [all criminal cases].)

In *Crawford v Washington* (541 US 36, 56 n 6 [2004]), the United States Supreme Court left open the issue of the effect, if any, of its Confrontation Clause holding upon the dying declaration exception. The Appellate Division, Second Department has held that the United States Supreme Court would likely determine that the Confrontation Clause incorporates an exception for testimonial dying declarations and so held. (*People v Clay*, 88 AD3d 14 [2d Dept [2011].) The vast majority of courts in other jurisdictions have reached the same conclusion. (*See Bishop v State*, 40 NE3d 935 [Ind Ct Appeals 2015] [collecting cases].)

8.17. Excited Utterance ¹

A statement about a startling or exciting event made by a participant in, or a person who personally observed, the event is admissible, irrespective of whether the declarant is available as a witness, provided the statement was made under the stress of nervous excitement resulting from the event and was not the product of studied reflection and possible fabrication.

Note

This rule is derived from the formulations of the exception as stated by the Court of Appeals. (See e.g. *People v Johnson*, 1 NY3d 302, 306 [2003] [“An out-of-court statement is properly admissible under the excited utterance exception when made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication”]; *People v Brown*, 70 NY2d 513, 518 [1987] [“An excited utterance is one made “under the immediate and uncontrolled domination of the senses and during the brief period when consideration of self-interest could not have been brought fully to bear by reasoned reflection”]; *People v Nieves*, 67 NY2d 125, 135 [1986] [“Statements within this exception are generally made contemporaneously or immediately after a startling event which affected or was observed by the declarant, and relate to the event. The essential element of the exception is that the declarant spoke while under the stress or influence of the excitement caused by the event, so that his reflective capacity was stilled. An utterance made ‘as a direct result of sensory perception during that brief period when considerations of self-interest cannot be immediately brought to bear’ is deemed sufficiently trustworthy to be admitted into evidence as an expression of the true belief of the declarant with respect to the facts observed” (citations omitted)]; *People v Edwards*, 47 NY2d 493, 496-497 [1979] [referring to exception as “excited utterance” and observing that underlying it “is the assumption that a person under the influence of the excitement precipitated by an external startling event will lack the reflective capacity essential for fabrication”]; encompasses statement “which asserts the circumstances of (the) occasion as observed by the declarant”]; *People v Caviness*, 38 NY2d 227, 230-231 [1975] [“spontaneous declarations made by a participant while he is under the stress of nervous excitement resulting from an injury or other startling event, while his reflective powers are stilled and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection and deliberation, are admissible as true exceptions to the hearsay rule”; Court also rejected decisions that excluded declarations by bystanders].)

¹ In May 2018, this rule was revised to substitute the words “a person who personally observed” the event for the words “a bystander to” the event to better reflect the need for the “bystander” to have personally observed the incident, as explained in the Note, and as emphasized by the Court of Appeals in *People v Cummings*, 31 N.Y.3d 204 (May 8, 2018).

The Court of Appeals has cautioned that “it must be inferable that the declarant had an opportunity to observe personally the event described in the declaration . . .” (*People v Fratello*, 92 NY2d 565, 571 [1998].) Overall, the Court has instructed that

“[t]he admissibility of an excited utterance is entrusted in the first instance to the trial court. In making that determination, the court must ascertain whether, at the time the utterance was made, the declarant was under the stress of excitement caused by an external event sufficient to still his reflective faculties, thereby preventing opportunity for deliberation which might lead the declarant to be untruthful. The court must assess not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth. Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection.” (*People v Edwards*, 47 NY2d at 497.)

With respect to the difference between the “excited utterance” exception and its “close relative” the “present sense impression” exception, the Court of Appeals has explained:

“ ‘Excited utterances’ are the product of the declarant’s exposure to a startling or upsetting event that is sufficiently powerful to render the observer’s normal reflective processes inoperative. ‘Present sense impression’ declarations, in contrast, are descriptions of events made by a person who is perceiving the event as it is unfolding. They are deemed reliable not because of the declarant’s excited mental state but rather because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory. In our State, we have added a requirement of corroboration to bolster these assurances of reliability. Thus, while the key components of ‘excited utterances’ are their spontaneity and the declarant’s excited mental state, the key components of ‘present sense impressions’ are contemporaneity and corroboration.” (*People v Vasquez*, 88 NY2d 561, 574–575 [1996] [citations omitted].)

In criminal actions, a statement admitted under this exception may be barred by the Confrontation Clause of the Federal and New York State Constitutions if it is found to be “testimonial.” (*But see People v Nieves-Andino*, 9 NY3d 12 [2007] [as police officer reasonably assumed that there was an ongoing emergency, the victim’s responses to the officer’s inquiries were nontestimonial and were admissible as excited utterances]; *People v Bradley*, 8 NY3d 124 [2006] [admission into evidence of a statement as an excited utterance was not barred by the Confrontation Clause as it was not testimonial because it was made in response to

a question from a police officer and the officer's evident reason for asking the question was to deal with an emergency].)

8.17. Excited Utterance ¹

A statement about a startling or exciting event made by a participant in, or a person who personally observed, the event is admissible, irrespective of whether the declarant is available as a witness, provided the statement was made under the stress of nervous excitement resulting from the event and was not the product of studied reflection and possible fabrication.

Note

This rule is derived from the formulations of the exception as stated by the Court of Appeals. (See *e.g. People v Johnson*, 1 NY3d 302, 306 [2003] [“An out-of-court statement is properly admissible under the excited utterance exception when made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication”]; *People v Brown*, 70 NY2d 513, 518 [1987] [“An excited utterance is one made “under the immediate and uncontrolled domination of the senses and during the brief period when consideration of self-interest could not have been brought fully to bear by reasoned reflection”]; *People v Nieves*, 67 NY2d 125, 135 [1986] [“Statements within this exception are generally made contemporaneously or immediately after a startling event which affected or was observed by the declarant, and relate to the event. The essential element of the exception is that the declarant spoke while under the stress or influence of the excitement caused by the event, so that his reflective capacity was stilled. An utterance made ‘as a direct result of sensory perception during that brief period when considerations of self-interest cannot be immediately brought to bear’ is deemed sufficiently trustworthy to be admitted into evidence as an expression of the true belief of the declarant with respect to the facts observed” (citations omitted)]; *People v Edwards*, 47 NY2d 493, 496-497 [1979] [referring to exception as “excited utterance” and observing that underlying it “is the assumption that a person under the influence of the excitement precipitated by an external startling event will lack the reflective capacity essential for fabrication”]; encompasses statement “which asserts the circumstances of (the) occasion as observed by the declarant”]; *People v Caviness*, 38 NY2d 227, 230-231 [1975] [“spontaneous declarations made by a participant while he is under the stress of nervous excitement resulting from an injury or other startling event, while his reflective powers are stilled and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection and deliberation, are admissible as true exceptions to the hearsay rule”; Court also rejected decisions that excluded declarations by bystanders].)

¹ In May 2018, this rule was revised to substitute the words “a person who personally observed” the event for the words “a bystander to” the event to better reflect the need for the “bystander” to have personally observed the incident, as explained in the Note, and as emphasized by the Court of Appeals in *People v Cummings*, 2018 NY Slip Op 03306 (May 8, 2018).

The Court of Appeals has cautioned that “it must be inferable that the declarant had an opportunity to observe personally the event described in the declaration . . .” (*People v Fratello*, 92 NY2d 565, 571 [1998].) Overall, the Court has instructed that

“[t]he admissibility of an excited utterance is entrusted in the first instance to the trial court. In making that determination, the court must ascertain whether, at the time the utterance was made, the declarant was under the stress of excitement caused by an external event sufficient to still his reflective faculties, thereby preventing opportunity for deliberation which might lead the declarant to be untruthful. The court must assess not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth. Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection.” (*People v Edwards*, 47 NY2d at 497.)

With respect to the difference between the “excited utterance” exception and its “close relative” the “present sense impression” exception, the Court of Appeals has explained:

“ ‘Excited utterances’ are the product of the declarant’s exposure to a startling or upsetting event that is sufficiently powerful to render the observer’s normal reflective processes inoperative. ‘Present sense impression’ declarations, in contrast, are descriptions of events made by a person who is perceiving the event as it is unfolding. They are deemed reliable not because of the declarant’s excited mental state but rather because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory. In our State, we have added a requirement of corroboration to bolster these assurances of reliability. Thus, while the key components of ‘excited utterances’ are their spontaneity and the declarant’s excited mental state, the key components of ‘present sense impressions’ are contemporaneity and corroboration.” (*People v Vasquez*, 88 NY2d 561, 574–575 [1996] [citations omitted].)

In criminal actions, a statement admitted under this exception may be barred by the Confrontation Clause of the Federal and New York State Constitutions if it is found to be “testimonial.” (*But see People v Nieves-Andino*, 9 NY3d 12 [2007] [as police officer reasonably assumed that there was an ongoing emergency, the victim’s responses to the officer’s inquiries were nontestimonial and were admissible as excited utterances]; *People v Bradley*, 8 NY3d 124 [2006] [admission into evidence of a statement as an excited utterance was not barred by the Confrontation Clause as it was not testimonial because it was made in response to

a question from a police officer and the officer's evident reason for asking the question was to deal with an emergency].)

8.19. Forfeiture By Wrongdoing

Where a witness in a proceeding is unwilling to testify or testify to the full extent of the witness's knowledge, a party forfeits the right to preclude that witness's prior out of court statement(s) as hearsay or on the ground that the party will be denied the right to confront the witness, if the party offering the statement proves by clear and convincing evidence that: (a) the opposing party, personally or with the aid of others, engaged or acquiesced in misconduct aimed at least in part at preventing the witness from testifying, and (b) such misdeeds were a significant cause of the witness's decision not to testify or testify fully.

Note

This rule is derived from the Court of Appeals recent decisions in *People v Dubarry* (25 NY3d 161, 174-175 [2015]) and *People v Smart* (23 NY3d 213, 219-220 [2014]), which in turn were derived from several prior decisions of the court.

In *People v Geraci* (85 NY2d 359 [1995]), the court held that forfeiture requires a showing that the witness's unavailability was procured by misconduct and noted such a showing had traditionally required that the defendant procured the witness's unavailability through "violence, threats or chicanery." (*Id.* at 365-366.) In *Dubarry* and *Smart*, the court stated the rule as requiring that the defendant engaged in "misconduct" or "misdeeds" aimed at least in part at preventing the witness from testifying and that defendant's misconduct was a significant cause of the witness's decision not to testify. (*People v Dubarry*, 25 NY3d at 176, quoting *People v Smart*, 23 NY3d at 220.) These recent holdings introduced more precise evidentiary standards to the procured by misconduct rule. This language, read literally, also includes misdeeds other than "violence, threats or chicanery." The Court of Appeals, however, has never indicated that misconduct beyond these three kinds of behaviors would qualify for forfeiture. (See also *People v Cotto*, 92 NY2d 68 [1998]; *People v Johnson*, 93 NY2d 254 [1999]; *People v Maher*, 89 NY2d 456, 461-463 [1997].)

The forfeiture of confrontation rights " 'constitutes a substantial

deprivation’ ” (*People v Johnson*, 93 NY2d at 258, quoting *People v Geraci*, 85 NY2d at 367), and the clear and convincing evidence requirement places a “heavy burden” on the statement’s proponent (*People v Cotto*, 92 NY2d at 76). Forfeiture is a “narrow departure from the hearsay rule.” (*People v Maher*, 89 NY2d at 461.) Where the statement’s proponent alleges “specific facts which demonstrate a ‘distinct possibility’ that a criminal defendant has engaged in witness tampering,” the court must conduct an evidentiary hearing, known as a *Sirois* hearing (*see Matter of Holtzman v Hellenbrand*, 92 AD2d 405 [2d Dept 1983]), to determine if forfeiture should be invoked. (*People v Johnson*, 93 NY2d at 258, quoting *People v Cotto*, 92 NY2d at 72.) Because of the inherently surreptitious nature of witness tampering, circumstantial evidence may be used to establish, in whole or in part, that a witness’s unavailability was procured by the defendant. (*People v Geraci*, 85 NY2d at 369.)

The Court of Appeals has expressly stated that this forfeiture rule is not limited to admitting prior grand jury testimony of an intimidated witness and may encompass other out-of-court statements made by an intimidated witness. (*People v Cotto*, 92 NY2d at 77.) However, the court has cautioned that any statement sought to be admitted pursuant to it “cannot be so devoid of reliability as to offend due process.” (*Id.* at 78.)

The Court of Appeals has noted that when an out-of-court statement is admitted pursuant to this rule, the trial court has the discretion to admit additional out-of-court statements of the unavailable witness for impeachment where there is a possibility that, if such impeachment is not allowed, the factfinder will be misled into giving too much weight to the initially offered statement. (*People v Bosier*, 6 NY3d 523, 528 [2006].) However, the court has cautioned that impeachment need not always be allowed. In this connection, the court emphasized that the trial court in exercising that discretion shall consider that the party offering the impeaching statement may benefit from his own wrongful conduct because the party proffering the initial out-of-court statement will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent impeachment evidence. (*Id.* [“Where impeachment is permitted, the defendant, in direct contravention of the most basic legal principles and the policy objectives of *Geraci*, may benefit from his or her own wrongful conduct because the prosecution will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent testimony proffered by the defendant”].) In *Bosier*, the court rejected the defendant’s impeachment attempt, commenting that since “the inconsistency defendant relied on did not go to the heart of the prosecution’s case and might well have been credibly explained if the witness had been present, it was not an abuse of discretion to exclude the impeaching evidence.” (*Id.*)

While the forfeiture rule has arisen in criminal cases, there is no indication

in the case law that the rule is not applicable in civil actions when a party seeks to introduce a statement of an intimidated witness over a hearsay objection.

8.21. Hearsay or Nonhearsay Within Hearsay

An out-of-court statement that is included within an otherwise admissible statement is itself admissible: (a) where it is offered to prove the truth of its contents and the included statement meets the requirements of an exception to the hearsay rule; or (b) it includes a statement made by a declarant that is not offered for its truth.

Note

The Court of Appeals has addressed proffers of evidence which involve a declarant's out-of-court statement which contains another out-of-court statement. In that instance, the Court admits evidence consisting of multiple layers of out-of-court statements provided each such layer overcomes a hearsay exception or is not offered for its truth. (*See People v Ortega*, 15 NY3d 610, 620-621 [2010] [Smith, J., concurring] [discussing the "hearsay within hearsay" rule in relation to the admissibility of a hospital record that was admissible as an exception to the hearsay rule as well as the statements of crime victims contained in the hospital record].) In essence, the Court has recognized that the hearsay rule should not exclude an out-of-court statement which includes another out-of-court statement when each part of the combined statements is separately admissible.

For example, in *People v Patterson* (28 NY3d 544 [2016]), the police obtained the phone number of Patterson's accomplice and then acquired from the provider of the phone service a record of the phone numbers of calls made to that phone during the period of the crime and the subscriber information associated with those calls. The last name of the subscriber and other information pointed to defendant Patterson as the subscriber. It was accepted that the log of the phone call numbers received by the accomplice was a business record and thus admissible for its truth. The subscriber information was not admissible for its truth "because the subscriber was not under a duty to report his or her 'pedigree' information correctly when activating the prepaid cell phone accounts" (*id.* at 550). The Court of Appeals, however, held that the subscriber information was admissible for a nonhearsay purpose, namely, it was admissible not for the truth of who the subscriber and caller was, but that someone (not necessarily the defendant) had supplied certain pedigree information in subscribing to the phone service. The People were then able to couple that pedigree information with other evidence which tended to confirm that the defendant was the subscriber and caller.

By contrast, in *Flynn v Manhattan & Bronx Surface Tr. Operating Auth.* (61 NY2d 769, 770-771 [1984]) a police officer testified as to what a bus driver told him about what he, the bus driver, had heard from a passenger. That testimony “was double hearsay,” i.e., passenger to bus driver and bus driver to police officer, and was inadmissible because the statement of the passenger did not fit within any of the exceptions to the hearsay rule (*id.* at 771).

The presence of multiple out-of-court statements frequently occurs in records of regularly conducted activities. In *Patterson*, the Court set forth with approval examples of such cases:

“*Splawn v Lextaj Corp.*, 197 AD2d 479, 480 [1st Dept 1993], *lv denied* 83 NY2d 753 [1994] [hotel logbook entries reporting burglaries not admissible to prove the crimes occurred but permitted to show hotel had notice of activity]; *People v Blanchard*, 177 AD2d 854, 855 [3d Dept 1991], *lv denied* 79 NY2d 918 [1992] [police blotter entry showing phone call made by someone purporting to be defendant’s father properly received not for its truth, but to impeach father, who testified that he did not make the call]; *Donohue v Losito*, 141 AD2d 691, 691-692 [2d Dept 1988], *lv denied* 72 NY2d 810 [1988] [portion of police report indicating trial witness stated that defendant had punched plaintiff in the face not admissible for its truth under CPLR 4518, but admissible to impeach witness]” (*Patterson*, 28 NY3d at 551).

(See also *e.g. Ortega*, 15 NY3d 610 [hospital record which may contain a patient’s statement]; *Cover v Cohen*, 61 NY2d 261, 274 [1984] [police accident report which may contain statements of those involved in an accident]; *Matter of Leon RR*, 48 NY2d 117, 123 [1979] [social service department reports which may contain statements of those involved in the services being provided].)

In sum, a hearsay statement, admissible under an exception, may contain several out-of-court statements. Theoretically, under the rule such a statement is admissible, provided each statement conforms to an exception or is offered for a non-truth purpose, as the rule contains no limit. However, the trial court has the discretion to exclude an otherwise admissible statement with multiple out-of-court statements upon a determination that the statement with so many layers of other statements is unreliable, or gives rise to confusion, or is otherwise more prejudicial than probative.

8.23. Impeachment of Hearsay Declarant

(1) Except as provided in subdivision two, when hearsay evidence has been admitted, the credibility of the declarant may be impeached by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The admission of that impeachment evidence is accordingly not conditioned on affording the declarant an opportunity to deny or explain.

(2) When hearsay evidence is admitted pursuant to rule 8.19, the trial court may in its discretion preclude evidence of impeachment. The court may consider, on the one hand, the possibility that, if impeachment is not allowed, the jury will be misled into giving too much weight to the hearsay evidence and, on the other hand, that the party against whom the hearsay evidence is offered may unfairly benefit from the party's own wrongful conduct because the opposing party will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent testimony proffered as impeaching evidence.

Note

Subdivision (1), first sentence, is derived from Court of Appeals case law, which uniformly recognizes the rule stated therein. (*See People v Fratello*, 92 NY2d 565, 572 [1998], *cert den* 526 US 1068 [1999]; *Matter of Hesdra*, 119 NY 615 [1890].) The second sentence restates recent authority addressing this point. (*See Lawton v Palmer*, 126 AD3d 945 (2d Dept [2015]; *People v Conde*, 16 AD2d 327, 331-332 [3d Dept 1962], *aff'd* 13 NY2d 939 [1963].)

Subdivision (2) applies when the hearsay statements are admitted because of the defendant's forfeiture of the right to exclude them (*see* Guide to NY Evid rule 8.19) and is derived from *People v Bosier* (6 NY3d 523, 528 [2006] ["(W)e do not hold that such a defendant (who tampered with a witness) should never be able to introduce the unavailable witness's out-of-court statements for impeachment purposes. The trial judge has discretion to permit such impeachment where there is a possibility that, if it is not allowed, the jury will be misled into giving too much weight to the statement offered by the prosecution. But such impeachment need not always be allowed. Where impeachment is permitted, the defendant, in direct

contravention of the most basic legal principles and the policy objectives of *Geraci* (85 NY2d 359 [1995]), may benefit from his or her own wrongful conduct because the prosecution will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent testimony proffered (as impeaching evidence). Here, where the inconsistency defendant relied on did not go to the heart of the prosecution's case and might well have been credibly explained if the witness had been present, it was not an abuse of discretion to exclude the impeaching evidence").

8.24 Market Reports (CPLR 4533)

A report of a regularly organized stock or commodity market published in a newspaper or periodical of general circulation or in an official publication or trade journal is admissible in evidence to prove the market price or value of any article regularly sold or dealt in on such market. The circumstances of the preparation of such a report may be shown to affect its weight, but they shall not affect its admissibility.

Note

This rule restates verbatim CPLR 4533. It sets forth a hearsay exception for a report of a regularly organized stock or commodity market published in a newspaper or periodical of general circulation or an official publication or trade journal when offered to prove the price or value of any article regularly sold or dealt in on such market.

“Reports of stock and commodity market prices . . . are considered trustworthy because members of the public generally rely upon them and the persons who compile the figures that go into the reports are motivated to be accurate in order to maintain such reliance” (Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4533).

Thus, there is no requirement that the report be shown to have been accurately compiled or that the report is considered authoritative before it may be admitted. Evidence of the circumstances of the report’s preparation, however, is admissible to affect the weight to be given to the report by the trier of fact. (CPLR 4533 [last sentence]; see *Auld v Estridge*, 86 Misc 2d 895, 907 [Sup Ct, Nassau County 1976] [finding reports of the National Quotation Bureau showing the value of over-the-counter stock to be admissible pursuant to CPLR 4533, albeit they had “only small probative force”], *affd* 58 AD2d 636 [2d Dept 1977].)

When the report is published in a newspaper or periodical of general circulation, a separate foundation for the “authenticity” of the report is not necessary as the report will be deemed self-authenticating (CPLR 4533; Guide to NY Evid rule 9.03 [4]).

8.25. Past Recollection Recorded

A memorandum or record made or adopted by a witness concerning a matter about which that witness had knowledge, but about which the witness lacks sufficient present recollection to enable the witness to testify fully and accurately, even after reading the memorandum or record, is admissible, provided: (a) the memorandum or record was made or adopted by the witness when the matter was fresh in the witness's memory and (b) the witness testifies that the memorandum or record correctly represented the witness's knowledge and recollection when made.

Note

This rule is derived from *People v Taylor* (80 NY2d 1, 8 [1992] ["(A) memorandum made of a fact known or an event observed in the past of which the witness lacks sufficient present recollection may be received in evidence as a supplement to the witness's oral testimony. The requirements for admission of a memorandum of a past recollection are generally stated to be that the witness observed the matter recorded, the recollection was fairly fresh when recorded or adopted, the witness can presently testify that the record correctly represented his knowledge and recollection when made, and the witness lacks sufficient present recollection of the recorded information" (citations omitted)]; see also *People v Tapia*, 33 NY3d 257 [2019] [a witness's prior grand jury testimony was properly admitted as past recollection recorded]; *People v Caprio*, 25 AD2d 145, 150 [2d Dept 1966], *aff'd* 18 NY2d 617 [1966]; *Halsey v Sinsebaugh*, 15 NY 485 [1857]). Once admitted, the "witness' testimony and the writing's contents are to be taken together and treated in combination as if the witness had testified to the contents of the writing based on present knowledge" (*Taylor* at 9).

Tapia also held that the admission of a past recollection document did not violate the Sixth Amendment's right of confrontation:

"Significantly, the right to confrontation guarantees not only the right to cross-examine all witnesses, but also the ability to literally confront the witness who is providing testimony against the accused in a face-to-face encounter before the trier of fact The Confrontation Clause is satisfied when these requirements are fulfilled—even if the witness's memory is faulty. . . . In [*United States v*] *Owens* [(484 US 554 [1988])], the Court held that '[t]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in

whatever way, and to whatever extent, the defense might wish' (484 US at 559 [internal quotation marks and citations omitted]). To that end, '[i]t is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination), . . . the very fact that he has a bad memory' (484 US at 559 . . .). '[T]he Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination' (*Crawford v Washington*, 541 US 36, 61 [2004])." (*Tapia*, 33 NY3d at 269-270.)

8.27. Statement of Pedigree

(1) An out-of-court statement by a declarant concerning the declarant's or another person's birth, adoption, death, lineage, marriage, legitimacy or other relationship between or among family members or other similar fact of personal or family history, made before the controversy, is admissible even though the declarant had no means of acquiring personal knowledge of the matter stated, provided that the relationship of the declarant with the family is established by some proof independent of the declaration itself, and the declarant is not available as a witness.

(2) A statement admissible under this exception may be in any form.

(3) A witness may testify to his or her own pedigree.

Note

Subdivision (1). Pedigree means the history of family descent that is transmitted from one generation to another and encompasses such matters as birth, descent, marriage, death and relationship. Pedigree declarations "extend to any inquiry necessarily involving these events, or which tend to show that either, some or all of them took place or did not." (*Washington v Bank for Sav. in City of N.Y.*, 171 NY 166, 175 [1902].)

Pedigree declarations are "a well known and recognized exception to the general rule excluding hearsay evidence." (*Eisenlord v Clum*, 126 NY 552, 563 [1891].) They are "admitted on the principle that they are the natural effusions of persons who must know the truth and who speak on occasions when their minds stand in an even position without any temptation to exceed or fall short of the truth." (*Aalholm v People*, 211 NY 406, 412 [1914].) The exception encompasses statements by a declarant concerning his or her personal family history or another's personal or family history.

The formulation of the rule is based on the decisional law of the Court of Appeals. Thus, the Court has held that

- a pedigree declaration must have been made before the controversy giving rise to the action (*Aalholm*, 211 NY at 412-413; *Young v Shulenberg*, 165 NY 385, 388 [1901]);
- the declaration to be admissible “need not be upon the knowledge of the declarant” (*Eisenlord*, 126 NY at 564); and
- “[t]he declarant must be related either by blood or affinity to the family concerning which he speaks” (*Aalholm*, 211 NY at 413).

The Court of Appeals has emphasized as an “important qualification” to the exception that, “before a declaration can be admitted in evidence, the relationship of the declarant with the family must be established by some proof independent of the declaration itself,” although proof of the family relationship may be “slight.” (*Aalholm*, 211 NY at 414-415; *Young*, 165 NY at 388 [“ ‘slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy’ ” (citation omitted)].)

As to unavailability of the declarant, the Court of Appeals has recognized three grounds: death, incompetency, and absence beyond the jurisdiction. (*See Young*, 165 NY at 388.) *Young* does not indicate whether these are the only grounds of unavailability that are recognized for this hearsay exception or whether other grounds might be acceptable.

Subdivision (2) is derived from the numerous decisions in which this exception was in issue. (*See Aalholm*, 211 NY at 412 [oral statements]; *Young*, 165 NY at 388 [deeds and immigration acknowledgment before a United States minister]; *Matter of Whalen*, 146 Misc 176, 189 [Sur Ct, NY County 1932] [statements made “in a family bible, inscriptions on tombstones, etc.”].)

Subdivision (3) is derived from *Koester v Rochester Candy Works* (194 NY 92, 97 [1909] [witness competent to testify to his or her own age]) and *People v Lewis* (69 NY2d 321, 324 [1987] [witness permitted to testify that defendant was her father]).

8.29. Present Sense Impression

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition as it was unfolding or immediately thereafter is admissible, irrespective of whether the declarant is available to testify, provided that there is evidence, independent of the statement, that supports: (a) the accuracy of the contents of the statement and (b) that the statement was made contemporaneously with the event or immediately thereafter.

Note

This formulation of the present sense impression hearsay exception is primarily derived from *People v Brown* (80 NY2d 729, 734-735, 737 [1993]), wherein the Court of Appeals recognized the exception:

“[W]e hold that spontaneous descriptions of events made substantially contemporaneously with the observations are admissible if the descriptions are sufficiently corroborated by other evidence. Further, such statements may be admitted even though the declarant is not a participant in the events and is an unidentified bystander . . .

“What corroboration is sufficient will depend on the particular circumstances of each case and must be left largely to the sound discretion of the trial court. But before present sense impression testimony is received there must be some evidence in addition to the statements themselves to assure the court that the statements sought to be admitted were made spontaneously and contemporaneously with the events described.”

(*See People v Cantave*, 21 NY3d 374, 382 [2013]). *Brown* requires that the present sense impression statement must be made while the declarant was observing the event as it was unfolding or “immediately thereafter.” The statements at issue in *Brown* were “contemporaneous reports of events then being observed by the [declarant]” (*People v Brown*, 80 NY2d at 732), and thus the Court had no occasion to discuss what it meant by “immediately thereafter.”

The Court had that opportunity in *People v Vasquez* (88 NY2d 561, 575 [1996]):

“The . . . language [‘or immediately thereafter’] . . . was meant to suggest only that the description and the event need not be precisely simultaneous, since it is virtually impossible to describe a rapidly unfolding series of events without some delay between the occurrence and the observer’s utterance. The language in question was certainly not intended to suggest that declarations can qualify as present sense impressions even when they are made after the event being described has concluded. Indeed, we noted in *Brown* that the description of events must be made ‘substantially contemporaneously’ with the observations (*id.*, at 734).

“Thus, although we recognize that there must be some room for a marginal time lag between the event and the declarant’s description of that event, that recognition does not obviate the basic need for a communication that reflects a *present* sense impression rather than a recalled or recast description of events that were observed in the recent past. Without satisfaction of this requirement, the essential assurance of reliability—the absence of time for reflection and the reduced likelihood of faulty recollection—is negated and there is then nothing to distinguish the declaration from any other postevent out-of-court statement that is offered for the truth of its contents.”

The Court then found that the 911 call by defendant was not admissible under the exception as it was “after the entire sequence of events had come to a final and fatal end and defendant had run from the crime scene. At that point, it could no longer be said that defendant’s statements were a description of his ‘present sense impressions’ as his observations were made” (*People v Vasquez*, 88 NY2d at 578), and a statement by a victim was not admissible as it was made “several minutes after the assault took place.” (*Id.* at 580.)

Consistent with this strict view of the contemporaneity element, the Appellate Divisions have indicated that a time lag of a few seconds after the event ended and the statement was made will satisfy the element of “immediately thereafter.” (*People v Haskins*, 121 AD3d 1181, 1184 [3d Dept 2014] [“right away,” but under the excited utterance exception]; *People v George*, 79 AD3d 1148, 1148 [2d Dept 2010] [the delay was insufficient to impair reliability]; *People v York*, 304 AD2d 681, 681 [2d Dept 2003] [same]; *People v White*, 297 AD2d 587, 587 [1st Dept 2002] [“substantially contemporaneous”].) A delay of seven minutes after the end, however, will not satisfy the element of “immediately thereafter.” (*People v Demand*, 268 AD2d 901, 902 [3d Dept 2000].)

With respect to the difference between the “excited utterance” exception

and its “close relative” the “present sense impression” exception, *People v Vasquez* (88 NY2d at 574-575) explained:

“ ‘Excited utterances’ are the product of the declarant’s exposure to a startling or upsetting event that is sufficiently powerful to render the observer’s normal reflective processes inoperative. ‘Present sense impression’ declarations, in contrast, are descriptions of events made by a person who is perceiving the event as it is unfolding. They are deemed reliable not because of the declarant’s excited mental state but rather because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory. In our State, we have added a requirement of corroboration to bolster these assurances of reliability. Thus, while the key components of ‘excited utterances’ are their spontaneity and the declarant’s excited mental state, the key components of ‘present sense impressions’ are contemporaneity and corroboration” (citations omitted).

With respect to corroboration of the present sense impression statement, the Court also elaborated on that requirement in *People v Vasquez* (88 NY2d at 575-576), as follows:

“The general idea, as we stated in *Brown* . . . , is that there must be some independent verification of the declarant’s descriptions of the unfolding events. Although we stated in *People v Brown* . . . that ‘there must be some evidence . . . that the statements sought to be admitted were made spontaneously and contemporaneously with the events described,’ we did not mean by that language that such proof would suffice to satisfy the entirely separate requirement that the content of the communication be corroborated by independent proof. Rather, we merely intended to reiterate the basic foundational requirements for admitting an out-of-court declaration purporting to be a ‘*present* sense impression.’ Accordingly, contrary to appellants’ arguments here, the corroboration element cannot be established merely by showing that the declarant’s statements were unprompted and were made at or about the time of the reported event.

“The extent to which the content of the declaration must be corroborated by extrinsic proof is, as we have previously said, dependent on the particular circumstances of the individual case (*People v Brown*, 80 NY2d, at 737). Because

of the myriad of situations in which the problem may arise, it would not be productive to attempt to fashion a definitive template for general application. It is sufficient at this point to note that in all cases the critical inquiry should be whether the corroboration offered to support admission of the statement truly serves to support its substance and content.”

The admissibility of a present sense impression is not conditioned on the declarant being unavailable to testify. (*People v Buie*, 86 NY2d 501, 506-507 [1995].) *Buie* did note, however, that the unavailability of the declarant “may be weighed by Trial Judges in assessing the traditional probativeness versus undue prejudice calculus for allowing evidence before a petit jury.” (*Id.* at 506.)

In criminal actions, a statement admitted under this exception may be barred by the Confrontation Clause of the Federal and New York State Constitutions if it is found to be “testimonial.” (See *People v Rodriguez*, 50 AD3d 476, 476 [1st Dept 2008] [declarants’ statements to 911 operators describing the victim’s pursuit of defendant and his accomplice were admissible under the present sense impression exception and they were not testimonial as the statements in the calls were primarily “to enable police assistance to meet an ongoing emergency”]; *People v Coleman*, 16 AD3d 254, 255 [1st Dept 2005] [information conveyed by the 911 caller was admissible under the present sense impression and excited utterance exceptions and was not testimonial as it was made for the “purpose of urgently seeking police intervention”].)

8.31. Prior Consistent Statement

A statement of a witness made prior to his or her testimony and consistent with that testimony is admissible when offered to rebut an express or implied claim of recent fabrication and when the statement was made prior to the circumstances supporting that claim.

Note

This rule sets forth an exception for a prior consistent statement of a witness where the witness testifies at a proceeding and the statement is offered to prove the truth of the matter asserted therein (*see e.g. People v Seit*, 86 NY2d 92, 95 [1995] [prior consistent statement was admissible “under the recent fabrication exception to the hearsay rule”]; *People v Singer*, 300 NY 120, 123 [1949] [“exception to the hearsay rule” for prior consistent statements that rebut a charge of recent fabrication]). As stated by the Court of Appeals, “[t]his exception is rooted in fairness; it would be unjust to permit a party to suggest that a witness, as a result of interest, bias or influence, is fabricating a story without allowing the opponent to demonstrate that the witness had spoken similarly even before the alleged incentive to falsify arose” (*People v McDaniel*, 81 NY2d 10,18 [1993]).

The exception’s “recent fabrication” condition for admissibility is derived from the substantial Court of Appeals precedent which holds that a prior consistent statement is only admissible where the “cross-examiner has created the inference of, or directly characterized the testimony as, a recent fabrication” (*People v Davis*, 44 NY2d 269, 277 [1978]; *see Fishman v Scheuer*, 39 NY2d 502, 504 [1976] [“The plaintiff had not attempted to assert that the testimony of [the] witness was a recent fabrication. In the absence of such claim, prior consistent statements are inadmissible”]; *Crawford v Nilan*, 289 NY 444, 450-451 [1943]; *Seit*, 86 NY2d at 96 [“The implication that the testimony was recently fabricated arises only if it appears that the cross-examiner believes and wants the jury to believe that the witness is testifying falsely to ‘meet the exigencies of the case’ ” (citing *People v Katz*, 209 NY 311, 340 [1913])]). The further condition for admissibility that the statement was made before the charged fabrication is also derived from substantial Court of Appeals precedent (*see Davis*, 44 NY2d at 277 [“prior consistent statements made at a time when there was no motive to falsify are admissible to repel the implication or charge”])).

Consistent with the “recent fabrication” condition, the Court of Appeals has noted that mere impeachment with a prior inconsistent statement or other attack on the credibility of a witness is an insufficient basis for admitting a prior consistent

statement under the rule (*People v Ramos*, 70 NY2d 639 [1987]; *Crawford*, 289 NY at 450 [“testimony of an impeached or discredited witness may not be supported and bolstered by proving that he has made similar declarations out of court”])).

When a prior consistent statement is admissible under the exception recognized by this section, the Court of Appeals has noted that the statement may also serve to rehabilitate the witness (*see People v McDaniel*, 81 NY2d 10,18 [1993]; *People v McClean*, 69 NY2d 426, 428 [1987]).

Apart from the hearsay exception recognized by this section, a prior consistent statement may be offered for a purpose other than its truth, for example, to explain the investigative process leading to a defendant’s arrest when such evidence is relevant to a jury’s assessment of the witness’s alleged motive to lie (*see People v Gross*, 26 NY3d 689, 694 [2016] [child’s report of sexual abuse by the defendant testified to by her mother, a sister and school principal, and two police officers assigned to investigate her allegations]; *People v Ludwig*, 24 NY3d 221, 230-232 [2014] [a child’s report of sexual abuse by the defendant testified to by her mother and older half-brother]).

Where the witness is the complainant in a proceeding involving the commission of a sexual offense, and at issue is the admissibility of a statement made by the witness/complainant reporting the matter after the purported incident, the prompt outcry rule may apply (*see* Guide to NY Evid rule 8.37, Prompt Outcry).

8.33. Prior Inconsistent Statement

(1) Civil Proceeding. If a witness testifies at a proceeding and is subject to cross-examination concerning a statement made by the witness prior to the proceeding, the statement is admissible if the statement is inconsistent with the witness's testimony and the statement contains sufficient indicia of reliability justifying its admissibility.

(2) Criminal Proceeding. If a witness testifies at a proceeding and is subject to cross-examination concerning a statement made by the witness prior to the proceeding, the statement is admissible if the statement is inconsistent with the witness's testimony but solely for impeachment purposes.

Note

Subdivision (1) sets forth an exception for a prior inconsistent statement of a declarant where the declarant in a civil case testifies at the proceeding and is subject to cross-examination (*see Kaufman v Quickway, Inc.*, 14 NY3d 907, 908 [2010] ["hearsay exception for prior inconsistent statements"]). As derived from *Kaufman* (14 NY3d at 908), *Nucci v Proper* (95 NY2d 597, 602-603 [2001]), and *Letendre v Hartford Acc. & Indem. Co.* (21 NY2d 518, 524 [1968]), the statement must possess sufficient indicia of reliability to justify its admission. In *Kaufman*, the Court of Appeals found the statement in issue met that standard as it was in writing, made to a State Police trooper and signed under penalty of perjury (14 NY3d at 908); and in *Letendre*, the Court found the statement to be reliable since it was in writing and had the declarant been unavailable to testify at trial, the statement would have been admissible as a declaration against interest (21 NY2d at 524). However, in *Nucci*, the statements were found to possess no indicia of reliability, as under the circumstances "a significant probability exist[ed] that the statements may implicate the dangers of the declarant's faulty memory or perception, insincerity, or ambiguity—traditional testimonial infirmities which the hearsay rule is designed to guard against" (95 NY2d at 604).

Subdivision (2) sets forth the view of the Court of Appeals that a prior inconsistent statement of an adverse witness is admissible in a criminal proceeding for impeachment purposes only (*see People v Freeman*, 9 NY2d 600, 605 [1961]

[“ ‘(A) witness’ own prior statement in which he has given a contrary version’ . . . may not be introduced as affirmative evidence”]).

By statute, in a criminal proceeding a party may impeach *its own witness* when that witness “gives testimony upon a material issue of the case which tends to disprove the position” of the party who called the witness by introducing “evidence that such witness has previously made either a written statement signed by him or an oral statement under oath contradictory to such testimony” (CPL 60.35 [1]).

8.35. Prior Judgment of Conviction

(1) Civil proceeding. In a civil proceeding, evidence of a final judgment adjudging a person guilty of a crime is admissible as *prima facie* evidence of the facts involved in the criminal judgment.

(2) Criminal proceeding. If in the course of a criminal proceeding, any witness, including a defendant, is properly asked whether he or she was previously convicted of a specified offense and answers in the negative or in an equivocal manner, the party adverse to the one who called him or her may independently prove such conviction. If in response to proper inquiry whether he or she has ever been convicted of any offense the witness answers in the negative or in an equivocal manner, the adverse party may independently prove any previous conviction of the witness.

Note

Subdivision (1) is derived from *Schindler v Royal Ins. Co.* (258 NY 310, 314 [1932]) wherein the Court of Appeals held a party's prior conviction of a crime was admissible in a later civil action and the conviction was "*prima facie* evidence of the facts involved," i.e., the facts upon which the conviction rested.

Where a conviction is entered upon a guilty plea, the plea is admissible as a party admission. (*Ando v Woodberry*, 8 NY2d 165 [1960] [plea of guilty to a traffic violation admissible as an admission].)

Subdivision (2) is taken verbatim from CPL 60.40 (1).

8.36.1 Prior Testimony in Criminal Proceedings [CPL art 670]

(1) *Prior testimony.* Under circumstances prescribed in [CPL article 670], testimony given by a witness at (a) a trial of an accusatory instrument, or (b) a hearing upon a felony complaint conducted pursuant to [CPL] section 180.60, or (c) an examination of such witness conditionally, conducted pursuant to [CPL] article six hundred sixty, may, where otherwise admissible, be received into evidence at a subsequent proceeding in or relating to the action involved when at the time of such subsequent proceeding the witness is unable to attend the same by reason of death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot with due diligence be brought before the court. Upon being received into evidence, such testimony may be read and any videotape or photographic recording thereof played. Where any recording is received into evidence, the stenographic transcript of that examination shall also be received.

(2) *Subsequent proceedings, defined.* The subsequent proceedings at which such testimony may be received in evidence consist of:

(a) Any proceeding constituting a part of a criminal action based upon the charge or charges which were pending against the defendant at the time of the witness's testimony and to which such testimony related; and

(b) Any post-judgment proceeding in which a judgment of conviction upon a charge specified in paragraph (a) is challenged.

(3) *Procedure in non-grand jury proceeding.* In any criminal action or proceeding other than a grand jury proceeding, a party thereto who desires to offer in evidence testimony of a witness given in a previous

action or proceeding, as provided [in subdivision one], must so move, either in writing or orally in open court, and must submit to the court, and serve a copy thereof upon the adverse party, an authenticated transcript of the testimony and any videotape or photographic recording thereof sought to be introduced. Such moving party must further state facts showing that personal attendance of the witness in question is precluded by some factor specified in [subdivision one]. In determining the motion, the court, with opportunity for both parties to be heard, must make inquiry and conduct a hearing to determine whether personal attendance of the witness is so precluded. If the court determines that such is the case and grants the motion, the moving party may introduce the transcript in evidence and read into evidence the testimony contained therein. In such case, the adverse party may register any objection or protest thereto that he would be entitled to register were the witness testifying in person, and the court must rule thereon.

(4) *Procedure in grand jury proceedings.* Without obtaining any court order or authorization, a district attorney may introduce in evidence in a grand jury proceeding testimony of a witness given in a previous action or proceeding specified in [subdivision one], provided that a foundation for such evidence is laid by other evidence demonstrating that personal attendance of such witness is precluded by some factor specified in [subdivision one].

Note

Except for the subdivision headings in italics, the words in brackets, and the substitution of “[CPL article 670]” for the words “this article” in the opening line of subdivision (1), this rule reproduces verbatim CPL 670.10 (“Use in a criminal proceeding of testimony given in a previous proceeding; when authorized”) in subdivisions (1) and (2), and CPL 670.20 (“Use in a criminal proceeding of testimony given in a previous proceeding; procedure”) in subdivisions (2) and (3).

The rule sets forth a hearsay exception governing the admissibility of testimony previously taken in certain, specified criminal proceedings in subsequent criminal proceedings.

Unlike its counterpart governing admissibility of former testimony in civil actions, its provisions are not supplemented by the common law (*People v Harding*, 37 NY2d 130 [1975]; see Guide to NY Evid rule 8.36, Prior Testimony in a Civil Proceeding).

The Confrontation Clause prohibits the “admission of testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination” (*Crawford v Washington*, 541 US 36, 53-54 [2004]; see *People v Pealer*, 20 NY3d 447, 453 [2013]).

To the extent therefore that the witness is unavailable and there has been a full and fair opportunity for cross-examination by the party against whom the testimony is offered, the requirements of the Confrontation Clause are met. (*Compare People v Simmons*, 36 NY2d 126 [1975], with *People v Prince*, 66 NY2d 935 [1985], *affg for reasons stated below* 106 AD2d 521 [2d Dept 1984].)

As stated by the Court of Appeals: “Insofar as it allows a jury to convict a defendant based on a witness’s previous testimony, CPL 670.10 (1) is an exception to the Sixth Amendment right of confrontation. Although the right of confrontation contemplates that testimony against an accused be ‘delivered live within eyesight and earshot of the jurors,’ the statute makes, and the Constitution allows, limited departures based on necessity and fairness.” (*People v Diaz*, 97 NY2d 109, 114 [2001] [citations omitted]; see also Guide to NY Evid rule 8.02, Admissibility Limited by Confrontation Clause [*Crawford*] and accompanying note.)

Subdivision (1) states verbatim CPL 670.10 (1). It sets forth three specific types of former testimony which are admissible when the declarant is proved “unable to attend” trial for specified reasons: testimony that was given at a trial on the accusatory instrument, at a preliminary hearing on a felony complaint, or at a conditional examination under CPL article 660 (CPL 670.10 [1]).

The Court of Appeals, construing strictly this statutory provision, has observed that its “ ‘three carefully worded and enumerated exceptions’ to the use of prior testimony of an unavailable declarant are essentially exclusive” (*People v Tapia*, 33 NY3d 257, 266 [2019] [citation omitted]). Thus, if the proffered testimony is given at a proceeding other than the three types stated in the statute, it is inadmissible under the exception. (See *e.g. People v Ayala*, 75 NY2d 422, 428-29 [1990]; *Harding*, 37 NY2d at 133.)

At the prior permitted proceeding, there must have been also, as noted, a full and fair opportunity to cross-examine the declarant. (*People v Simmons*, 36

NY2d 126 [1975]). “An adequate opportunity to cross-examine at the prior proceeding is an additional, constitutional requirement for the admissibility of prior testimony that otherwise satisfies CPL 670.10” (*Ayala*, 75 NY2d at 430).

Should the defendant, however, be the cause of the witness’s absence, the defendant forfeits the limitations on the admission of former testimony irrespective of whether the defendant had an opportunity to cross-examine the witness. (See *People v Geraci*, 85 NY2d 359 [1995] [witness’s Grand Jury testimony admitted].)

As to the triggering condition for the admissibility of permitted former testimony, the provision provides that the declarant must be “unable to attend . . . by reason of death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot with due diligence be brought before the court.” There is Appellate Division authority holding that the declarant may also be unavailable when the declarant invokes the Fifth Amendment privilege against self-incrimination. (See *e.g.* *People v Whitley*, 14 AD3d 403 [1st Dept 2005]; *People v Johns*, 297 AD2d 645 [2d Dept 2002]; *People v Snow*, 298 AD2d 985 [4th Dept 2002].) The Appellate Division, Third Department, has held that even if a witness does not assert his or her privilege against self-incrimination, the witness’s persistent refusal to testify after threat of a contempt citation will render the witness unavailable for purposes of CPL 670.10 (1). (*People v Knowles*, 79 AD3d 16, 24-25 [3d Dept 2010].)

The People must demonstrate “due diligence” in attempting to secure the presence of a witness. (*People v Diaz*, 97 NY2d 109 [2001].) *Diaz* noted that the Court has required “that the prosecutor’s failure to produce [a witness] . . . not [be] due to indifference or a strategic preference for presenting her testimony in the more sheltered form of [a transcript] rather than in the confrontational setting of a personal appearance on the stand.” (*Id.* at 115 [internal quotation marks and citation omitted].)

Subdivision (1) concludes by providing that the former testimony when admissible may be read to the jury and any recording of the testimony may be played. When a recording is played, the stenographic transcript of the testimony must also be admitted.

Subdivision (2) states verbatim CPL 670.10 (2). It provides that the former testimony from any of the three types of specified proceedings may be used “at a subsequent proceeding in or relating to the action involved,” including post-judgment proceedings.

Subdivision (3) states verbatim CPL 670.20 (1). It sets forth the procedure for the introduction of the former testimony into evidence in a criminal proceeding other than a grand jury proceeding. Of note, it requires the court to “conduct a hearing to determine whether personal attendance of the witness” is precluded by “some factor” specified in CPL 670.10 (1).

Subdivision (4) states verbatim CPL 670.20 (2). It sets forth the procedure for the introduction into evidence of the former testimony in grand jury proceedings.

8.36 Prior Testimony in a Civil Proceeding

Part I: CPLR 4517

(a) In a civil action, at the trial or upon the hearing of a motion or an interlocutory proceeding, all or any part of the testimony of a witness that was taken at a prior trial in the same action or at a prior trial involving the same parties or their representatives and arising from the same subject matter, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions:

1. any such testimony may be used by any party for the purpose of contradicting or impeaching the testimony of the same witness;

2. the prior trial testimony of a party or of any person who was a party when the testimony was given or of any person who at the time the testimony was given was an officer, director, member, employee, or managing or authorized agent of a party, may be used for any purpose by any party who is adversely interested when the prior testimony is offered in evidence;

3. the prior trial testimony of any person may be used by any party for any purpose against any other party, provided the court finds:

(i) that the witness is dead; or

(ii) that the witness is at a greater distance than one hundred miles from the place of trial or is out of the state, unless it appears that the absence of the witness was procured by the party offering the testimony; or

(iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(iv) that the party offering the testimony has been unable to procure the attendance of the witness by diligent efforts; or

(v) upon motion on notice, that such exceptional circumstances exist as to make its use desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court;

4. the prior trial testimony of a person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances subject to the right of any party to move for preclusion upon the ground that admission of the prior testimony would be prejudicial under the circumstances.

(b) Use of part of the prior trial testimony of a witness. If only part of the prior trial testimony of a witness is read at the trial by a party, any other party may read any other part of the prior testimony of that witness that ought in fairness to be considered in connection with the part read.

(c) Substitution of parties; prior actions. Substitution of parties does not affect the right to use testimony previously taken at trial.

Part II: Common Law

At a hearing or trial in a civil proceeding, the testimony of a witness that was taken at a prior hearing or trial or other legal proceeding before a tribunal may be admitted,

provided the witness is unavailable due to death or otherwise as a court may determine; the testimony referred to the same subject matter and was given under oath against the party contesting its admission; and the contesting party had the opportunity to be represented by counsel and cross-examine the witness.

Note

Introduction

The rule sets forth a hearsay exception governing the admissibility of former testimony in civil actions. It encompasses both the statutory former testimony exception for civil actions provided by CPLR 4517 and the former testimony exception recognized in civil actions under the common law.

Part I reproduces CPLR 4517 verbatim, including that statute's numbering system, except for the heading of the statute (Impeachment of witnesses; parties; unavailable witness) which is less informative, if not misleading, given that the statute and its embodiment in this rule simply set forth the requirements for the admissibility of former testimony.

Part II is derived from *Fleury v Edwards* (14 NY2d 334 [1964]) and sets forth the common-law rule on the admission of former testimony that continues to coexist with the statute in a civil case. There is no common-law former testimony exception applicable in criminal proceedings (*People v Harding*, 37 NY2d 130, 133-134 [1975]; see Guide to NY Evid rule 8.36.1).

Part I

Subdivision (a) requires that the former testimony must have been “taken at a prior trial in the same action or at a prior trial involving the same parties or their representatives and arising from the same subject matter.” Cf. Part II: the common-law rule does not require that the former testimony be “taken at a prior trial” (*Siegel v Waldbaum*, 59 AD2d 555, 555 [2d Dept 1977]).

Subdivision (a) proceeds to define the authorized uses of the former testimony in its following paragraphs.

Subdivision (a) (1) provides for the use of the former testimony for impeachment of witnesses.

Subdivision (a) (2) governs the use of former testimony of an adverse party and the *adverse* party's employees.

Subdivision (a) (3) provides for the admissibility of the former trial testimony of a witness who is now deemed to be unavailable (by reason of one of the five categories of unavailability set forth in the rule) to testify against a party who, at the former trial, had an opportunity to cross-examine the party.

Subdivision (a) (4) permits the use of the former testimony of a physician by any party for any purpose without the need to show unavailability or special circumstances, subject to the court's discretion.

For an analysis of those paragraphs, see Vincent C. Alexander, Practice Commentaries (McKinney's Cons Laws of NY, Book 7B, CPLR 4517).

Subdivision (b) sets forth the common-law rule of completeness as applied to former testimony, which is also set forth in Guide to NY Evidence rule 4.03.

Subdivision (c), which provides that the "[s]ubstitution of parties does not affect the right to use testimony previously taken at trial," applies equally to the common-law rule set forth in Part II of this rule.

Part II

Part II sets forth the common-law rule and is derived as noted from *Fleury v Edwards* (14 NY2d 334 [1964]).

In *Fleury*, the Court of Appeals held that the common-law exception was coterminous with CPLR 4517's statutory predecessor. Thus, the common-law rule may provide a basis for the admission of former testimony where the statute does not (*Shaw v New York El. R.R. Co.*, 187 NY 186, 194 [1907] ["evidence was competent under the common law, even if not so under the statute"]).

In *Fleury*, the former testimony was taken not at a prior trial, but at a hearing held by the State Motor Vehicle Bureau. The Court held that the former testimony could be introduced in evidence by the deceased's administratrix at the trial of a personal injury suit against the party the deceased had testified against who had been present at the hearing with counsel and had cross-examined the deceased.

Thus, the first requirement of the common-law rule for the admission of former testimony is that the witness be unavailable. In *Fleury*, the unavailability of the witness was due to the witness's death. Whether the common-law rule extends to other forms of unavailability (e.g., incompetency, beyond the jurisdiction, illness) is an open question.

With respect to the remaining requirements of the common-law rule, the *Fleury* Court stated:

“the prime and essential requirement for [the former testimony’s] use is that it related to the same subject matter as given under oath and against the same party now contesting it with the right in the latter to have counsel present and to cross-examine.” (*Id.* at 339.)

Of note, this common-law rule is not restricted to former testimony at a trial, as required by CPLR 4517 (a) and set forth in Part I, subdivision (a) of this rule, but extends to former testimony “given in any legal proceeding and before any tribunal employing cross-examination as part of its procedure,” which includes administrative hearings (*id.* at 338 [driver’s license revocation hearing]). (See *Siegel*, 59 AD2d at 555 [allowing testimony of a deceased given in an examination before trial]; *but see* CPLR 3117 [Use of depositions].)

8.37. Prompt Outcry

Evidence that the victim of a sexual assault promptly reported the matter to another person is admissible:

- (1) for the purpose of assessing the credibility of the complainant with respect to the commission of the offense; or**
- (2) when relevant, and to the extent necessary, to explain the investigative process and complete the narrative of events leading to the defendant's arrest.**

Note

This rule is derived from substantial Court of Appeals precedent holding that in a sex offense criminal prosecution, evidence that the victim of the crime reported the assault shortly after it occurred is admissible as bearing on his or her credibility, a non-truth purpose. (See e.g. *People v Rosario*, 17 NY3d 501, 515 [2011]; *People v McDaniel*, 81 NY2d 10, 16-17 [1993]; *People v Rice*, 75 NY2d 929, 932 [1990]; *People v Deitsch*, 237 NY 300, 304 [1923]; *People v O'Sullivan*, 104 NY 481, 486 [1887]; *Baccio v People*, 41 NY 265 [1869].) In essence, it is “admissible to corroborate the allegation that an assault took place.” (*McDaniel*, 81 NY2d at 16; see also *Rosario*, 17 NY3d at 511 [viewing the rule as “an exception to the inadmissibility of the prior consistent statements of an unimpeached witness”].)

The “premise” for this evidence, as stated by the Court, is that “prompt complaint was ‘natural’ conduct on the part of an ‘outraged [complainant],’ and failure to complain therefore cast doubt on the complainant's veracity; outcry evidence was considered necessary to rebut the adverse inference a jury would inevitably draw if not presented with proof of a timely complaint.” (*Rice*, 75 NY2d at 931.)

There are two limitations to admissibility under this rule. First, the complaint must be made promptly, which requires it to be made “at the first suitable opportunity.” (See *Rosario*, 17 NY3d at 512, 515; *People v Shelton*, 1 NY3d 614, 615 [2004].) What constitutes the first suitable opportunity “is a relative concept dependent on the facts.” (*McDaniel*, 81 NY2d at 17; see also *O'Sullivan*, 104 NY at 489 [noting “circumstances which will excuse delay”].) Second, only the fact of complaint, and not the details, is normally admissible. (See *Rice*, 75 NY2d at 932

[error to admit description of the assailant under the rule]; *Deitsch*, 237 NY at 304 [same]; *Baccio v People*, 41 NY 265, 269 [1869] [“particulars of the complaint” not within the rule].) This limitation, however, does not preclude the potential admissibility of the content of the statement under an exception to the hearsay rule such as the excited utterance exception. (See *People v Brewer*, 28 NY3d 271, 278 [2016] [“brief account of what (complainant) told (complainant’s) mother can be viewed as both a prompt outcry and an excited utterance”].)

While the prompt outcry rule has been developed and applied by the Court of Appeals in criminal sexual offense proceedings, the Court’s rationale for the rule suggests it is equally applicable in other proceedings involving the commission of a sexual assault or offense. The Appellate Division, First Department, has recognized the potential admissibility of prompt outcry evidence at fact-finding hearings in Family Court. (*Matter of Dandre H.*, 89 AD3d 553 [1st Dept 2011]; *Matter of Brown v Simon*, 123 AD3d 1120, 1121 [2d Dept 2014].) The Appellate Division, First Department, has also held in a malicious prosecution action commenced by the plaintiff after he was found not guilty of the crime of rape that the prompt outcries of the victim were admissible to corroborate her testimony that an assault had taken place. (*Moorhouse v Standard, N.Y.*, 124 AD3d 1, 5-6 [1st Dept 2014].)

The Court of Appeals has held that a child's belated report of sexual abuse by the defendant, which was testified to by the child as well as by two relatives, was properly admitted for the purpose of “explaining the investigative process and completing the narrative of events leading to the defendant’s arrest.” (See *People v Ludwig*, 24 NY3d 221, 230-234 [2014]; *People v Cullen*, 24 NY3d 1014, 1016 [2014].)

8.39. Reputation Evidence

(1) Character Trait.

(a) Evidence of reputation among a “community of individuals” of a person’s character trait is admissible when that character trait is provable.

(b) A “community of individuals” exists wherever the person’s associations are of such quantity and quality as to permit the person to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability of that reputation.

(c) The foundation for the admission of such reputation evidence requires that a witness testify to views of a sufficient number of individuals who have had sufficient experience with the person whose reputation is being testified to.

(d) Reputation may not be proved by evidence of specific acts of a person, or by a witness’s opinion of a person’s character.

(e) Notwithstanding subdivision (1) (a), evidence of a defendant’s bad reputation for a relevant character trait is not admissible unless the defendant first offers evidence of his or her good reputation for that character trait.

(2) Pedigree. Evidence of reputation within a family, before the controversy in issue arose, as to matters of pedigree, such as birth, death, lineage, marriage, legitimacy and relationships between and among family members, is admissible.

(3) Lands. Evidence of long-standing reputation in the relevant community as to boundaries of, or customs affecting, lands in issue, existing before the controversy arose, is admissible.

Note

Subdivision (1) (a) is derived from Court of Appeals precedents which hold that reputation evidence of a person's relevant character trait when otherwise admissible may be used for its truth. (See *People v Bouton*, 50 NY2d 130, 139 [1980] [reputation evidence when admissible "may in and of itself give rise to a reasonable doubt of guilt where none would otherwise exist"], citing *People v Trimarchi*, 231 NY 263, 266 [1921]; *People v Colantone*, 243 NY 134, 136 [1926] ["This court has frequently stated that evidence of good character is a matter of substance, not of form, in criminal cases, and must be considered by the jury as bearing upon the issue of guilt"].)

Subdivision (1) (b) is derived from *People v Fernandez* (17 NY3d 70, 76 [2011]) wherein the Court of Appeals noted:

"[W]e rejected [in *People v Bouton*] the notion that one's community was restricted to 'one's residential neighborhood.' Rather, we observed that '[a] reputation may grow *wherever* an individual's associations are of such quantity and quality as to 'permit him to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability' " (citations omitted).

In *People v Bouton* (50 NY2d at 139), the Court had observed that a person "might be better known in the community of his employment and in the circle of his vocational fellows, where opportunities to evidence the traits at stake may occur with greater frequency than in the environs of his dwelling place, nestled in the anonymity of a large city or suburb."

Subdivision (1) (c) is derived from *People v Fernandez* (17 NY3d at 77 [a proper foundation is laid when a witness reports "views of a sufficient number of people" who have had "sufficient experience" with the person in question]) and *People v Hanley* (5 NY3d 108, 113-114 [2005] [a proper foundation was laid when the witness "worked in a close setting with (the person) and regularly interacted and communicated with the same group of people"]).

Subdivision (1) (d) and (e) reflect the Court of Appeals statement in *People v Kuss* (32 NY2d 436, 443 [1973]) that "[w]hether the defendant's character will become an issue in the trial is the defendant's option, for until he introduces evidence of good character the People are precluded from showing that it is otherwise. And although character is the issue (i.e., the unlikelihood of the defendant's committing the crime), reputation is the only proof which the law allows. Neither the defendant nor the prosecutor may introduce evidence of particular acts tending to prove or rebut the defendant's good character" (citations omitted). (See also *People v Bouton*, 50 NY2d at 139 [wherein the Court stated that

reputation is “the aggregate tenor of what others say or do not say about him” and “is the raw material from which that character may be established”].)

Subdivision (2) is derived from *Badger v Badger* (88 NY 546, 556 [1882] [the application of reputation evidence “to cases of pedigree . . . is justified by difficulties of proof, and (is) confined generally to the family and relatives whose knowledge is assumed, and who have spoken before a controversy arisen”]) and *McKinnon v Bliss* (21 NY 206, 217 [1860] [“That hearsay or reputation is admissible as evidence, upon questions of pedigree or family relationship, . . . is a familiar doctrine”]).

The proof of pedigree by means other than reputation evidence is governed by Guide to New York Evidence rule 8.33.

Subdivision (3) is derived from *McKinnon v Bliss* (21 NY at 217), wherein the Court of Appeals stated: “That hearsay or reputation is admissible . . . upon questions respecting the boundaries of lands . . . is a familiar doctrine.” (See also *Village of Oxford v Willoughby*, 181 NY 155, 160-161 [1905] [“accepted belief of the community” as to location of public road]; *Hannah v Baylon Holding Corp.*, 34 AD2d 792 [2d Dept 1970] [in action to determine boundary lines, Court held evidence of reputation regarding boundaries insufficient to invoke “reputation” exception], *revd on other grounds* 28 NY2d 89 [1971] [declarations of a deceased person who owned or was in possession of land, as to the boundary line between him and the land of another, were admissible as an exception to the hearsay rule and were sufficient to establish boundary lines]; *Gardner v Town of Claverack*, 22 NYS2d 265, 268-269 [Sup Ct, Columbia County 1940], *affd* 259 App Div 1111 [3d Dept 1940].)

8.41. State of Mind

(1) An out-of-court statement by a declarant describing the declarant's state of mind at the time the statement was made, such as intent, plan, motive, design, or mental condition and feeling, but not including a statement of memory or belief to prove the fact remembered or believed, is admissible, even though the declarant is available as a witness.

(2) An out-of-court statement by a declarant describing the declarant's physical condition at the time the statement is made is admissible provided the declarant is unavailable at the time of the proceeding.

Note

Subdivision (1) is derived from several Court of Appeals decisions that recognize this exception (*see e.g. People v Reynoso*, 73 NY2d 816, 819 [1988] ["While such declarations may be received to show the declarant's state of mind at the time the statement was made, they are not admissible to establish the truth of past facts contained in them," such as a statement to a third party made after a shooting that the defendant believed the victim was armed]; *Matter of Putnam*, 257 NY 140, 145 [1931] ["mental conditions and feelings"]; *Schultz v Third Ave. R.R. Co.*, 89 NY 242, 248-249 [1882] [feelings of hostility]; *see also Hine v New York El. R.R. Co.*, 149 NY 154, 162 [1896] [statement as to motive admitted as part of *res gestae*]).

The exception for "memory or belief," initially recognized in *Shepard v United States* (290 US 96 [1933, Cardozo, J.]), has been consistently recognized by the Court of Appeals (*see People v Vasquez*, 88 NY2d 561, 580 [1996]; *Reynoso*, 73 NY2d at 819).

Statements regarding the declarant's present pain or then-existing physical condition are not within the exception set forth in subdivision (1) (*see Davidson v Cornell*, 132 NY 228 [1892]; *Roche v Brooklyn City & Newtown R.R. Co.*, 105 NY 294 [1887]). See subdivision (2) and the Note thereto.

For the rules governing a statement of future intent, see Guide to New York Evidence rule 8.42.

Subdivision (2) is derived from *Tromblee v North Am. Acc. Ins. Co.* (173 App Div 174, 176 [3d Dept 1916], *aff'd* 226 NY 615 [1919]), which held that a statement made by a declarant concerning the declarant's present physical condition after an accident was admissible where the declarant was deceased at the time of the trial (*but see Crawford v Washington*, 541 US 36 [2004]).

Such a statement may be admissible, however, even though the declarant is available where the statement is admissible as one made to a health care professional under Guide to New York Evidence rule 8.43 (*see People v Duhs*, 16 NY3d 405, 408 [2011]), or the statement is admissible as an excited utterance under rule 8.12 or as a present sense impression under rule 8.15 (*see e.g. People v McCray*, 102 AD3d 1000, 1009 [3d Dept 2013]; *Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]; *Hyung Kee Lee v New York Hosp. Queens*, 118 AD3d 750 [2d Dept 2014]).

8.43. Statement Made for Medical Diagnosis or Treatment

A statement made by a declarant to a health care professional for purposes of medical treatment and diagnosis which describes medical history, or past or present symptoms, pain or sensations, or their general cause, and is germane to diagnosis or treatment is not excluded by the hearsay rule even though the declarant is available to testify.

Note

This formulation is derived from several Court of Appeals decisions.

In *Davidson v Cornell* (132 NY 228, 237-238 [1892]), the Court recognized a hearsay exception for statements by a person to his or her physician “indicating pain or distress or expressive of the present state of his feelings,” which were made for purposes of treatment and diagnosis. The basis for this exception was the existence of a “strong inducement for the patient to speak truly of his pains and sufferings.” (*Id.* at 237.) However, statements relating to past pain and suffering were not within this exception. (*Id.*)

Three recent decisions of the Court of Appeals, *People v Ortega* (15 NY3d 610, 617-620 [2010]), *People v Duhs* (16 NY3d 405, 408 [2011]) and *People v Spicola* (16 NY3d 441, 451 [2011]), broadened the scope of the exception as initially recognized in *Davidson*.

In *Ortega*, the Court held that a patient’s statements as made to medical staff about the cause of his or her injuries, “domestic violence,” and the need for a “safety plan” were admissible as they were relevant to treatment and diagnosis. Thus, in the context of domestic violence and sexual assault cases, the Court of Appeals has recognized as a general proposition that how a patient was injured is germane to diagnosis and treatment because it concerns not only how to treat physical injuries, but also whether and what psychological and trauma issues need to be medically addressed and the development of a safety plan upon discharge. (See *People v Ortega*, 15 NY3d at 617.) Further, the Court of Appeals has observed that in a domestic violence case, statements by the victim to a health care professional regarding a victim’s abuser can be relevant to physical and psychological remediation. (See *People v Ortega*, 15 NY3d at 617-620.) The Court has not specifically addressed whether the declarant’s identification of the individual who caused his or her injury is germane to treatment in other situations.

In *Duhs*, the Court held a child's statement to a pediatrician concerning the cause of his injuries was admissible as it was relevant to treatment and diagnosis.

In *Spicola*, the Court held a statement by a teenage boy to a nurse practitioner at a child advocacy center describing how he was sexually abused six to seven years before was admissible as it was germane to treatment and diagnosis. These statements were admissible "as an exception to the hearsay rule" as they were prompted by the "strong inducement for the patient to speak truly." (See *People v Duhs*, 16 NY3d at 408; *People v Spicola*, 16 NY3d at 451.)

Care need be taken that the statement is germane to diagnosis and treatment, and thus admissible. In *Williams v Alexander* (309 NY 283, 288 [1955] [emphasis and citations omitted]), for example, the Court explained:

"In some instances, perhaps, the patient's explanation as to how he was hurt may be helpful to an understanding of the medical aspects of his case; it might, for instance, assist the doctors if they were to know that the injured man had been struck by an automobile. However, whether the patient was hit by car A or car B, by car A under its own power or propelled forward by car B, or whether the injuries were caused by the negligence of the defendant or of another, cannot possibly bear on diagnosis or aid in determining treatment. That being so, entries of this sort, purporting to give particulars of the accident, which serve no medical purpose, may not be regarded as having been made in the regular course of the hospital's business." (*Compare Benavides v City of New York*, 115 AD3d 518 [1st Dept 2014] [plaintiff's treating physicians did not need to know whether plaintiff jumped or was pushed off the fence in order for the physicians to determine what medical testing plaintiff needed], and *Nelson v Friends of Associated Beth Rivka Sch. for Girls*, 119 AD3d 536 [2d Dept 2014] [in action where the cause of child's fall was in issue, statement that child fell from monkey bars as opposed to a ladder was held germane to treatment].)

Where statements that are not admissible under this exception are contained in a medical record which is otherwise admissible, such statements must be redacted from the record before the record is received in evidence. (See *People v Ortega*, 15 NY3d at 622-623 [Pigott, J., concurring], citing *People v Johnson*, 70 AD3d 1188, 1191 [3d Dept 2010, Stein, J.].)

ARTICLE 8. HEARSAY

8.00. Definition of Hearsay

(1) Hearsay is an out of court statement of a declarant offered in evidence to prove the truth of the matter asserted in the statement.

(2) The declarant of the statement is a person who is not a witness at the proceeding, or if the declarant is a witness, the witness uttered the statement when the witness was not testifying in the proceeding.

(3) A statement of the declarant may be written or oral, or non-verbal, provided the verbal or non-verbal conduct is intended as an assertion.

Note

This section sets forth the definition of hearsay which is generally applied by the courts. (See *People v Nieves*, 67 NY2d 125, 131 [1986] [the statements in issue “constituted hearsay evidence, as they were made out of court and were sought to be introduced for the truth of what she asserted. Accordingly, they were admissible only if the People demonstrated that they fell within one of the exceptions to the hearsay rule” (citations omitted)]; see also *People v Caviness*, 38 NY2d 227, 230 [1975]; *Felska v New York Cent. & Hudson Riv. R.R. Co.*, 152 NY 339, 342 [1897].)

Hearsay admitted without objection may properly be considered by the trier of fact and can be given such probative value as under the circumstances it may possess. (See *Matter of Findlay*, 253 NY 1, 11 [1930]; *Ford v Snook*, 205 App Div 194, 198 [4th Dept 1923], *affd* 240 NY 624 [1925].) However, the Appellate Division may in the interest of justice reverse or modify a judgment for error in admitting hearsay even though no objection was made at trial. (See *Alexander v State of New York*, 36 AD2d 777, 778 [3d Dept 1971] [“It is well established that in the interest of justice we have the right to reverse a judgment and grant a new trial where there is fundamental trial error, even though no objection was taken at the trial”]; *People v Clegg*, 18 AD2d 694 [2d Dept 1962]; CPL 470.15 [3] [c]; [6] [a].) The Court of Appeals review power is much more limited as it is precluded from reviewing a claim of error when no proper objection was made at trial except where the claim falls within “the narrow class

of mode of proceedings errors for which preservation is not required.” (*People v Mack*, 27 NY3d 534, 536 [2016].) The Court of Appeals has never held that a claim of error in the admission of hearsay to which no objection was made, much less a general claim of error in the admission of evidence generally, is a “mode of proceedings” error.

Subdivision (1). No statement made by a declarant is inherently hearsay. Whether the statement is hearsay turns on the purpose for which it is offered. Thus, where the statement is offered for its truth, or has no relevant purpose other than a truth purpose, the statement is deemed hearsay. (*See People v Steiner*, 30 NY2d 762, 763 [1972].)

However, a statement which is not offered to prove the truth of the matter asserted therein is not hearsay. (*See People v Salko*, 47 NY2d 230, 239 [1979] [“If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the hearsay rule does not apply” (internal quotation marks omitted)]; *People v Becoats*, 17 NY3d 643, 656 [2011] [there was no need for defendant to rely upon a hearsay exception because he was not offering the out-of-court statements for their truth].)

If the statement is not offered for its truth, and is offered merely to show that the words were uttered or the conduct was engaged in, the issue of admissibility then becomes whether it is relevant and whether its probative value is substantially outweighed by the potential of unfair prejudice to the party against whom the statement is admissible. (*See Guide to NY Evid rule 4.07.*) There are many non-truth purposes for statements offered into evidence which the Court of Appeals has recognized. For example:

- A statement of a declarant which is heard by another and provides evidence of the hearer’s state of mind. (*See People v Waters*, 90 NY2d 826 [1997]; *Ferrara v Galluchio*, 5 NY2d 16, 20 [1958].)
- A statement of a declarant which provides evidence of the declarant’s state of mind. (*See People v Ricco*, 56 NY2d 320 [1982]; *Loetsch v New York City Omnibus Corp.*, 291 NY 308, 310-311 [1943].)
- A statement of a testifying witness which may be inconsistent with the witness’s testimony and thereby tend to impeach the witness’s credibility. (*See Larkin v Nassau Elec. R.R. Co.*, 205 NY 267, 268-269 [1912].)
- A timely complaint of a sexual assault by the victim, known as “prompt outcry.” (*See People v McDaniel*, 81 NY2d 10, 16-17 [1993].)

- A statement of the victim of a crime describing the purported perpetrator of the crime. (See *People v Huertas*, 75 NY2d 487 [1990]; *People v Smith*, 22 NY3d 462 [2013].)
- A statement which provides an explanation of the conduct of a police investigation or simply completes the narrative of events leading to the defendant's arrest. (See *People v Gross*, 26 NY3d 689, 695 [2016]; *People v Ludwig*, 24 NY3d 221, 231 [2014].)
- A statement which has a legally operative effect under the substantive law (see *People v Caban*, 5 NY3d 143, 149-150 [2005] ["verbal act"]); or where conduct is ambiguous, which, accompanies the conduct and tends to explain or characterize it (see *People v Salko*, 47 NY2d 230, 239 [1979] ["verbal part of an act"]).
- A "flow diagram" offered as an aid to the jury to understand a doctor's testimony that he had followed a set of guidelines. (See *Hinlicky v Dreyfuss*, 6 NY3d 636 [2006].)

Subdivision (2). While no Court of Appeals decision has set forth a definition of "declarant," the term, in accord with its normal meaning, has been commonly used by the Court to mean a person who makes an extrajudicial statement. (See *People v James*, 93 NY2d 620, 630-631 [1999]; *People v Settles*, 46 NY2d 154, 166-167 [1978].) In connection with this definition, the courts have recognized that while the usual situation will involve the offered testimony of a witness who will testify about what he or she heard someone else say at a time prior to the trial or hearing, a declarant for purposes of the hearsay rule may also be a witness who seeks to testify about his or her own pre-trial statement. (See *People v Buie*, 86 NY2d 501 [1995] [witness permitted to testify to a statement she made prior to trial because it was admissible under the present sense impression hearsay exception].)

It should also be noted that since the declarant is defined to be a "person," any statement generated from mechanical sources, other than data inputted by humans and subsequently retrieved, will not constitute hearsay. (See *People v Towsley*, 85 AD3d 1549 [4th Dept 2011] [canine tracking evidence not barred by hearsay rule]; *People v Stultz*, 284 AD2d 350 [2d Dept 2001] [testimony regarding the telephone caller ID number displayed on victim's telephone not barred by hearsay rule since the number as displayed was not made by a person].)

Subdivision (3). As recognized by the courts, a statement within the hearsay definition can be verbal, written or oral, or non-verbal, provided the verbal or non-verbal conduct is intended as an assertion, e.g., an expressive communication. (See e.g. *People v Salko*, 47 NY2d 230, 238-241 [1979] [the hearsay rule has, "as a general rule, no application to an act which is not intended to serve as an expressive communication"]; see also *People v Spicola*, 16 NY3d 441, 452 n 2 [2011] [infant's flushed skin and elevated heart rate, as testified to,

not “statements”]; *People v Madas*, 201 NY 349, 354 [1911] [identifying perpetrator by pointing to him a communicative gesture and therefore hearsay but admissible as a dying declaration]; *Roche v Brooklyn City & Newtown R.R. Co.*, 105 NY 294 [1887] [involuntary expressions and exclamations of pain not hearsay].)

8.01. Admissibility of Hearsay

(1) (a) Hearsay is not admissible unless it falls within an exception to the hearsay rule as provided by decisional law or statute and is permissible under the Federal Constitution and New York Constitution as provided in rule 8.02, or as provided in subdivision (1)(b) below.

(b) The Federal and New York State Constitutions require the admission of hearsay not encompassed within a hearsay exception when the court finds that the declarant is unavailable to testify and the hearsay is material, exculpatory and has sufficient indicia of reliability.

(c) New York law does not currently recognize the “residual exception” to the hearsay rule set forth in Federal Rules of Evidence rule 807.

(2) The burden of establishing the applicability of an exception rests upon the proponent of the statement.

(3) A statement which is not offered for its truth is not barred by the hearsay rule.

Note

Subdivision (1) (a). This subdivision is derived from *Nucci v Proper* (95 NY2d 597, 602 [2001] [Hearsay statements “may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule”). It also reflects the Court of Appeals holdings that defendant has the constitutional right to introduce hearsay but under strict conditions set forth in subdivision (1) (b). (See e.g. *People v Robinson*, 89 NY2d 648, 650 [1997].)

New York evidence law provides for numerous hearsay exceptions, each with specific requirements which must be fulfilled before the statement is admissible. (See *People v James*, 93 NY2d 620, 634-635 [1999].) The source of these exceptions is both statutory and decision law. Statutory exceptions can be found in CPLR article 45 and CPL article 60, and throughout the consolidated

laws. The judicially created exceptions are part of New York's common law of evidence. (See *Fleury v Edwards*, 14 NY2d 334, 340 [1964 Fuld, J., concurring] ["The common law of evidence is constantly being refashioned by the courts of this . . . jurisdiction() to meet the demands of modern litigation. Exceptions to the hearsay rule are being broadened and created where necessary."]; see also *People v Lynes*, 64 AD2d 543 [1978], affd 49 NY2d 286 [1980] [the determination of preliminary questions of fact on the admissibility of evidence "is not restricted by the ordinary exclusionary rules of evidence"].)

Subdivision (1) (b). The applicability of a hearsay exception may be dictated by the Constitution of New York or the United States, which both recognize that "a [criminal] defendant has a constitutional right to present a defense." (*People v Hayes*, 17 NY3d 46, 53 ([2011]; *Chambers v Mississippi*, 410 US 284, 294 [1973]), and a "[criminal] defendant's right to due process requires admission of hearsay evidence when [the] declarant has become unavailable to testify and 'the hearsay testimony is material, exculpatory and has sufficient indicia of reliability'" (*People v Burns*, 6 NY3d 793, 795 [2006]), quoting *People v Robinson*, 89 NY2d at 650, *supra* [emphasis omitted]).

Subdivision (1) (c). This subdivision makes it clear that New York has not approved of a "residual exception" similar to Federal Rules of Evidence rule 807. (See *People v Nieves*, 67 NY2d 125, 131 [1986] ["we are not prepared at this time to abandon the well-established reliance on specific categories of hearsay exceptions in favor of an amorphous 'reliability' test, particularly in criminal cases where to do so could raise confrontation clause problems"].)

Subdivision (2). This subdivision restates New York's well established rule, as stated in *Tyrrell v Wal-Mart Stores* (97 NY2d 650, 652 [2001]), that "[t]he proponent of hearsay evidence must establish the applicability of a hearsay-rule exception."

Subdivision (3). This subdivision states expressly that which is implicit from the definition of hearsay set forth in Guide to New York Evidence rule 8.00 (1). (See *People v Ricco*, 56 NY2d 320, 328 [1982] ["a relevant extrajudicial statement introduced for the fact that it was made rather than for its contents . . . is not interdicted by the hearsay rule"].)

8.02 Admissibility Limited by Confrontation Clause (*Crawford*)¹

(1) Confrontation rule in a criminal prosecution. A “testimonial statement” of a person who does not testify at trial is not admissible against a defendant for the truth of the statement, unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination, or the defendant engaged or acquiesced in wrongdoing that was intended to and did procure the unavailability of the witness.

(2) Testimonial statement, in general.

A hearsay statement is testimonial when it consists of:

(a) prior testimony at a preliminary hearing, before a grand jury, or at a former trial;

(b) an out-of-court statement in which

(i) state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial; or

(ii) absent a formal interrogation, the circumstances demonstrate that the “primary purpose” of an exchange was to procure an out-of-court statement to prove criminal conduct or past events potentially relevant to a later criminal prosecution, or otherwise substitute for trial testimony.

(3) Statement to police.

A statement made to the police is not testimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. The

statement to the police is testimonial when the circumstances objectively indicate that there is no ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution. A statement obtained by the police in a formal station house interrogation for that stated purpose is thus testimonial.

(4) Statement to a court.

A defendant's guilty plea allocution that implicates a codefendant is a testimonial statement and may not therefore be admitted at the trial of the codefendant in the absence of an opportunity for the codefendant to cross-examine the defendant.

(5) Statement made for the safety or treatment of a person.

(a) A statement of a student made in response to an inquiry of an educator is not testimonial when the primary purpose of the inquiry was to provide for the safety of the child.

(b) A statement of a patient made in response to an inquiry by a physician is not testimonial when the primary purpose of the inquiry was to diagnose the patient's condition and administer medical treatment.

(6) Forensic Report.

(a) A forensic report is a testimonial statement when the primary purpose of the report is to provide evidence at trial that explicitly links the defendant to a crime. A testimonial forensic report includes one that identifies an item connected to the defendant as an illegal drug, or delineates the blood-alcohol content of a

defendant's blood, or identifies the defendant through a fingerprint analysis or through a DNA analysis of incriminating evidence.

(b) A testimonial forensic report entitles a defendant to be confronted, as defined in subdivision one, with either the person who made the forensic report or with a person who is a trained analyst who supervised, witnessed or observed the testing, even without having personally conducted it.

(c) Nontestimonial reports include:

(i) an autopsy report prepared by a medical examiner and describing only the observations and measurements of the deceased that does not link the commission of a crime to a particular person;

(ii) documents pertaining to the routine inspection, maintenance, and calibration of a breathalyzer machine; and

(iii) a report setting forth raw data of a DNA profile generated from an item in the contents of a rape kit before the defendant was a suspect in the crime.

(7) "Opening the door evidence." Unconfronted testimonial hearsay is not admissible in response to evidence introduced by a defendant in a criminal case that is misleading even though the misleading evidence would be subject to correction by the unconfronted testimonial hearsay.

Note

Subdivision (1). The Confrontation Clause of the US Constitution Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy

the right . . . to be confronted with the witnesses against him.” That Clause applies to the states through the Fourteenth Amendment of the US Constitution (*Pointer v Texas*, 380 US 400, 406 [1965]), and therefore limits the admissibility of “testimonial” hearsay statements that may otherwise be admissible under state law.

The parameters of “confrontation” are defined in subdivision (1) in accord with *Crawford v Washington* (541 US 36, 42 [2004]) and *Giles v California* (554 US 353, 367 [2008]).

In *Crawford*, the Supreme Court held that

“[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination” (*Crawford v Washington*, 541 US at 68).

Crawford, however, does not extend to a testimonial statement admitted “for purposes other than establishing the truth of the matter asserted” (*Crawford v Washington*, 541 US at 59 n 9; *Williams v Illinois*, 567 US 50, 57-58 [2012] [plurality op], and at 125-126 [dissenting op]; *People v Garcia*, 25 NY3d 77, 86 [2015]; *People v Reynoso*, 2 NY3d 820, 821 [2004]).

Nor does *Crawford* apply to the admission of testimonial statements at a sentencing proceeding (*People v Leon*, 10 NY3d 122, 125-126 [2008]), or in a grand jury proceeding.

Last, a defendant may forfeit the right of confrontation where the defendant engaged or acquiesced in wrongdoing that was intended to and did procure the witness’s unavailability (*Giles*; see also Guide to NY Evid rule 8.19, Forfeiture by Wrongdoing, http://www.courts.state.ny.us/judges/evidence/8-HEARSAY/8.19_FORFEITURE%20BY%20WRONGDOING.pdf; Fed Rules Evid rule 804 [b] [6]; see also *People v Geraci*, 85 NY2d 359, 366 [1995] [“out-of-court statements, including Grand Jury testimony, may be admitted as direct evidence where the witness is unavailable to testify at trial and the proof establishes that the witness’s unavailability was procured by misconduct on the part of the defendant”]).

Subdivision (2) (a) is derived from *Crawford*’s declaration that “[w]hatever else the term [testimonial evidence] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial” (*Crawford*, 541 US at 68).

Subdivision (2) (b) (i) is derived from *Crawford* (541 US at 68), which itself directly held inadmissible a witness’s statement obtained by formal station house interrogation (541 US at 68); and *Michigan v Bryant* (562 US 344, 358

[2011]), which declared that “the most important instances in which the [Confrontation] Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.” (See *People v Goldstein*, 6 NY3d 119, 129 [2005] [(T)he statements made to (the expert) by her interviewees were testimonial. . . . (The interviewees) knew they were responding to questions from an agent of the State engaged in trial preparation. None of them was making ‘a casual remark to an acquaintance’; all of them should reasonably have expected their statements ‘to be used prosecutorially’ or to ‘be available for use at a later trial.’ . . . Responses to questions asked in interviews that were part of the prosecution’s trial preparation are ‘formal’ in much the same sense as ‘depositions’ and other materials that the Supreme Court identified as testimonial”).)

Subdivision (2) (b) (ii). The rule that, absent a formal investigation, a statement is testimonial when the “primary purpose” of questioning was to prove criminal conduct or past events relevant to a criminal prosecution is derived from *Davis v Washington* (547 US 813, 822 [2006] [statements “are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution”]; see *Michigan v Bryant*, 562 US 344, 358, 366, 370 [2011] [“although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent” (citation and internal quotation marks omitted)]; *People v John*, 27 NY3d 294, 307 [2016] [deeming the primary purpose test essential to determining whether particular evidence is testimonial hearsay requiring the declarant to be a live witness at trial]).

That a statement is testimonial when its primary purpose is to create a substitute for trial testimony is derived from *Bryant* (562 US at 358 [“When . . . the primary purpose of an interrogation is to respond to an ‘ongoing emergency,’ its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute”]; accord *Ohio v Clark*, 576 US 237, 238 [2015]; *People v John*, 27 NY3d at 307 [a “statement will be treated as testimonial only if it was procured with a primary purpose of creating an out-of-court substitute for trial testimony (*People v Pealer*, 20 NY3d 447, 453 [2013], quoting *Michigan v Bryant*” (internal quotation marks omitted)]; see *People v Pacer*, 6 NY3d 504, 512 [2006]; *Pealer* at 453 [an affidavit of an employee of the Department of Motor Vehicles attesting to the revocation of an accused’s license in a prosecution was testimonial because it “had an accusatory purpose in that it provided proof of an element of the crime and resembled testimonial hearsay”])).

Subdivision (3) is derived from *Davis v Washington* (547 US at 822) which decided two cases. In the first case, a 911 caller’s statements relating to an ongoing assault, including the identification of her assailant, were not testimonial, given that the “primary purpose” of the statements was to obtain help (*People v Nieves-Andino*, 9 NY3d 12, 17 [2007]; *People v Bradley*, 8 NY3d 124, 127 [2006]). In the second case, the police, responding to a “domestic disturbance” call, found no ongoing emergency, and thus statements in response to their questions as to what happened were testimonial. (See *Michigan v Bryant*, 562 US at 349 [where the police found a mortally wounded person lying on the ground in a parking lot of a gas station, the victim’s statement identifying his assailant, in response to police questions, was admissible because the “ ‘primary purpose of the interrogation’ was ‘to enable police assistance to meet an ongoing emergency’ ”].)

Subdivision (4) is derived from *People v Hardy* (4 NY3d 192 [2005]) and *People v Douglas* (4 NY3d 777 [2005]).

Subdivision (5) (a) is derived from *Ohio v Clark* (576 US at 249-250 [“(M)andatory reporting (obligations) . . . cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution. It is irrelevant that the teachers’ questions and their duty to report the matter had the natural tendency to result in Clark’s prosecution”]).

Subdivision (5) (b) is derived from *People v Duhs* (16 NY3d 405, 408-409 [2011] [a child’s responses to a medical doctor questioning the child for purposes of treatment was not testimonial]).

Subdivision (6) (a) is derived from *Melendez-Diaz v Massachusetts* (557 US 305 [2009] [drug analysis]); *Bullcoming v New Mexico* (564 US 647 [2011] [blood-alcohol content]); *People v Rawlins* (10 NY3d 136, 157 [2008] [fingerprint report]); *People v John* (27 NY3d at 307-308 [DNA report that linked the defendant to possession of the weapon he was charged with possessing]); and *People v Austin* (30 NY3d 98, 104 [2017] [buccal swab was obtained and the resulting profile was compared with the DNA profile generated from the burglaries “with the primary (truly, the sole) purpose of proving a particular fact in a criminal proceeding—that defendant . . . committed the crime for which he was charged”]).

Subdivision (6) (b) is derived from *Bullcoming* (564 US at 651 [holding that a surrogate analyst who was familiar with the laboratory’s testing procedures, but “had neither participated in nor observed the test,” did not satisfy the Confrontation Clause requirement]); and *People v Hao Lin* (28 NY3d 701, 705 [2017]) from which the language of subdivision (6) (b) is taken. In *Hao Lin*, a retired officer performed the “breath test” and the officer who testified observed him “perform all of the steps on the checklist and saw the breathalyzer machine print out the results. Based upon his personal observations, Mercado—as a trained and certified operator who was present for the entire testing protocol—was a

suitable witness to testify about the testing procedure and results in defendant’s test. Inasmuch as Mercado testified as to his own observations, not as a surrogate for Harriman, there was no Confrontation Clause violation.” (*Id.* at 707; *see People v John*, 27 NY3d at 314 [(T)he claim of a need for a horde of analysts is overstated and a single analyst, particularly the one who performed, witnessed or supervised the generation of the critical numerical DNA profile, would satisfy the dictates of *Crawford* and *Bullcoming*”).)

Subdivision (6) (c) (i) is derived from *People v Freycinet* (11 NY3d 38, 42 [2008] [an autopsy report]). Caveat: Contrary to *Freycinet*, the United States Court of Appeals for the Second Circuit has held that an autopsy report was a testimonial document, regardless of whether it linked the defendant to a crime. (*Garlick v Lee*, 1 F4th 122 [2d Cir 2021], *cert denied* 595 US —, 142 S Ct 1189 [2022].)

Subdivision (6) (c) (ii) and (iii) are derived from *People v Pealer* (20 NY3d at 455-456 [with respect to a breathalyzer machine, the Court noted that “*Melendez-Diaz* recognized the possibility that records ‘prepared in the regular course of equipment maintenance’—precursors to an actual breathalyzer test of a suspect—‘may well qualify as nontestimonial records’ (557 US at 311 n 1). It may reasonably be inferred that the primary motivation for examining the breathalyzer was to advise the . . . Police Department that its machine was adequately calibrated and operating properly”]); *People v Meekins* (10 NY3d 136, 159-160 [2008] [decided with *Rawlins*]); and *People v Brown* (13 NY3d 332, 340 [2009] [a DNA raw data profile before the defendant was a suspect]). In *People v John*, however, the Court cautioned that “our focus in both of those cases [*Meekins* and *Brown*] was that extrajudicial facts were shepherded into evidence by a testifying expert whose subsequent independent analysis of that raw data provided the assurance that the DNA profile generated was accurate. Our sharpest focus was on the final stage of the DNA typing results, to wit, the generated DNA profile” (27 NY3d at 310; *see People v Austin*, 30 NY3d at 104).

Subdivision (7) is derived from *Hemphill v New York* (595 US —, 142 S Ct 681 [2022]). Contrary to the principle set forth in *People v Reid* (19 NY3d 382 [2012]) that was applied in *People v Hemphill* (173 AD3d 471 [1st Dept 2019], *affd* 35 NY3d 1035 [2020]), the Supreme Court held that the “opening the door to evidence” principle must not permit the introduction of evidence in violation of the Sixth Amendment’s Confrontation Clause. In *Hemphill*, the defense to a murder indictment rested upon a claimed third party’s culpability; in accord with New York’s then “opening the door to evidence” principle, the trial court allowed the introduction of the third party’s guilty plea when the third party was unavailable to testify. The parties did not dispute that the third party’s guilty plea was “testimonial” hearsay, and the Supreme Court then held its admission to be in violation of the Confrontation Clause. Thus, even if it may be argued that “unconfronted, testimonial hearsay” would respond to a party’s misleading impression on an issue, it is not admissible: “[The Confrontation Clause] admits no exception for cases in which the trial judge believes unconfronted testimonial

hearsay might be reasonably necessary to correct a misleading impression. Courts may not overlook its command, no matter how noble the motive” (595 US at —, 142 S Ct at 693).

The Supreme Court, however, made a point of stating that “the Court does not decide today the validity of the common-law rule of completeness as applied to testimonial hearsay. Under that rule, a party against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder. The parties agree that the rule of completeness does not apply to the facts of this case, as Morris’ plea allocution was not part of any statement that Hemphill introduced. Whether and under what circumstances that rule might allow the admission of testimonial hearsay against a criminal defendant presents different issues that are not before this Court” (595 US at —, 142 S Ct at 693 [internal quotation marks and citations omitted]; see Guide to NY Evid rule 4.03).

¹ In June 2022, this rule was amended to add subdivision (7) with a corresponding Note to incorporate the rule of *Hemphill v New York* (595 US —, 142 S Ct 681 [2022]), and to modify subdivision (6) and the Note thereto to account for the decision of the United States Court of Appeals for the Second Circuit in *Garlick v Lee* (1 F4th 122 [2d Cir 2021], *cert denied* 595 US —, 142 S Ct 1189 [2022]), holding, contrary to the Court of Appeals, that an autopsy report was a testimonial document, regardless of whether it linked the defendant to a crime.

8.03 Admission by Party¹

(1) A statement of a party which is inconsistent with the party's position in the proceeding is admissible against that party, if the statement is one of the following:

(a) made by a party in an individual or representative capacity and offered against the party in that capacity, irrespective of the party's lack of personal knowledge of the facts asserted by the party.

(b) made by a person in a relationship of privity with the party and the statement concerns the party's and the person's joint interest.

(2) A statement offered against an opposing party shall not be excluded from evidence as hearsay if made by [a] a person whom the opposing party authorized to make a statement on the subject or [b] by the opposing party's agent or employee on a matter within the scope of that relationship and during the existence of that relationship.

The required authorization may be expressly given by the party or implied from the scope of the agent's or employee's duties or employment. The statement cannot be used as proof of the agency or employment relationship, or the claimed authority to make the statement, or the scope of the agency or employment relationship, unless it is admissible under another exception.

Note

Subdivision (1) (a) is derived from *Reed v McCord* (160 NY 330, 341 [1899]) which held that "admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made." *Reed* further held that the absence of personal knowledge on the part of the

party making the statement does not preclude the statement's admissibility under the admission's exception. (*See Reed v McCord*, 160 NY at 341.)

Unlike Federal Rules of Evidence rule 801 (d) (2) (A), which permits a party's statement to be admitted against the party in either the party's individual or representative capacity, present New York law authorizes the use of a statement made by the party in a representative capacity to be admitted against the party only in that capacity. (*See Commercial Trading Co. v Tucker*, 80 AD2d 779 [1st Dept 1981].)

Subdivision (1) (b) is derived from a series of Court of Appeals decisions which adopted this privity-based admissions exception. (*See e.g. Murdock v Waterman*, 145 NY 55 [1895] [joint obligor]; *Chadwick v Fonner*, 69 NY 404 [1877] [grantor]; *Hatch v Elkins*, 65 NY 489 [1875] [principal-surety].)

Subdivision (2) contains three sentences. The first sentence restates verbatim CPLR 4549 (enacted by L 2021, ch 833), except for the insertion of paragraph letters, and sets forth two closely related hearsay exceptions for statements made by an agent or employee offered against the principal or agent. When the agent's or employee's statement is admitted under either of the exceptions, the statement is treated as a party's admission (*see Michael J. Hutter, New CPLR 4549: Admissibility of Agent/Employee Statements Against the Principal/Agent*, NYLJ, Feb. 16, 2022 at 3, col 1).

Paragraph (a) of the first sentence codifies New York's well established common law "speaking agent" exception, permitting the admission of a statement of a party's agent or employee against the principal or employer when the party has authorized the statement to be made; paragraph (b) creates a new exception permitting the admission of a statement of a party's agent or employee against the party principal or employer when the statement concerns a matter within the scope of the agency or employment irrespective of whether the statement was authorized or not. Before the enactment of CPLR 4549, New York's common law did not recognize a hearsay exception for an agent's or employee's statement concerning the relationship when the agent or employee had no speaking authority.

The operative element of the "speaking agent" exception is that the agent or employee has been given authority to make the statement in issue (*see e.g. Tyrrell v Wal-Mart Stores*, 97 NY2d 650, 652 [2001] ["The Appellate Division correctly concluded that plaintiff failed to establish that the unidentified employee was authorized to make the alleged statement; thus, the statement did not constitute an admission binding on the employer"]; *Loschiavo v Port Auth. of N.Y. & N.J.*, 58 NY2d 1040, 1041 [1983] ["(T)he hearsay statement of an agent is admissible against his employer under the admissions exception to the hearsay rule . . . if the making of the statement is an activity within the scope of his authority"]; *Merchants' Natl. Bank, of Gardner, Kennebec County, Me. v Clark*, 139 NY 314, 319 [1893] ["Hearsay evidence of this character is only permissible when it relates

to statements by the agent, which he was authorized by his principal to make”)). Proof that the person was authorized or otherwise directed to act in the matter to which his statement relates is insufficient (Barker & Alexander, Evidence in New York State and Federal Courts § 8:21 [2d ed]).

The other exception set forth in paragraph (b) creates an exception for statements of a party’s agent or employee made by the agent or employee in the scope of such relationship. The exception has two operative elements: (1) the statement relates to or concerns a matter within the scope of the agency or employment relationship; and (2) the statement was made during the existence of that relationship. As to the first element, the relational phrase—“within the scope of that relationship”—is identical to that phrase in Federal Rules of Evidence rule 801 (d) (2) (D). Commentators have noted that relationship phrase “is broad in its scope” (Mueller & Kirkpatrick, Federal Evidence § 8:55 [4th ed]). Consistent with that observation, the federal courts have given the phrase a liberal construction, requiring only that the statement have some connection to the agent’s or employee’s specific job duties (*id.*). With respect to the second element, the temporal requirement—“during the existence of that relationship”—is likewise derived from Federal Rules of Evidence rule 801 (d) (2) (D). Federal courts uniformly hold the statement must be made while the agent or employee was employed, not before the person was hired, or after the person quit or was fired.

The subdivision’s second sentence, reciting present law, provides that authority may be expressly given by the agent’s or employee’s principal or employer or implied from the scope of the agent’s or employee’s duties or employment (*see e.g. Spett v President Monroe Bldg. & Mfg. Corp.*, 19 NY2d 203, 206 [1967] [although defendant’s general foreman was not given any authority to speak on behalf of his employer, his statement was admissible against employer since he “was apparently the person who ran (his employer’s business), in whom complete managerial responsibility for the enterprise was vested”]). As *Spett* recognizes, where the employee has been given extensive managerial responsibility over the employer’s business, speaking authority may be implied. Thus, implied authority to speak has been found to exist where the employee was placed “in full charge” of the business (*Stecher Lithographic Co. v Inman*, 175 NY 124, 127 [1903]); the employee was the “general manager” of the business (*Vaughn Mach. Co. v Quintard*, 165 NY 649 [1903], *affg* 37 App Div 368, 372 [1st Dept 1899]); and the employee was the superintendent of the job site or facility (*see Brusca v El Al Israel Airlines*, 75 AD2d 798, 800 [2d Dept 1980]). There are cases concluding that an employer’s general manager of one of the employer’s stores did not have implied authority from that position, cases that apparently turn on the extent of the responsibilities given to the general manager. (*E.g. Alvarez v First Natl. Supermarkets, Inc.*, 11 AD3d 572 [2d Dept 2004]; *Scherer v Golub Corp.*, 101 AD3d 1286 [3d Dept 2012]; *compare Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 247 [1st Dept 2002] [implied authority present]; *Bransfield v Grand Union Co.*, 24 AD2d 586 [2d Dept 1965], *affd* 17 NY2d 474 [1965] [implied authority present].)

The subdivision's third sentence addresses foundational requirements, specifying that the agent's or employee's statement cannot be used as proof of the agency or employment relationship, or the claimed authority to make the statement, or the scope of the agency or employment relationship unless it is admissible under another exception. Proof of those foundation elements must be made by independently admissible evidence, i.e., evidence other than the statement being offered into evidence. This requirement is derived from present law governing the "speaking agent" exception (Martin, Capra & Rossi, NY Evidence Handbook § 8.3.2 [2d ed]). No principled reason suggests that it should not also apply to the newly created exception. Of note, Federal Rules of Evidence rule 801 (d) (2) provides that the agent's or employee's statement may be considered along with other evidence to establish the agency relationship.

An agent's or employee's lack of personal knowledge of the facts underlying an otherwise admissible statement does not under existing New York law preclude the statement's admissibility (Martin, Capra & Rossi, *supra* at 715; *see also Reed*, 160 NY at 341).

This rule does not bar the admission of an employee's statement that is admissible on other grounds. See, for example, the rules on declaration against interest (*Kelleher v F.M.E. Auto Leasing Corp.*, 192 AD2d 581, 583 [2d Dept 1993]); excited utterance (*Tyrrell*, 97 NY2d at 652 [recognizing potential but finding insufficient foundation for its admissibility]); and verbal act (*Giardino v Beranbaum*, 279 AD2d 282 [1st Dept 2001]).

For the rule on "informal judicial admissions" and "formal judicial admissions" by a party see Guide to New York Evidence rule 8.23.

¹ In June 2022, this rule and Note were amended for the purpose of incorporating CPLR 4549, enacted in 2021. Subdivision (1) (c) was deleted, and subdivision (2) was added to incorporate portions of former subdivision (1) (c) and CPLR 4549.

8.05 Admission by Adopted Statement¹

(1) A person who understands and clearly expresses assent in word or conduct to a statement of another that is inconsistent with that person's position in the proceeding adopts that statement as his or her own and the statement is thus admissible in evidence as that person's adopted admission.

(2) Except as provided in subdivision three, an out-of-court statement made by a person that is inconsistent with a party's position in the proceeding is admissible against that party if the party heard and understood the statement and provided an equivocal or evasive response or remained silent when he or she would reasonably have been expected to deny the statement and had an opportunity to do so.

(3) In a criminal proceeding when, before or after a defendant's arrest, the defendant is silent following a statement made to the defendant by a person the defendant knows to be a member of law enforcement, during the performance of his or her duties, the defendant's silence is not admissible as an admission or to impeach the defendant's testimony, except as provided in paragraphs (a) and (b).

(a) The silence of a defendant, who at the time was a law enforcement officer, in the face of an accusation of criminal conduct by a fellow officer is admissible if the defendant was under a duty to inform his or her superiors of his or her activities.

(b) A defendant who, prior to trial, makes a voluntary statement relating to the criminal transaction at issue and then provides testimony at a criminal proceeding with respect to that transaction may be impeached by the defendant's omission of critical details from the

defendant's pretrial statement that would have been natural to include in that statement.

(4) A party's failure to respond to a written statement directed to the party may not be used to establish the party's assent to the statement.

Note

This rule addresses the adoptive admission hearsay exception.

An adoptive admission occurs “when a party acknowledges and assents to something ‘*already* uttered by another person, which thus becomes effectively the party’s own admission’ ” (*People v Campney*, 94 NY2d 307, 311 [1999], citing 4 John Henry Wigmore, Evidence § 1069 at 100 [James H. Chadbourn rev]). The other person’s statement is then admissible against the party as a party admission. In effect, it is as if the party himself or herself made the statement. The manifestations of assent are also admissible to establish the “relevant demonstrative response of the affected party” (*People v Lourido*, 70 NY2d 428, 433 [1987]).

Subdivision (1) sets forth the adoptive admission rule in situations where the alleged manifestation of assent involves words or conduct by the party charged with the adoption. It recognizes that the assent may be by a verbalized response (*see e.g. Campney*, 94 NY2d at 312-313; *see also People v Vining*, 28 NY3d 686 [2017] [express assent may be based upon evasive or equivocal answers]), or by conduct (*e.g. People v Ferrara*, 199 NY 414, 430 [1910] [shrugging of shoulders]). Subdivision (2) and subdivision (3) set forth the rule where the alleged manifestation involves the party’s evasive or equivocal responses or silence.

The Court of Appeals has cautioned that an adoptive admission is allowed only when the statement was “fully known and fully understood” by the party against whom it is being offered (*People v Koerner*, 154 NY 355, 374 [1897]; *see also People v Allen*, 300 NY 222, 225-226 [1949]). Thus, the foundation for holding that a statement was adopted includes finding, by direct or circumstantial evidence, that the “defendant had read or been informed of the contents of the statement, understood its implications, and affirmatively adopted the statement as his own” (*Campney*, 94 NY2d at 313).

In *People v Woodward* (50 NY2d 922, 923 [1980]), for example, the police read to the defendant his codefendant’s written confession, whereupon the defendant said: “Yes, that is what happened.” In addition to holding that the statement was admissible at the joint trial of the defendants, the Court observed: “Even at a separate trial . . . the [codefendant’s] statement would have been admissible since the jury could find that he had adopted it as his own” (*id.*).

Whether the foundation elements for the admissibility of the statement have been established is to be decided by the trial court in light of “all the facts and circumstances surrounding the incident” (*Ferrara*, 199 NY at 430).

Subdivision (2). Except as set forth in subdivision (3), subdivision (2) sets forth the rule governing an adoption of a statement in circumstances involving a party’s silence or evasive or equivocal response. The Court of Appeals has held that “[a]ssent can be manifested by silence, because ‘[a] party’s silence in the face of an accusation, under circumstances that would prompt a reasonable person to protest, is generally considered an admission’ ” (*Vining*, 28 NY3d at 690). For purposes of this rule, the Court has held that silence may also encompass equivocal or evasive answers (*id.* [“an equivocal or evasive response may similarly be used against (a) party . . . as an adoptive admission by silence”]).

As to adoption by silence, the Court of Appeals has cautioned that while “accusatory statements, not denied, may be admitted against the one accused, as admissions,” they are admissible “only when the accusation was ‘fully known and fully understood’ by defendant and when defendant was ‘at full liberty to make answer thereto, and then only under such circumstances as would justify the inference of assent or acquiescence as to the truth of the statement by his remaining silent’ ” (*People v Allen*, 300 NY at 225 [citations omitted]; *see also Vining*, 28 NY3d at 691 [“To use a defendant’s silence or evasive response as evidence against the defendant, the People must demonstrate that the defendant heard and understood the assertion, and reasonably would have been expected to deny it”]; *Koerner*, 154 NY at 374 [the circumstances must be “such as would properly or naturally call for some action or reply from (persons) similarly situated”]). Whether these foundation elements have been established is an issue for the trial court to determine (*Vining*, 28 NY3d at 691).

Of note, the Court of Appeals has stated that in criminal proceedings this rule “is to be applied with careful discrimination” as “ ‘[r]eally it is most dangerous evidence’ ” (*Koerner*, 154 NY at 374) and that this evidence “should always be received with caution, and ought not to be admitted unless the evidence is of direct declarations of a kind which naturally call for contradiction, or some assertion made to a party with respect to [the party’s] rights, in which, by silence, [the party] acquiesces” (*id.* at 374-375).

Subdivision (3). Subdivision (3) sets forth the rule governing the admissibility in a criminal proceeding of a defendant’s silence during police questioning. Specifically, evidence of a criminal defendant’s pre-arrest and post-arrest silence during police questioning may not be used in the People’s direct case or for impeachment purposes, a rule derived from the State Constitution (*see e.g. People v De George*, 73 NY2d 614, 618 [1989] [pre-arrest silence]; *People v Von Werne*, 41 NY2d 584, 588 [1977] [post-arrest silence]; *People v Conyers*, 52 NY2d 454, 457 [1981] [post-arrest silence]).

In summing up New York law, the Court of Appeals has stated: “We hold, as a matter of state evidentiary law, that evidence of a defendant’s selective silence generally may not be used by the People as part of their case-in-chief, either to allow the jury to infer the defendant’s admission of guilt or to impeach the credibility of the defendant’s version of events when the defendant has not testified” (*People v Williams*, 25 NY3d 185, 188 [2015]).

Subdivision (3) (a). Subdivision (3) (a) is derived from *People v Rothschild* (35 NY2d 355, 360-361 [1974] [“The natural consequences of his status as a law enforcement officer would require him to promptly report any bribe or attempted bribe to his superiors, and certainly protest and reveal such an alleged scheme after his arrest to them, and to his fellow officers as well”]); and *People v De George* (73 NY2d 614, 619 [1989] [“we affirmed the (*Rothschild*) conviction because under the circumstances, the evidence of silence had an unusually high probative value. The officer was under a duty to inform his superiors of his undercover activities and thus his continued silence in the face of direct accusations by his fellow officers was probative of guilt”]).

Subdivision (3) (b). Subdivision (3) (b) is derived from *People v Savage* (50 NY2d 673, 676 [1980] [“a defendant who, having been given the warnings required by *Miranda v Arizona* (384 US 436 [1966]) and having elected to waive his right to silence, proceeds to narrate the essential facts of his involvement in the crime, may be cross-examined about his failure to inform the police at that time of exculpatory circumstances to which he later testifies at trial”]); and *People v Chery* (28 NY3d 139, 142, 145 [2016] [it was permissible for “the People to use defendant’s selective silence, while making a spontaneous postdetention statement to the police, to impeach his trial testimony,” given that the “defendant elected to provide some explanation of what happened at the scene, and it was unnatural to have omitted the significantly more favorable version of events to which he testified at trial”]).

Subdivision (4). This subdivision is derived from substantial Court of Appeals precedent (*see e.g. Talcott v Harris*, 93 NY 567, 571 [1883] [“While a party may be called upon in many cases to speak where a charge is made against him, and in failing to do so may be considered as acquiescing in its correctness, his omission to answer a written allegation, whether by affidavits or otherwise, cannot be regarded as an admission of the correctness thereof and that it is true in all respects”]; *Gray v Kaufman Dairy & Ice Cream Co.*, 162 NY 388, 397-398 [1900] [collecting cases]; *Viele v McLean*, 200 NY 260, 262 [1910]).

¹ In June 2022, the rule was amended to merge the contents of subdivisions (1) and (5) into subdivision (1).

8.07 Ancient Documents

A statement in a document is admissible if it is proved to be in existence for more than thirty years, and its authenticity is supported by its proper custody or otherwise accounted for, and it is free from any indication of fraud or invalidity.

Note¹

This common-law rule is referred to as the “ancient documents” exception to the hearsay rule. While the rule allows for the admission of these documents in evidence, the rule does not specify that the documents are “prima facie evidence” of their contents. (*Compare* CPLR 4522 [rendering properly filed maps, surveys, and official records affecting real property for more than ten years “prima facie evidence of their contents”]; Guide to NY Evid rule 8.52, Ancient Filed Maps, Surveys and Real Property Records; *cf.* Fed Rules Evid rule 803 [16] [providing a hearsay exception for a “statement in a document that was prepared before January 1, 1998, and whose authenticity is established”].)

The rule is derived primarily from Court of Appeals decisions dealing with certain recitals in documents affecting interests in real property. (*See e.g. Young v Shulenberg*, 165 NY 385 [1901] [statement in 81-year-old deed]; *McKinnon v Bliss*, 21 NY 206 [1860] [statement in “ancient” deed and will regarding title].)

The Court of Appeals explained the rule by noting that

“[i]t is usually impossible to establish a very ancient possession of property by the testimony of persons having knowledge of the fact, and when a deed forming part of a chain of title is so ancient that there can be, in the nature of things, no living persons who can testify to acts of ownership by the grantor or grantee, it may be received in evidence without such proof.” (*Greenleaf v Brooklyn, Flatbush & Coney Is. R.R. Co.*, 132 NY 408, 414 [1892].)

However, before receiving such documents in evidence, the Court of Appeals advised that “[c]are is first taken to ascertain their genuineness, and this may be shown *prima facie* by proof that the document came from the proper custody, or by otherwise accounting for it. The documents found in a place in which and under the care of persons with whom such papers might naturally and reasonably be expected to be found, or in possession of persons having an interest in them, are in precisely the custody which gives authenticity to documents found within it.” (*Dodge v Gallatin*, 130 NY 117, 133-134 [1891].)

¹ In December 2020, the note was amended by adding the first paragraph.

Later, the Appellate Division reaffirmed the “ancient document rule,” explaining that

“a record or document which is found to be more than 30 years of age and which is proven to have come from proper custody and is itself free from any indication of fraud or invalidity ‘proves itself’ (*Fairchild v Union Ferry Co.*, 121 Misc 513, 518 [1923], affd 212 App Div 823, affd 240 NY 666). This rule dispenses with the proof of the execution of a record or document on the proof of its antiquity. It presumes that the entrant of the record or document is dead after the passage of 30 years. (*Matter of Barney*, 185 App Div 782, 798, 799 [1919].) If the genuineness of an ancient document is established, it may be received to prove the truth of the facts that it recites.” (*Tillman v Lincoln Warehouse Corp.*, 72 AD2d 40, 44-45 [1st Dept 1979].)

In the *Fairchild* case, cited by *Tillman*, an action in which rights to docks and piers in New York harbor were in issue, the Supreme Court held that old writings and book entries were properly admitted under the ancient document rule, observing:

“This rule is that a record or document which is found to be more than thirty years of age and which is proven to have come from proper custody and is itself free from any indication of fraud or invalidity proves itself.” (*Fairchild*, 121 Misc at 518.)

While the Court of Appeals has not held that this exception applies to non-real-property documents, the Appellate Division has so held. (See *e.g. Estate of Essig v 5670 58 St. Holding Corp.*, 50 AD3d 948, 949 [2d Dept 2008] [“The stock certificates are more than 30 years old, are free from any indication of fraud or invalidity, and were discovered by the plaintiff . . . amongst the personal records of (the deceased) after her death. Under such circumstances, the stock certificates are self-authenticating pursuant to the ancient document rule”]; *Tillman*, 72 AD2d at 44-45 [inventory list; quoting the rule as set forth by the Supreme Court in *Fairchild*]; *Matter of Barney*, 185 App Div 782, 798 [1st Dept 1919] [psychiatric hospital records]; *Layton v Kraft*, 111 App Div 842, 847 [1st Dept 1906] [church records].)

8.08 Business Records (CPLR 4518)

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

In addition, the writing or record must have been made upon the recorder's own personal knowledge or from information given to the recorder by someone with personal knowledge and a business duty to transmit the information accurately.

For a hospital or medical office record the entry must be germane to the patient's treatment or diagnosis.

The admission of an out-of-court statement that is included within a properly admitted business record is itself admissible for the truth of its contents only if the statement meets the requirements of an exception to the hearsay rule; otherwise the statement is admissible for having been made and not for its truth.

An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and

accurate representation of such electronic record.

All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

(b) Hospital bills. A hospital bill is admissible in evidence under this rule and is prima facie evidence of the facts contained, provided it bears a certification by the head of the hospital or by a responsible employee in the controller's or accounting office that the bill is correct, that each of the items was necessarily supplied and that the amount charged is reasonable. This subdivision shall not apply to any proceeding in a surrogate's court nor in any action instituted by or on behalf of a hospital to recover payment for accommodations or supplies furnished or for services rendered by or in such hospital, except that in a proceeding pursuant to section one hundred eighty-nine of the lien law to determine the validity and extent of the lien of a hospital, such certified hospital bills are prima facie evidence of the fact of services and of the reasonableness of any charges which do not exceed the comparable charges made by the hospital in the care of workmen's compensation patients.

(c) Other records. All records, writings and other things referred to in [CPLR] section 2306 and 2307 are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician.

Where a hospital record is in the custody of a warehouse as that term is defined by paragraph

(thirteen) of subsection (a) of section 7-102 of the uniform commercial code, pursuant to a plan approved in writing by the state commissioner of health, admissibility under this subdivision may be established by a certification made by the manager of the warehouse that sets forth (i) the authority by which the record is held, including but not limited to a court order, order of the commissioner, or order or resolution of the governing body or official of the hospital, and (ii) that the record has been in the exclusive custody of such warehouse or warehousemen since its receipt from the hospital or, if another has had access to it, the name and address of such person and the date on which and the circumstances under which such access was had. Any warehouse providing a certification as required by this subdivision shall have no liability for acts or omissions relating thereto, except for intentional misconduct, and the warehouse is authorized to assess and collect a reasonable charge for providing the certification described by this subdivision. Where a hospital record is located in a jurisdiction other than this state, admissibility under this subdivision may be established by either a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state or by an employee delegated for that purpose, or by a qualified physician.

(d) Any records or reports relating to the administration and analysis of a genetic marker or DNA test, including records or reports of the costs of such tests, administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law are admissible in evidence under this rule and are prima facie evidence of the facts contained therein provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee delegated for that purpose,

or by a qualified physician. If such record or report relating to the administration and analysis of a genetic marker test or DNA test or tests administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law indicates at least a ninety-five percent probability of paternity, the admission of such record or report shall create a rebuttable presumption of paternity, and shall, if un rebutted, establish the paternity of and liability for the support of a child pursuant to articles four and five of the family court act.

(e) Notwithstanding any other provision of law, a record or report relating to the administration and analysis of a genetic marker test or DNA test certified in accordance with subdivision (d) of this rule and administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law is admissible in evidence under this rule without the need for foundation testimony or further proof of authenticity or accuracy unless objections to the record or report are made in writing no later than twenty days before a hearing at which the record or report may be introduced into evidence or thirty days after receipt of the test results, whichever is earlier.

(f) Notwithstanding any other provision of law, records or reports of support payments and disbursements maintained pursuant to title six-A of article three of the social services law by the office of temporary and disability assistance or the fiscal agent under contract to the office for the provision of centralized collection and disbursement functions are admissible in evidence under this rule, provided that they bear a certification by an official of a social services district attesting to the accuracy of the content of the record or report of support payments and that in attesting to the accuracy of the record or report such official has received

confirmation from the office of temporary and disability assistance or the fiscal agent under contract to the office for the provision of centralized collection and disbursement functions pursuant to section one hundred eleven-h of the social services law that the record or report of support payments reflects the processing of all support payments in the possession of the office or the fiscal agent as of a specified date, and that the document is a record or report of support payments maintained pursuant to title six-A of article three of the social services law. If so certified, such record or report shall be admitted into evidence under this rule without the need for additional foundation testimony. Such records shall be the basis for a permissive inference of the facts contained therein unless the trier of fact finds good cause not to draw such inference.

(g) Pregnancy and childbirth costs. Any hospital bills or records relating to the costs of pregnancy or birth of a child for whom proceedings to establish paternity, pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law have been or are being undertaken, are admissible in evidence under this rule and are prima facie evidence of the facts contained therein, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee designated for that purpose, or by a qualified physician.

Note

Introduction. This rule restates verbatim CPLR 4518, except for paragraphs two, three, and four of subdivision (a) which incorporate the holdings of decisional law discussed in the “subdivision (a)” section of this note.

The key *statutory* provisions governing the hearsay exception for the admissibility of business records are contained in CPLR 4518 (a), as set forth in paragraphs one and six of subdivision (a). The fifth paragraph of this subdivision

(as set forth in CPLR 4518 [a]) addresses the admissibility of an “electronic record,” i.e., “information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities” (State Technology Law § 302 [2]).

Paragraphs two, three and four of subdivision (a), as noted, set forth additional *decisional law* rules governing business records.

The remaining subdivisions of this rule and CPLR 4518 provide separate hearsay exceptions for specified records as well as certification procedures that make it unnecessary to call a witness to lay the foundation for their admissibility.

Subdivision (a) initially sets forth the scope of the business records exception to the general prohibition on the admission of hearsay. (*See* Guide to NY Evid rule 8.01, Admissibility of Hearsay.) The exception encompasses any record of a business “made as a memorandum or record of any act, transaction, occurrence or event” (CPLR 4518 [a] [first sentence]). The term, “business,” is broadly defined as a “business, profession, occupation and calling of every kind” (CPLR 4518 [a] [last sentence]).

The Court of Appeals has included within the scope of this exception: government records (*Kelly v Wasserman*, 5 NY2d 425, 429 [1959] [welfare department records]; *Johnson v Lutz*, 253 NY 124 [1930] [police accident report]); hospital records (*Williams v Alexander*, 309 NY 283, 286 [1955]); and criminal enterprise records (*People v Kennedy*, 68 NY2d 569, 577 [1986] [loan shark records]). A record falls outside the scope of the exception if it contains purely personal, nonbusiness related activity (*Kennedy* at 577).

As to the form of the record, the subdivision provides that “[a]ny writing or record, whether in the form of an entry in a book or otherwise” may be admissible. The Appellate Division has interpreted that language broadly, holding that “ ‘[a]ny record designed to retain information and otherwise possessed of the characteristics of a business record should be admitted under the rule regardless of the form which the record takes,’ ” provided the record is intelligible (*Wilson v Bodian*, 130 AD2d 221, 231 [2d Dept 1987] [citation omitted]).

A business record stored in computerized format in a database is admissible under the exception through a computer printout of the stored information, provided it is shown that the printout is a fair and accurate representation of the electronic record (CPLR 4518 [a] [second sentence]). In *People v Kangas* (28 NY3d 984 [2016]), the Court of Appeals held that CPLR 4539 (b)’s requirement that reproductions of an original record must be authenticated by testimony or an affidavit does not apply when the record was created electronically in the first instance, that “CPLR 4539 (b) applies only when a document that originally existed in hard copy form is scanned to store a digital ‘image’ of the hard copy document,

and then a ‘reproduction’ of the digital image is printed in the ordinary course of business” (28 NY3d at 985).

Admissibility of a business record requires proof of four foundation elements. Three of those foundation elements are set forth in CPLR 4518 (a) and in the first paragraph of subdivision (a) of this rule. The fourth element is established in *Johnson v Lutz* (253 NY 124 [1930]) and is set forth in the second paragraph of subdivision (a) of this rule. *Williams v Alexander* (309 NY 283 [1955]) sets forth an additional requirement for hospital and medical records and that requirement is set forth in the third paragraph of subdivision (a) of this rule.

The three statutory elements as recited in *Kennedy* (68 NY2d at 579-580) are

“*first*, that the record be made in the regular course of business--essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business; *second*, that it be the regular course of such business to make the record (a double requirement of regularity)--essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record; and *third*, that the record be made at or about the time of the event being recorded--essentially, that recollection be fairly accurate and the habit or routine of making the entries assured.”

Notably, these elements provide the “probability of [the record’s] trustworthiness . . . , which justifies admission of the writing or record without the necessity of calling all the persons who may have had a hand in preparing it” (*Williams*, 309 NY at 286-287). Since the entry is routine, the regularity and continuity of making such entries develop habits of precision; the temporal requirement assures that the recollection of the information recorded is fairly accurate; and the existence of the recorder’s duty to record the information ensures that it is in the recorder’s own interest to accurately record the information (*Kennedy*, 68 NY2d at 579).

In *Johnson v Lutz*, the Court of Appeals imposed the fourth foundation requirement, namely that there must be a showing that the record was made upon the recorder’s own personal knowledge, or from information given to the recorder by someone with personal knowledge and a business duty to transmit the information accurately (253 NY at 128 [business records statute “was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto”]; see *People v Patterson*, 28 NY3d 544, 550 [2016] [reaffirming *Lutz*’s requirement that “ ‘admission may only be granted where it is demonstrated that the informant has personal knowledge of the act, event or condition and he (or she) is under a business duty to report it to the entrant’ ”]). This fourth requirement enhances the trustworthiness of the record (*Matter of Leon RR*, 48 NY2d 117, 123

[1979] [“it is essential to emphasize that the mere fact that the recording of third-party statements by the caseworker might be routine, imports no guarantee of the truth, or even reliability, of those statements. To construe these statements as admissible simply because the caseworker is under a business duty to record would be to open the floodgates for the introduction of random, irresponsible material beyond the reach of the usual tests for accuracy--cross-examination and impeachment of the declarant”]).

Thus, if the recorder had no personal knowledge about the information being recorded and the source of the information being recorded had no business duty to transmit the information accurately to the recorder, the record is inadmissible (*Cover v Cohen*, 61 NY2d 261, 274 [1984] [the investigating police officer’s accident report of the statement of the driver of a vehicle involved in an accident that “his accelerator stuck on him” was not admissible as the driver was under no duty to report to the police officer]; *Cox v State of New York*, 3 NY2d 693, 699 [1958] [hospital record containing an entry that a hospital patient stated she pushed another patient excluded on ground the declarant inmate was under no duty to impart such information]).

In essence, the rule derived from *Johnson v Lutz* and its progeny is an application of New York’s double hearsay rule (*see Patterson*, 28 NY3d at 550-551; Barker & Alexander, Evidence in New York State and Federal Courts § 8:94 at 204-205 [2d ed West’s NY Prac Series]; Guide to NY Evid rule 8.21, Hearsay or Nonhearsay Within Hearsay). That rule as applied to a business record is set forth in the fourth paragraph of subdivision (a) of this rule. The first level of hearsay is the record containing the statement; the second level of hearsay is the statement itself. The business records exception covers the first level; that is, if the four foundation elements are met, then the record comes in as proof that the statement was made. As to the admissibility of the statement itself (second level), if the maker of the record either had personal knowledge of the information being recorded or prepared the record with information provided by another person who had a duty to transmit the information accurately, then the record also comes in as some proof that the statement is true. The double hearsay is excused by the business records exception. However, if the source had no such duty, the information provided to the recorder must fall within another hearsay exception in order to overcome the double hearsay to be admissible for its truth. Alternatively, the statement itself could be admissible for a relevant non-truth purpose.

Where the record being offered is a hospital or medical office record, the Court of Appeals has imposed a special requirement in addition to the four foundation elements discussed thus far. As originally imposed in *Williams* (309 NY at 286-287) and reaffirmed in *People v Ortega (Benston)* (15 NY3d 610, 617-618 [2010]), the medical record entry must be germane to the patient’s treatment or diagnosis, that is, being germane to treatment or diagnosis is what makes the record a business record in the first instance. If the entry is not germane to treatment or diagnosis, it is not admissible under the exception.

In *Ortega (Benston)*, a consolidation of two appeals, an entry in a hospital record was in issue in each case. In the *Ortega* case, which involved a charge of drug possession, the entry stated the patient-complainant “was forced to smoke [a] white substance from [a] pipe”; that entry was found to be germane because “complainant would not have been in control over either the amount or the nature of the substance he ingested[,]” and “treatment of a patient who is the victim of coercion may differ from a patient who has intentionally taken drugs” (15 NY3d at 616, 620). In the *Benston* case, which involved a charge of assault of the defendant’s former girlfriend, the entry contained references to domestic violence committed against the patient-complainant and the existence of a safety plan for her; that entry was found to be germane because a victim of domestic violence will have a “host of . . . issues” that need to be treated in addition to the treatment of physical injuries (15 NY3d at 619).

As expressed in the note to Guide to NY Evidence rule 8.43 (Statement Made for Medical Diagnosis or Treatment), care must be exercised in determining whether an entry is germane because some details recorded in a medical record may not relate to treatment or diagnosis. For example, in *Williams*, the Court of Appeals held that information that the patient was struck by a motor vehicle was germane to his treatment but not the statement that the car that struck the patient was propelled into him when it was struck by another car (*Williams*, 309 NY at 288). As stated by the Court: “[W]hether the patient was hit by car A or car B, by car A under its own power or propelled forward by car B, or whether the injuries were caused by the negligence of the defendant or of another, cannot possibly bear on diagnosis or aid in determining treatment.” (*Id.*) Medical testimony about whether the information is germane to treatment or diagnosis will be helpful in making the determination. (See *People v Pham*, 118 AD3d 1159, 1162 [3d Dept 2014]; *Wright v New York City Hous. Auth.*, 273 AD2d 378, 379 [2d Dept 2000]; *Sanchez v Manhattan & Bronx Surface Tr. Operating Auth.*, 170 AD2d 402, 404 [1st Dept 1991].)

It bears repeating that entries in a medical record will not be admissible merely because they are determined to be germane to the patient’s diagnosis and treatment; like all other business records, the entry must be made upon the recorder’s personal knowledge or from information given by one with personal knowledge and a duty to transmit accurately the information to the recorder, or the information must fall within its own independent hearsay exception (see *Ortega*, 15 NY3d at 620-621 [Smith, J., concurring]).

The subject matter of any business record may be “any act, transaction, occurrence or event.” While opinions are not specifically enumerated as proper subject matter, the Court of Appeals held in *People v Kohlmeyer*, interpreting CPLR 4518 (a)’s predecessor, Civil Practice Act § 374-a, that a hospital entry recording an opinion of a physician is admissible under the business records exception (284 NY 366, 369 [1940]). Consistent with *Kohlmeyer*, the courts routinely admit records containing opinions provided a showing is made that the

opinion was rendered by a person qualified to give the opinion and was based on proper data (*see* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C4518:4).

Reports or records received from another business and filed as part of the receiving business's business records are ordinarily not admissible as business records of the recipient business (*see People v Cratsley*, 86 NY2d 81, 90 [1995]). They may be qualified as business records of the recipient, however, upon a showing that the maker of the report prepared the report on behalf of the recipient and in accordance with its requirements, and the recipient relied on the report in conducting its business (*Cratsley*, 86 NY2d at 89-91; *see also People v DiSalvo*, 284 AD2d 547, 548-549 [2d Dept 2001]).

Records or reports prepared solely for litigation that are offered by the party responsible for making the record are not admissible under the exception (*People v Foster*, 27 NY2d 47, 52 [1970] ["Of course, records prepared solely for the purpose of litigation should be excluded"]; *Flaherty v American Turners N.Y.*, 291 AD2d 256, 257-258 [1st Dept 2002] [physician's report prepared for specific litigation purpose]; *Cornier v Spagna*, 101 AD2d 141, 148 [1st Dept 1984] [same]). The reason is that such records or reports are "not the systematic, routine, day-to-day type of record envisioned by the business records exception" (*Wilson v Bodian*, 130 AD2d 221, 229-230 [2d Dept 1987]).

The four foundation elements necessary for the admissibility of a record under the business record exception must be proven to the court's satisfaction by the offering party (*Kennedy*, 68 NY2d at 580). Traditionally, a witness is called for this purpose. While the person or persons involved in the preparation of the record is not required to be called, the witness must have personal knowledge of the record keeping practices of the business (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 208-210 [2d Dept 2019]). Alternatively, resort may be had to the certification procedure provided for certain records in the remaining subdivisions.

Where the record or report is offered against the defendant in a criminal action, the defendant's US Constitution Sixth Amendment right of confrontation may be implicated and the record or report may be inadmissible as a violation of that right (*see* Guide to NY Evid rule 8.02, Admissibility Limited by Confrontation Clause [*Crawford*]).

CPLR 3122-a allows for the certification of business records produced pursuant to a subpoena duces tecum for the discovery and production of documents pursuant to CPLR 3120. The certification's contents must include an attestation of the statutory foundation for the admission of business records. Once all the content requirements of the certification are fulfilled, the certification "is admissible as to the matters set forth therein and as to such matters shall be presumed true" (CPLR 3122-a [b]). Thus, the certification eliminates the need for foundation testimony for the record. The underlying certification procedure is discussed in detail in Patrick M.

Connors, Practice Commentaries to CPLR 3122-a (McKinney's Cons Laws of NY).

As mentioned earlier, a statement inadmissible for its truth as a business record may yet be admissible for a relevant non-truth purpose or pursuant to some other exception to the hearsay rule (*see Patterson*, 28 NY3d at 550-551; *Kelly v Wasserman*, 5 NY2d at 429-430). In *Patterson*, for example, the Court held that subscriber information in prepaid cell phone records provided by the person purchasing the phone was not admissible to prove the truth of the name of the subscriber because the subscriber was not under a duty to provide accurate information to the phone provider; but the record of the subscriber's name was admissible for the non-truth purpose of permitting other evidence to prove that the name listed as the subscriber in the record was, in fact, that of the defendant (28 NY3d at 552-553). In *Kelly*, the Court held a welfare investigator's report was admissible even though it contained a statement to the investigator by a welfare recipient's landlord, who had no duty to report, because the statement fell within the hearsay exception for the admission of a party (*see* Guide to NY Evid rule 8.03, Admission by Party).

Subdivision (b) creates a hearsay exception for hospital bills and also provides a certification procedure for their admission, thereby making it unnecessary to call a foundation witness. The certification must be made by the head of the hospital or by a responsible employee in the controller's office that the bill is correct, that each of the items was necessarily supplied and that the amount charged is reasonable. If properly certified, the hospital bill is "prima facie" evidence of the facts contained therein. As to the evidentiary effect of a hospital bill admitted as "prima facie" evidence, the Court of Appeals has interpreted "prima facie" in CPLR 4518 (c) as creating only a permissive inference (*Matter of Commissioner of Social Servs. v Philip De G.*, 59 NY2d 137, 140 [1983] ["In the absence of contradictory evidence, these hospital entries were sufficient to permit but not require the trier of fact to find in accordance with the record"]; *see also People v Mertz*, 68 NY2d 136, 148 [1986] [prima facie evidence is "not a presumption which must be rebutted but rather an inference"]).

Bills for medical services provided by physicians outside of a hospital may be admissible without a witness to lay a foundation pursuant to CPLR 4533-a (*see Matter of Haroche v Haroche*, 38 AD2d 957, 957 [2d Dept 1972] ["We note in passing that the evidentiary problem encountered as to the necessity for and reasonable value of most of the medical and dental expenses for which claim was made might have been avoided by the use of CPLR 4533-a"]).

A hospital bill may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception will need to be established by foundation testimony.

By the statute's terms, subdivision (b) does not apply in a Surrogate's Court proceeding or an action commenced by the hospital to recover payments for its

services. A certified hospital bill may be sued upon, however, by a hospital in a proceeding pursuant to Lien Law § 189.

Subdivision (c) creates a hearsay exception and a certification procedure for three types of business records described in CPLR 2306 and 2307, i.e., medical records of a hospital or government entity concerning the condition or treatment of a patient; records of a library; and records of a department or bureau of a municipal corporation or of the state. A 2017 amendment provides that out-of-state hospital records are admissible pursuant to the certification procedure (L 2017, ch 229, amending CPLR 4518 [c]).

The certification or authentication required must be made by the head of the hospital, laboratory, department, or bureau of a municipal corporation or of the state, or by an employee delegated for the purpose, or by a qualified physician. As to the certificate's contents, the Court of Appeals held in *Mertz* that the "admissibility [under CPLR 4518 (c)] is governed by the same standards as the general business record exception in subdivision (a)" (68 NY2d at 147). Of note, the certificate does not have to be dated near the time of the event reported in the record so long as the record itself was created at or near that time (*People v Kinne*, 71 NY2d 879 [1988]).

Records admitted pursuant to the certification procedure constitute "prima facie evidence" of the facts contained in the record. As noted, *supra*, the certification creates a permissive inference of the truth of the facts contained in the record (*see also Rodriguez v Triborough Bridge & Tunnel Auth.*, 276 AD2d 769, 770 [2d Dept 2000] [blood alcohol test results]; *LaDuke v State Farm Ins. Co.*, 158 AD2d 137, 138 [4th Dept 1990] [blood alcohol test result]).

Where the hospital record has been retrieved from a warehouse, as defined in UCC 7-102 (a) (13), a separate certification procedure allowing admission of the retrieved records without foundation evidence is set forth in subdivision (c).

Records encompassed by subdivision (c) may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception needs to be established by foundation testimony.

Subdivision (d) creates a hearsay exception and provides a certification procedure for the admission of records or reports on genetic marker tests or DNA tests administered pursuant to Family Court Act §§ 418 and 532 or Social Services Law §111-k, thereby making it unnecessary to call a foundation witness. The certification or authentication must be made by the head of the hospital, laboratory, or department or bureau of a municipal corporation or the state, or an employee designated for that purpose, or a qualified physician must make the certification or authorization. If properly certified, the records or reports are "prima facie" evidence of the facts contained therein; and if at least a 95 % probability of paternity is shown, the records or reports create a rebuttable presentation of paternity, and if un rebutted,

they “shall” establish paternity and liability for child support (*see Matter of Orleans County Dept. of Social Servs. v Aaron S.*, 281 AD2d 931, 931 [4th Dept 2001]). Records encompassed by subdivision (d) may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception needs to be established by foundation testimony.

Subdivision (e) provides that, “notwithstanding any other provision of law,” a record or report on genetic marker or DNA tests administered pursuant to Family Court Act §§ 418 and 532 or Social Services Law § 111-k, and certified in accordance with subdivision (d) is admissible into evidence without the need of a foundation witness or further proof of authenticity or accuracy unless a timely written objection is made. Specifically, any objection must be made no later than 20 days before the hearing at which the report may be introduced into evidence or 30 days after receipt of the test results, whichever is earlier.

Subdivision (f) creates a hearsay exception and provides a certification procedure for the admissibility of records of reports of specified support payments and disbursements maintained by the State Department of Social Services or the fiscal agent under contract to the Department for the provision of centralized collection and disbursement functions, thereby making it unnecessary to call a foundation witness. The certification must be made by an official of a social services district who must attest to the accuracy of the contents of the record or report, that the official has received a specified confirmation from the Office of Temporary and Disability Assistance or the fiscal agent under contract to the Office, and that confirmation is of a record or report maintained pursuant to title 6-A of article 3 of the Social Services Law. If properly certified, and admitted into evidence, a permissive inference of the facts contained therein may be drawn unless the trier of fact finds good cause not to do so. Records encompassed by subdivision (f) may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception needs to be established by foundation testimony.

Subdivision (g) creates a hearsay exception and provides a certification procedure for the admission of any hospital bill or record relating to the costs of pregnancy or birth of a child as to whom a paternity proceeding has been commenced, thereby making it unnecessary to call a foundation witness. The certification or authentication must be made by the head of the hospital, laboratory, or department or bureau of a municipal corporation or the state, or, by an employee designated for that purpose, or by a “qualified physician.” If properly certified, the bills or record are “prima facie” evidence of the facts contained therein. Bills and records encompassed by subdivision (g) may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception needs to be established by foundation testimony.

8.09. Coconspirator Statement

(1) A statement by a defendant's coconspirator made in furtherance of the conspiracy during the course of the defendant's involvement in the conspiracy, or prior to the defendant joining the conspiracy, or after the defendant's active involvement has ceased but the conspiracy continues, is admissible to prove the conspiracy and the crime that was the object of the conspiracy, irrespective of the availability of the coconspirator; provided that:

(a) there is a prima facie showing of the existence of the conspiracy, including an overt act and the party's participation in the conspiracy, without recourse to the statement sought to be introduced; and

(b) if the statement was made after the defendant's active involvement had ceased, the defendant had not unequivocally communicated his or her withdrawal from the conspiracy to the coconspirators.

(2) A statement accepting another's solicitation to commit a crime is a verbal act, not hearsay, when offered to prove a conspiracy to commit the underlying crime and is thus admissible without prima facie proof of the conspiracy.

(3) A charge of conspiracy in the accusatory instrument is not required when a statement of a coconspirator is otherwise admissible pursuant to subdivision one or two.

Note

Subdivision (1) is derived from *People v Caban* (5 NY3d 143, 149 [2005]) and *People v Flanagan* (28 NY3d 644 [2017]).

In *Caban*, the Court held:

“ ‘A declaration by a coconspirator during the course and in furtherance of the conspiracy is admissible against another coconspirator as an exception to the hearsay rule.’ The theory underlying the coconspirator’s exception is that all participants in a conspiracy are deemed responsible for each of the acts and declarations of the others. The exception ‘is not limited to permitting introduction of a conspirator’s declaration to prove that a coconspirator committed the crime of conspiracy, but, rather, may be invoked to support introduction of such declaration to prove a coconspirator’s commission of a substantive crime for which the conspiracy was formed.’ However, as defendant points out, such declarations may be admitted only when a prima facie case of conspiracy has been established. While the prima facie case of conspiracy ‘must be made without recourse to the declarations sought to be introduced,’ ‘the testimony of other witnesses or participants may establish a prima facie case’ ” (*Caban*, 5 NY3d at 148 [citations omitted]; see also *People v Wolf*, 98 NY2d 105, 118 [2002]; *People v Berkowitz*, 50 NY2d 333, 341 [1980]; *People v Salko*, 47 NY2d 230, 237-238 [1979]; cf. *People v Bac Tran*, 80 NY2d 170, 179-180 [1992] [prima facie case not established]).

In *Flanagan* (28 NY3d 644 [2017]), the Court of Appeals held: (1) “when a conspirator subsequently joins an ongoing conspiracy, any previous statements made by his or her coconspirators in furtherance of the conspiracy are admissible against the conspirator pursuant to the coconspirator exception to the hearsay rule”; and (2) “statements made after a conspirator’s alleged active involvement in the conspiracy has ceased, but the conspiracy continues, are admissible unless this conspirator has unequivocally communicated his or her withdrawal from the conspiracy to the coconspirators (see *United States v Brown*, 332 F3d 363, 373-374 [6th Cir 2003] [‘The defendant carries the burden of proving withdrawal, and must show that he took affirmative action to defeat or disavow the purpose of the conspiracy’]).”

It appears that the Court of Appeals has approved requiring that the prima facie case include proof of an overt act. (See *People v Bongarzone*, 69 NY2d 892, 896 [1987] [“We agree with the courts below that there was sufficient circumstantial evidence upon which to infer the performance of an overt act by the defendant and, in turn, establish a prima facie case of conspiracy. . . . This evidence being sufficient to establish a prima facie case that a conspiracy existed, the evidence concerning the mother’s and sister’s statements which established an overt act was properly received”). The Appellate Division, Third Department has consistently held that the proof of an overt act, as well as the conspiracy, is required for the admission of the coconspirator’s statement. (See e.g. *People v Portis* 129 AD3d 1300, 1301 [3d Dept 2015].)

In *People v Caban* (5 NY3d at 151), the Court of Appeals approved of admitting hearsay statements of coconspirators “subject to connection”—meaning,

“subject to later proof of a prima facie case of conspiracy. Although any statements admitted pursuant to the coconspirator’s exception must have been made after the formation of the conspiracy—that is, in the course and in furtherance of it—testimony establishing the prima facie case need not precede testimony about the hearsay statements. Inasmuch as the order of proof at trial is committed to the sound discretion of the trial court (*see e.g. People v Olsen*, 34 NY2d 349, 353 [1974]), a coconspirator’s statements are admissible as long as the People independently establish a conspiracy by the close of their case (*see e.g. People v McKane*, 143 NY 455, 473 [1894] [even if the coconspirator’s statements were objectionable at the time they were introduced, they were subsequently made competent by proof of the defendant’s admissions that the coconspirator was acting under his orders]; *People v Becker*, 215 NY 126, 148-149 [1915]).”

In *Crawford v Washington* (541 US 36, 56 [2004]), the United States Supreme Court recognized that at the time the Confrontation Clause was enacted, statements made in furtherance of a conspiracy were an established nontestimonial hearsay exception.

Consistent with *Crawford*, the Appellate Division has rejected challenges from defendants asserting that coconspirator statements introduced against them violated their right to confrontation under the United States Constitution. (*See e.g. People v Inoa*, 109 AD3d 765 [1st Dept 2013], *affd* 25 NY3d 466 [2015]; *People v Adames*, 53 AD3d 503 [2d Dept 2008].)

In a pre-*Crawford* decision, the Court of Appeals held that the admission of hearsay statements by an unavailable declarant pursuant to the coconspirator exception did not violate the Federal or State Constitutions’ Confrontation Clause. (*People v Sanders*, 56 NY2d 51 [1982].) The *Sanders* Court also held that no reason had been advanced “which would cause us to recognize a State constitutional right of confrontation broader than the Sixth Amendment guarantee as interpreted by the Supreme Court.” (*Id.* at 64-65.) The *Sanders* Court then applied the applicable federal standard for admission of a coconspirator statement when the declarant was unavailable; namely, that there must be some indicia of reliability of the proffered statement.

After *Sanders* and before *Crawford*, the United States Supreme Court declined to require a showing of the declarant’s unavailability (*see United States v Inadi*, 475 US 387 [1986]), or “independent indicia of reliability” (*see Bourjaily v United States*, 483 US 171, 182 [1987]) as prerequisites to the admission of a coconspirator statement.

Thereafter, the Appellate Division, First Department expressed concern about the reliability of coconspirator statements in light of the “combined effect of *Inadi* and *Bourjaily*.” (*People v Persico*, 157 AD2d 339, 345 [1st Dept 1990].) As a result, the First Department adopted the *Sanders* test as a matter of state constitutional law. In the words of the *Persico* court: “If the declarant is available,

he or she will testify and the hearsay will be admitted. If the declarant is unavailable, the hearsay will be admitted anyway, provided it is reliable.” (*Id.* at 349.)

The Court of Appeals has never expressly considered whether the Confrontation Clause of the New York Constitution requires that the coconspirator statement must be shown to be reliable if the declarant is unavailable; however, in *People v James* (93 NY2d 620 [1999]), decided after *Persico*, the Court cited with approval the United States Supreme Court’s holding in *Bourjaily*, that “ ‘a court need not independently inquire into . . . reliability’ ” of a coconspirator statement before admitting it into evidence. (*James*, 93 NY2d at 634.)

Subdivision (2) is derived from *People v Caban* (5 NY3d at 149 [2005]) [“with respect to the conspiracy charge, Garcia’s acceptance of defendant’s solicitation to murder Ortiz was relevant not for its truth, but rather as evidence of an agreement to commit the underlying crime—itsself an essential element of the crime of conspiracy. In other words, whether or not Garcia in fact killed Ortiz, his acceptance of defendant’s invitation to do so was a verbal act which rendered defendant and his coconspirators culpable for the inchoate crime of conspiracy, even if the planned substantive crime never came to fruition”)].

Subdivision (3) is derived from *People v Fiore* (12 NY2d 188, 200 [1962]) [“ ‘When a conspiracy is shown, or evidence on the subject given sufficient for the jury, then the acts and declarations of the conspirators, in furtherance of its purpose and object, are competent, and in a case like this it is not necessary, in order to make such proof competent, that the conspiracy should be charged in the indictment’ ” (citations omitted)]).

8.11. Statement Against Penal or Pecuniary Interest

(1) A statement made by a declarant based upon personal knowledge which at the time of its making the declarant knew was contrary to the declarant's pecuniary or proprietary interest, or tended to subject the declarant to criminal liability, is admissible, provided the declarant is unavailable as a witness.

(2) Notwithstanding subdivision (1), in a criminal proceeding:

(a) where the statement is testimonial, such as a plea allocution, it is not admissible against a defendant;

(b) where the statement is not testimonial and tends to expose the declarant to criminal liability and is offered against the defendant, the statement is admissible only as to that part which is disserving to the declarant and when evidence independent of the statement establishes that the statement was made under circumstances which render it highly probable that it is truthful; and

(c) where a statement tends to expose the declarant to criminal liability and is offered to exculpate the defendant, the statement is admissible only when evidence independent of the statement establishes a reasonable possibility that the statement might be true.

Note

Subdivision (1). Subdivision (1) is derived from Court of Appeals decisions which have created a hearsay exception, "declarations against interest," for certain statements that are disserving to the declarant at the time they were made. (*See People v Brown*, 26 NY2d 88, 91 [1970]; *Kittredge v Grannis*, 244 NY 168, 175 [1926].) The particular interests specified are ones identified by the Court. (*See Kittredge v Grannis*, 244 NY at 175 [pecuniary]; *Lyon v Ricker*, 141 NY 225, 231 [1894] [proprietary]; *People v Brown*, 26 NY2d 88 [1970], *supra* [penal].) As to

the knowledge element, the Court of Appeals has insisted that to invoke the exception there must be a showing that the declarant had to have been aware at the time the statement was made that it was against interest. (See e.g. *People v Maerling*, 46 NY2d 289, 298 [1978] [“the declarant must actually be conscious of the adversity” and “the knowledge of the facts on which its adversity hangs and the awareness of the adversity must act on one another and therefore must be contemporaneous”].) The declarant’s awareness that the statement was against his or her interest may be proved directly or inferred from the “nature of the adverse matter declared and its relationship to the declarant.” (*Maerling*, 46 NY2d at 298.)

In *People v Brown* (26 NY2d at 93), the Court of Appeals held that unavailability of the declarant must be established before a declaration against interest can be admitted and that unavailability may be established by the declarant’s death, absence beyond the jurisdiction, or privileged refusal to testify. However, the decision does not preclude the recognition of other grounds of unavailability for the exception.

Subdivision (2) (a). Subdivision (2) (a) is derived from *People v Hardy* (4 NY3d 192 [2005]) and *People v Douglas* (4 NY3d 777 [2005]) where the Court held that, in light of *Crawford v Washington* (541 US 36 [2004]), it was error to admit against the defendant on trial a declaration against penal interest set forth in the declarant’s plea allocution.

Subdivision (2) (b). Subdivision (2) (b) is derived from *People v Brensic* (70 NY2d 9 [1987]) wherein the Court stated “the trial court must determine, by evaluating competent evidence independent of the declaration itself, whether the declaration was spoken under circumstances which render it highly probable that it is truthful” (*id.* at 14-15); and “[i]f the court decides to allow such evidence, it should admit only the portion of that statement which is opposed to the declarant’s interest since the guarantee of reliability contained in declarations against penal interest exists only to the extent the statement is disserving to the declarant” (*id.* at 16).

Subdivision (2) (c). Subdivision (2) (c) is derived from *People v Settles* (46 NY2d 154, 168, 169-170 [1978]), wherein the Court of Appeals stated that “there must be some evidence, independent of the declaration itself . . . [which] establishes a reasonable possibility that the statement might be true.” See also *People v Soto* (26 NY3d 455, 457 [2015]) reaffirming *Settles* (“The central issue in this case is whether an unavailable witness’s statement to a defense investigator—that she, not defendant, was the driver at the time of the accident and that she fled the scene—should have been admitted as a declaration against interest. Because the witness was aware at the time she made the statement that it was against her interest, the four prongs of the test described in *People v Settles* [46 NY2d 154 (1978)] were met and the statement should have been admitted as a declaration against interest”).

8.13. Declaration of Future Intent

(1) Where an out-of-court statement of a declarant describes the declarant's then-existing intent and is offered to prove subsequent conduct, it is admissible as follows:

(a) A declarant's out-of-court statement of an intention to engage in particular conduct is admissible to prove that the declarant engaged in that conduct, provided there is independent evidence of the statement's reliability, i.e., a showing of circumstances which all but rule out a motive to falsify, and independent evidence that the declarant was at least likely to have engaged in that conduct.

(b) Where the statement also indicates an intention to engage in particular conduct with another person, such statement is admissible to prove that such other person engaged, in fact, in the conduct:

(i) if the declarant is unavailable;

(ii) if the statement of the declarant's intent unambiguously contemplated some future action by the declarant, either jointly with the non-declarant or which required the non-declarant's cooperation for its accomplishment;

(iii) to the extent that the declaration expressly or impliedly refers to a prior understanding or arrangement with the non-declarant, it must be inferable under the circumstances that the understanding or arrangement occurred in the recent past and that the declarant was a party to it or had competent knowledge of it; and

(iv) if there is independent evidence of reliability, i.e., a showing of circumstances which all but rule out a motive to falsify, and evidence that the intended future acts were at least likely to have actually taken place.

Note

This rule addresses specifically the situation where a statement of the declarant's then-existing intent, which is admissible under the exception set forth in Guide to New York Evidence rule 8.39, is offered as proof of subsequent conduct. It encompasses the doctrine as set forth in *Mutual Life Ins. Co. v Hillmon* (145 US 285 [1892]). The United States Supreme Court noted in *Hillmon* that a declarant's statements of current intent were admissible to show that the intended act occurred.

Subdivision (1) (a) is derived from several Court of Appeals decisions which followed *Hillmon*. In these decisions, the Court held that where the statement of current intent by the declarant is offered as proof that the declarant performed the intended act, the statement is admissible for that purpose. (See e.g. *Crawford v Nilan*, 289 NY 444, 448-449 [1943]; *People v Conklin*, 175 NY 333, 342 [1903].) The foundation for admissibility is derived from *People v James* (93 NY2d 620, 634-635 [1999]).

Subdivision (1) (b) is taken verbatim from *People v James* (93 NY2d at 634-635). Following dictum in *Hillmon*, the Court of Appeals held a declarant's statement of intent to participate in conduct with another person is admissible to prove that the other person engaged in the intended conduct, provided the four conditions in the rule were satisfied.

8.15 Dying Declaration¹

In a prosecution for homicide, a statement of the deceased is admissible when it is based upon personal knowledge made by a declarant in extremis, while under a sense of impending death with no hope of recovery, concerning the cause or circumstances of the deceased's impending death.

Note

This rule is derived from *People v Nieves* (67 NY2d 125, 131-134 [1986]); *People v Allen* (300 NY 222, 227 [1949]); *People v Ludkowitz* (266 NY 233, 238-239 [1935]); and *People v Becker* (215 NY 126, 145-146 [1915]).

As noted in these decisions, the key elements for its invocation are that the declarant be “in extremis” *and* is conscious of “impending death without hope of recovery.” These elements are to be strictly construed. (See *People v Nieves*, 67 NY2d at 133; *People v Liccione*, 63 AD2d 305, 316 [4th Dept 1978, Simons, J.], *affd* 50 NY2d 850 [1980] [exception applied with “great care”]; *People v Kraft*, 148 NY 631, 634 [1896] [dying declaration is not regarded “as of the same value and weight as the evidence of a witness given in a court of justice”].) Additionally, the exception encompasses only those statements that relate to the cause or circumstances of the declarant’s death. (See *People v Smith*, 172 NY 210, 242-243 [1902] [“dying declarations are admissible . . . only (as to) the circumstances of the death . . . , and . . . they may not properly include narratives of past occurrences”].)

Where the statement is nothing more than the declarant’s speculation concerning the cause of the declarant’s impending death, it is not admissible. (See *People v Gumbs*, 143 AD3d 403, 404 [1st Dept 2016] [The trial “court erred in admitting, as dying declarations, the victim’s statements implicating defendants, since they were his ‘mere expression of belief and suspici(ons)’ that defendants were involved in his shooting rather than ‘statements of facts to which a living witness would have been permitted to testify, if placed upon the stand’ (*People v Shaw*, 63 NY 36, 40 [1875])”]; see also *People v Liccione*, 63 AD2d at 319-320, citing to *Shepard v United States*, 290 US 96, 101 [1933, Cardozo, J.].)

Historically, the exception has been limited to a prosecution for a homicide. (See *People v Becker*, 215 NY at 145 [noting that the Court had held “that dying declarations were admissible in cases of homicide only, where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations”].) *Becker* added that such restriction was “so clearly established,” that any expansion of the exception would require legislative action. (*Id.*) In other jurisdictions, the exception has been

expanded to encompass civil actions and to non-homicide prosecutions. (*See e.g.* Fed Rules Evid rule 804 [b] [2] [homicide and civil cases]; Cal Evid Code § 1242 [all cases]; Colo Rev Stat § 13-25-119 [all cases]; Fla Evid Code § 90.804 [2] [b] [all cases]; Ind Rules Evid rule 804 [b] [2] [all cases]; NJ Rules Evid rule 804 [b] [2] [all criminal cases].)

In *Crawford v Washington* (541 US 36, 56 n 6 [2004]), the United States Supreme Court left open the issue of the effect, if any, of its Confrontation Clause holding upon the dying declaration exception. The Appellate Division, Second Department has held that the United States Supreme Court would likely determine that the Confrontation Clause incorporates an exception for testimonial dying declarations and so held. (*People v Clay*, 88 AD3d 14 [2d Dept 2011].) The vast majority of courts in other jurisdictions have reached the same conclusion. (*See Bishop v State*, 40 NE3d 935 [Ind Ct App 2015] [collecting cases].)

In any event, the Criminal Jury Instructions recognize that a dying declaration “is not always true,” and instruct a jury that a dying declaration “be carefully evaluated, and further that such testimony not be accorded the same value and weight as the testimony of a witness, given under oath, in open court, and subject to cross-examination.” (CJI2d[NY] General Applicability, Evidence: Dying Declaration.)

¹ In June 2022, the Note was amended to add the last paragraph.

8.17. Excited Utterance ¹

A statement about a startling or exciting event made by a participant in, or a person who personally observed, the event is admissible, irrespective of whether the declarant is available as a witness, provided the statement was made under the stress of nervous excitement resulting from the event and was not the product of studied reflection and possible fabrication.

Note

This rule is derived from the formulations of the exception as stated by the Court of Appeals. (See e.g. *People v Johnson*, 1 NY3d 302, 306 [2003] [“An out-of-court statement is properly admissible under the excited utterance exception when made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication”]; *People v Brown*, 70 NY2d 513, 518 [1987] [“An excited utterance is one made “under the immediate and uncontrolled domination of the senses and during the brief period when consideration of self-interest could not have been brought fully to bear by reasoned reflection”]; *People v Nieves*, 67 NY2d 125, 135 [1986] [“Statements within this exception are generally made contemporaneously or immediately after a startling event which affected or was observed by the declarant, and relate to the event. The essential element of the exception is that the declarant spoke while under the stress or influence of the excitement caused by the event, so that his reflective capacity was stilled. An utterance made ‘as a direct result of sensory perception during that brief period when considerations of self-interest cannot be immediately brought to bear’ is deemed sufficiently trustworthy to be admitted into evidence as an expression of the true belief of the declarant with respect to the facts observed” (citations omitted)]; *People v Edwards*, 47 NY2d 493, 496-497 [1979] [referring to exception as “excited utterance” and observing that underlying it “is the assumption that a person under the influence of the excitement precipitated by an external startling event will lack the reflective capacity essential for fabrication”]; encompasses statement “which asserts the circumstances of (the) occasion as observed by the declarant”]; *People v Caviness*, 38 NY2d 227, 230-231 [1975] [“spontaneous declarations made by a participant while he is under the stress of nervous excitement resulting from an injury or other startling event, while his reflective powers are stilled and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection and deliberation, are admissible as true exceptions to the hearsay rule”; Court also rejected decisions that excluded declarations by bystanders].)

¹ In May 2018, this rule was revised to substitute the words “a person who personally observed” the event for the words “a bystander to” the event to better reflect the need for the “bystander” to have personally observed the incident, as explained in the Note, and as emphasized by the Court of Appeals in *People v Cummings*, 2018 NY Slip Op 03306 (May 8, 2018).

The Court of Appeals has cautioned that “it must be inferable that the declarant had an opportunity to observe personally the event described in the declaration . . .” (*People v Fratello*, 92 NY2d 565, 571 [1998].) Overall, the Court has instructed that

“[t]he admissibility of an excited utterance is entrusted in the first instance to the trial court. In making that determination, the court must ascertain whether, at the time the utterance was made, the declarant was under the stress of excitement caused by an external event sufficient to still his reflective faculties, thereby preventing opportunity for deliberation which might lead the declarant to be untruthful. The court must assess not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth. Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection.” (*People v Edwards*, 47 NY2d at 497.)

With respect to the difference between the “excited utterance” exception and its “close relative” the “present sense impression” exception, the Court of Appeals has explained:

“ ‘Excited utterances’ are the product of the declarant’s exposure to a startling or upsetting event that is sufficiently powerful to render the observer’s normal reflective processes inoperative. ‘Present sense impression’ declarations, in contrast, are descriptions of events made by a person who is perceiving the event as it is unfolding. They are deemed reliable not because of the declarant’s excited mental state but rather because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory. In our State, we have added a requirement of corroboration to bolster these assurances of reliability. Thus, while the key components of ‘excited utterances’ are their spontaneity and the declarant’s excited mental state, the key components of ‘present sense impressions’ are contemporaneity and corroboration.” (*People v Vasquez*, 88 NY2d 561, 574–575 [1996] [citations omitted].)

In criminal actions, a statement admitted under this exception may be barred by the Confrontation Clause of the Federal and New York State Constitutions if it is found to be “testimonial.” (*But see People v Nieves-Andino*, 9 NY3d 12 [2007] [as police officer reasonably assumed that there was an ongoing emergency, the victim’s responses to the officer’s inquiries were nontestimonial and were admissible as excited utterances]; *People v Bradley*, 8 NY3d 124 [2006] [admission into evidence of a statement as an excited utterance was not barred by the Confrontation Clause as it was not testimonial because it was made in response to

a question from a police officer and the officer's evident reason for asking the question was to deal with an emergency].)

8.19. Forfeiture By Wrongdoing

Where a witness in a proceeding is unwilling to testify or testify to the full extent of the witness's knowledge, a party forfeits the right to preclude that witness's prior out of court statement(s) as hearsay or on the ground that the party will be denied the right to confront the witness, if the party offering the statement proves by clear and convincing evidence that: (a) the opposing party, personally or with the aid of others, engaged or acquiesced in misconduct aimed at least in part at preventing the witness from testifying, and (b) such misdeeds were a significant cause of the witness's decision not to testify or testify fully.

Note

This rule is derived from the Court of Appeals recent decisions in *People v Dubarry* (25 NY3d 161, 174-175 [2015]) and *People v Smart* (23 NY3d 213, 219-220 [2014]), which in turn were derived from several prior decisions of the court.

In *People v Geraci* (85 NY2d 359 [1995]), the court held that forfeiture requires a showing that the witness's unavailability was procured by misconduct and noted such a showing had traditionally required that the defendant procured the witness's unavailability through "violence, threats or chicanery." (*Id.* at 365-366.) In *Dubarry* and *Smart*, the court stated the rule as requiring that the defendant engaged in "misconduct" or "misdeeds" aimed at least in part at preventing the witness from testifying and that defendant's misconduct was a significant cause of the witness's decision not to testify. (*People v Dubarry*, 25 NY3d at 176, quoting *People v Smart*, 23 NY3d at 220.) These recent holdings introduced more precise evidentiary standards to the procured by misconduct rule. This language, read literally, also includes misdeeds other than "violence, threats or chicanery." The Court of Appeals, however, has never indicated that misconduct beyond these three kinds of behaviors would qualify for forfeiture. (See also *People v Cotto*, 92 NY2d 68 [1998]; *People v Johnson*, 93 NY2d 254 [1999]; *People v Maher*, 89 NY2d 456, 461-463 [1997].)

The forfeiture of confrontation rights " 'constitutes a substantial

deprivation’ ” (*People v Johnson*, 93 NY2d at 258, quoting *People v Geraci*, 85 NY2d at 367), and the clear and convincing evidence requirement places a “heavy burden” on the statement’s proponent (*People v Cotto*, 92 NY2d at 76). Forfeiture is a “narrow departure from the hearsay rule.” (*People v Maher*, 89 NY2d at 461.) Where the statement’s proponent alleges “specific facts which demonstrate a ‘distinct possibility’ that a criminal defendant has engaged in witness tampering,” the court must conduct an evidentiary hearing, known as a *Sirois* hearing (*see Matter of Holtzman v Hellenbrand*, 92 AD2d 405 [2d Dept 1983]), to determine if forfeiture should be invoked. (*People v Johnson*, 93 NY2d at 258, quoting *People v Cotto*, 92 NY2d at 72.) Because of the inherently surreptitious nature of witness tampering, circumstantial evidence may be used to establish, in whole or in part, that a witness’s unavailability was procured by the defendant. (*People v Geraci*, 85 NY2d at 369.)

The Court of Appeals has expressly stated that this forfeiture rule is not limited to admitting prior grand jury testimony of an intimidated witness and may encompass other out-of-court statements made by an intimidated witness. (*People v Cotto*, 92 NY2d at 77.) However, the court has cautioned that any statement sought to be admitted pursuant to it “cannot be so devoid of reliability as to offend due process.” (*Id.* at 78.)

The Court of Appeals has noted that when an out-of-court statement is admitted pursuant to this rule, the trial court has the discretion to admit additional out-of-court statements of the unavailable witness for impeachment where there is a possibility that, if such impeachment is not allowed, the factfinder will be misled into giving too much weight to the initially offered statement. (*People v Bosier*, 6 NY3d 523, 528 [2006].) However, the court has cautioned that impeachment need not always be allowed. In this connection, the court emphasized that the trial court in exercising that discretion shall consider that the party offering the impeaching statement may benefit from his own wrongful conduct because the party proffering the initial out-of-court statement will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent impeachment evidence. (*Id.* [“Where impeachment is permitted, the defendant, in direct contravention of the most basic legal principles and the policy objectives of *Geraci*, may benefit from his or her own wrongful conduct because the prosecution will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent testimony proffered by the defendant”].) In *Bosier*, the court rejected the defendant’s impeachment attempt, commenting that since “the inconsistency defendant relied on did not go to the heart of the prosecution’s case and might well have been credibly explained if the witness had been present, it was not an abuse of discretion to exclude the impeaching evidence.” (*Id.*)

While the forfeiture rule has arisen in criminal cases, there is no indication

in the case law that the rule is not applicable in civil actions when a party seeks to introduce a statement of an intimidated witness over a hearsay objection.

8.21. Hearsay or Nonhearsay Within Hearsay

An out-of-court statement that is included within an otherwise admissible statement is itself admissible: (a) where it is offered to prove the truth of its contents and the included statement meets the requirements of an exception to the hearsay rule; or (b) it includes a statement made by a declarant that is not offered for its truth.

Note

The Court of Appeals has addressed proffers of evidence which involve a declarant's out-of-court statement which contains another out-of-court statement. In that instance, the Court admits evidence consisting of multiple layers of out-of-court statements provided each such layer overcomes a hearsay exception or is not offered for its truth. (*See People v Ortega*, 15 NY3d 610, 620-621 [2010] [Smith, J., concurring] [discussing the "hearsay within hearsay" rule in relation to the admissibility of a hospital record that was admissible as an exception to the hearsay rule as well as the statements of crime victims contained in the hospital record].) In essence, the Court has recognized that the hearsay rule should not exclude an out-of-court statement which includes another out-of-court statement when each part of the combined statements is separately admissible.

For example, in *People v Patterson* (28 NY3d 544 [2016]), the police obtained the phone number of Patterson's accomplice and then acquired from the provider of the phone service a record of the phone numbers of calls made to that phone during the period of the crime and the subscriber information associated with those calls. The last name of the subscriber and other information pointed to defendant Patterson as the subscriber. It was accepted that the log of the phone call numbers received by the accomplice was a business record and thus admissible for its truth. The subscriber information was not admissible for its truth "because the subscriber was not under a duty to report his or her 'pedigree' information correctly when activating the prepaid cell phone accounts" (*id.* at 550). The Court of Appeals, however, held that the subscriber information was admissible for a nonhearsay purpose, namely, it was admissible not for the truth of who the subscriber and caller was, but that someone (not necessarily the defendant) had supplied certain pedigree information in subscribing to the phone service. The People were then able to couple that pedigree information with other evidence which tended to confirm that the defendant was the subscriber and caller.

By contrast, in *Flynn v Manhattan & Bronx Surface Tr. Operating Auth.* (61 NY2d 769, 770-771 [1984]) a police officer testified as to what a bus driver told him about what he, the bus driver, had heard from a passenger. That testimony “was double hearsay,” i.e., passenger to bus driver and bus driver to police officer, and was inadmissible because the statement of the passenger did not fit within any of the exceptions to the hearsay rule (*id.* at 771).

The presence of multiple out-of-court statements frequently occurs in records of regularly conducted activities. In *Patterson*, the Court set forth with approval examples of such cases:

“*Splawn v Lextaj Corp.*, 197 AD2d 479, 480 [1st Dept 1993], *lv denied* 83 NY2d 753 [1994] [hotel logbook entries reporting burglaries not admissible to prove the crimes occurred but permitted to show hotel had notice of activity]; *People v Blanchard*, 177 AD2d 854, 855 [3d Dept 1991], *lv denied* 79 NY2d 918 [1992] [police blotter entry showing phone call made by someone purporting to be defendant’s father properly received not for its truth, but to impeach father, who testified that he did not make the call]; *Donohue v Losito*, 141 AD2d 691, 691-692 [2d Dept 1988], *lv denied* 72 NY2d 810 [1988] [portion of police report indicating trial witness stated that defendant had punched plaintiff in the face not admissible for its truth under CPLR 4518, but admissible to impeach witness]” (*Patterson*, 28 NY3d at 551).

(See also *e.g. Ortega*, 15 NY3d 610 [hospital record which may contain a patient’s statement]; *Cover v Cohen*, 61 NY2d 261, 274 [1984] [police accident report which may contain statements of those involved in an accident]; *Matter of Leon RR*, 48 NY2d 117, 123 [1979] [social service department reports which may contain statements of those involved in the services being provided].)

In sum, a hearsay statement, admissible under an exception, may contain several out-of-court statements. Theoretically, under the rule such a statement is admissible, provided each statement conforms to an exception or is offered for a non-truth purpose, as the rule contains no limit. However, the trial court has the discretion to exclude an otherwise admissible statement with multiple out-of-court statements upon a determination that the statement with so many layers of other statements is unreliable, or gives rise to confusion, or is otherwise more prejudicial than probative.

8.23. Informal and Formal Judicial Admissions

(1) Informal Judicial Admissions.

(a) A statement made in the course of any judicial proceeding (whether in the same or another case) by a party or, in accord with paragraph (b), the party's attorney, that is inconsistent with the position the party now assumes is admissible as an "informal judicial admission" that constitutes evidence (not conclusive evidence) of the fact(s) admitted.

(b) For a statement of a party's attorney to be admitted as an informal judicial admission, the proponent must show that the attorney is the authorized agent of the client, that the client is the source of the statement, and that the client expressly or impliedly waived the attorney-client privilege.

(2) Formal Judicial Admissions.

An act of a party done in the course of a judicial proceeding that dispenses with the production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary is admissible as a "formal judicial admission." A formal judicial admission is conclusive of the fact(s) admitted in the action in which the admission is made.

Note

Introduction

The language of the rule is derived from *People v Brown* (98 NY2d 226 [2002]), although the rule applies in civil cases as well. (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 412 [2014]; *Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 99, 103 [1996].)

Brown summarized the differences between an “informal” and “formal” judicial admission as follows:

“An ‘informal judicial admission is a declaration made by a party in the course of any judicial proceeding (whether in the same or another case) inconsistent with the position [the party] now assumes’ (Fisch, New York Evidence § 803, at 475 [2d ed]). Such an admission is ‘not conclusive on the defendant in the litigation’ (*People v Rivera*, 45 NY2d [989,] 991 [1978]) but ‘is merely evidence of the fact or facts admitted’ (Prince, Richardson on Evidence § 8-219, at 530 [Farrell 11th ed]). By contrast, a formal judicial admission ‘takes the place of evidence’ and is ‘conclusive of the facts admitted in the action in which [it is] made’ (*id.* § 8-215, at 523 [emphasis supplied]). ‘A formal judicial admission is an act of a party done in the course of a judicial proceeding, which dispenses with the production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary’ (*id.*).” (*Brown*, 98 NY2d at 232 n 2.)

While there is a dividing line between an “informal judicial admission” and a “formal judicial admission,” as will be seen in the following comments, it is possible that a single admission may constitute both a “formal judicial admission” in one proceeding and an “informal judicial admission” in another or, in other words, an “informal judicial admission” in one proceeding may emanate from a “formal judicial admission” in another proceeding.

Informal Judicial Admissions

The foundational requirements for the introduction in evidence of an “informal judicial admission” by a party’s attorney are discernable from the facts in *Brown*. In that case, during an in-court *Sandoval* hearing, the defendant’s attorney, as Brown’s “authorized agent,” represented what the defendant would testify to at trial. Brown was present at the hearing, was the “sole source” of the attorney’s statements, and the attorney-client privilege was waived given that the attorney’s statements were “made on the record in open court.” The attorney’s statements, “which unequivocally represented to the hearing court that Brown was present at the scene only to buy drugs, were inconsistent with his trial testimony that he was at the scene for purely innocent purposes.” The trial court therefore properly allowed the prosecutor to use the attorney’s statements to impeach the defendant on cross-examination. (*Brown* at 232-233; *cf. People v Cassas*, 84 NY2d 718, 722-723 [1995] [the attorney’s statement was inadmissible here because “the attorney’s statement was oral and made out of court, to a third party,” there was “nothing to suggest the attorney had authority to speak on behalf of his client,” and

there was “no evidentiary record support for a finding of waiver of the (attorney-client) privilege by defendant”]; *see generally* John Brunetti, New York Confessions § 10.03 [6] [Admissions by Counsel, 2014 ed].)

Notably, in *Brown*, the attorney whose statement was used for impeachment was not then representing the defendant; in the circumstance where the attorney is representing the party, the trial court may need to grant “counsel’s request to withdraw” or declare “a mistrial.” (*People v Ortiz*, 26 NY3d 430, 439 [2015].)

Statements of a defendant’s attorney at the defendant’s arraignment may constitute an “informal judicial admission” (*see People v Gary*, 44 AD3d 416, 416 [1st Dept 2007]) and may be introduced in evidence “by way of the testimony of a court reporter.” (*People v Castillo*, 94 AD3d 678, 679 [1st Dept 2012]; *People v Killiebrew*, 280 AD2d 684, 685 [2d Dept 2001] [“The attorney who represented the defendant at arraignment informed the court that the defendant ‘tells me that the complaining witness . . . came towards him in a very threatening manner and he thought he was going to be attacked.’ The trial court (properly) ruled that the defendant could be impeached with this statement if he testified and raised a defense which was inconsistent with justification”]; *but see People v L.D.*, 60 Misc 3d 729 [Sup Ct, Bronx County 2018].)

Statements of a defendant’s attorney at a bail hearing may constitute an “informal judicial admission.” (*People v Johnson*, 46 AD3d 276, 278 [1st Dept 2007]; *People v Mahone*, 206 AD2d 263, 264 [1st Dept 1994].)

A plea of guilty or admission of guilt may be a “formal judicial admission” in the action where entered and is admissible as an “informal judicial admission” in a separate action. (*See Ando v Woodberry*, 8 NY2d 165, 166 [1960] [a plea of guilty to a traffic offense is admissible in a civil negligence action as evidence of the defendant’s carelessness, but the defendant may submit evidence on the reason for entering the plea that may affect the weight to accord the plea]; *People v Walden*, 236 AD2d 779, 779 [4th Dept 1997] [in a prosecution for sexual abuse and endangering the welfare of a child, the defendant’s admission of guilt in a parallel Family Court proceeding was properly received into evidence against the defendant].)

Similarly, an “admission in a pleading in one action is admissible against the pleader in another suit” as an “informal judicial admission,” provided “that it can be shown that the facts were alleged with the pleader’s knowledge or under his direction.” (*Jack C. Hirsch, Inc. v Town of N. Hempstead*, 177 AD2d 683, 684 [2d Dept 1991]; *compare* CPLR 3123 [b] [“Any admission made, or deemed to be made, by a party pursuant to a request (for an admission) made under this rule is for the purpose of the pending action only and does not constitute an admission by

him for any other purpose nor may it be used against him in any other proceeding”].)

A formal judicial admission in a pleading in a civil proceeding may become an “informal judicial admission” when the pleading is amended. See the section below on Formal Judicial Admissions in a civil proceeding.

An “informal judicial admission” of a party to a judicial proceeding by the party’s attorney may be used to impeach that party’s testimony given as a defense witness in another case. (*People v Davis*, 103 AD3d 810, 812 [2d Dept 2013] [the People properly impeached “the testimony of a defense witness with a statement made by that witness’s former counsel in his presence at a plea proceeding (see *People v Brown*, 98 NY2d 226 [2002])”].)

Statements of a defendant’s attorney in an affidavit may constitute an informal judicial admission. (See *Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 99, 103 [1996] [statements made by a party’s outside counsel in a sworn affidavit in a related action, incorporating supporting documentation and evidence, constituted informal judicial admissions].) That informal judicial admission may be used to impeach a defendant during cross-examination; in the discretion of the court, the affidavit itself may be received in evidence solely for impeachment purposes. (*People v Rivera*, 58 AD2d 147, 148 [1st Dept 1977], *aff’d* 45 NY2d 989 [1978] [the trial court did not commit error when it “permitted cross-examination based on this affidavit and received the affidavit in evidence, limiting however, both the exhibit and the related cross-examination to use for impeachment of credibility only”].)

Formal Judicial Admissions

A party may admit the truth of fact(s) in issue in an action that would thereby be conclusive of the fact(s) admitted in that action. The bedrock principle behind a “formal judicial admission” is: “ ‘A controversy put out of the case by the parties is not to be put into it by us.’ ” (*People v Robinson*, 284 NY 75, 81 [1940].)

Criminal proceeding

Examples of a “formal judicial admission” in a criminal proceeding are:

- The defense concession in a murder trial that the deceased had been “brutally killed,” “strangled by someone,” in part justified the court in denying the defendant’s request to charge the jury on the need for corroboration of a confession by some proof that the

crime charged has been committed by someone. (*People v Louis*, 1 NY2d 137, 141 [1956].)

- The trial court did not err “in failing to instruct the jury that, if they found that the value of the [stolen] property was less than \$100, they should find the defendant guilty of a misdemeanor” because the defendant testified and admitted in his testimony that the value exceeded \$100, “thus taking the issue of value out of the case.” (*People v Brady*, 16 NY2d 186, 189-190 [1965].)
- In a bribery prosecution, the defendant’s “guilty connection with the crime did not extend to actual payment of the money, only to bringing about the payment[;] the issue of whether or not [the bribe giver] actually gave the money to [the bribe receiver] was taken out of the case by defense counsel’s numerous concessions on this point.” The concessions “relieved the prosecution of any obligation of presenting further evidence on the question on the trial even though the jury was charged that it must find that a bribe took place in order to bring in guilty verdicts on the counts in the indictment on which [the defendant] was convicted.” (*People v Morhouse*, 21 NY2d 66, 75 [1967].)

Civil proceeding

In a civil proceeding: “Facts admitted in a party’s pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made” (*GMS Batching, Inc. v TADCO Constr. Corp.*, 120 AD3d 549, 551 [2d Dept 2014]; see *Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 412 [2014] [quoting *GMS Batching* in holding that as a “general matter, statements in the corporations’ pleadings that they owed (appellant) the settlement money constitute formal judicial admissions . . . (and these) assertions are ‘conclusive upon the party making (them)’ ” (citations omitted)]; *Cook v Barr*, 44 NY 156, 158 [1870] [“admissions contained in the pleadings” are admissible when shown “by the signature of the party, or otherwise, that the facts were inserted with his knowledge, or under his direction, and with his sanction”]; *Roxborough Apts. Corp. v Kalish*, 29 Misc 3d 41, 42-43 [App Term, 1st Dept 2010] [“Statements made in a pleading verified by a person with personal knowledge of the content of the statements are formal judicial admissions, which dispense with the production of evidence and concede, for the purposes of the litigation in which the pleading was prepared, the truth of the statements”]; see also CPLR 2104 [“An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered”]).

A statement in a pleading made on personal knowledge “constitutes a formal judicial admission,” and “even though [the pleading is] subject to a subsequent, valid amendment, [the statement] remains evidence of the facts admitted”—i.e., the statement then constitutes an “informal judicial admission.” (*Bogoni v Friedlander*, 197 AD2d 281, 291-292 [1st Dept 1994]; *Stauber v Brookhaven Natl. Lab.*, 256 AD2d 570, 570-571 [2d Dept 1998] [“If a complaint is amended with leave of the court, any formal judicial admission deleted by the amendment is relegated to the status of an informal judicial admission which, although not conclusive, constitutes evidence of the proposition alleged”]; *Resseguie v Adams*, 55 AD2d 698, 699 [3d Dept 1976], *affd on mem below sub nom. Locator-Map v Adams*, 42 NY2d 1022 [1977] [“Even if a valid amendment of defendants’ pleadings were made, the admissions are still evidence of the facts admitted”].)

A party cannot be charged with a “formal judicial admission” based on inconsistent pleadings which are authorized by law (*Scolite Intl. Corp. v Vincent J. Smith, Inc.*, 68 AD2d 417, 421 [3d Dept 1979]).

Statements made in a pleading “on information and belief” do not constitute a “formal judicial admission.” (*Empire Purveyors, Inc. v Weinberg*, 66 AD3d 508, 509 [2009]; *Scolite Intl. Corp. v Vincent J. Smith, Inc.* at 421; *but see Ficus Invs., Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 11 [2009].)

A “concession arguendo contained in a brief on a motion for summary judgment is not a formal judicial admission.” (*1014 Fifth Ave. Realty Corp. v Manhattan Realty Co.*, 67 NY2d 718, 720 [1986].)

By statute, certain conduct generally directed to a settlement of an action “shall not be made known to the jury.” (CPLR 3219 [Tender (of an amount deemed by party to be sufficient to satisfy the claim asserted against the party)]; 3220 [Offer to liquidate damages conditionally]; 3221 [Offer to compromise].)

8.24 Market Reports (CPLR 4533)

A report of a regularly organized stock or commodity market published in a newspaper or periodical of general circulation or in an official publication or trade journal is admissible in evidence to prove the market price or value of any article regularly sold or dealt in on such market. The circumstances of the preparation of such a report may be shown to affect its weight, but they shall not affect its admissibility.

Note

This rule restates verbatim CPLR 4533. It sets forth a hearsay exception for a report of a regularly organized stock or commodity market published in a newspaper or periodical of general circulation or an official publication or trade journal when offered to prove the price or value of any article regularly sold or dealt in on such market.

“Reports of stock and commodity market prices . . . are considered trustworthy because members of the public generally rely upon them and the persons who compile the figures that go into the reports are motivated to be accurate in order to maintain such reliance” (Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4533).

Thus, there is no requirement that the report be shown to have been accurately compiled or that the report is considered authoritative before it may be admitted. Evidence of the circumstances of the report’s preparation, however, is admissible to affect the weight to be given to the report by the trier of fact. (CPLR 4533 [last sentence]; see *Auld v Estridge*, 86 Misc 2d 895, 907 [Sup Ct, Nassau County 1976] [finding reports of the National Quotation Bureau showing the value of over-the-counter stock to be admissible pursuant to CPLR 4533, albeit they had “only small probative force”], *affd* 58 AD2d 636 [2d Dept 1977].)

When the report is published in a newspaper or periodical of general circulation, a separate foundation for the “authenticity” of the report is not necessary as the report will be deemed self-authenticating (CPLR 4533; Guide to NY Evid rule 9.03 [4]).

8.25. Past Recollection Recorded

A memorandum or record made or adopted by a witness concerning a matter about which that witness had knowledge, but about which the witness lacks sufficient present recollection to enable the witness to testify fully and accurately, even after reading the memorandum or record, is admissible, provided: (a) the memorandum or record was made or adopted by the witness when the matter was fresh in the witness's memory and (b) the witness testifies that the memorandum or record correctly represented the witness's knowledge and recollection when made.

Note

This rule is derived from *People v Taylor* (80 NY2d 1, 8 [1992] [(A) memorandum made of a fact known or an event observed in the past of which the witness lacks sufficient present recollection may be received in evidence as a supplement to the witness's oral testimony. The requirements for admission of a memorandum of a past recollection are generally stated to be that the witness observed the matter recorded, the recollection was fairly fresh when recorded or adopted, the witness can presently testify that the record correctly represented his knowledge and recollection when made, and the witness lacks sufficient present recollection of the recorded information" (citations omitted)]; see also *People v Caprio*, 25 AD2d 145, 150 [2d Dept 1966]), *affd* 18 NY2d 617 [1966]; *Halsey v Sinsebaugh*, 15 NY 485 [1857]).

8.27. Statement of Pedigree

(1) An out-of-court statement by a declarant concerning the declarant's or another person's birth, adoption, death, lineage, marriage, legitimacy or other relationship between or among family members or other similar fact of personal or family history, made before the controversy, is admissible even though the declarant had no means of acquiring personal knowledge of the matter stated, provided that the relationship of the declarant with the family is established by some proof independent of the declaration itself, and the declarant is not available as a witness.

(2) A statement admissible under this exception may be in any form.

(3) A witness may testify to his or her own pedigree.

Note

Subdivision (1). Pedigree means the history of family descent that is transmitted from one generation to another and encompasses such matters as birth, descent, marriage, death and relationship. Pedigree declarations "extend to any inquiry necessarily involving these events, or which tend to show that either, some or all of them took place or did not." (*Washington v Bank for Sav. in City of N.Y.*, 171 NY 166, 175 [1902].)

Pedigree declarations are "a well known and recognized exception to the general rule excluding hearsay evidence." (*Eisenlord v Clum*, 126 NY 552, 563 [1891].) They are "admitted on the principle that they are the natural effusions of persons who must know the truth and who speak on occasions when their minds stand in an even position without any temptation to exceed or fall short of the truth." (*Aalholm v People*, 211 NY 406, 412 [1914].) The exception encompasses statements by a declarant concerning his or her personal family history or another's personal or family history.

The formulation of the rule is based on the decisional law of the Court of Appeals. Thus, the Court has held that

- a pedigree declaration must have been made before the controversy giving rise to the action (*Aalholm*, 211 NY at 412-413; *Young v Shulenberg*, 165 NY 385, 388 [1901]);
- the declaration to be admissible “need not be upon the knowledge of the declarant” (*Eisenlord*, 126 NY at 564); and
- “[t]he declarant must be related either by blood or affinity to the family concerning which he speaks” (*Aalholm*, 211 NY at 413).

The Court of Appeals has emphasized as an “important qualification” to the exception that, “before a declaration can be admitted in evidence, the relationship of the declarant with the family must be established by some proof independent of the declaration itself,” although proof of the family relationship may be “slight.” (*Aalholm*, 211 NY at 414-415; *Young*, 165 NY at 388 [“ ‘slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy’ ” (citation omitted)].)

As to unavailability of the declarant, the Court of Appeals has recognized three grounds: death, incompetency, and absence beyond the jurisdiction. (*See Young*, 165 NY at 388.) *Young* does not indicate whether these are the only grounds of unavailability that are recognized for this hearsay exception or whether other grounds might be acceptable.

Subdivision (2) is derived from the numerous decisions in which this exception was in issue. (*See Aalholm*, 211 NY at 412 [oral statements]; *Young*, 165 NY at 388 [deeds and immigration acknowledgment before a United States minister]; *Matter of Whalen*, 146 Misc 176, 189 [Sur Ct, NY County 1932] [statements made “in a family bible, inscriptions on tombstones, etc.”].)

Subdivision (3) is derived from *Koester v Rochester Candy Works* (194 NY 92, 97 [1909] [witness competent to testify to his or her own age]) and *People v Lewis* (69 NY2d 321, 324 [1987] [witness permitted to testify that defendant was her father]).

8.29. Present Sense Impression

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition as it was unfolding or immediately thereafter is admissible, irrespective of whether the declarant is available to testify, provided that there is evidence, independent of the statement, that supports: (a) the accuracy of the contents of the statement and (b) that the statement was made contemporaneously with the event or immediately thereafter.

Note

This formulation of the present sense impression hearsay exception is primarily derived from *People v Brown* (80 NY2d 729, 734-735, 737 [1993]), wherein the Court of Appeals recognized the exception:

“[W]e hold that spontaneous descriptions of events made substantially contemporaneously with the observations are admissible if the descriptions are sufficiently corroborated by other evidence. Further, such statements may be admitted even though the declarant is not a participant in the events and is an unidentified bystander . . .

“What corroboration is sufficient will depend on the particular circumstances of each case and must be left largely to the sound discretion of the trial court. But before present sense impression testimony is received there must be some evidence in addition to the statements themselves to assure the court that the statements sought to be admitted were made spontaneously and contemporaneously with the events described.”

(See *People v Cantave*, 21 NY3d 374, 382 [2013]). *Brown* requires that the present sense impression statement must be made while the declarant was observing the event as it was unfolding or “immediately thereafter.” The statements at issue in *Brown* were “contemporaneous reports of events then being observed by the [declarant]” (*People v Brown*, 80 NY2d at 732), and thus the Court had no occasion to discuss what it meant by “immediately thereafter.”

The Court had that opportunity in *People v Vasquez* (88 NY2d 561, 575 [1996]):

“The . . . language [‘or immediately thereafter’] . . . was meant to suggest only that the description and the event need not be precisely simultaneous, since it is virtually impossible to describe a rapidly unfolding series of events without some delay between the occurrence and the observer’s utterance. The language in question was certainly not intended to suggest that declarations can qualify as present sense impressions even when they are made after the event being described has concluded. Indeed, we noted in *Brown* that the description of events must be made ‘substantially contemporaneously’ with the observations (*id.*, at 734).

“Thus, although we recognize that there must be some room for a marginal time lag between the event and the declarant’s description of that event, that recognition does not obviate the basic need for a communication that reflects a *present* sense impression rather than a recalled or recast description of events that were observed in the recent past. Without satisfaction of this requirement, the essential assurance of reliability—the absence of time for reflection and the reduced likelihood of faulty recollection—is negated and there is then nothing to distinguish the declaration from any other postevent out-of-court statement that is offered for the truth of its contents.”

The Court then found that the 911 call by defendant was not admissible under the exception as it was “after the entire sequence of events had come to a final and fatal end and defendant had run from the crime scene. At that point, it could no longer be said that defendant’s statements were a description of his ‘present sense impressions’ as his observations were made” (*People v Vasquez*, 88 NY2d at 578), and a statement by a victim was not admissible as it was made “several minutes after the assault took place.” (*Id.* at 580.)

Consistent with this strict view of the contemporaneity element, the Appellate Divisions have indicated that a time lag of a few seconds after the event ended and the statement was made will satisfy the element of “‘immediately thereafter.’” (*People v Haskins*, 121 AD3d 1181, 1184 [3d Dept 2014] [“right away,” but under the excited utterance exception]; *People v George*, 79 AD3d 1148, 1148 [2d Dept 2010] [the delay was insufficient to impair reliability]; *People v York*, 304 AD2d 681, 681 [2d Dept 2003] [same]; *People v White*, 297 AD2d 587, 587 [1st Dept 2002] [“substantially contemporaneous”].) A delay of seven minutes after the end, however, will not satisfy the element of “‘immediately thereafter.’” (*People v Demand*, 268 AD2d 901, 902 [3d Dept 2000].)

With respect to the difference between the “excited utterance” exception

and its “close relative” the “present sense impression” exception, *People v Vasquez* (88 NY2d at 574-575) explained:

“ ‘Excited utterances’ are the product of the declarant’s exposure to a startling or upsetting event that is sufficiently powerful to render the observer’s normal reflective processes inoperative. ‘Present sense impression’ declarations, in contrast, are descriptions of events made by a person who is perceiving the event as it is unfolding. They are deemed reliable not because of the declarant’s excited mental state but rather because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory. In our State, we have added a requirement of corroboration to bolster these assurances of reliability. Thus, while the key components of ‘excited utterances’ are their spontaneity and the declarant’s excited mental state, the key components of ‘present sense impressions’ are contemporaneity and corroboration” (citations omitted).

With respect to corroboration of the present sense impression statement, the Court also elaborated on that requirement in *People v Vasquez* (88 NY2d at 575-576), as follows:

“The general idea, as we stated in *Brown* . . . , is that there must be some independent verification of the declarant’s descriptions of the unfolding events. Although we stated in *People v Brown* . . . that ‘there must be some evidence . . . that the statements sought to be admitted were made spontaneously and contemporaneously with the events described,’ we did not mean by that language that such proof would suffice to satisfy the entirely separate requirement that the content of the communication be corroborated by independent proof. Rather, we merely intended to reiterate the basic foundational requirements for admitting an out-of-court declaration purporting to be a ‘*present* sense impression.’ Accordingly, contrary to appellants’ arguments here, the corroboration element cannot be established merely by showing that the declarant’s statements were unprompted and were made at or about the time of the reported event.

“The extent to which the content of the declaration must be corroborated by extrinsic proof is, as we have previously said, dependent on the particular circumstances of the individual case (*People v Brown*, 80 NY2d, at 737). Because

of the myriad of situations in which the problem may arise, it would not be productive to attempt to fashion a definitive template for general application. It is sufficient at this point to note that in all cases the critical inquiry should be whether the corroboration offered to support admission of the statement truly serves to support its substance and content.”

The admissibility of a present sense impression is not conditioned on the declarant being unavailable to testify. (*People v Buie*, 86 NY2d 501, 506-507 [1995].) *Buie* did note, however, that the unavailability of the declarant “may be weighed by Trial Judges in assessing the traditional probativeness versus undue prejudice calculus for allowing evidence before a petit jury.” (*Id.* at 506.)

In criminal actions, a statement admitted under this exception may be barred by the Confrontation Clause of the Federal and New York State Constitutions if it is found to be “testimonial.” (See *People v Rodriguez*, 50 AD3d 476, 476 [1st Dept 2008] [declarants’ statements to 911 operators describing the victim’s pursuit of defendant and his accomplice were admissible under the present sense impression exception and they were not testimonial as the statements in the calls were primarily “to enable police assistance to meet an ongoing emergency”]; *People v Coleman*, 16 AD3d 254, 255 [1st Dept 2005] [information conveyed by the 911 caller was admissible under the present sense impression and excited utterance exceptions and was not testimonial as it was made for the “purpose of urgently seeking police intervention”].)

8.31 Prior Consistent Statement¹

(1) Except as otherwise provided in this rule, a prior statement of a testifying witness that is consistent with the witness's testimony is not admissible in evidence.

(2) A statement of a witness made before the witness's testimony, at a time when there was no motive to fabricate, and which is consistent with that testimony, is admissible to aid in establishing the witness's credibility when a party creates the inference of, or directly characterizes the testimony of the witness as a recent fabrication, as set forth in Guide to New York Evidence rule 6.20.

(3) A statement of a witness made before the witness's testimony that constitutes a "prompt outcry" is admissible to the extent set forth in Guide to New York Evidence rule 8.37.

(4) A statement of a witness made before the witness's testimony that describes the person alleged to have committed the charged offense and is consistent with the witness's testimony is admissible, not for its truth, but rather as evidence that assists the jury in evaluating the witness's opportunity to observe at the time of the crime, and the reliability of her memory at the time of the corporeal identification.

(5) A statement of a witness made before the witness's testimony is admissible when the statement is admitted not for the truth of its contents but for some other relevant purpose, such as explaining what led to an investigation and arrest.

Note

Subdivision (1) states the general rule that excludes a testifying witness's prior consistent statements. As summarized in *People v McDaniel* (81 NY2d 10, 16 [1993]):

“A witness’ trial testimony ordinarily may not be bolstered with pretrial statements. Several rationales underlie the rule: untrustworthy testimony does not become less so merely by repetition; testimony under oath is preferable to extrajudicial statements; and litigations should not devolve into contests as to which party could obtain the latest version of a witness’ story” (citations omitted).

McDaniel, however, also recognized exceptions to the general rule of exclusion.

Subdivision (2) sets forth an exception for the admission of a prior consistent statement of a witness when the testimony of the witness is challenged as a “recent fabrication,” meaning “the defense is charging the witness not with mistake or confusion, but with making up a false story” (*People v Singer*, 300 NY 120, 123-124 [1949]; Guide to NY Evid rule 6.20 [Impeachment by Recent Fabrication]; see generally, Michael J. Hutter, *Admissibility of Prior Consistent Statement*, NYLJ, Dec. 4, 2014, available at <https://www.law.com/newyorklawjournal/almID/1202677999322/admissibility-of-prior-consistent-statement/>).

As stated by the Court of Appeals, “[t]his exception is rooted in fairness; it would be unjust to permit a party to suggest that a witness, as a result of interest, bias or influence, is fabricating a story without allowing the opponent to demonstrate that the witness had spoken similarly even before the alleged incentive to falsify arose” (*People v McDaniel*, 81 NY2d at 18).

The “recent fabrication” exception for admissibility of a prior consistent statement is derived from the substantial Court of Appeals precedent which holds that a prior consistent statement is admissible where the “cross-examiner has created the inference of, or directly characterized the testimony as, a recent fabrication” (*People v Davis*, 44 NY2d 269, 277 [1978]; see *Fishman v Scheuer*, 39 NY2d 502, 504 [1976] [“The plaintiff had not attempted to assert that the testimony of [the] witness was a recent fabrication. In the absence of such claim, prior consistent statements are inadmissible”]; *Crawford v Nilan*, 289 NY 444, 450-451 [1943]; *People v Seit*, 86 NY2d 92, 96 [1995] [“The implication that the testimony was recently fabricated arises only if it appears that the cross-examiner believes and wants the jury to believe that the witness is testifying falsely to ‘meet the exigencies of the case’ ” (citing *People v Katz*, 209 NY 311, 340 [1913])]). The further condition for admissibility that the statement was made before the charged fabrication is also derived from substantial Court of Appeals precedent (see *Davis*, 44 NY2d at 277 [“prior consistent statements made at a time when there was no motive to falsify are admissible to repel the implication or charge”]).

Consistent with the “recent fabrication” condition, the Court of Appeals has noted that mere impeachment with a prior inconsistent statement or other attack on the credibility of a witness is an insufficient basis for admitting a prior consistent

statement (*People v Ramos*, 70 NY2d 639 [1987]; *Crawford*, 289 NY at 450 [“testimony of an impeached or discredited witness may not be supported and bolstered by proving that he has made similar declarations out of court”]).

When a prior consistent statement is admissible under the exception recognized by this section, the Court of Appeals has noted that the statement “may be admitted, not to prove or disprove any of the facts in issue, but to aid in establishing the credibility of the witness” (*People v McClean*, 69 NY2d 426, 428 [1987]; *People v McDaniel*, 81 NY2d 10, 18 [1993]).

Proof of the prior consistent statement(s) may be testified to by the witness or otherwise by “independent verification of the prior statements” (*People v Mirenda*, 23 NY2d 439, 452 [1969] [“We see no reason why a witness cannot attempt to rehabilitate himself by testifying to prior consistent statements after a claim of recent fabrication. It is open to the adversary, of course, to point out to the jury that this rehabilitation testimony is a less reliable indication of veracity than if independent verification of the prior statements had been offered”]; see *People v Maldonado*, 97 NY2d 522, 529 [2002] [“composite sketch may be admissible as a prior consistent statement where the testimony of an identifying witness is assailed as a recent fabrication”]; *Seit*, 86 NY2d at 98 [a 911 tape should have been admitted in response to a claim of recent fabrication]; *People v Baker*, 23 NY2d 307, 323 [1968] [approving testimony by the witness and the person to whom the prior consistent statements were made])).

Subdivision (3) is explained in the Guide to New York Evidence rule 8.37 (Prompt Outcry) (see *People v Rosario*, 17 NY3d 501, 511 [2011] [“The prompt outcry rule—an exception to the inadmissibility of the prior consistent statements of an unimpeached witness—‘permits evidence that a timely complaint (of a sexual assault) was made,’ but does not allow further testimony as to the ‘details of the incident’ ” (citation omitted)])).

Subdivision (4) is derived from the Court of Appeals decision in *People v Huertas* (75 NY2d 487, 488-489 [1990]). In that case, the Court allowed the “admission into evidence, on the People’s direct case, of the complaining witness’s account of a description of her assailant given to the police shortly after she was raped” (*id.* at 488), noting that the “probative force of the complainant’s description evidence is not based on an assumption that the prior description is or is not true, nor does the comparison conclusively establish the identification as accurate or inaccurate. It is, however, evidence that assists the jury in evaluating the witness’s opportunity to observe at the time of the crime, and the reliability of her memory at the time of the corporeal identification—both important aspects of the critical issue. Thus, the description testimony was properly admitted for this nonhearsay purpose” (*id.* at 493; but see *People v Fluitt*, 80 NY2d 949, 950 [1992] [where the complainant’s showup identification of the defendant had been suppressed, “it was improper for complainant to give a physical description of the robber—there having been no finding that such description, given for the first time *after* the showup, was

untainted”]).

In addition to the complainant’s testimony of the description, a police officer to whom the “crime victim” gave a description of the perpetrator may testify “to a victim’s description, where it does not tend to mislead the jury” by giving the jury, for example, the “false impression that there was ‘an impressive amount of testimony’ corroborating [the complainant’s] account” (*People v Smith*, 22 NY3d 462, 464, 467 [2013]).

Subdivision (5) is a catchall provision derived from Court of Appeals decisions allowing for the introduction in evidence of a prior consistent statement when the statement is admitted not for its truth but for some other relevant reason, such as explaining the “investigative process and completing the narrative of events leading to the defendant’s arrest” (e.g. *People v Gross*, 26 NY3d 689, 694-695 [2016]; *People v Ludwig*, 24 NY3d 221, 231 [2014]). In those cases, witnesses were permitted to testify that the child whom the defendant was accused of sexually abusing had made “nonspecific statements,” a “disclosure,” relating to sexual abuse and the “steps they took after hearing the disclosure,” not for the truth of the child’s statements, but rather to explain the process that led to the investigation and arrest of the defendant.

¹ In June 2022, this rule was amended to number the sole existing paragraph of the rule to be subdivision (2) and to amend the content of that subdivision to conform with the addition of rule 6.02 on “recent fabrication.” Further, subdivisions (1), (3), (4), and (5) have been added to reflect in the rule information that was in part in the Note.

8.33. Prior Inconsistent Statement

(1) Civil Proceeding. If a witness testifies at a proceeding and is subject to cross-examination concerning a statement made by the witness prior to the proceeding, the statement is admissible if the statement is inconsistent with the witness's testimony and the statement contains sufficient indicia of reliability justifying its admissibility.

(2) Criminal Proceeding. If a witness testifies at a proceeding and is subject to cross-examination concerning a statement made by the witness prior to the proceeding, the statement is admissible if the statement is inconsistent with the witness's testimony but solely for impeachment purposes.

Note

Subdivision (1) sets forth an exception for a prior inconsistent statement of a declarant where the declarant in a civil case testifies at the proceeding and is subject to cross-examination (*see Kaufman v Quickway, Inc.*, 14 NY3d 907, 908 [2010] ["hearsay exception for prior inconsistent statements"]). As derived from *Kaufman* (14 NY3d at 908), *Nucci v Proper* (95 NY2d 597, 602-603 [2001]), and *Letendre v Hartford Acc. & Indem. Co.* (21 NY2d 518, 524 [1968]), the statement must possess sufficient indicia of reliability to justify its admission. In *Kaufman*, the Court of Appeals found the statement in issue met that standard as it was in writing, made to a State Police trooper and signed under penalty of perjury (14 NY3d at 908); and in *Letendre*, the Court found the statement to be reliable since it was in writing and had the declarant been unavailable to testify at trial, the statement would have been admissible as a declaration against interest (21 NY2d at 524). However, in *Nucci*, the statements were found to possess no indicia of reliability, as under the circumstances "a significant probability exist[ed] that the statements may implicate the dangers of the declarant's faulty memory or perception, insincerity, or ambiguity—traditional testimonial infirmities which the hearsay rule is designed to guard against" (95 NY2d at 604).

Subdivision (2) sets forth the view of the Court of Appeals that a prior inconsistent statement of an adverse witness is admissible in a criminal proceeding for impeachment purposes only (*see People v Freeman*, 9 NY2d 600, 605 [1961]).

[“ ‘(A) witness’ own prior statement in which he has given a contrary version’ . . . may not be introduced as affirmative evidence”]).

By statute, in a criminal proceeding a party may impeach *its own witness* when that witness “gives testimony upon a material issue of the case which tends to disprove the position” of the party who called the witness by introducing “evidence that such witness has previously made either a written statement signed by him or an oral statement under oath contradictory to such testimony” (CPL 60.35 [1]).

8.35. Prior Judgment of Conviction

(1) Civil proceeding. In a civil proceeding, evidence of a final judgment adjudging a person guilty of a crime is admissible as *prima facie* evidence of the facts involved in the criminal judgment.

(2) Criminal proceeding. If in the course of a criminal proceeding, any witness, including a defendant, is properly asked whether he or she was previously convicted of a specified offense and answers in the negative or in an equivocal manner, the party adverse to the one who called him or her may independently prove such conviction. If in response to proper inquiry whether he or she has ever been convicted of any offense the witness answers in the negative or in an equivocal manner, the adverse party may independently prove any previous conviction of the witness.

Note

Subdivision (1) is derived from *Schindler v Royal Ins. Co.* (258 NY 310, 314 [1932]) wherein the Court of Appeals held a party's prior conviction of a crime was admissible in a later civil action and the conviction was "*prima facie* evidence of the facts involved," i.e., the facts upon which the conviction rested.

Where a conviction is entered upon a guilty plea, the plea is admissible as a party admission. (*Ando v Woodberry*, 8 NY2d 165 [1960] [plea of guilty to a traffic violation admissible as an admission].)

Subdivision (2) is taken verbatim from CPL 60.40 (1).

8.36.1 Prior Testimony in Criminal Proceedings [CPL art 670]

(1) *Prior testimony.* Under circumstances prescribed in [CPL article 670], testimony given by a witness at (a) a trial of an accusatory instrument, or (b) a hearing upon a felony complaint conducted pursuant to [CPL] section 180.60, or (c) an examination of such witness conditionally, conducted pursuant to [CPL] article six hundred sixty, may, where otherwise admissible, be received into evidence at a subsequent proceeding in or relating to the action involved when at the time of such subsequent proceeding the witness is unable to attend the same by reason of death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot with due diligence be brought before the court. Upon being received into evidence, such testimony may be read and any videotape or photographic recording thereof played. Where any recording is received into evidence, the stenographic transcript of that examination shall also be received.

(2) *Subsequent proceedings, defined.* The subsequent proceedings at which such testimony may be received in evidence consist of:

(a) Any proceeding constituting a part of a criminal action based upon the charge or charges which were pending against the defendant at the time of the witness's testimony and to which such testimony related; and

(b) Any post-judgment proceeding in which a judgment of conviction upon a charge specified in paragraph (a) is challenged.

(3) *Procedure in non-grand jury proceeding.* In any criminal action or proceeding other than a grand jury proceeding, a party thereto who desires to offer in evidence testimony of a witness given in a previous

action or proceeding, as provided [in subdivision one], must so move, either in writing or orally in open court, and must submit to the court, and serve a copy thereof upon the adverse party, an authenticated transcript of the testimony and any videotape or photographic recording thereof sought to be introduced. Such moving party must further state facts showing that personal attendance of the witness in question is precluded by some factor specified in [subdivision one]. In determining the motion, the court, with opportunity for both parties to be heard, must make inquiry and conduct a hearing to determine whether personal attendance of the witness is so precluded. If the court determines that such is the case and grants the motion, the moving party may introduce the transcript in evidence and read into evidence the testimony contained therein. In such case, the adverse party may register any objection or protest thereto that he would be entitled to register were the witness testifying in person, and the court must rule thereon.

(4) *Procedure in grand jury proceedings.* Without obtaining any court order or authorization, a district attorney may introduce in evidence in a grand jury proceeding testimony of a witness given in a previous action or proceeding specified in [subdivision one], provided that a foundation for such evidence is laid by other evidence demonstrating that personal attendance of such witness is precluded by some factor specified in [subdivision one].

Note

Except for the subdivision headings in italics, the words in brackets, and the substitution of “[CPL article 670]” for the words “this article” in the opening line of subdivision (1), this rule reproduces verbatim CPL 670.10 (“Use in a criminal proceeding of testimony given in a previous proceeding; when authorized”) in subdivisions (1) and (2), and CPL 670.20 (“Use in a criminal proceeding of testimony given in a previous proceeding; procedure”) in subdivisions (2) and (3).

The rule sets forth a hearsay exception governing the admissibility of testimony previously taken in certain, specified criminal proceedings in subsequent criminal proceedings.

Unlike its counterpart governing admissibility of former testimony in civil actions, its provisions are not supplemented by the common law (*People v Harding*, 37 NY2d 130 [1975]; see Guide to NY Evid rule 8.36, Prior Testimony in a Civil Proceeding).

The Confrontation Clause prohibits the “admission of testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination” (*Crawford v Washington*, 541 US 36, 53-54 [2004]; see *People v Pealer*, 20 NY3d 447, 453 [2013]).

To the extent therefore that the witness is unavailable and there has been a full and fair opportunity for cross-examination by the party against whom the testimony is offered, the requirements of the Confrontation Clause are met. (*Compare People v Simmons*, 36 NY2d 126 [1975], with *People v Prince*, 66 NY2d 935 [1985], *affg for reasons stated below* 106 AD2d 521 [2d Dept 1984].)

As stated by the Court of Appeals: “Insofar as it allows a jury to convict a defendant based on a witness’s previous testimony, CPL 670.10 (1) is an exception to the Sixth Amendment right of confrontation. Although the right of confrontation contemplates that testimony against an accused be ‘delivered live within eyesight and earshot of the jurors,’ the statute makes, and the Constitution allows, limited departures based on necessity and fairness.” (*People v Diaz*, 97 NY2d 109, 114 [2001] [citations omitted]; see also Guide to NY Evid rule 8.02, Admissibility Limited by Confrontation Clause [*Crawford*] and accompanying note.)

Subdivision (1) states verbatim CPL 670.10 (1). It sets forth three specific types of former testimony which are admissible when the declarant is proved “unable to attend” trial for specified reasons: testimony that was given at a trial on the accusatory instrument, at a preliminary hearing on a felony complaint, or at a conditional examination under CPL article 660 (CPL 670.10 [1]).

The Court of Appeals, construing strictly this statutory provision, has observed that its “ ‘three carefully worded and enumerated exceptions’ to the use of prior testimony of an unavailable declarant are essentially exclusive” (*People v Tapia*, 33 NY3d 257, 266 [2019] [citation omitted]). Thus, if the proffered testimony is given at a proceeding other than the three types stated in the statute, it is inadmissible under the exception. (See e.g. *People v Ayala*, 75 NY2d 422, 428-29 [1990]; *Harding*, 37 NY2d at 133.)

At the prior permitted proceeding, there must have been also, as noted, a full and fair opportunity to cross-examine the declarant. (*People v Simmons*, 36

NY2d 126 [1975]). “An adequate opportunity to cross-examine at the prior proceeding is an additional, constitutional requirement for the admissibility of prior testimony that otherwise satisfies CPL 670.10” (*Ayala*, 75 NY2d at 430).

Should the defendant, however, be the cause of the witness’s absence, the defendant forfeits the limitations on the admission of former testimony irrespective of whether the defendant had an opportunity to cross-examine the witness. (See *People v Geraci*, 85 NY2d 359 [1995] [witness’s Grand Jury testimony admitted].)

As to the triggering condition for the admissibility of permitted former testimony, the provision provides that the declarant must be “unable to attend . . . by reason of death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot with due diligence be brought before the court.” There is Appellate Division authority holding that the declarant may also be unavailable when the declarant invokes the Fifth Amendment privilege against self-incrimination. (See *e.g. People v Whitley*, 14 AD3d 403 [1st Dept 2005]; *People v Johns*, 297 AD2d 645 [2d Dept 2002]; *People v Snow*, 298 AD2d 985 [4th Dept 2002].) The Appellate Division, Third Department, has held that even if a witness does not assert his or her privilege against self-incrimination, the witness’s persistent refusal to testify after threat of a contempt citation will render the witness unavailable for purposes of CPL 670.10 (1). (*People v Knowles*, 79 AD3d 16, 24-25 [3d Dept 2010].)

The People must demonstrate “due diligence” in attempting to secure the presence of a witness. (*People v Diaz*, 97 NY2d 109 [2001].) *Diaz* noted that the Court has required “that the prosecutor’s failure to produce [a witness] . . . not [be] due to indifference or a strategic preference for presenting her testimony in the more sheltered form of [a transcript] rather than in the confrontational setting of a personal appearance on the stand.” (*Id.* at 115 [internal quotation marks and citation omitted].)

Subdivision (1) concludes by providing that the former testimony when admissible may be read to the jury and any recording of the testimony may be played. When a recording is played, the stenographic transcript of the testimony must also be admitted.

Subdivision (2) states verbatim CPL 670.10 (2). It provides that the former testimony from any of the three types of specified proceedings may be used “at a subsequent proceeding in or relating to the action involved,” including post-judgment proceedings.

Subdivision (3) states verbatim CPL 670.20 (1). It sets forth the procedure for the introduction of the former testimony into evidence in a criminal proceeding other than a grand jury proceeding. Of note, it requires the court to “conduct a hearing to determine whether personal attendance of the witness” is precluded by “some factor” specified in CPL 670.10 (1).

Subdivision (4) states verbatim CPL 670.20 (2). It sets forth the procedure for the introduction into evidence of the former testimony in grand jury proceedings.

8.36 Prior Testimony in a Civil Proceeding

Part I: CPLR 4517

(a) In a civil action, at the trial or upon the hearing of a motion or an interlocutory proceeding, all or any part of the testimony of a witness that was taken at a prior trial in the same action or at a prior trial involving the same parties or their representatives and arising from the same subject matter, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions:

1. any such testimony may be used by any party for the purpose of contradicting or impeaching the testimony of the same witness;

2. the prior trial testimony of a party or of any person who was a party when the testimony was given or of any person who at the time the testimony was given was an officer, director, member, employee, or managing or authorized agent of a party, may be used for any purpose by any party who is adversely interested when the prior testimony is offered in evidence;

3. the prior trial testimony of any person may be used by any party for any purpose against any other party, provided the court finds:

(i) that the witness is dead; or

(ii) that the witness is at a greater distance than one hundred miles from the place of trial or is out of the state, unless it appears that the absence of the witness was procured by the party offering the testimony; or

(iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(iv) that the party offering the testimony has been unable to procure the attendance of the witness by diligent efforts; or

(v) upon motion on notice, that such exceptional circumstances exist as to make its use desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court;

4. the prior trial testimony of a person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances subject to the right of any party to move for preclusion upon the ground that admission of the prior testimony would be prejudicial under the circumstances.

(b) Use of part of the prior trial testimony of a witness. If only part of the prior trial testimony of a witness is read at the trial by a party, any other party may read any other part of the prior testimony of that witness that ought in fairness to be considered in connection with the part read.

(c) Substitution of parties; prior actions. Substitution of parties does not affect the right to use testimony previously taken at trial.

Part II: Common Law

At a hearing or trial in a civil proceeding, the testimony of a witness that was taken at a prior hearing or trial or other legal proceeding before a tribunal may be admitted,

provided the witness is unavailable due to death or otherwise as a court may determine; the testimony referred to the same subject matter and was given under oath against the party contesting its admission; and the contesting party had the opportunity to be represented by counsel and cross-examine the witness.

Note

Introduction

The rule sets forth a hearsay exception governing the admissibility of former testimony in civil actions. It encompasses both the statutory former testimony exception for civil actions provided by CPLR 4517 and the former testimony exception recognized in civil actions under the common law.

Part I reproduces CPLR 4517 verbatim, including that statute's numbering system, except for the heading of the statute (Impeachment of witnesses; parties; unavailable witness) which is less informative, if not misleading, given that the statute and its embodiment in this rule simply set forth the requirements for the admissibility of former testimony.

Part II is derived from *Fleury v Edwards* (14 NY2d 334 [1964]) and sets forth the common-law rule on the admission of former testimony that continues to coexist with the statute in a civil case. There is no common-law former testimony exception applicable in criminal proceedings (*People v Harding*, 37 NY2d 130, 133-134 [1975]; see Guide to NY Evid rule 8.36.1).

Part I

Subdivision (a) requires that the former testimony must have been “taken at a prior trial in the same action or at a prior trial involving the same parties or their representatives and arising from the same subject matter.” Cf. Part II: the common-law rule does not require that the former testimony be “taken at a prior trial” (*Siegel v Waldbaum*, 59 AD2d 555, 555 [2d Dept 1977]).

Subdivision (a) proceeds to define the authorized uses of the former testimony in its following paragraphs.

Subdivision (a) (1) provides for the use of the former testimony for impeachment of witnesses.

Subdivision (a) (2) governs the use of former testimony of an adverse party and the *adverse* party's employees.

Subdivision (a) (3) provides for the admissibility of the former trial testimony of a witness who is now deemed to be unavailable (by reason of one of the five categories of unavailability set forth in the rule) to testify against a party who, at the former trial, had an opportunity to cross-examine the party.

Subdivision (a) (4) permits the use of the former testimony of a physician by any party for any purpose without the need to show unavailability or special circumstances, subject to the court's discretion.

For an analysis of those paragraphs, see Vincent C. Alexander, Practice Commentaries (McKinney's Cons Laws of NY, Book 7B, CPLR 4517).

Subdivision (b) sets forth the common-law rule of completeness as applied to former testimony, which is also set forth in Guide to NY Evidence rule 4.03.

Subdivision (c), which provides that the "[s]ubstitution of parties does not affect the right to use testimony previously taken at trial," applies equally to the common-law rule set forth in Part II of this rule.

Part II

Part II sets forth the common-law rule and is derived as noted from *Fleury v Edwards* (14 NY2d 334 [1964]).

In *Fleury*, the Court of Appeals held that the common-law exception was coterminous with CPLR 4517's statutory predecessor. Thus, the common-law rule may provide a basis for the admission of former testimony where the statute does not (*Shaw v New York El. R.R. Co.*, 187 NY 186, 194 [1907] ["evidence was competent under the common law, even if not so under the statute"]).

In *Fleury*, the former testimony was taken not at a prior trial, but at a hearing held by the State Motor Vehicle Bureau. The Court held that the former testimony could be introduced in evidence by the deceased's administratrix at the trial of a personal injury suit against the party the deceased had testified against who had been present at the hearing with counsel and had cross-examined the deceased.

Thus, the first requirement of the common-law rule for the admission of former testimony is that the witness be unavailable. In *Fleury*, the unavailability of the witness was due to the witness's death. Whether the common-law rule extends to other forms of unavailability (e.g., incompetency, beyond the jurisdiction, illness) is an open question.

With respect to the remaining requirements of the common-law rule, the *Fleury* Court stated:

“the prime and essential requirement for [the former testimony’s] use is that it related to the same subject matter as given under oath and against the same party now contesting it with the right in the latter to have counsel present and to cross-examine.” (*Id.* at 339.)

Of note, this common-law rule is not restricted to former testimony at a trial, as required by CPLR 4517 (a) and set forth in Part I, subdivision (a) of this rule, but extends to former testimony “given in any legal proceeding and before any tribunal employing cross-examination as part of its procedure,” which includes administrative hearings (*id.* at 338 [driver’s license revocation hearing]). (See *Siegel*, 59 AD2d at 555 [allowing testimony of a deceased given in an examination before trial]; *but see* CPLR 3117 [Use of depositions].)

8.37. Prompt Outcry

Evidence that the victim of a sexual assault promptly reported the matter to another person is admissible:

- (1) for the purpose of assessing the credibility of the complainant with respect to the commission of the offense; or**
- (2) when relevant, and to the extent necessary, to explain the investigative process and complete the narrative of events leading to the defendant's arrest.**

Note

This rule is derived from substantial Court of Appeals precedent holding that in a sex offense criminal prosecution, evidence that the victim of the crime reported the assault shortly after it occurred is admissible as bearing on his or her credibility, a non-truth purpose. (See e.g. *People v Rosario*, 17 NY3d 501, 515 [2011]; *People v McDaniel*, 81 NY2d 10, 16-17 [1993]; *People v Rice*, 75 NY2d 929, 932 [1990]; *People v Deitsch*, 237 NY 300, 304 [1923]; *People v O'Sullivan*, 104 NY 481, 486 [1887]; *Baccio v People*, 41 NY 265 [1869].) In essence, it is “admissible to corroborate the allegation that an assault took place.” (*McDaniel*, 81 NY2d at 16; see also *Rosario*, 17 NY3d at 511 [viewing the rule as “an exception to the inadmissibility of the prior consistent statements of an unimpeached witness”].)

The “premise” for this evidence, as stated by the Court, is that “prompt complaint was ‘natural’ conduct on the part of an ‘outraged [complainant],’ and failure to complain therefore cast doubt on the complainant's veracity; outcry evidence was considered necessary to rebut the adverse inference a jury would inevitably draw if not presented with proof of a timely complaint.” (*Rice*, 75 NY2d at 931.)

There are two limitations to admissibility under this rule. First, the complaint must be made promptly, which requires it to be made “at the first suitable opportunity.” (See *Rosario*, 17 NY3d at 512, 515; *People v Shelton*, 1 NY3d 614, 615 [2004].) What constitutes the first suitable opportunity “is a relative concept dependent on the facts.” (*McDaniel*, 81 NY2d at 17; see also *O'Sullivan*, 104 NY at 489 [noting “circumstances which will excuse delay”].) Second, only the fact of complaint, and not the details, is normally admissible. (See *Rice*, 75 NY2d at 932

[error to admit description of the assailant under the rule]; *Deitsch*, 237 NY at 304 [same]; *Baccio v People*, 41 NY 265, 269 [1869] [“particulars of the complaint” not within the rule].) This limitation, however, does not preclude the potential admissibility of the content of the statement under an exception to the hearsay rule such as the excited utterance exception. (See *People v Brewer*, 28 NY3d 271, 278 [2016] [“brief account of what (complainant) told (complainant’s) mother can be viewed as both a prompt outcry and an excited utterance”].)

While the prompt outcry rule has been developed and applied by the Court of Appeals in criminal sexual offense proceedings, the Court’s rationale for the rule suggests it is equally applicable in other proceedings involving the commission of a sexual assault or offense. The Appellate Division, First Department, has recognized the potential admissibility of prompt outcry evidence at fact-finding hearings in Family Court. (*Matter of Dandre H.*, 89 AD3d 553 [1st Dept 2011]; *Matter of Brown v Simon*, 123 AD3d 1120, 1121 [2d Dept 2014].) The Appellate Division, First Department, has also held in a malicious prosecution action commenced by the plaintiff after he was found not guilty of the crime of rape that the prompt outcries of the victim were admissible to corroborate her testimony that an assault had taken place. (*Moorhouse v Standard, N.Y.*, 124 AD3d 1, 5-6 [1st Dept 2014].)

The Court of Appeals has held that a child's belated report of sexual abuse by the defendant, which was testified to by the child as well as by two relatives, was properly admitted for the purpose of “explaining the investigative process and completing the narrative of events leading to the defendant’s arrest.” (See *People v Ludwig*, 24 NY3d 221, 230-234 [2014]; *People v Cullen*, 24 NY3d 1014, 1016 [2014].)

8.39. Reputation Evidence

(1) Character Trait.

(a) Evidence of a person's reputation among a “community of individuals” of a character trait is admissible as set forth in Guide to NY Evidence rule 4.11 [Character Evidence].¹

(b) A “community of individuals” exists wherever the person’s associations are of such quantity and quality as to permit the person to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability of that reputation.

(c) The foundation for the admission of such reputation evidence requires that a witness testify to views of a sufficient number of individuals who have had sufficient experience with the person whose reputation is being testified to.

(d) Reputation may not be proved by evidence of specific acts of a person, or by a witness’s opinion of a person’s character.

(e) Notwithstanding subdivision (1) (a), evidence of a defendant’s bad reputation for a relevant character trait is not admissible unless the defendant first offers evidence of his or her good reputation for that character trait.

¹ In June 2021, subdivision (1)(a) was revised primarily to include the cross-reference to the Guide's rule 4.11.

(2) Pedigree. Evidence of reputation within a family, before the controversy in issue arose, as to matters of pedigree, such as birth, death, lineage, marriage, legitimacy and relationships between and among family members, is admissible.

(3) Lands. Evidence of long-standing reputation in the relevant community as to boundaries of, or customs affecting, lands in issue, existing before the controversy arose, is admissible.

Note

Subdivision (1) (a) is derived from Court of Appeals precedents that reputation evidence of a person's relevant character trait when admissible pursuant to Guide to NY Evidence rule 4.11 may be used for its truth. (See *People v Bouton*, 50 NY2d 130, 139 [1980] [reputation evidence when admissible "may in and of itself give rise to a reasonable doubt of guilt where none would otherwise exist"], citing *People v Trimarchi*, 231 NY 263, 266 [1921]; *People v Colantone*, 243 NY 134, 136 [1926] ["This court has frequently stated that evidence of good character is a matter of substance, not of form, in criminal cases, and must be considered by the jury as bearing upon the issue of guilt"].)

Subdivision (1) (b) is derived from *People v Fernandez* (17 NY3d 70, 76 [2011]) wherein the Court of Appeals noted:

"[W]e rejected [in *People v Bouton*] the notion that one's community was restricted to 'one's residential neighborhood.' Rather, we observed that '[a] reputation may grow *wherever* an individual's associations are of such quantity and quality as to 'permit him to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability' " (citations omitted).

In *People v Bouton* (50 NY2d at 139), the Court had observed that a person "might be better known in the community of his employment and in the circle of his vocational fellows, where opportunities to evidence the traits at stake may occur with greater frequency than in the environs of his dwelling place, nestled in the anonymity of a large city or suburb."

Subdivision (1) (c) is derived from *People v Fernandez* (17 NY3d at 77 [a proper foundation is laid when a witness reports “views of a sufficient number of people” who have had “sufficient experience” with the person in question]) and *People v Hanley* (5 NY3d 108, 113-114 [2005] [a proper foundation was laid when the witness “worked in a close setting with (the person) and regularly interacted and communicated with the same group of people”]).

Subdivision (1) (d) and (e) reflect the Court of Appeals statement in *People v Kuss* (32 NY2d 436, 443 [1973]) that “[w]hether the defendant’s character will become an issue in the trial is the defendant’s option, for until he introduces evidence of good character the People are precluded from showing that it is otherwise. And although character is the issue (i.e., the unlikelihood of the defendant’s committing the crime), reputation is the only proof which the law allows. Neither the defendant nor the prosecutor may introduce evidence of particular acts tending to prove or rebut the defendant’s good character” (citations omitted). (*See also People v Bouton*, 50 NY2d at 139 [wherein the Court stated that reputation is “the aggregate tenor of what others say or do not say about him” and “is the raw material from which that character may be established”].)

Subdivision (2) is derived from *Badger v Badger* (88 NY 546, 556 [1882] [the application of reputation evidence “to cases of pedigree . . . is justified by difficulties of proof, and (is) confined generally to the family and relatives whose knowledge is assumed, and who have spoken before a controversy arisen”]) and *McKinnon v Bliss* (21 NY 206, 217 [1860] [“That hearsay or reputation is admissible as evidence, upon questions of pedigree or family relationship, . . . is a familiar doctrine”]).

The proof of pedigree by means other than reputation evidence is governed by Guide to New York Evidence rule 8.33.

Subdivision (3) is derived from *McKinnon v Bliss* (21 NY at 217), wherein the Court of Appeals stated: “That hearsay or reputation is admissible . . . upon questions respecting the boundaries of lands . . . is a familiar doctrine.” (*See also Village of Oxford v Willoughby*, 181 NY 155, 160-161 [1905] [“accepted belief of the community” as to location of public road]; *Hannah v Baylon Holding Corp.*, 34 AD2d 792 [2d Dept 1970] [in action to determine boundary lines, Court held evidence of reputation regarding boundaries insufficient to invoke “reputation” exception], *revd on other grounds* 28 NY2d 89 [1971] [declarations of a deceased person who owned or was in possession of land, as to the boundary line between him and the land of another, were admissible as an exception to the hearsay rule

and were sufficient to establish boundary lines]; *Gardner v Town of Claverack*, 22 NYS2d 265, 268-269 [Sup Ct, Columbia County 1940], *affd* 259 App Div 1111 [3d Dept 1940].)

8.41. State of Mind

(1) An out-of-court statement by a declarant describing the declarant's state of mind at the time the statement was made, such as intent, plan, motive, design, or mental condition and feeling, but not including a statement of memory or belief to prove the fact remembered or believed, is admissible, even though the declarant is available as a witness.

(2) An out-of-court statement by a declarant describing the declarant's physical condition at the time the statement is made is admissible provided the declarant is unavailable at the time of the proceeding.

Note

Subdivision (1) is derived from several Court of Appeals decisions that recognize this exception (*see e.g. People v Reynoso*, 73 NY2d 816, 819 [1988] ["While such declarations may be received to show the declarant's state of mind at the time the statement was made, they are not admissible to establish the truth of past facts contained in them," such as a statement to a third party made after a shooting that the defendant believed the victim was armed]; *Matter of Putnam*, 257 NY 140, 145 [1931] ["mental conditions and feelings"]; *Schultz v Third Ave. R.R. Co.*, 89 NY 242, 248-249 [1882] [feelings of hostility]; *see also Hine v New York El. R.R. Co.*, 149 NY 154, 162 [1896] [statement as to motive admitted as part of *res gestae*]).

The exception for "memory or belief," initially recognized in *Shepard v United States* (290 US 96 [1933, Cardozo, J.]), has been consistently recognized by the Court of Appeals (*see People v Vasquez*, 88 NY2d 561, 580 [1996]; *Reynoso*, 73 NY2d at 819).

Statements regarding the declarant's present pain or then-existing physical condition are not within the exception set forth in subdivision (1) (*see Davidson v Cornell*, 132 NY 228 [1892]; *Roche v Brooklyn City & Newtown R.R. Co.*, 105 NY 294 [1887]). See subdivision (2) and the Note thereto.

For the rules governing a statement of future intent, see Guide to New York Evidence rule 8.42.

Subdivision (2) is derived from *Tromblee v North Am. Acc. Ins. Co.* (173 App Div 174, 176 [3d Dept 1916], *aff'd* 226 NY 615 [1919]), which held that a statement made by a declarant concerning the declarant's present physical condition after an accident was admissible where the declarant was deceased at the time of the trial (*but see Crawford v Washington*, 541 US 36 [2004]).

Such a statement may be admissible, however, even though the declarant is available where the statement is admissible as one made to a health care professional under Guide to New York Evidence rule 8.43 (*see People v Duhs*, 16 NY3d 405, 408 [2011]), or the statement is admissible as an excited utterance under rule 8.12 or as a present sense impression under rule 8.15 (*see e.g. People v McCray*, 102 AD3d 1000, 1009 [3d Dept 2013]; *Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]; *Hyung Kee Lee v New York Hosp. Queens*, 118 AD3d 750 [2d Dept 2014]).

8.43. Statement Made for Medical Diagnosis or Treatment

A statement made by a declarant to a health care professional for purposes of medical treatment and diagnosis which describes medical history, or past or present symptoms, pain or sensations, or their general cause, and is germane to diagnosis or treatment is not excluded by the hearsay rule even though the declarant is available to testify.

Note

This formulation is derived from several Court of Appeals decisions.

In *Davidson v Cornell* (132 NY 228, 237-238 [1892]), the Court recognized a hearsay exception for statements by a person to his or her physician “indicating pain or distress or expressive of the present state of his feelings,” which were made for purposes of treatment and diagnosis. The basis for this exception was the existence of a “strong inducement for the patient to speak truly of his pains and sufferings.” (*Id.* at 237.) However, statements relating to past pain and suffering were not within this exception. (*Id.*)

Three recent decisions of the Court of Appeals, *People v Ortega* (15 NY3d 610, 617-620 [2010]), *People v Duhs* (16 NY3d 405, 408 [2011]) and *People v Spicola* (16 NY3d 441, 451 [2011]), broadened the scope of the exception as initially recognized in *Davidson*.

In *Ortega*, the Court held that a patient’s statements as made to medical staff about the cause of his or her injuries, “domestic violence,” and the need for a “safety plan” were admissible as they were relevant to treatment and diagnosis. Thus, in the context of domestic violence and sexual assault cases, the Court of Appeals has recognized as a general proposition that how a patient was injured is germane to diagnosis and treatment because it concerns not only how to treat physical injuries, but also whether and what psychological and trauma issues need to be medically addressed and the development of a safety plan upon discharge. (*See People v Ortega*, 15 NY3d at 617.) Further, the Court of Appeals has observed that in a domestic violence case, statements by the victim to a health care professional regarding a victim’s abuser can be relevant to physical and psychological remediation. (*See People v Ortega*, 15 NY3d at 617-620.) The Court has not specifically addressed whether the declarant’s identification of the individual who caused his or her injury is germane to treatment in other situations.

In *Duhs*, the Court held a child's statement to a pediatrician concerning the cause of his injuries was admissible as it was relevant to treatment and diagnosis.

In *Spicola*, the Court held a statement by a teenage boy to a nurse practitioner at a child advocacy center describing how he was sexually abused six to seven years before was admissible as it was germane to treatment and diagnosis. These statements were admissible "as an exception to the hearsay rule" as they were prompted by the "strong inducement for the patient to speak truly." (See *People v Duhs*, 16 NY3d at 408; *People v Spicola*, 16 NY3d at 451.)

Care need be taken that the statement is germane to diagnosis and treatment, and thus admissible. In *Williams v Alexander* (309 NY 283, 288 [1955] [emphasis and citations omitted]), for example, the Court explained:

"In some instances, perhaps, the patient's explanation as to how he was hurt may be helpful to an understanding of the medical aspects of his case; it might, for instance, assist the doctors if they were to know that the injured man had been struck by an automobile. However, whether the patient was hit by car A or car B, by car A under its own power or propelled forward by car B, or whether the injuries were caused by the negligence of the defendant or of another, cannot possibly bear on diagnosis or aid in determining treatment. That being so, entries of this sort, purporting to give particulars of the accident, which serve no medical purpose, may not be regarded as having been made in the regular course of the hospital's business." (*Compare Benavides v City of New York*, 115 AD3d 518 [1st Dept 2014] [plaintiff's treating physicians did not need to know whether plaintiff jumped or was pushed off the fence in order for the physicians to determine what medical testing plaintiff needed], and *Nelson v Friends of Associated Beth Rivka Sch. for Girls*, 119 AD3d 536 [2d Dept 2014] [in action where the cause of child's fall was in issue, statement that child fell from monkey bars as opposed to a ladder was held germane to treatment].)

Where statements that are not admissible under this exception are contained in a medical record which is otherwise admissible, such statements must be redacted from the record before the record is received in evidence. (See *People v Ortega*, 15 NY3d at 622-623 [Pigott, J., concurring], citing *People v Johnson*, 70 AD3d 1188, 1191 [3d Dept 2010, Stein, J.].)

GUIDE TO NEW YORK EVIDENCE
ARTICLE 9 AUTHENTICITY

TABLE OF CONTENTS

9.01 AUTHENTICATING OR IDENTIFYING EVIDENCE, IN GENERAL

9.03 SELF-AUTHENTICATING EVIDENCE

9.07 METHODS OF AUTHENTICATION AND IDENTIFICATION

**9.09 ADMISSIBILITY OF GRAPHIC, NUMERICAL, SYMBOLIC, OR
PICTORIAL REPRESENTATION OF MEDICAL OR DIAGNOSTIC
TESTS (CPLR 4532-a)**

9.01. Authenticating or Identifying Evidence; In General

(1) When non-testimonial evidence or evidence of a conversation is offered into evidence, the proponent of that evidence must properly authenticate or identify it by showing that the proffered evidence is what the proponent claims it is.

(2) As set forth in rule 9.03, where the offered evidence is “self-authenticating,” extrinsic evidence of authenticity as a condition precedent to admissibility is not required.

(3) When the offered evidence is not “self-authenticating,” the proponent of the evidence must introduce evidence sufficient to support a finding that the offered evidence is what the proponent claims it is. Rule 9.05 sets forth examples, not a complete list, of evidence that satisfies the requirement of authentication or identification for offered evidence subject to this requirement.

Note

This rule serves as an introduction to the rules that relate to the authentication or identification of proffered evidence set forth in article 9 of the Guide to New York Evidence.

Authentication refers to the requirement that before a writing, a tangible object or other non-testimonial evidence is admitted, the offering party must establish that such evidence is what the party claims it to be. Identification refers to the requirement that before testimony concerning a conversation with another person is admitted, there must be identification of the speaker. (*See generally* Barker & Alexander, Evidence in New York State and Federal Courts § 9:1 [2d ed].) These rules are a specialized application of the requirement that offered evidence must be relevant to be admissible (Guide to NY Evid rule 4.01, Relevant Evidence). As stated by the Court of Appeals in *People v Price* (29 NY3d 472, 476 [2017]): “In order for a piece of evidence to be of probative value, there must be proof that it is what its proponent says it is. The requirement of authentication is thus a condition precedent to admitting evidence.” (*People v Lynes*, 49 NY2d 286, 292 [1980] [voice identification]; *People v Dunbar Contr. Co.*, 215 NY 416, 422-423 [1915] [voice identification].)

There is no limitation on the kind of evidence by which authentication or identification may be established. (*See* CPLR 4543.) The foundation necessary to establish the required authentication or identification in a given situation will “differ according to the nature of the evidence sought to be admitted.” (*People v McGee*, 49 NY2d 48, 59 [1979].) Thus, the proponent of the evidence may, depending upon the evidence being offered, rely upon a variety of proof, alone or in combination. (*See People v Ely*, 68 NY2d 520, 527 [1986].) Examples of foundation proof that can support a finding of authentication or identification are set forth in rule 9.05 (Methods of Authentication and Identification). In some instances, the offered evidence may be “self-authenticating” and will be admissible without the need for extrinsic evidence of authenticity, as set forth in rule 9.03 (Self-Authenticating Evidence).

When issues of authentication or identification are raised, the provisions of Guide to New York Evidence rule 1.11 (Preliminary Questions) become applicable. The court must make a determination as to whether the proponent of the evidence has made a sufficient evidentiary showing from which it can be found by a jury that the evidence is genuine. If the evidence is insufficient, then the evidence is excluded; and if the evidence is sufficient, the jury will then determine whether the evidence is in fact genuine. (*See People v Molineux*, 168 NY 264, 330 [1901]; *Barker & Alexander*, *supra* § 9:1.)

Authentication may be acknowledged either expressly, or impliedly by the failure to make a contemporaneous objection. (*See People v Parsons*, 84 AD2d 510, 511 [1981], *affd for reasons stated in App Div memorandum* 55 NY2d 858 [1982] [“It is quite customary, even under New York’s present rules, where there is no real question of authenticity of the documents, for attorneys to permit the use of documents not authenticated to the last iota of the statutory requirement. Thus office copies of letters are frequently received in evidence; certified but not exemplified copies of out-of-State documents and of notarial certificates, etc., are frequently received without objection. . . . In the absence of any hint that the documents were not genuine, we do not think it was an abuse of discretion for the court to refuse to permit the defendant to object to the documents or to refuse to strike them six weeks after they had been received in evidence without objection”].)

Authentication or identification is not necessary in instances where the offered evidence is relevant irrespective of whether it is genuine, or the speaker is identified. (*See People v Brown*, 80 NY2d 729 [1993] [911 call admitted where caller’s identity was not established as events described were corroborated by other evidence]; *Price*, 29 NY3d at 477 n 2 [“fabricated or altered photographs found on a defendant’s Internet profile page may, in some other cases, be relevant *regardless* of the photograph’s authenticity—for example, if offered to show a defendant’s state of mind”]; *Prince*, *Richardson on Evidence* § 9-101 [Farrell 11th ed 1995] [a “writing is relevant without regard to the identity of the person who executed it; e.g., where an anonymous letter is offered on a prosecution for murder to show circumstantially the state of mind of the defendant who read it”].)

Notwithstanding CPLR article 45 statutes on authentication, by virtue of CPLR 4543: “Nothing in [article 45] 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.”

Finally, it must be noted that a finding of authentication does not alone support the admissibility of the offered evidence. The evidence may still be inadmissible because it is not relevant or is barred by the hearsay rule or by another exclusionary evidence rule.

9.03. Self-Authenticating Evidence

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Official Record of Court or Government Office in United States.

(a) An official publication, or a copy attested as correct by an officer or a deputy of an officer having legal custody of an official record of the United States or of any state, territory or jurisdiction of the United States, or of any of its courts, legislature, offices, public bodies or boards is prima facie evidence of such record.

(b) Where the copy is attested by an officer of the state, it shall be accompanied by a certificate signed by, or with a facsimile of the signature of, the clerk of a court having legal custody of the record, and, except where the copy is used in the same court or before one of its officers, with the seal of the court affixed; or signed by, or with a facsimile of the signature of, the officer having legal custody of the original, or his deputy or clerk, with his official seal affixed; or signed by, or with a facsimile of the signature of, the presiding officer, secretary or clerk of the public body or board and, except where it is certified by the clerk or secretary of either house of the legislature, with the seal of the body or board affixed. If the certificate is made by a county clerk, the county seal shall be affixed.

(c) Where the copy is attested by an officer of another jurisdiction, it shall be accompanied by a certificate that such officer has legal custody of the record, and that his signature is believed to be genuine, which certificate shall be made by a

judge of a court of record of the district or political subdivision in which the record is kept, with the seal of the court affixed; or by any public officer having a seal of office and having official duties in that district or political subdivision with respect to the subject matter of the record, with the seal of his office affixed.

(2) Foreign Records and Documents.

(a) A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation, or is in a chain of certificates of genuineness of signature and official position relating to the attestation.

(b) A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, admit an attested copy without final certification, or permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(3) Acknowledged Documents.

Certification of the acknowledgment or proof of a writing, except a will, in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property within the state is prima facie evidence that it was executed by the person who purported to do so. A conveyance of real property, situated within another state, territory or jurisdiction of the United States, which has been duly authenticated, according to the laws of that state, territory or jurisdiction, so as to be read in evidence in the courts thereof, is admissible in evidence in the state.

(4) Newspapers and Periodicals of General Circulation.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to printed materials purporting to be newspapers or periodicals of general circulation; provided however, nothing herein shall be deemed to preclude or limit the right of a party to challenge the authenticity of such printed material, by extrinsic evidence or otherwise, prior to admission by the court or to raise the issue of authenticity as an issue of fact.

(5) Trade Inscriptions and the Like.

A trademark, trade name, inscription, sign, tag, or label purporting to have been affixed to an item in the course of business and indicating origin, ownership or control of the item is evidence of the origin, ownership or control of the matter.

(6) Materials Authored or Otherwise Created by a Party and Produced by the Party.

Material produced by a party in response to a demand pursuant to article thirty-one of the Civil Practice Law and Rules 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.

(7) Other Laws of self-authentication.

In addition to the foregoing subdivisions, the consolidated laws and decisional law provide for self-authentication of specific types of evidence.

Note

As set forth in this rule, certain documents and writings are “self-authenticating,” meaning that their authenticity is established without the need to call a foundation witness. While compliance with a “self-authentication” statute bars a challenge to offered evidence for lack of authenticity, it does not bar a challenge on other grounds, such as to the genuineness of the offered “self-authenticating” document, the admissibility of aspects of its contents, or the weight to be accorded the evidence.

CPLR article 45 is the principal source of important evidentiary rules, including those setting forth methods of authentication of evidence. (*See generally* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4532, 4538, 4540, 4540-a, 4542; Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts § 9:24 [2d ed].)

Subdivision (1) provides for self-authentication of official publications or copies of public records of New York, other states and the United States. It restates verbatim CPLR 4540, with subdivision (1) (a) restating CPLR 4540 (a), subdivision (1) (b) restating CPLR 4540 (b), and subdivision (1) (c) restating CPLR 4540 (c).

CPLR 4540 (a) addresses when an “official publication” or a “copy attested as correct” of an “official record” of the United States or other non-foreign governmental bodies may constitute prima facie evidence of the record. By the terms of CPLR 4540 (a), no attestation is required for an “official” document; however, to protect the integrity of an “official” document, a copy of the document is generally preferred. (*See* CPLR 8021 [e] [with exceptions, the statute prohibits the production of a record of a county clerk’s office “in the interest of the safety

and preservation thereof”]; Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4540.) A copy of an “official record” requires that it be properly attested to as “correct” by the officer or deputy having legal custody of the document.

CPLR 4540 (b) details the additional requirements necessary to verify the attestation by an officer of the state.

CPLR 4540 (c) governs a copy of a document attested to by an officer of another jurisdiction within the United States. The added requirement of this provision is “obviously highly technical” and the “superfluity of this technicality is recognized in modern developments in the law of evidence.” (*People v Parsons*, 84 AD2d 510, 511 [1st Dept 1981], *affd for reasons stated in App Div mem* 55 NY2d 858 [1982].) As a result, the authenticity of a document has been recognized where there was “substantial compliance” with CPLR 4540 (c). (*See Sparaco v Sparaco*, 309 AD2d 1029, 1030 [3d Dept 2003]; *Matter of Thomas v New York State Bd. of Parole*, 208 AD2d 460 [1st Dept 1994]; *Parsons*, 84 AD2d at 511; *cf. People v Wheeler*, 46 AD3d 1082, 1082 [3d Dept 2007] [where a statute authorized the consideration of “reliable hearsay,” a document in substantial compliance with CPLR 4540 constituted “reliable hearsay”]; *but see Waingort v Waingort*, 203 AD2d 453 [2d Dept 1994] [final judgment and decree of divorce of another state was not properly authenticated pursuant to CPLR 4540 (c) and motion to vacate its filing was granted, albeit without prejudice to the filing of a properly authenticated copy]; *People v Acebedo*, 156 AD2d 369, 369 [2d Dept 1989] [“sentencing court erred at the second felony offender hearing, when, over the defendant’s objection, it admitted into evidence certificates of conviction from Florida which were not accompanied by the certification required by CPLR 4540 (c)”].)

In some instances, judicial notice can be used to establish that a document is authentic. Thus, court and public records may be judicially noticed pursuant to Guide to New York Evidence article 2 (Judicial Notice), thereby making it unnecessary to resort to an authentication method. Additionally, where the original of a public document has attached to it the seal of the State of New York, of other states, or of the United States, or the seal of an officer of the State of New York, of its subdivisions, or of the federal government, the New York courts will take judicial notice of the authenticity of the document. (*See e.g. People v Reese*, 258 NY 89, 98 [1932].)

Subdivision (2) provides for self-authentication of foreign official records. It restates verbatim CPLR 4542.

This rule of self-authentication is subject to an international treaty to which the United States became a party on October 15, 1981 and is entitled: “Convention Abolishing the Requirement of Legalization for Foreign Public Documents” (<https://assets.hcch.net/docs/b12ad529-5f75-411b-b523-8eebe86613c0.pdf>; 33 UST 883, TIAS No. 10072). “In essence, the convention creates a standard

certificate, the ‘apostille’, which requires only one signature to function as the effective certification of the foreign document sought to be authenticated. This is in marked contrast to the chain method of certification that is presently embodied in the provisions of CPLR 4542, which is based on the premise that it is necessary to insure that the individual who originally certified the document had the authority to do so”; thus, “to the extent that CPLR 4542 is inconsistent with the provisions of the convention, it is . . . inapplicable and its provisions must yield to the convention.” (*Matter of McDermott*, 112 Misc 2d 308, 309-310 [Sur Ct, Bronx County 1982]; *see* US Const art VI, cl 2 [“all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”].) While there are as of December 9, 2018, 117 parties to the convention (<https://www.hcch.net/en/instruments/conventions/status-table/?cid=41>), CPLR 4542 remains in effect for those foreign countries that are not a party to the convention. (*Matter of Eggers*, 122 Misc 2d 793, 795 [Sur Ct, Nassau County 1984].)

Subdivision (3) restates verbatim CPLR 4538.

The first sentence provides for authentication of a “[c]ertification of the acknowledgement or proof of a writing” (except for a will) in the State of New York and adds that the certification is prima facie evidence “that it was executed by the person who purported to do so.” (*See* Real Property Law § 309-a [“Uniform forms of certificates of acknowledgment or proof within this state”]; *see also Osborne v Zornberg*, 16 AD3d 643, 644 [2d Dept 2005] [“(A) certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing as to amount to a moral certainty”], citing *Albany County Sav. Bank v McCarty*, 149 NY 71, 80 [1896].)

The second sentence of CPLR 4538 addresses a “conveyance of real property, situated within another state, territory or jurisdiction of the United States.” If that item “has been duly authenticated, according to the laws of that state, territory or jurisdiction, so as to be read in evidence in the courts thereof, [it] is admissible in evidence in the state.”

Subdivision (4) restates verbatim CPLR 4532. It provides for self-authentication of newspapers and periodicals of general circulation. The proviso clause states the common rule generally which permits the opposing party to controvert the claimed authenticity (i.e. the genuineness of the document) “by extrinsic evidence or otherwise” and “to raise the issue of authenticity as an issue of fact.”

Subdivision (5) is derived from decisional law which provides that any trade inscriptions and the like on items indicating origin, ownership or control are self-authenticating. (See *e.g. Lindsay v Academy Broadway Corp.*, 198 AD2d 641, 642 [3d Dept 1993] [“Plaintiff did not and does not controvert the fact that each of the tents depicted in the photographs has an attached label(s) identifying its manufacturer and, additionally, with respect to defendant’s tent, a sewn-in patch displaying the company logo. These circumstantial facts are sufficient evidence of the photographs’ authenticity and therefore they were properly considered”]; *Weiner v Mager & Throne, Inc.*, 167 Misc 338, 340 [Mun Ct, Bronx County 1938] [“This defendant’s trade label, affixed to the loaf, is some evidence that it manufactured the bread; and unless rebutted, or at least contested by evidence, gives rise to a reasonable inference that the owner of the trade label manufactured the article to which it was affixed. No one except Mager & Throne, Inc., had the right to use its trade name or label. In the absence of any evidence tending to show that this defendant’s trade name or label was being wrongfully used by others, the inference is drawn that the name and label were used by it, and that this defendant was the manufacturer of the bread”].) Statutes also provide self-authentication for specific trade inscriptions. (See *e.g.* General Business Law §§ 276, 277 [a certificate issued by the secretary of state to a person who has filed with the secretary of state a “name, mark or device to indicated ownership of vessels, receptacles or utensils” is “prima facie evidence of the ownership by the person filing hereunder of all vessels, receptacles and utensils upon which such name, mark or device is produced”].)

Subdivision (6) restates verbatim CPLR 4540-a. It is applicable to material produced by a party in the course of pretrial discovery in civil proceedings pursuant to a proper discovery request. Drawing on the concept that authenticity may be established by an admission, this section effectively finds an implied admission when a party in a civil proceeding in response to a discovery demand by an adversary discloses “material authored or otherwise created by such party.” That material when offered in evidence by the recipient is “presumed authentic,” albeit the presumption is subject to rebuttal. The Advisory Committee on Civil Practice to the Chief Administrative Judge recommended the statute, and the Legislative Memorandum in support of the legislation explained that the statute “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.” (2018 Rep of Advisory Comm on Civ Prac at 86-87.)

Subdivision (7) references the existence of numerous statutes in the Consolidated Laws that provide for methods of self-authentication of certain types of writings and documents. These statutes include: Business Corporation Law § 107 (corporate seal as authenticating execution and authority); CPLR 2105 (certification by attorney); CPLR 3122-a (certification of business records); CPLR 4518 (b) (hospital bill); CPLR 4518 (c) (hospital, laboratory, library, and public office records); CPLR 4540 (d) (tariff or classification of Public Service Commission or Commissioner of Transportation); CPLR 4541 (transcript of docket-book of a justice of the peace); Domestic Relations Law § 14-a (4) (certificates of marriage registration); Public Health Law § 11 (1) (published health regulations); Tax Law §§ 287, 429, 505, 653 (signature on tax return). In addition to these self-authenticating statutes, there are statutes that create exceptions to the hearsay rule for certain documents and provide a method of self-authentication. Those statutes include: CPLR 4525 (filing of financial statements and related records under article 9 of the Uniform Commercial Code); CPLR 4532-a (hearsay exception and self-authentication method for information imprinted on X ray or analogous pictorial test results); CPLR 4533-a (invoice for services or repairs not exceeding \$2,000).

9.05. Methods of Authentication and Identification.

The requirement of authentication or identification is established by evidence that the offered evidence is what the proponent of the evidence claims it is and, where the offered evidence is fungible, that its condition is unchanged during the relevant period. The foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted. Examples of how to satisfy a requirement of authentication or identification when the proffered evidence is not self-authenticating include, but are not limited to:

(1) Admission of authenticity.

Evidence of an admission of authenticity made by the party against whom the evidence is being introduced.

(2) Testimony of witness.

Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.

(3) Subscribing witness.

Testimony of a subscribing witness to a writing may establish authenticity of the writing. Unless a writing requires a subscribing witness for its validity, however, it may be proved as if there were no subscribing witness.

(4) Nonexpert opinion on handwriting.

Nonexpert opinion that a handwriting is genuine, based on a familiarity with it that was not acquired for purposes of the litigation.

(5) Comparison of handwriting.

Comparison of a disputed handwriting by a qualified expert or the trier of fact with any handwriting proved to the satisfaction of the court to be the handwriting of the person claimed to have written the disputed handwriting.

(6) Circumstantial evidence.

The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(7) Voice identification.

Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon familiarity with the voice of the person identified as the speaker.

(8) Identification of recipient of telephone call.

Identification of a recipient of a telephone call, by evidence that a call was made to the number assigned at the time by a telephone company to a particular person or business, if: (a) in the case of a person, self-identification or other circumstances show the person answering to be the one called; or (b) in the case of a business, the call was made to a place of business and the conversation related to that business.

(9) Result of application of process, system, or scientific test or experiment.

Consistent with the requirements of rule 7.01, evidence that a process, system, or scientific test or experiment produces an accurate and reliable result and was properly employed or applied on the relevant occasion.

Note

The opening paragraph is derived from decisional law. (*See e.g. People v Price*, 29 NY3d 472, 476 [2017] [photograph]; *Zegarelli v Hughes*, 3 NY3d 64, 69 [2004] [surveillance videotape]; *People v Ely*, 68 NY2d 520, 527-528 [1986] [tape-recorded conversation]; *People v Julian*, 41 NY2d 340 [1977] [drugs]; *Amaro v City of New York*, 40 NY2d 30, 35 [1976] [blood sample]; *People v Flanigan*, 174 NY 356, 368 [1903] [iron bar and rope used in homicide].) It is applicable, as noted, to “chain of custody” cases, cases where it is necessary to account for custody of the offered evidence due to its fungible nature from the time it initially became relevant to the case and to show that its condition has not been changed. (*See People v Connelly*, 35 NY2d 171, 174 [1974].)

This rule includes examples of evidence that are not self-authenticating and thus require extrinsic evidence of the required authentication or identification. These examples are not intended to be exclusive or exhaustive.

Subdivision (1) is derived from decisional law which provides that a party’s admission that evidence offered against the party is what it purports is sufficient to establish the evidence’s authenticity. (*See People v Molineux*, 168 NY 264, 328 [1901].) An admission of authentication may be made: (1) expressly by the party (*see* Prince, Richardson on Evidence § 9-103 [b] at 703-704 [Farrell 11th ed 1995] [“an admission of authenticity made by the adversary to a witness, or in a writing proved or admitted to be (his or hers), or while testifying on another trial or hearing”]); (2) formally by admission pursuant to CPLR 3123; or (3) impliedly by reason of a failure to object on ground of lack of authentication. (*See People v Parsons*, 84 AD2d 510, 511 [1981], *affd for reasons stated in App Div mem* 55 NY2d 858 [1982] [“It is quite customary, even under New York’s present rules, where there is no real question of authenticity of the documents, for attorneys to permit the use of documents not authenticated to the last iota of the statutory requirement”]; *see also* CPLR 4540-a [presumption of authenticity based on a party’s production of material authored or otherwise created by the party].)

Subdivision (2), derived from substantial decisional law, describes perhaps the most common method of authentication or identification, i.e., the testimony of a witness with knowledge that the offered evidence is what it is represented to be. Examples of such testimonial authentication are endless. (*See* Robert A. Barker & Vincent C. Alexander, *Evidence in New York State and Federal Courts* § 9.3 [2d ed] [collecting cases].) For example, a witness may be the author of a writing in

question and testify to its authenticity; a witness may have sufficient knowledge to verify the accuracy of a photograph, a map, or diagram; and a witness may be able to identify an object in issue. (*Id.*).

When evidence is fungible and not patently identifiable or is capable of being replaced or altered, authentication is done through a chain of custody (*Connelly*, 35 NY2d at 174; *People v Julian*, 41 NY2d at 342-343; *Amaro*, 40 NY2d at 36). Normally, the testimony of a witness or witnesses with personal knowledge both of the custody of an object from the time it initially became relevant to the action to the time of trial and that its condition has not been altered will suffice to authenticate the evidence (*Julian*, 41 NY2d 340).

The witness's knowledge need not be certain. (See *People v Mirenda*, 23 NY2d 439, 452 [1969] [sunglasses were admitted in evidence when the "driver's assistant testified that the glasses found by (another person) were similar to those he had noticed one of the suspects wearing"]; *People v Miller*, 17 NY2d 559, 560 [1966] [revolver found on a defendant's person was properly admitted when a witness testified that it looks like the revolver he saw in the defendant's hand]; *People v Martinez*, 115 AD2d 665, 665 [2d Dept 1985] [shotgun properly admitted when "three witnesses identified the gun recovered from defendant's possession as either the one with which defendant shot decedent or one that looked exactly like it"]; *People v Randolph*, 40 AD2d 806, 806 [1st Dept 1972] [gun was admissible where the "complainant testified the gun was like the one placed against his chest"].)

Subdivision (3) is derived from CPLR 4537, which reads: "Unless a writing requires a subscribing witness for its validity, it may be proved as if there was no subscribing witness." The statute abrogates the common-law rule that required a subscribing witness to testify to the authenticity of the document and permits authentication, even when there is a subscribing witness, "as if there was no subscribing witness" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4537). The "unless" clause, however, recognizes statutory exceptions, e.g., EPTL 3-2.1 and SCPA 1404, 1405 and 1406 (need subscribing witness to a will unless unavailable). Thus, absent a statutory requirement for the testimony of a subscribing witness, one or more of the ways of proving a writing set forth in this rule may be utilized.

Subdivision (4) sets forth the well-established rule that a lay witness may identify handwriting with which the witness is familiar, which familiarity was not acquired for purposes of litigation. (See *Molineux*, 168 NY at 320-321; *Hynes v McDermott*, 82 NY 41, 53-54 [1880] [a lay witness's identification of handwriting, however, based on familiarity acquired "*post litem motam*" is inadmissible]; *Matter of Collins v Wyman*, 38 AD2d 600, 601 [2d Dept 1971] ["Although a nonexpert may testify directly to the genuineness of the disputed writing, he must first establish his familiarity with the handwriting of the person claimed to have executed the disputed writing and how this familiarity came about"].)

Familiarity with a person's handwriting may be acquired in various ways (see *Hammond v Varian*, 54 NY 398, 400 [1873] [sufficient familiarity was found with "one witness who had seen the defendant write his name once, and another who had never seen him write, but who had held his (promissory) note, acknowledged and conceded to be genuine The extent of their knowledge, and the weight or effect to be given to their opinion, were proper matters for the consideration of the jury"]; *People v Stephenson*, 202 AD2d 280, 281 [4th Dept 1994] ["People's non-expert witnesses, who testified regarding their familiarity with the peculiar characteristics of defendant's handwriting, were entitled to demonstrate such through the use of both disputed documents and documents known to have been written by defendant"]; *Gross v Sormani*, 50 App Div 531, 534 [2d Dept 1900] [sufficient familiarity was shown when the witness testified that "he was acquainted with the handwriting of plaintiff's testator; that he had received numerous letters from him in the course of business dealings with him"]). Where the proof of familiarity is insufficient, the witness's testimony will be excluded. (See *People v Corey*, 148 NY 476, 481-482 [1896].)

Subdivision (5) is derived from CPLR 4536 as interpreted by the Court of Appeals. (See *Molineux*, 168 NY at 330 ["(C)omparisons with standards produced in court, whether at common law or under the statutes, may be made by witnesses, or by the court or jury without the aid of witnesses"]; *People v Hunter*, 34 NY2d 432, 435-436 [1974] [Under CPLR 4536 "the jury in its deliberation, may make such a comparison whether or not an expert offers an opinion"]; *People v Fields*, 287 AD2d 577, 578 [2d Dept 2001] ["(A)n expert or a jury may compare a disputed writing to the known specimen, even in the absence of an expert opinion"].)

Under the rule only a handwriting specimen that has been proved to the satisfaction of the court to be genuine is permitted to be used for comparison purposes. (See *Molineux*, 168 NY at 328; *Clark v Douglass*, 5 App Div 547 [3d Dept 1896].) If the specimen is so proved, the genuineness of both the specimen and the offered handwriting are questions of fact for the jury. (*Molineux*, 168 NY at 330 ["If the court, having regard to the rules adverted to, adjudge the papers genuine, it then becomes the duty of the jury in its turn, at the proper time, before making comparison of a disputed writing with the standards, to examine the testimony respecting the genuineness of the latter and to decide for itself, under proper legal instructions from the court, whether their genuineness has been established"].)

A nonexpert witness "may not express an opinion as to handwriting based upon a comparison between a disputed writing and a writing conceded or proved to be the genuine handwriting of the person whose handwriting is in dispute" (*Matter of Collins v Wyman*, 38 AD2d 600, 601 [2d Dept 1971]). A nonexpert is limited to an opinion as to handwriting based upon a demonstrated familiarity with the handwriting of the person claimed to have written the disputed writing. (*Id.*; see subdivision [2].)

Subdivision (6) sets forth the rule that authentication of a document or physical evidence may be proved by circumstantial evidence derived from its distinctive facts and circumstances, such as appearance, contents, substance, internal patterns, or other identifying characteristics, and other circumstantial evidence derived from extrinsic evidence (*see Price*, 29 NY3d at 481 [“Authentication may be established by direct or circumstantial evidence, and ‘reasonable inferential linkages can ordinarily supply foundational prerequisites’ so long as the ‘tie-in effort’ is not ‘too tenuous and amorphous’ ” (citation omitted)]; *People v Manganaro*, 218 NY 9, 13 [1916] [“genuineness may be proved by indirect or circumstantial evidence the same as many other facts”]; *People v Dunbar Contr. Co.*, 215 NY 416, 423 [1915] [where there was proof that an incriminating telephone message came from a defendant, “the internal evidence of the letter (referring to the same incriminating evidence) shows that it came from the same source. The letter refers to the conversation, repeats its substance, and confirms it. Unexplained and uncontradicted by any witness for the defendants, the evidence justified the inference that (the same defendant) was the author”]; *People v Curry*, 82 AD3d 1650, 1650 [4th Dept 2011] [“The People established the similarities between the letters in those cases and the ones at issue here, including their content, writing style, paper, and envelopes, and they also established that in all cases defendant had sent multiple, nearly identical letters on the same day”]; *People v Sanchez*, 54 AD3d 638, 639 [1st Dept 2008] [“The court properly admitted the victim’s mother’s testimony that she overheard, by speakerphone, a telephone call in which the speaker apologized for hitting the victim. Although the mother, who was not familiar with defendant’s voice, did not hear the speaker identify himself, there was sufficient circumstantial evidence to establish that defendant was the speaker”]; *Anzalone v State Farm Mut. Ins. Co.*, 92 AD2d 238, 239 [2d Dept 1983] [“the authenticity of Steed’s signature on the finance agreement may be reasonably inferred from the fact that she paid at least five premium installments”]).

Circumstantial evidence of the type stated in the subdivision can be used to authenticate or identify electronic communications such as emails, text messages and posts on social media. (*See e.g. People v Green*, 107 AD3d 915, 916 [2d Dept 2013] [text messages authenticated by their contents as they “made no sense unless (they were) sent by defendant”]; *People v Pierre*, 41 AD3d 289, 291 [1st Dept 2007] [instant message authenticated by proof of the defendant’s screen name and proof of message sent to that screen name and a reply, “the content of which made no sense unless it was sent by defendant”]; *see also Price*, 29 NY3d 472 [photograph of the defendant holding a firearm was not authenticated, inter alia, because there was no testimony the internet page from which the photograph was obtained was controlled by the defendant].)

Subdivision (7) restates New York’s well settled rule that a person’s voice, whether heard in person, over the telephone, or by some other mechanical or electronic means, e.g., audio recording, can be identified by a witness who has familiarity with the voice. (*See e.g. People v Dunbar Contr. Co.*, 215 NY 416, 422-

423 [1915] [“A voice heard over the telephone may be compared with the voice of a speaker whom one meets for the first time thereafter as well as with the voice of a speaker whom one has known before. The difference affects the weight rather than the competency of the evidence. Whether the identity of the speaker had been sufficiently authenticated was a question of fact to be disposed of preliminarily by the trial judge” The witness “did not profess certainty, but certainty was not necessary” (citation omitted)]; *People v Dinan*, 15 AD2d 786, 787 [2d Dept 1962], *affd* 11 NY2d 350 [1962] [voice on audio-recording].)

The Court of Appeals has cautioned that testimony by a witness that the speaker identified himself/herself is insufficient foundation for admissibility of the speaker’s statement (*People v Lynes*, 49 NY2d 286, 291 [1980], citing *Murphy v Jack*, 142 NY 215, 217-218 [1894]).

Subdivision (8) sets forth a method of establishing the identity of the recipient of a phone call made to a person or business as recognized by decisional law. (*See People v Lynes*, 49 NY2d at 292 [“in some instances the placing of a call to a number listed in a directory or other similarly responsible index of subscribers, coupled with an unforced acknowledgment by the one answering that he or she is the one so listed, has been held to constitute an adequate showing. In other cases, the substance of the conversation itself has furnished confirmation of the caller’s identity, as, for example, when subsequent events indicated that the party whose identity is sought to be established had to have been a conversant in the telephone talk or when the caller makes reference to facts of which he alone is likely to have knowledge” (citations omitted). In *Lynes*, a reasonably prompt callback in response to a message to call, as well as the substance of a conversation disclosing facts known to the caller, authenticated the identity of the person calling]; *Orlando v Great E. Cas. Co.*, 91 Misc 539, 543 [App Term, 2d Dept 1915] [“While, in this state, a witness may not usually, at least, testify to a conversation with a particular person over the telephone, unless the voice of such person was recognized by the witness, yet when a person in the ordinary way calls up a city department, like the police department, to give notice of some fact, I think the giving of such notice may be proved by the testimony of the person giving it”].)

It should be noted that the rule stated in this subdivision can be utilized even where the witness has no familiarity with the recipient’s voice, obviating reliance upon the rule stated in subdivision (7).

Subdivision (9) restates the rule that, when the offered evidence has been produced by a process, system, or scientific test or experiment, the proponent must establish that the process, system, or scientific test or experiment produces an accurate and reliable result and that the process, system, or scientific test or experiment was properly employed or applied on that particular occasion. (*See generally* Robert A. Barker & Vincent C. Alexander, *Evidence in New York State and Federal Courts* § 9:19 [2d ed] [collecting cases applying this rule to various processes and tests that produce results].)

The first part of the rule requires evidence that the process, system, or scientific test or experiment produces accurate results. (See e.g. *People v Campbell*, 73 NY2d 481, 484-486 [1989] [blood-alcohol analysis]; *People v Smith*, 63 NY2d 41, 62-64 [1984] [photo-to-photo comparison of bite marks]; *People v Magri*, 3 NY2d 562, 566 [1958] [radar speed detection].)

In some instances, as set forth in Guide to New York Evidence rule 7.01, the underlying methods and principles may be subject to the *Frye* standard. (See e.g. *People v Wesley*, 83 NY2d 417, 422-423 [1994] [DNA analysis]; *People v Middleton*, 54 NY2d 42, 49-50 [1981] [bite mark comparison].)

The second part of the rule requires evidence that the process, system, or scientific test or experiment was properly administered on the occasion in issue. (See *Wesley*, 83 NY2d at 428-429 [“After the *Frye* inquiry, the issue then shifts to a second phase, admissibility of the specific evidence—i.e., the trial foundation—and elements such as how the sample was acquired, whether the chain of custody was preserved and how the tests were made”]; *People v Mertz*, 68 NY2d 136, 148 [1986] [breathalyzers must be shown to have been properly calibrated, in working order and properly prepared and operated].)

9.01. Authenticating or Identifying Evidence; In General

(1) When non-testimonial evidence or evidence of a conversation is offered into evidence, the proponent of that evidence must properly authenticate or identify it by showing that the proffered evidence is what the proponent claims it is.

(2) As set forth in rule 9.03, where the offered evidence is “self-authenticating,” extrinsic evidence of authenticity as a condition precedent to admissibility is not required.

(3) When the offered evidence is not “self-authenticating,” the proponent of the evidence must introduce evidence sufficient to support a finding that the offered evidence is what the proponent claims it is. Rule 9.07 sets forth examples, not a complete list, of evidence that satisfies the requirement of authentication or identification for offered evidence subject to this requirement.

Note

This rule serves as an introduction to the rules that relate to the authentication or identification of proffered evidence set forth in article 9 of the Guide to New York Evidence.

Authentication refers to the requirement that before a writing, a tangible object or other non-testimonial evidence is admitted, the offering party must establish that such evidence is what the party claims it to be. Identification refers to the requirement that before testimony concerning a conversation with another person is admitted, there must be identification of the speaker. (*See generally* Barker & Alexander, Evidence in New York State and Federal Courts § 9:1 [2d ed].) These rules are a specialized application of the requirement that offered evidence must be relevant to be admissible (Guide to NY Evid rule 4.01, Relevant Evidence). As stated by the Court of Appeals in *People v Price* (29 NY3d 472, 476 [2017]): “In order for a piece of evidence to be of probative value, there must be proof that it is what its proponent says it is. The requirement of authentication is thus a condition precedent to admitting evidence.” (*People v Lynes*, 49 NY2d 286, 292 [1980] [voice identification]; *People v Dunbar Contr. Co.*, 215 NY 416, 422-423 [1915] [voice identification].)

There is no limitation on the kind of evidence by which authentication or identification may be established. (See CPLR 4543.) The foundation necessary to establish the required authentication or identification in a given situation will “differ according to the nature of the evidence sought to be admitted.” (*People v McGee*, 49 NY2d 48, 59 [1979].) Thus, the proponent of the evidence may, depending upon the evidence being offered, rely upon a variety of proof, alone or in combination. (See *People v Ely*, 68 NY2d 520, 527 [1986].) Examples of foundation proof that can support a finding of authentication or identification are set forth in rule 9.05 (Methods of Authentication and Identification). In some instances, the offered evidence may be “self-authenticating” and will be admissible without the need for extrinsic evidence of authenticity, as set forth in rule 9.03 (Self-Authenticating Evidence).

When issues of authentication or identification are raised, the provisions of Guide to New York Evidence rule 1.11 (Preliminary Questions) become applicable. The court must make a determination as to whether the proponent of the evidence has made a sufficient evidentiary showing from which it can be found by a jury that the evidence is genuine. If the evidence is insufficient, then the evidence is excluded; and if the evidence is sufficient, the jury will then determine whether the evidence is in fact genuine. (See *People v Molineux*, 168 NY 264, 330 [1901]; Barker & Alexander, *supra* § 9:1.)

Authentication may be acknowledged either expressly, or impliedly by the failure to make a contemporaneous objection. (See *People v Parsons*, 84 AD2d 510, 511 [1981], *affd for reasons stated in App Div memorandum* 55 NY2d 858 [1982] [“It is quite customary, even under New York’s present rules, where there is no real question of authenticity of the documents, for attorneys to permit the use of documents not authenticated to the last iota of the statutory requirement. Thus office copies of letters are frequently received in evidence; certified but not exemplified copies of out-of-State documents and of notarial certificates, etc., are frequently received without objection. . . . In the absence of any hint that the documents were not genuine, we do not think it was an abuse of discretion for the court to refuse to permit the defendant to object to the documents or to refuse to strike them six weeks after they had been received in evidence without objection”].)

Authentication or identification is not necessary in instances where the offered evidence is relevant irrespective of whether it is genuine, or the speaker is identified. (See *People v Brown*, 80 NY2d 729 [1993] [911 call admitted where caller’s identity was not established as events described were corroborated by other evidence]; *Price*, 29 NY3d at 477 n 2 [“fabricated or altered photographs found on a defendant’s Internet profile page may, in some other cases, be relevant *regardless* of the photograph’s authenticity—for example, if offered to show a defendant’s state of mind”]; Prince, Richardson on Evidence § 9-101 [Farrell 11th ed 1995] [a “writing is relevant without regard to the identity of the person who executed it; e.g., where an anonymous letter is offered on a prosecution for murder to show circumstantially the state of mind of the defendant who read it”].)

Notwithstanding CPLR article 45 statutes on authentication, by virtue of CPLR 4543: “Nothing in [article 45] 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.”

Finally, it must be noted that a finding of authentication does not alone support the admissibility of the offered evidence. The evidence may still be inadmissible because it is not relevant or is barred by the hearsay rule or by another exclusionary evidence rule.

9.03 Self-Authenticating Evidence (CPLR 4532; 4538; 4540; 4540-a; 4542)¹

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Official Record of Court or Government Office in United States (CPLR 4540).

(a) An official publication, or a copy attested as correct by an officer or a deputy of an officer having legal custody of an official record of the United States or of any state, territory or jurisdiction of the United States, or of any of its courts, legislature, offices, public bodies or boards is prima facie evidence of such record.

(b) Where the copy is attested by an officer of the state, it shall be accompanied by a certificate signed by, or with a facsimile of the signature of, the clerk of a court having legal custody of the record, and, except where the copy is used in the same court or before one of its officers, with the seal of the court affixed; or signed by, or with a facsimile of the signature of, the officer having legal custody of the original, or his deputy or clerk, with his official seal affixed; or signed by, or with a facsimile of the signature of, the presiding officer, secretary or clerk of the public body or board and, except where it is certified by the clerk or secretary of either house of the legislature, with the seal of the body or board affixed. If the certificate is made by a county clerk, the county seal shall be affixed.

(c) Where the copy is attested by an officer of another jurisdiction, it shall be accompanied by a certificate that such officer has legal custody of the record, and that his signature is believed to

be genuine, which certificate shall be made by a judge of a court of record of the district or political subdivision in which the record is kept, with the seal of the court affixed; or by any public officer having a seal of office and having official duties in that district or political subdivision with respect to the subject matter of the record, with the seal of his office affixed.

(2) Foreign Records and Documents (CPLR 4542).

(a) A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position [i] of the attesting person, or [ii] of any foreign official whose certificate of genuineness of signature and official position relates to the attestation, or is in a chain of certificates of genuineness of signature and official position relating to the attestation.

(b) A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, admit an attested copy without final certification, or permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(3) Acknowledged Documents (CPLR 4538).

Certification of the acknowledgment or proof of a writing, except a will, in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property within the state is prima facie evidence that it was executed by the person who purported to do so. A conveyance of real property, situated within another state, territory or jurisdiction of the United States, which has been duly authenticated, according to the laws of that state, territory or jurisdiction, so as to be read in evidence in the courts thereof, is admissible in evidence in the state.

(4) Newspapers and Periodicals of General Circulation (CPLR 4532).

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to printed materials purporting to be newspapers or periodicals of general circulation; provided however, nothing herein shall be deemed to preclude or limit the right of a party to challenge the authenticity of such printed material, by extrinsic evidence or otherwise, prior to admission by the court or to raise the issue of authenticity as an issue of fact.

(5) Trade Inscriptions and the Like.

A trademark, trade name, inscription, sign, tag, or label purporting to have been affixed to an item in the course of business and indicating origin, ownership or control of the item is evidence of the origin, ownership or control of the matter.

(6) Materials Authored or Otherwise Created by a Party and Produced by the Party (CPLR 4540-a).

Material produced by a party in response to a demand pursuant to article thirty-one of the Civil Practice Law and Rules 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.

(7) Other Laws of self-authentication.

In addition to the foregoing subdivisions, the consolidated laws and decisional law provide for self-authentication of specific types of evidence. See Guide to New York Evidence article 3 (Prima Facie Evidence) and rule 8.08 (Business Records [CPLR 4518]).

Note

As set forth in this rule, certain documents and writings are “self-authenticating,” meaning that their authenticity is established without the need to call a foundation witness. While compliance with a “self-authentication” statute bars a challenge to offered evidence for lack of authenticity, it does not bar a challenge on other grounds, such as to the genuineness of the offered “self-authenticating” document, the admissibility of aspects of its contents, or the weight to be accorded the evidence.

CPLR article 45 is the principal source of important evidentiary rules, including those setting forth methods of authentication of evidence. (*See generally* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4532, 4538, 4540, 4540-a, 4542; Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts § 9:24 [2d ed].)

Subdivision (1) provides for self-authentication of official publications or copies of public records of New York, other states and the United States. It restates verbatim CPLR 4540, with subdivision (1) (a) restating CPLR 4540 (a), subdivision (1) (b) restating CPLR 4540 (b), and subdivision (1) (c) restating CPLR 4540 (c).

CPLR 4540 (a) addresses when an “official publication” or a “copy attested as correct” of an “official record” of the United States or other non-foreign governmental bodies may constitute prima facie evidence of the record. By the

terms of CPLR 4540 (a), no attestation is required for an “official” document; however, to protect the integrity of an “official” document, a copy of the document is generally preferred. (See CPLR 8021 [e] [with exceptions, the statute prohibits the production of a record of a county clerk’s office “in the interest of the safety and preservation thereof”]; Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4540.) A copy of an “official record” requires that it be properly attested to as “correct” by the officer or deputy having legal custody of the document.

CPLR 4540 (b) details the additional requirements necessary to verify the attestation by an officer of the state.

CPLR 4540 (c) governs a copy of a document attested to by an officer of another jurisdiction within the United States. The added requirement of this provision is “obviously highly technical” and the “superfluity of this technicality is recognized in modern developments in the law of evidence.” (*People v Parsons*, 84 AD2d 510, 511 [1st Dept 1981], *affd for reasons stated in App Div mem* 55 NY2d 858 [1982].) As a result, the authenticity of a document has been recognized where there was “substantial compliance” with CPLR 4540 (c). (See *Sparaco v Sparaco*, 309 AD2d 1029, 1030 [3d Dept 2003]; *Matter of Thomas v New York State Bd. of Parole*, 208 AD2d 460 [1st Dept 1994]; *Parsons*, 84 AD2d at 511; *cf. People v Wheeler*, 46 AD3d 1082, 1082 [3d Dept 2007] [where a statute authorized the consideration of “reliable hearsay,” a document in substantial compliance with CPLR 4540 constituted “reliable hearsay”]; *but see Waingort v Waingort*, 203 AD2d 453 [2d Dept 1994] [final judgment and decree of divorce of another state was not properly authenticated pursuant to CPLR 4540 (c) and motion to vacate its filing was granted, albeit without prejudice to the filing of a properly authenticated copy]; *People v Acebedo*, 156 AD2d 369, 369 [2d Dept 1989] [“sentencing court erred at the second felony offender hearing, when, over the defendant’s objection, it admitted into evidence certificates of conviction from Florida which were not accompanied by the certification required by CPLR 4540 (c)”].)

In some instances, judicial notice can be used to establish that a document is authentic. Thus, court and public records may be judicially noticed pursuant to Guide to New York Evidence article 2 (Judicial Notice), thereby making it unnecessary to resort to an authentication method. Additionally, where the original of a public document has attached to it the seal of the State of New York, of other states, or of the United States, or the seal of an officer of the State of New York, of its subdivisions, or of the federal government, the New York courts will take judicial notice of the authenticity of the document. (See *e.g. People v Reese*, 258 NY 89, 98 [1932].)

Subdivision (2) provides for self-authentication of foreign official records. It restates verbatim CPLR 4542.

This rule of self-authentication is subject to an international treaty to which the United States became a party on October 15, 1981 and is entitled: “Convention Abolishing the Requirement of Legalization for Foreign Public Documents” (<https://assets.hcch.net/docs/b12ad529-5f75-411b-b523-8eebe86613c0.pdf>; 33 UST 883, TIAS No. 10072). “In essence, the convention creates a standard certificate, the ‘apostille’, which requires only one signature to function as the effective certification of the foreign document sought to be authenticated. This is in marked contrast to the chain method of certification that is presently embodied in the provisions of CPLR 4542, which is based on the premise that it is necessary to insure that the individual who originally certified the document had the authority to do so”; thus, “to the extent that CPLR 4542 is inconsistent with the provisions of the convention, it is . . . inapplicable and its provisions must yield to the convention.” (*Matter of McDermott*, 112 Misc 2d 308, 309-310 [Sur Ct, Bronx County 1982]; see US Const, art VI, cl 2 [“all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”].) While there are as of August 4, 2022, 122 parties to the convention (<https://www.hcch.net/en/instruments/conventions/status-table/?cid=41>), CPLR 4542 remains in effect for those foreign countries that are not a party to the convention. (*Matter of Eggers*, 122 Misc 2d 793, 795 [Sur Ct, Nassau County 1984].)

Subdivision (3) restates verbatim CPLR 4538.

The first sentence provides for authentication of a “[c]ertification of the acknowledgement or proof of a writing” (except for a will) in the State of New York and adds that the certification is prima facie evidence “that it was executed by the person who purported to do so.” (See Real Property Law § 309-a [“Uniform forms of certificates of acknowledgment or proof within this state”]; see also *Osborne v Zornberg*, 16 AD3d 643, 644 [2d Dept 2005] [“(A) certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing as to amount to a moral certainty”], citing *Albany County Sav. Bank v McCarty*, 149 NY 71, 80 [1896].)

The second sentence of CPLR 4538 addresses a “conveyance of real property, situated within another state, territory or jurisdiction of the United States.” If that item “has been duly authenticated, according to the laws of that state, territory or jurisdiction, so as to be read in evidence in the courts thereof, [it] is admissible in evidence in the state.”

Subdivision (4) restates verbatim CPLR 4532. It provides for self-authentication of newspapers and periodicals of general circulation. The proviso clause states the common rule generally which permits the opposing party to

controvert the claimed authenticity (i.e. the genuineness of the document) “by extrinsic evidence or otherwise” and “to raise the issue of authenticity as an issue of fact.”

Subdivision (5) is derived from decisional law which provides that any trade inscriptions and the like on items indicating origin, ownership or control are self-authenticating. (*See e.g. Lindsay v Academy Broadway Corp.*, 198 AD2d 641, 642 [3d Dept 1993] [“Plaintiff did not and does not controvert the fact that each of the tents depicted in the photographs has an attached label(s) identifying its manufacturer and, additionally, with respect to defendant’s tent, a sewn-in patch displaying the company logo. These circumstantial facts are sufficient evidence of the photographs’ authenticity and therefore they were properly considered”]; *Weiner v Mager & Throne, Inc.*, 167 Misc 338, 340 [Mun Ct, Bronx County 1938] [“This defendant’s trade label, affixed to the loaf, is some evidence that it manufactured the bread; and unless rebutted, or at least contested by evidence, gives rise to a reasonable inference that the owner of the trade label manufactured the article to which it was affixed. No one except Mager & Throne, Inc., had the right to use its trade name or label. In the absence of any evidence tending to show that this defendant’s trade name or label was being wrongfully used by others, the inference is drawn that the name and label were used by it, and that this defendant was the manufacturer of the bread”].) Statutes also provide self-authentication for specific trade inscriptions. (*See e.g. General Business Law §§ 276, 277* [a certificate issued by the secretary of state to a person who has filed with the secretary of state a “name, mark or device to indicated ownership of vessels, receptacles or utensils” is “prima facie evidence of the ownership by the person filing hereunder of all vessels, receptacles and utensils upon which such name, mark or device is produced”].)

Subdivision (6) restates verbatim CPLR 4540-a. It is applicable to material produced by a party in the course of pretrial discovery in civil proceedings pursuant to a proper discovery request. Drawing on the concept that authenticity may be established by an admission, this section effectively finds an implied admission when a party in a civil proceeding in response to a discovery demand by an adversary discloses “material authored or otherwise created by such party.” That material when offered in evidence by the recipient is “presumed authentic,” albeit the presumption is subject to rebuttal. The Advisory Committee on Civil Practice to the Chief Administrative Judge recommended the statute, and the Legislative Memorandum in support of the legislation explained that the statute “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.” (2018 Rep of Advisory Comm on Civ Prac at 86-87.)

Subdivision (7) references the existence of numerous statutes in the Consolidated Laws that provide for methods of self-authentication of certain types of writings and documents. See Guide to New York Evidence article 3 (Prima Facie Evidence); Guide to New York Evidence rule 8.08 (Business Records [CPLR 4518]); Business Corporation Law § 107 (corporate seal as authenticating execution and authority); CPLR 2105 (certification by attorney); CPLR 3122-a (certification of business records); CPLR 4540 (d) (tariff or classification of Public Service Commission or Commissioner of Transportation); CPLR 4541 (transcript of docket-book of a justice of the peace); Public Health Law § 11 (1) (published health regulations); Tax Law §§ 287, 429, 505, 653 (signature on tax return).

¹ In 2022, subdivision (7) was amended to add appropriate cross-references. The Note to subdivision (7) was also amended to delete references to statutes that were subsequently included in a Guide to New York Evidence rule and to add instead the Guide references.

9.07. Methods of Authentication and Identification.

The requirement of authentication or identification is established by evidence that the offered evidence is what the proponent of the evidence claims it is and, where the offered evidence is fungible, that its condition is unchanged during the relevant period. The foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted. Examples of how to satisfy a requirement of authentication or identification when the proffered evidence is not self-authenticating include, but are not limited to:

(1) Admission of authenticity.

Evidence of an admission of authenticity made by the party against whom the evidence is being introduced.

(2) Testimony of witness.

Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.

(3) Subscribing witness.

Testimony of a subscribing witness to a writing may establish authenticity of the writing. Unless a writing requires a subscribing witness for its validity, however, it may be proved as if there were no subscribing witness.

(4) Nonexpert opinion on handwriting.

Nonexpert opinion that a handwriting is genuine, based on a familiarity with it that was not acquired for purposes of the litigation.

(5) Comparison of handwriting.

Comparison of a disputed handwriting by a qualified expert or the trier of fact with any handwriting proved to the satisfaction of the court to be the handwriting of the person claimed to have written the disputed handwriting.

(6) Circumstantial evidence.

The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(7) Voice identification.

Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon familiarity with the voice of the person identified as the speaker.

(8) Identification of recipient of telephone call.

Identification of a recipient of a telephone call, by evidence that a call was made to the number assigned at the time by a telephone company to a particular person or business, if: (a) in the case of a person, self-identification or other circumstances show the person answering to be the one called; or (b) in the case of a business, the call was made to a place of business and the conversation related to that business.

(9) Result of application of process, system, or scientific test or experiment.

Consistent with the requirements of rule 7.01, evidence that a process, system, or scientific test or experiment produces an accurate and reliable result and was properly employed or applied on the relevant occasion.

Note

The opening paragraph is derived from decisional law. (*See e.g. People v Price*, 29 NY3d 472, 476 [2017] [photograph]; *Zegarelli v Hughes*, 3 NY3d 64, 69 [2004] [surveillance videotape]; *People v Ely*, 68 NY2d 520, 527-528 [1986] [tape-recorded conversation]; *People v Julian*, 41 NY2d 340 [1977] [drugs]; *Amaro v City of New York*, 40 NY2d 30, 35 [1976] [blood sample]; *People v Flanigan*, 174 NY 356, 368 [1903] [iron bar and rope used in homicide].) It is applicable, as noted, to “chain of custody” cases, cases where it is necessary to account for custody of the offered evidence due to its fungible nature from the time it initially became relevant to the case and to show that its condition has not been changed. (*See People v Connelly*, 35 NY2d 171, 174 [1974].)

This rule includes examples of evidence that are not self-authenticating and thus require extrinsic evidence of the required authentication or identification. These examples are not intended to be exclusive or exhaustive.

Subdivision (1) is derived from decisional law which provides that a party’s admission that evidence offered against the party is what it purports is sufficient to establish the evidence’s authenticity. (*See People v Molineux*, 168 NY 264, 328 [1901].) An admission of authentication may be made: (1) expressly by the party (*see* Prince, Richardson on Evidence § 9-103 [b] at 703-704 [Farrell 11th ed 1995] [“an admission of authenticity made by the adversary to a witness, or in a writing proved or admitted to be (his or hers), or while testifying on another trial or hearing”]); (2) formally by admission pursuant to CPLR 3123; or (3) impliedly by reason of a failure to object on ground of lack of authentication. (*See People v Parsons*, 84 AD2d 510, 511 [1981], *affd for reasons stated in App Div mem* 55 NY2d 858 [1982] [“It is quite customary, even under New York’s present rules, where there is no real question of authenticity of the documents, for attorneys to permit the use of documents not authenticated to the last iota of the statutory requirement”]; *see also* CPLR 4540-a [presumption of authenticity based on a party’s production of material authored or otherwise created by the party].)

Subdivision (2), derived from substantial decisional law, describes perhaps the most common method of authentication or identification, i.e., the testimony of a witness with knowledge that the offered evidence is what it is represented to be. Examples of such testimonial authentication are endless. (*See* Robert A. Barker & Vincent C. Alexander, *Evidence in New York State and Federal Courts* § 9.3 [2d ed] [collecting cases].) For example, a witness may be the author of a writing in

question and testify to its authenticity; a witness may have sufficient knowledge to verify the accuracy of a photograph, a map, or diagram; and a witness may be able to identify an object in issue. (*Id.*).

When evidence is fungible and not patently identifiable or is capable of being replaced or altered, authentication is done through a chain of custody (*Connelly*, 35 NY2d at 174; *People v Julian*, 41 NY2d at 342-343; *Amaro*, 40 NY2d at 36). Normally, the testimony of a witness or witnesses with personal knowledge both of the custody of an object from the time it initially became relevant to the action to the time of trial and that its condition has not been altered will suffice to authenticate the evidence (*Julian*, 41 NY2d 340).

The witness's knowledge need not be certain. (See *People v Mirenda*, 23 NY2d 439, 452 [1969] [sunglasses were admitted in evidence when the "driver's assistant testified that the glasses found by (another person) were similar to those he had noticed one of the suspects wearing"]; *People v Miller*, 17 NY2d 559, 560 [1966] [revolver found on a defendant's person was properly admitted when a witness testified that it looks like the revolver he saw in the defendant's hand]; *People v Martinez*, 115 AD2d 665, 665 [2d Dept 1985] [shotgun properly admitted when "three witnesses identified the gun recovered from defendant's possession as either the one with which defendant shot decedent or one that looked exactly like it"]; *People v Randolph*, 40 AD2d 806, 806 [1st Dept 1972] [gun was admissible where the "complainant testified the gun was like the one placed against his chest"].)

Subdivision (3) is derived from CPLR 4537, which reads: "Unless a writing requires a subscribing witness for its validity, it may be proved as if there was no subscribing witness." The statute abrogates the common-law rule that required a subscribing witness to testify to the authenticity of the document and permits authentication, even when there is a subscribing witness, "as if there was no subscribing witness" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4537). The "unless" clause, however, recognizes statutory exceptions, e.g., EPTL 3-2.1 and SCPA 1404, 1405 and 1406 (need subscribing witness to a will unless unavailable). Thus, absent a statutory requirement for the testimony of a subscribing witness, one or more of the ways of proving a writing set forth in this rule may be utilized.

Subdivision (4) sets forth the well-established rule that a lay witness may identify handwriting with which the witness is familiar, which familiarity was not acquired for purposes of litigation. (See *Molineux*, 168 NY at 320-321; *Hynes v McDermott*, 82 NY 41, 53-54 [1880] [a lay witness's identification of handwriting, however, based on familiarity acquired "*post litem motam*" is inadmissible]; *Matter of Collins v Wyman*, 38 AD2d 600, 601 [2d Dept 1971] ["Although a nonexpert may testify directly to the genuineness of the disputed writing, he must first establish his familiarity with the handwriting of the person claimed to have executed the disputed writing and how this familiarity came about"].)

Familiarity with a person's handwriting may be acquired in various ways (*see Hammond v Varian*, 54 NY 398, 400 [1873] [sufficient familiarity was found with "one witness who had seen the defendant write his name once, and another who had never seen him write, but who had held his (promissory) note, acknowledged and conceded to be genuine The extent of their knowledge, and the weight or effect to be given to their opinion, were proper matters for the consideration of the jury"]; *People v Stephenson*, 202 AD2d 280, 281 [4th Dept 1994] ["People's non-expert witnesses, who testified regarding their familiarity with the peculiar characteristics of defendant's handwriting, were entitled to demonstrate such through the use of both disputed documents and documents known to have been written by defendant"]; *Gross v Sormani*, 50 App Div 531, 534 [2d Dept 1900] [sufficient familiarity was shown when the witness testified that "he was acquainted with the handwriting of plaintiff's testator; that he had received numerous letters from him in the course of business dealings with him"]). Where the proof of familiarity is insufficient, the witness's testimony will be excluded. (*See People v Corey*, 148 NY 476, 481-482 [1896].)

Subdivision (5) is derived from CPLR 4536 as interpreted by the Court of Appeals. (*See Molineux*, 168 NY at 330 ["(C)omparisons with standards produced in court, whether at common law or under the statutes, may be made by witnesses, or by the court or jury without the aid of witnesses"]; *People v Hunter*, 34 NY2d 432, 435-436 [1974] [Under CPLR 4536 "the jury in its deliberation, may make such a comparison whether or not an expert offers an opinion"]; *People v Fields*, 287 AD2d 577, 578 [2d Dept 2001] ["(A)n expert or a jury may compare a disputed writing to the known specimen, even in the absence of an expert opinion"].)

Under the rule only a handwriting specimen that has been proved to the satisfaction of the court to be genuine is permitted to be used for comparison purposes. (*See Molineux*, 168 NY at 328; *Clark v Douglass*, 5 App Div 547 [3d Dept 1896].) If the specimen is so proved, the genuineness of both the specimen and the offered handwriting are questions of fact for the jury. (*Molineux*, 168 NY at 330 ["If the court, having regard to the rules adverted to, adjudge the papers genuine, it then becomes the duty of the jury in its turn, at the proper time, before making comparison of a disputed writing with the standards, to examine the testimony respecting the genuineness of the latter and to decide for itself, under proper legal instructions from the court, whether their genuineness has been established"].)

A nonexpert witness "may not express an opinion as to handwriting based upon a comparison between a disputed writing and a writing conceded or proved to be the genuine handwriting of the person whose handwriting is in dispute" (*Matter of Collins v Wyman*, 38 AD2d 600, 601 [2d Dept 1971]). A nonexpert is limited to an opinion as to handwriting based upon a demonstrated familiarity with the handwriting of the person claimed to have written the disputed writing. (*Id.*; *see* subdivision [2].)

Subdivision (6) sets forth the rule that authentication of a document or physical evidence may be proved by circumstantial evidence derived from its distinctive facts and circumstances, such as appearance, contents, substance, internal patterns, or other identifying characteristics, and other circumstantial evidence derived from extrinsic evidence (*see Price*, 29 NY3d at 481 [“Authentication may be established by direct or circumstantial evidence, and ‘reasonable inferential linkages can ordinarily supply foundational prerequisites’ so long as the ‘tie-in effort’ is not ‘too tenuous and amorphous’ ” (citation omitted)]; *People v Manganaro*, 218 NY 9, 13 [1916] [“genuineness may be proved by indirect or circumstantial evidence the same as many other facts”]; *People v Dunbar Contr. Co.*, 215 NY 416, 423 [1915] [where there was proof that an incriminating telephone message came from a defendant, “the internal evidence of the letter (referring to the same incriminating evidence) shows that it came from the same source. The letter refers to the conversation, repeats its substance, and confirms it. Unexplained and uncontradicted by any witness for the defendants, the evidence justified the inference that (the same defendant) was the author”]; *People v Curry*, 82 AD3d 1650, 1650 [4th Dept 2011] [“The People established the similarities between the letters in those cases and the ones at issue here, including their content, writing style, paper, and envelopes, and they also established that in all cases defendant had sent multiple, nearly identical letters on the same day”]; *People v Sanchez*, 54 AD3d 638, 639 [1st Dept 2008] [“The court properly admitted the victim’s mother’s testimony that she overheard, by speakerphone, a telephone call in which the speaker apologized for hitting the victim. Although the mother, who was not familiar with defendant’s voice, did not hear the speaker identify himself, there was sufficient circumstantial evidence to establish that defendant was the speaker”]; *Anzalone v State Farm Mut. Ins. Co.*, 92 AD2d 238, 239 [2d Dept 1983] [“the authenticity of Steed’s signature on the finance agreement may be reasonably inferred from the fact that she paid at least five premium installments”]).

Circumstantial evidence of the type stated in the subdivision can be used to authenticate or identify electronic communications such as emails, text messages and posts on social media. (*See e.g. People v Green*, 107 AD3d 915, 916 [2d Dept 2013] [text messages authenticated by their contents as they “made no sense unless (they were) sent by defendant”]; *People v Pierre*, 41 AD3d 289, 291 [1st Dept 2007] [instant message authenticated by proof of the defendant’s screen name and proof of message sent to that screen name and a reply, “the content of which made no sense unless it was sent by defendant”]; *see also Price*, 29 NY3d 472 [photograph of the defendant holding a firearm was not authenticated, inter alia, because there was no testimony the internet page from which the photograph was obtained was controlled by the defendant].)

Subdivision (7) restates New York’s well settled rule that a person’s voice, whether heard in person, over the telephone, or by some other mechanical or electronic means, e.g., audio recording, can be identified by a witness who has familiarity with the voice. (*See e.g. People v Dunbar Contr. Co.*, 215 NY 416, 422-

423 [1915] [“A voice heard over the telephone may be compared with the voice of a speaker whom one meets for the first time thereafter as well as with the voice of a speaker whom one has known before. The difference affects the weight rather than the competency of the evidence. Whether the identity of the speaker had been sufficiently authenticated was a question of fact to be disposed of preliminarily by the trial judge” The witness “did not profess certainty, but certainty was not necessary” (citation omitted)]; *People v Dinan*, 15 AD2d 786, 787 [2d Dept 1962], *affd* 11 NY2d 350 [1962] [voice on audio-recording].)

The Court of Appeals has cautioned that testimony by a witness that the speaker identified himself/herself is insufficient foundation for admissibility of the speaker’s statement (*People v Lynes*, 49 NY2d 286, 291 [1980], citing *Murphy v Jack*, 142 NY 215, 217-218 [1894]).

Subdivision (8) sets forth a method of establishing the identity of the recipient of a phone call made to a person or business as recognized by decisional law. (*See People v Lynes*, 49 NY2d at 292 [“in some instances the placing of a call to a number listed in a directory or other similarly responsible index of subscribers, coupled with an unforced acknowledgment by the one answering that he or she is the one so listed, has been held to constitute an adequate showing. In other cases, the substance of the conversation itself has furnished confirmation of the caller’s identity, as, for example, when subsequent events indicated that the party whose identity is sought to be established had to have been a conversant in the telephone talk or when the caller makes reference to facts of which he alone is likely to have knowledge” (citations omitted). In *Lynes*, a reasonably prompt callback in response to a message to call, as well as the substance of a conversation disclosing facts known to the caller, authenticated the identity of the person calling]; *Orlando v Great E. Cas. Co.*, 91 Misc 539, 543 [App Term, 2d Dept 1915] [“While, in this state, a witness may not usually, at least, testify to a conversation with a particular person over the telephone, unless the voice of such person was recognized by the witness, yet when a person in the ordinary way calls up a city department, like the police department, to give notice of some fact, I think the giving of such notice may be proved by the testimony of the person giving it”].)

It should be noted that the rule stated in this subdivision can be utilized even where the witness has no familiarity with the recipient’s voice, obviating reliance upon the rule stated in subdivision (7).

Subdivision (9) restates the rule that, when the offered evidence has been produced by a process, system, or scientific test or experiment, the proponent must establish that the process, system, or scientific test or experiment produces an accurate and reliable result and that the process, system, or scientific test or experiment was properly employed or applied on that particular occasion. (*See generally* Robert A. Barker & Vincent C. Alexander, *Evidence in New York State and Federal Courts* § 9:19 [2d ed] [collecting cases applying this rule to various processes and tests that produce results].)

The first part of the rule requires evidence that the process, system, or scientific test or experiment produces accurate results. (See e.g. *People v Campbell*, 73 NY2d 481, 484-486 [1989] [blood-alcohol analysis]; *People v Smith*, 63 NY2d 41, 62-64 [1984] [photo-to-photo comparison of bite marks]; *People v Magri*, 3 NY2d 562, 566 [1958] [radar speed detection].)

In some instances, as set forth in Guide to New York Evidence rule 7.01, the underlying methods and principles may be subject to the *Frye* standard. (See e.g. *People v Wesley*, 83 NY2d 417, 422-423 [1994] [DNA analysis]; *People v Middleton*, 54 NY2d 42, 49-50 [1981] [bite mark comparison].)

The second part of the rule requires evidence that the process, system, or scientific test or experiment was properly administered on the occasion in issue. (See *Wesley*, 83 NY2d at 428-429 [“After the *Frye* inquiry, the issue then shifts to a second phase, admissibility of the specific evidence—i.e., the trial foundation—and elements such as how the sample was acquired, whether the chain of custody was preserved and how the tests were made”]; *People v Mertz*, 68 NY2d 136, 148 [1986] [breathalyzers must be shown to have been properly calibrated, in working order and properly prepared and operated].)

9.09 Admissibility of graphic, numerical, symbolic or pictorial representations of medical or diagnostic tests (CPLR 4532-a)

A graphic, numerical, symbolic or pictorial representation of the results of a medical or diagnostic procedure or test is admissible in evidence provided:

(1) the name of the injured party, the date when the information constituting the graphic, numerical, symbolic or pictorial representation was taken, and such additional identifying information as is customarily inscribed by the medical practitioner or medical facility is inserted on such graphic, numerical, symbolic or pictorial representation; and

(2) (a) the representation has been previously received or examined by the party or parties against whom it is being offered; or

(b) (i) at least ten days before the date of trial of the action, the party intending to offer such graphic, numerical, symbolic or pictorial representation as a proposed exhibit serves upon the party or parties against whom said proposed exhibit is to be offered, a notice of intention to offer such proposed exhibit in evidence during the trial and that the same is available for inspection; and

(ii) the notice aforesaid is accompanied by an affidavit or affirmation of such physician identifying such graphic, numerical, symbolic or pictorial representation and attesting to the identifying information inscribed thereon, attesting that the identifying information inscribed thereon is the same as is customarily inscribed by the medical practitioner or facility, and further attesting that, if called as a witness in the action, he or she would so testify.

Nothing contained in this rule, however, shall prohibit

the admissibility of a graphic, numerical, symbolic or pictorial representation in evidence where otherwise admissible.

Note

This rule restates verbatim CPLR 4532-a. That rule was substantially amended by the Laws of 2004, chapter 375, effective January 1, 2005, so judicial decisions under the rule before then may no longer be applicable.

Under the best evidence rule, a party seeking to prove the contents of an X ray, a magnetic resonance imaging (MRI), or an analogous pictorial, graphic, symbolic, or numerical representation must introduce the authenticated original image or offer a satisfactory excuse for the absence of the original that would allow for proof by secondary evidence. (Guide to NY Evid rule 10.03.) A physician witness may not prove the contents of an X ray or MRI, for example, that is not in evidence based on a reading of a report interpreting an X ray or MRI.

CPLR 4532-a facilitates admission of the image itself without calling the technician who conducted the imaging or testing, by providing a means to authenticate any “graphic, numerical, symbolic or pictorial representation of the results of a medical or diagnostic procedure or test” without foundation testimony.

The rule encompasses not only X rays and MRIs, but also computed axial tomographs (CAT scans), positron emission tomographs (PET scans), electromyograms (EMGs), sonograms, fetal heart monitor strips, and other diagnostic tests that are currently in use or may be developed. (*See e.g. Clevenger v Mitnick*, 38 AD3d 586, 587 [2d Dept 2007] [MRI scans and EMG test data].)

The rule does not encompass *reports* of tests. (*Ewanciw v Atlas*, 65 AD3d 1077, 1078 [2d Dept 2009] [the rule did not encompass a report of quantitative results of a nerve conduction study].)

The rule creates a self-authentication procedure and a hearsay exception for the identifying information on the image or other test results.

Subdivision (1) of the rule sets forth the required identifying information. The only specified requirements are the patient’s name and the test’s date. Subdivision (1) otherwise is flexible to conform to medical practitioners’ and facilities’ varying practices of imprinting identifying information on patients’ test results: “and such additional identifying information as is customarily inscribed by the medical practitioner or medical facility.”

The rule sets forth two alternative additional prerequisites to admissibility.

Subdivision (2) (a) requires the proponent of the exhibit to show that the

parties against whom the exhibit is introduced have received or examined the exhibit. Parties who received the exhibit thus are provided the opportunity to examine the exhibit and therefore are presumed to have examined it. Otherwise the proponent may provide the opportunity for examination, for example, at an attorney's or medical practitioner's office or at a deposition. Receipt or examination of the exhibit enables an opponent to challenge the exhibit's admissibility or develop rebuttal evidence.

Subdivision (2) (b) sets forth an alternative means for admissibility. At least 10 days before the trial, the proponent must serve the parties against whom the exhibit is to be introduced with notice of the proponent's intent to introduce the exhibit and its availability for inspection. (*See e.g. Trombin v City of New York*, 33 AD3d 564, 564 [1st Dept 2006].) This notice must be accompanied by a physician's affidavit identifying the exhibit and attesting (1) to the information inscribed on the exhibit, (2) that that information is what the practitioner or facility customarily inscribes, and (3) that the physician would so testify if called as a witness. Noncompliance with the notice requirements will result in the exhibit's exclusion (*Dwight v New York City Tr. Auth.*, 30 AD3d 270, 271 [1st Dept 2006]), or its erroneous admission. (*Wang v 161 Hudson, LLC*, 60 AD3d 668, 668-669 [2d Dept 2009]; *Lucian v Schwartz*, 55 AD3d 687, 689 [2d Dept 2008].)

In any event, a physician's testimony inevitably will be necessary to interpret the exhibit since this rule simply provides a shortcut to authenticating the exhibit. The witness, however, need not be the physician who conducted or supervised the imaging or diagnostic test as would be necessary to authenticate it.

CPLR 4532-a does not preclude the use of a witness to authenticate an image or other diagnostic test encompassed by the rule. The proponent of course may call the physician or technician who conducted the imaging or testing to authenticate it or may introduce at the trial a physician's authentication of the imaging or testing at a deposition. (CPLR 3101 [a] [3]; 3117 [a] [4].)

Finally, admission over objection of images or tests without strict adherence to the required authentication procedures may amount to harmless error where physicians testify regarding their review of the images or other test results or reports of them are admitted without objection. (*Lucian v Schwartz*, 55 AD3d at 689.)

GUIDE TO NEW YORK EVIDENCE
ARTICLE 10: BEST EVIDENCE RULE
TABLE OF CONTENTS

10.01 DEFINITIONS

10.03 BEST EVIDENCE RULE

10.05 EXCEPTION FOR REPRODUCTIONS & COPIES

10.07 EXCEPTION WHEN ORIGINAL LOST OR COLLATERAL

10.09 EXCEPTION FOR ADMISSIONS

10.11 EXCEPTION FOR VOLUMINIOUS MATERIAL

10.01. Best Evidence Rule; Definitions

The following definitions apply to this article:

(1) Writing. A “writing” consists of letters, words, numbers, or their equivalent set down in any form.

(2) Recording. A “recording” consists of letters, words, numbers, sounds, or their equivalent recorded in any manner.

(3) Photograph. A “photograph” consists of a photographic image or its equivalent stored in any form, electronic or otherwise, including still photographs, motion pictures, video or digital recordings, and diagnostic imaging.

(4) Original.

(a) The original of a writing or recording includes the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it.

(b) The original of electronically stored information includes any printout or other output that accurately reflects the information and is readable by sight.

(c) The original of a photograph includes any print or digital reproduction thereof or a negative.

Note

This rule sets forth definitions applicable to the best evidence rule and its exceptions, as set forth in this article.

Subdivision (1) broadly defines a “writing” that may be subject to the best evidence rule. This definition accords with New York law that recognizes that the best evidence rule applies to any form of communicating, memorializing, or

storing verbal or numeric evidence set down by handwriting or a mechanical process. Thus, all forms of documentary evidence, from a contract, deed, or business record to letters or memoranda, are subject to the best evidence rule (e.g. *Trombley v Seligman*, 191 NY 400, 403 [1908] [shipping bill]; *Taft v Little*, 178 NY 127, 133 [1904] [contract]; *Butler v Mail & Express Publ. Co.*, 171 NY 208, 211 [1902] [stipulation]; *Foot v Bentley*, 44 NY 166, 171 [1870] [letter]; *Shanmugam v SCI Eng'g, P.C.*, 122 AD3d 437, 438 [1st Dept 2014] [business records]; *Dhillon v Bryant Assoc.*, 26 AD3d 155, 157 [1st Dept 2006] [tax returns]; *Matter of Marks*, 33 AD2d 1029, 1029 [2d Dept 1970] [plot plan for real estate parcel]). The term “writing” also includes verbal or numeric information that is stored digitally and can be read on a screen or printed out (e.g. *Ed Guth Realty v Gingold*, 34 NY2d 440, 451-452 [1974] [computer printouts]).

Inscriptions on physical objects, so-called “inscribed chattels,” are not considered to be writings for purposes of the best evidence rule when they merely identify the object (*Carroll v Gimbel Bros., New York*, 195 App Div 444, 451 [1st Dept 1921] [testimony that merchandise allegedly shoplifted by plaintiff bore tags and marks of the defendant’s store erroneously excluded on best evidence grounds; court noted the best evidence rule applied only to “documentary evidence”]; see *United States v Duffy*, 454 F2d 809, 812 [5th Cir 1972] [witness could testify about three-letter “D-U-F” laundry mark on shirt collar without producing the shirt as “the shirt with a laundry mark would not, under ordinary understanding, be considered a writing” for purposes of the best evidence rule]).

Subdivision (2) parallels subdivision (1), likewise broadly defining a “recording” subject to the best evidence rule. That definition accords with New York law (see *People v Harding*, 44 AD2d 800, 801 [1st Dept 1974] [“The fact that the transcript made of the recorded telephone conversation was concededly correct fails to ameliorate the fact that the tape and not the transcript constitutes the best evidence of the nature of the conversation”]; *People v Graham*, 57 AD2d 478, 480 [4th Dept 1977], *affd* 44 NY2d 768 [1978]).

Subdivision (3) defines “photograph,” which New York courts have recognized may have multiple meanings in the application of the best evidence rule in the electronic age. For example, the best evidence rule may apply to still photographs (e.g. *People v Byrnes*, 33 NY2d 343, 347-348 [1974]; *People v Farbman*, 231 AD2d 588 [2d Dept 1996]); videotapes, including surveillance tapes (see e.g. *People v Cyrus*, 48 AD3d 150, 159 [1st Dept 2007]; *People v Fondal*, 154 AD2d 476, 477 [2d Dept 1989]); motion pictures (see Martin, Capra & Rossi, NY Evidence Handbook § 10.1.2 at 920 [2d ed]); and diagnostic imaging (see e.g. *Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 644-645 [1994] [X ray film]; *Wagman v Bradshaw*, 292 AD2d 84, 88 [2d Dept 2002] [MRI film]).

Subdivision (4) restates the separate definitions of an “original,” “writing or recording,” computer printout, and “photograph,” as provided in New York decisional law.

Subdivision (4) (a) sets forth what constitutes an “original” for purposes of the best evidence rule (*Sarasohn v Kamaiky*, 193 NY 203, 215 [1908]; *Hubbard v Russell*, 24 Barb 404, 408 [Sup Ct 1857]). Where the parties make two or more copies of a document and each party retaining one, both copies are considered an “original” if that is what the parties intended; and any one copy is admissible as the “original” without accounting for the absence of the other copy (*Sarasohn*, 193 NY at 215-216; *People v Sims*, 127 AD2d 712, 713 [2d Dept 1987]). A different rule, however, applies when multiple copies of a will are executed, as all copies must be accounted for before one is probated (*see Crossman v Crossman*, 95 NY 145 [1884]; *Matter of Robinson*, 257 App Div 405, 406-407 [4th Dept 1939]; *see also* SCPA 1407 [proof of lost or destroyed will]).

The Third Department has noted that carbon copies of written statements are originals for purposes of the best evidence rule (*see People v Chaplin*, 134 AD3d 1148, 1152 [3d Dept 2015]; *People v Kolp*, 49 AD2d 139, 141 [3d Dept 1975]). The First Department has taken a contrary position (*Rosenberg v People’s Sur. Co. of N.Y.*, 140 App Div 436, 437 [1st Dept 1910]). In *Foot v Bentley* (44 NY 166 [1870]), the Court of Appeals held the best evidence rule barred the admission of a “letter press” copy of a letter.

Subdivision (4) (b) sets forth New York law that treats any printout or other readable output of electronically stored information as the “original” of the stored data (*Ed Guth Realty*, 34 NY2d at 452).

Subdivision (4) (c) restates New York law recognizing that an original of a photograph includes any print or digital reproduction thereof or a negative (*Byrnes*, 33 NY2d at 348; *People v Fort*, 146 AD3d 1017, 1018 [3d Dept 2017] [still photographs from a surveillance video]; *see People v Fraser*, 96 NY2d 318, 327 [2001] [holding that the term “photograph” used in the definition of a crime (Penal Law § 263.00 [4]) included a digital computer image]).

10.03. Best Evidence Rule

When a party seeks to prove the contents of a writing, recording, or photograph that is in dispute, the writing, recording, or photograph must be proved by production of the original, except when the production is excused as provided in this article.

Note

This rule restates New York’s long-standing best evidence rule, which provides that, when a party is seeking to prove the disputed contents of a writing, recording, or photograph, as defined in rule 10.01 of the Guide to New York Evidence, the party must produce the original, as also defined in rule 10.01, unless nonproduction is excused for reasons allowed by decisional law or by statute (e.g. *People v Haggerty*, 23 NY3d 871, 876 [2014] [“The best evidence rule requires the production of an original writing where its contents are in dispute and sought to be proven” (internal quotation marks omitted)]; *Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643 [1994] [“(B)est evidence rule simply requires the production of an original writing where its contents are in dispute and sought to be proven”]; *Foot v Bentley*, 44 NY 166, 171 [1870] [Rule violated when trial court admitted letter-press copies of letters as the copies did not “obviate the necessity of producing the originals” of the letters]).

As to the rule’s underlying rationale, the Court of Appeals explained in *Schozer*: “At its genesis, the rule was primarily designed to guard against ‘mistakes in copying or transcribing the original writing.’ Given the technological advancements in copying, in modern day practice the rule serves mainly to protect against fraud, perjury and ‘inaccuracies . . . which derive from faulty memory’ ” (84 NY2d at 643-644 [citations omitted]; see also *People v Haggerty*, 23 NY3d 871, 876 [2014] [“The rule protects against fraud, perjury, and inaccurate recollection by allowing the jury to judge a document by its own literal terms”]).

The rule does not apply, however, when a party seeks to prove a fact that is memorialized in a writing, recording, or photograph if that fact has an existence independent of a writing, recording, or photograph (*McRorie v Monroe*, 203 NY 426, 429-430 [1911] [oral testimony may be proved without reference to the stenographer’s minutes]; *Steele v Lord*, 70 NY 280, 283-284 [1877] [payment may be proved without producing the written receipt provided]; *Grieshaber v City of Albany*, 279 AD2d 232, 235 [3d Dept 2001] [“Where, as here, a party seeks to prove the content of a conversation, which is a fact existing independently of an available recording of that conversation, an individual who heard the conversation may testify as to its content despite the existence of the tape recording”]; *Universal Grain Corp. v Lamport & Holt Line*, 54 NYS2d 53, 53-54 [App Term, 1st Dept 1945] [“The best evidence rule has no application to the instant case.

When a party seeks to prove a fact which has an existence independently of any writing, he may do so by parol, even though the fact has been reduced to, or is evidenced by, a writing. Here plaintiff relied on the positive and direct testimony of witnesses having independent knowledge” (citation omitted)). Similarly, it is not necessary to use certificates to prove such facts as marriage, birth, age, and death (*see Commonwealth v Dill*, 156 Mass 226, 227, 30 NE 1016, 1017 [1892, Holmes, J.] [“(T)he record of a marriage . . . is a mere memorandum or declaration of the fact which effected the result, not itself the fact, nor that which has been constituted the only evidence of the fact. There is no reason why the oath of the person who did the act should be deemed inferior evidence to a written statement by him or another” (citation omitted)]). In these instances, the proof is directed to the occurrence of an event and not to the contents of the writing or recording.

The core element of the best evidence rule is “proof of content.” The rule requires the production of the original of a writing, recording, or photograph only when a party is seeking to prove the contents of the writing, recording, or photograph (*e.g. Flynn v Manhattan & Bronx Surface Tr. Operating Auth.*, 61 NY2d 769, 771 [1984]; *Clarke v New York City Tr. Auth.*, 174 AD2d 268, 273 [1st Dept 1992]). Thus, the rule will apply when under the governing substantive law a fact required to be proved is a written transaction, *e.g.*, a deed, will, or written contract (*see Mahaney v Carr*, 175 NY 454, 461-462 [1903]; *Curran v Newport Assoc.*, 57 AD2d 882, 883 [2d Dept 1977]; *Matter of Hamilton*, 182 App Div 908, 908-909 [4th Dept 1918]), and a party chooses to prove a relevant fact by evidence of a writing or recording even though the substantive law does not require the writing or recording to be proved (*see Barker & Alexander, Evidence in New York State and Federal Courts* § 10.1 [2d ed]; *Martin, Capra & Rossi, New York Evidence Handbook* § 10.1.3 [2d ed]).

There are exceptions to the best evidence rule, however, as set forth in the ensuing rules:

- 10.05 Exception for Certain Reproductions and Copies
- 10.07 Exception when Original Missing or Collateral
- 10.09 Exception for Admission of Contents
- 10.11 Exception for Summary of Voluminous Material

10.05. Exception for Certain Reproductions and Copies

(1) When an original writing, recording, or photograph is required, a reproduction or copy is not admissible to prove its contents, except as provided in subdivisions two, three, and four, and rule 10.07 (Exception when Original Missing or Collateral).

(2) If any business, institution, or member of a profession or calling, in the regular course of business or activity has made, kept or recorded any writing, entry, print or representation and in the regular course of business has recorded, copied, or reproduced it by any process, including reproduction, which accurately reproduces or forms a durable medium for reproducing the original, such reproduction, when satisfactorily identified, is as admissible in evidence as the original, whether the original is in existence or not, and an enlargement or facsimile of such reproduction is admissible in evidence if the original reproduction is in existence and available for inspection under direction of the court. The introduction of a reproduction does not preclude admission of the original.

(3) A reproduction created by any process which stores an image of any writing, entry, print or representation and which does not permit additions, deletions, or changes without leaving a record of such additions, deletions, or changes, when authenticated by competent testimony or affidavit which shall include the manner or method by which tampering or degradation of the reproduction is prevented, shall be as admissible in evidence as the original.

(4) A reproduction or copy of a record or report is admissible to prove its contents when specifically permitted by statute.

Note

This rule addresses the circumstances when a reproduction or copy of a writing, recording, or photograph is admissible to prove the contents of the original.

Subdivision (1) restates New York law that provides the contents of a writing, recording, or photograph cannot be proved by a copy except when permitted by a statute or decisional law (*e.g. Richardson v Tanner*, 140 App Div 372, 377 [1st Dept 1910]; *Guilfoyle v Pierce*, 125 App Div 504, 507 [1st Dept 1908], *affd* 196 NY 499 [1909]; *Dhillon v Bryant Assoc.*, 26 AD3d 155, 157 [1st Dept 2006]; *People v Hamilton*, 3 AD3d 405, 405 [1st Dept 2004], *mod on other grounds* 4 NY3d 654 [2005]; *see* Prince, *Richardson on Evidence* § 10-110 [Farrell 11th ed]).

Subdivision (2) restates verbatim CPLR 4539 (a). This statutory provision creates an exception to the best evidence rule set forth in Guide to New York Evidence rule 10.03 for a copy of any “writing, entry, print or representation” made by any “business, institution, or member of a profession or calling” by an accurate reproduction process, provided the copy was made in the regular course of business (*e.g. Grand Manor Health Related Facility, Inc. v Hamilton Equities, Inc.*, 122 AD3d 481, 482 [1st Dept 2014] [copy of assignment document was properly admitted: “The testimony of a witness for plaintiff that he retrieved the document from the company’s files, where it was plaintiff’s practice to keep photocopies of outgoing correspondence, satisfies CPLR 4539 (a)”]; *People v May*, 162 AD2d 977, 978 [4th Dept 1990] [two photocopies and fax copy of documents properly admitted when they were made in the regular course of business]). This exception is based on the legislative recognition that the “modern business practice is to make photographic reproductions in the regular course of business and also of the fact that photographic reproductions so made are sufficiently trustworthy to be treated as originals for the purpose of the best evidence rule” (*People v Flores*, 138 AD2d 512, 513 [2d Dept 1988]).

This exception does not encompass copies of documents not made in the regular course of business, even if made by an accurate reproduction process (*see Toho Bussan Kaisha, Ltd. v American President Lines, Ltd.*, 265 F2d 418, 423 [2d Cir 1959] [applying predecessor to CPLR 4539: “The provisions of those acts permitting use of photostats refer only to situations where photostats, microfilms, or the like, have been made in the ordinary course of business and not in preparation for trial”]; *Dipace v Hertz Corp.*, 30 AD2d 515, 516 [1st Dept 1968] [citing *Toho Bussan Kaisha, Ltd.*]). The legislature has not enacted a statute similar to Federal Rules of Evidence rule 1003 which provides that copies are generally admissible in all cases except where there is a genuine question of the authenticity of the original or where admission of the duplicate instead of the original would be unfair.

As noted by the Appellate Division: “[CPLR 4539 (a)] makes it unnecessary to establish that the exhibit was compared to the original and found to be an accurate copy. It is enough that the document is identified as a photocopy of the original or the product of some similarly accurate copying process” (*May*, 162 AD2d at 978).

CPLR 4539 (a) permits the introduction of the reproduced copy even if the original of the document exists. It also permits an enlargement of the reproduced copy to be admitted if the original document still exists and is available for inspection.

Subdivision (3) restates verbatim CPLR 4539 (b). It, too, creates an exception to the best evidence rule set forth in rule 10.03 for any “writing, entry, print or representation” produced by electronic data imaging, e.g., optically scanned images that are stored on a computer disc (*e.g. People v Gunther*, 172 AD3d 1403, 1404 [2d Dept 2019] [computer reproduction of scanned original withdrawal slips properly admitted]). The underlying legislative intent is to “expressly provide for the admissibility in evidence of business records produced by new technologies, including electronic data imaging, to remove the legal uncertainties that currently require businesses and governments that adopt such technologies to maintain dual record systems” (Senate Introducer’s Mem in Support, Bill Jacket, L 1996, ch 27 at 7).

Two conditions are imposed: the imaging process utilized does not allow “additions, deletions, or changes without leaving a record” of such alterations; and a description as to how “tampering or degradation of the reproduction is prevented” is presented by testimony or affidavit.

Of note, unlike CPLR 4539 (a), CPLR 4539 (b) is not limited to reproductions made in the regular course of business. Thus, CPLR 4539 (b) encompasses scanned documents that were converted to electronic form as part of a wholesale conversion of documents maintained in storage.

In *People v Kangas* (28 NY3d 984 [2016]), the Court of Appeals held that CPLR 4539 (b) does not apply to documents that were originally created in electronic form. Rather, it “applies only when a document that originally existed in hard copy form is scanned to store a digital ‘image’ of the hard copy document” (*id.* at 985). The Court expressly noted that an electronic business record offered into evidence as a true and accurate tangible exhibit under CPLR 4518 (a) can be admitted without the additional foundation elements of CPLR 4539 (b) (*id.* at 986).

Subdivision (4) refers to many statutes, other than CPLR 4539, that authorize the admission in evidence of reproductions or copies of specific types of records and reports in lieu of the original. They encompass both public and private records and reports. These statutes address specific types of writings (*see*

e.g. Banking Law § 11 [2] [b] [banking reports required to be kept by superintendent]; Banking Law § 256 [records of savings bank relating to accounts of depositors and relating to its business operations]; CPLR 3122-a [certification of copies of business records]; CPLR 4518 [c] [certified copies of hospital and medical records of a municipal corporation and the state; and records of a library, municipal corporation and the state]; CPLR 4525 [certified copies of statements made pursuant to UCC 9-523]; CPLR 4540 [copies of an official publication, official record of a court or government office of the United States and any state]; CPLR 4542 [a] [certified copies of foreign records and documents]; County Law § 208 [certified copies or transcripts of county records]; Education Law § 106 [copies of records made by the regents of a university and commissioner of education under their seal]; Public Service Law § 17 [certified copies of records filed or deposited in office of Public Service Commission]; Real Property Law § 399 [certified certificate of title]; Transportation Law § 69 [copies of records of Utica Transit Authority]; Transportation Law § 88 [certified copies of records filed or deposited in Transportation Department]).

10.07. Exception when Original Missing or Collateral

(1) Evidence, other than the original of a writing, recording, or photograph, may be admissible pursuant to subdivision two when:

(a) all originals are lost or destroyed unless the proponent caused or procured their loss or destruction in bad faith;

(b) an original cannot be obtained by any available judicial process; or

(c) the party against whom the original would be offered has control of the original and fails to produce it after having been notified by pleadings or otherwise that the original will be a subject of proof in the action or proceeding.

(2) Competent and reliable secondary evidence of the contents of an unproduced original is admissible when the court is satisfied that the proponent has, pursuant to subdivision one, sufficiently explained the unavailability of the original writing, recording, or photograph.

(3) Evidence, other than the original of a writing, recording, or photograph, may be admissible when the writing, recording, or photograph is not directly in issue.

Note

This rule restates New York law that establishes exceptions to the best evidence rule, excusing the nonproduction of the original of a writing, recording, or photograph; and, correspondingly, permits other evidence, referred to as secondary evidence, to prove the contents of a writing, recording, or photograph.

Subdivision (1) sets forth three judicially recognized exceptions to the best evidence rule under which production of the original writing, recording or photograph is excused.

Subdivision (1) (a) restates New York’s well-established “excuse of good faith loss or destruction” exception to the best evidence rule. As stated by the Court of Appeals in *Schozer v William Penn Life Ins. Co. of N.Y.*:

“Under a long-recognized exception to the best evidence rule, secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith” (84 NY2d 639, 644 [1994] [citations omitted]; *cf. Trombley v Seligman*, 191 NY 400, 403 [1908] [trial court erred in permitting testimony to establish the contents of shipping bills without any proper attempt to procure these bills on the trial and without any sufficient evidence of their loss or destruction]; *Butler v Mail & Express Publ. Co.*, 171 NY 208, 211 [1902] [trial court erred in permitting testimony to establish an alleged stipulation between the parties without satisfactorily explaining the absence of the stipulation entered into]).

Loss may be established upon a showing of a diligent search where the document was last known to have been kept and through the testimony of the person who last had custody of the original (*Schozer*, 84 NY2d at 644; *see Kearney v Mayor of City of N.Y.*, 92 NY 617, 621 [1883] [“The general rule is that the party alleging the loss of a material paper, where such proof is necessary for the purpose of giving secondary evidence of its contents, must show that he has in good faith exhausted, to a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him”]; *Kliamovich v Kliamovich*, 85 AD3d 867, 869 [2d Dept 2011]).

As to destruction of an original, proof that the destruction was made in the ordinary course of business, or there was no reason for its continued preservation, will excuse the original’s non-production (*Steele v Lord*, 70 NY 280, 283-284 [1877]). On the other hand, the exception will not apply when the destruction was made in bad faith by a party against whom secondary evidence of content is sought (*People v Grasso*, 237 AD2d 741, 742 [3d Dept 1997]).

Subdivision (1) (b) restates New York law that excuses production of an original writing, recording, or photograph and allows secondary evidence to prove the original’s contents when the original is not obtainable by any available judicial process (*see e.g. People v Burgess*, 244 NY 472, 479 [1927] [“Secondary evidence of the contents of a written document may ordinarily be introduced where the original document is in the custody of a person without the jurisdiction of the courts, and its production has been refused and cannot be compelled. ‘The books being out of the State and beyond the jurisdiction of the court, secondary

evidence to prove their contents was admissible’ ” (citation omitted)). This exception recognizes that an unobtainable original is analogous to it being lost or destroyed, and no principled reason dictates treating the situations differently.

The unobtainability of an original for purposes of this exception can be shown by evidence that the original cannot be subpoenaed or the subpoena when properly served was not obeyed (*Burgess*, 244 NY at 479; *Chanler v Manocherian*, 151 AD2d 432, 435 [1st Dept 1989]).

Subdivision (1) (c) restates New York law that the production of the original of a writing, recording, or photograph is excused when the party in control of the original is on notice that the contents of the original will be the subject of proof and the party fails to produce it (*see e.g. People v Dolan*, 186 NY 4, 11 [1906]; *Glatter v Borten*, 233 AD2d 166, 168 [1st Dept 1996] [A recognized “excuse is that the original is in the possession of an adversary who, after due notice, has failed to produce it; evidence of such adverse possession is required”]; *Briar Hill Apts. Co. v Teperman*, 165 AD2d 519, 521-522 [1st Dept 1991]). In these circumstances, that party cannot complain that the party who requested the original is proving its contents by secondary evidence.

Proof of notice is a basic foundational element for invoking this exception. There is, however, no mandated form of notice. Any reasonable means of giving notice will suffice (*see Dolan*, 186 NY at 11-13; *Gardam & Son v Batterson*, 198 NY 175 [1910] [mail]; *Lawson v Bachman*, 81 NY 616, 618 [1880] [pleadings], *affd* 109 US 659 [1884]).

Subdivision (2) restates New York law that, once the failure to produce the original of a writing, recording, or photograph is excused, any admissible evidence, referred to as secondary evidence, can be used to prove the contents of the original (*see e.g. Schozer*, 84 NY2d at 645 [“(O)nce the absence of (the original) is excused, all competent secondary evidence is generally admissible to prove its contents”]; *Chanler v Manocherian*, 151 AD2d 432, 435 [1st Dept 1989] [“The contents of a document may be proved by secondary evidence if the absence of the original writing can be satisfactorily accounted for” (internal quotation marks and citations omitted)]). In short, “[n]o categorical limitations are placed on the types of secondary evidence that are admissible” (*Schozer*, 84 NY2d at 645).

Thus, the contents of an original can be proved: (1) by testimony (*see Schozer*, 84 NY2d at 645-646 [“(W)hen oral testimony is received to establish the contents of an unavailable writing, the proponent of that proof must establish that the witness is able to recount or recite, from personal knowledge, ‘substantially and with reasonable accuracy’ all of its contents”]); (2) by documentary evidence (*Kliamovich v Kliamovich*, 85 AD3d 867 [2d Dept 2011]; *cf. Lipschitz v Stein*, 10 AD3d 634, 637 [2d Dept 2004]); (3) by copies of the original (*see People v Hamilton*, 3 AD3d 405, 405 [1st Dept 2004], *mod on other grounds* 4 NY3d 654

[2005]; *People v Sims*, 257 AD2d 582, 582 [2d Dept 1999]; *People v McCargo*, 144 AD2d 496 [2d Dept 1988]); or (4) by oral admissions (*Mandeville v Reynolds*, 68 NY 528, 536 [1877]; *Dependable Lists v Malek*, 98 AD2d 679, 680 [1st Dept 1983]; *Cociancich v Vazzoler*, 48 App Div 462, 467 [2d Dept 1900]).

In *Schozer*, the Court of Appeals explained the procedure to be followed to admit “secondary evidence.”

“[T]he proponent of such [secondary] proof has the heavy burden of establishing, preliminarily to the court’s satisfaction, that it is a reliable and accurate portrayal of the original. Thus, as a threshold matter, the trial court must be satisfied that the proffered evidence is authentic and correctly reflects the contents of the original before ruling on its admissibility. For example, when oral testimony is received to establish the contents of an unavailable writing, the proponent of that proof must establish that the witness is able to recount or recite, from personal knowledge, substantially and with reasonable accuracy all of its contents. Once a sufficient foundation for admission is presented, the secondary evidence is subject to an attack by the opposing party not as to admissibility but to the weight to be given the evidence, with [the] final determination left to the trier of fact” (84 NY2d at 645-646 [internal quotation marks and citations omitted]; see *Kearney v Mayor of City of N.Y.*, 92 NY 617, 620 [1883] [issue of whether proponent had lost writing and diligently tried to find it “presented a question to be determined by (the court) as matter of fact”]; *Mason v Libbey*, 90 NY 683, 685 [1882] [issue of whether the letters had been destroyed in bad faith and the “sufficiency of the explanation presented a question of fact for the trial judge”]).

The Court further noted in *Schozer* that “the more important the document to the resolution of the ultimate issue in the case, the stricter becomes the requirement of the evidentiary foundation [establishing loss] for the admission of secondary evidence” (84 NY2d at 644 [internal quotation marks and citations omitted]).

“Placement of this heavy foundational burden on the proponent of secondary evidence to prove its accuracy as a derivative source of proof,” the Court has observed, “serves to reduce the dangers of fraud and prejudice” (*Schozer*, 84 NY2d at 646).

In a criminal proceeding, where photographs viewed in an identification procedure are not produced at a *Wade* hearing, the secondary evidence must rebut a presumption of suggestiveness that arose from the nonproduction of the photographs (see *People v Holley*, 26 NY3d 514, 521-522 [2015] [the failure of the People to preserve and thus produce a record of photographs viewed in an

identification procedure gives rise to a rebuttable presumption that the array was suggestive]; *People v Castello*, 176 AD3d 730, 732 [2d Dept 2019] [“The presumption of suggestiveness may be overcome by presenting sufficient evidence of nonsuggestiveness, such as by reconstructing the photo array from related materials or through the testimony of a police witness detailing the manner in which the photo manager system was utilized to arrive at the identification. If the People meet their burden . . . the burden shifts to the defendant to persuade the hearing court that the procedure was improper” (internal quotation marks and citations omitted)]).

Subdivision (3) restates New York’s “collateral matters” exception to the best evidence rule. This exception excuses the production of an original writing, recording, or photograph where its contents are not directly in issue but are only incidental or collateral to a controlling issue in the action or proceeding, i.e., the contents are of minor significance to the issue so that no useful purpose would be served in requiring the original’s production (*e.g. People v Jones*, 106 NY 523, 526 [1887]; *Grover v Morris*, 73 NY 473, 480 [1878]; *Clover Crest Stock Farm, Inc. v New York Cent. Mut. Fire Ins. Co.*, 189 App Div 548, 555 [4th Dept 1919]). While the exception is well established, the cases do not provide meaningful guidance about when the contents are considered “collateral.”

10.09. Exception for Admission of Contents

The contents of a writing, recording, or photograph may be proved by the testimony, deposition, or admission of the party against whom offered, without accounting for the production of the original of the writing, recording, or photograph.

Note

This rule restates well established New York law that permits, as an exception to the best evidence rule, the contents of a writing, recording, or photograph to be proved by the testimony, deposition, or admission of the party against whom the contents are offered without the need for producing the original, regardless of its availability (*see e.g. Thomson v Rubenstein*, 31 AD3d 434, 436 [2d Dept 2006] [“plaintiff’s inability to produce the original note (does not) raise a triable issue of fact under the best evidence rule, since the appellants do not dispute the contents of the original note, which was drafted by their attorney”]; *Chamberlain v Amato*, 259 AD2d 1048, 1048-1049 [4th Dept 1999] [“Defendant admitted the existence and essential terms of the note in his pleadings and testimony, and he and another witness identified defendant’s writing and signature on the copy of the note. Under the circumstances, the best evidence rule does not apply”]; *Matter of La Rue v Crandall*, 254 AD2d 633, 635 [3d Dept 1998] [“(I)t appears from the record that during cross-examination petitioner was shown the photocopy of the letter, admitted that he wrote it to respondent and acknowledged making the statements contained therein. Under these circumstances, we find no violation of the best evidence rule”]; *Haas v Storner*, 21 Misc 661, 662-663 [App Term, 5th Jud Dist 1897] [“(T)he paper admitted was a letter-press copy of an agreement signed by the defendant, and the defendant herself while upon the stand admitted that it was a true copy of the original paper which she had signed. This certainly bound the defendant as an admission against interest, and made the evidence primary in its nature”]; *but see* SCPA 1407 [proof of lost or destroyed will]).

The rationale for this rule is that production of an original is unnecessary and the opposing party cannot complain about its absence where the party has admitted its contents (*see Haas*, 21 Misc at 662-663). The party’s admission in these circumstances is viewed as reliable evidence of the contents (*id.* at 662; *see* Guide to NY Evid rule 8.03 [1]).

The rule encompasses an admission by a party while testifying at a hearing or trial in the action or proceeding or at a deposition (*Matter of La Rue*, 254 AD2d at 635). The rule also encompasses written admissions made during pendency of the action or proceeding, or before (*Chamberlain*, 259 AD2d at 1048-1049).

Federal Rules of Evidence rule 1007, the federal equivalent of this rule, does not authorize the admission of an “oral, out-of-court admission,” without accounting for the original writing, recording, or photograph. No New York decision has expressly adopted that view; to the contrary, in accord with New York’s exception to hearsay for admissions, the Appellate Division, Second Department, in an alternative holding, appeared to accept an oral out-of-court admission without accounting for the original (*see Falcone v EDO Corp.*, 141 AD2d 498, 499 [2d Dept 1988]).

10.11. Exception for Summary of Voluminous Material

The content of voluminous writings, recordings, or photographs may be proved by the use of a summary, chart, or calculation of the contents, provided the writings, recordings, or photographs are accurate, otherwise admissible, and cannot be conveniently examined in court. The party offering such evidence must make the originals available for examination, copying, or both, by other parties at a reasonable time and place. The party against whom the item is being offered must be given an opportunity to challenge its admission. And, the court may order the offering party to produce the underlying originals in court.

Note

This rule restates New York's "voluminous writings" exception to the best evidence rule by permitting the contents of a large number of writings, recordings, or photographs to be admitted in the form of a chart, summary, or calculation of their contents (e.g. *Ed Guth Realty v Gingold*, 34 NY2d 440, 451-452 [1974]; *Von Sachs v Kretz*, 72 NY 548, 552 [1878]). As stated by the First Department in *Public Operating Corp. v Weingart* (257 App Div 379, 382 [1st Dept 1939]):

"When documents introduced in evidence at a trial are voluminous and of such a character as to render it difficult for the jury to comprehend material facts without schedules containing abstracts thereof, it is within the discretion of the judge to admit such schedules provided they are based on facts in evidence, verified by the testimony of the person by whom they were prepared, and provided that the adverse party is permitted to examine them to test their correctness and to cross-examine upon them before the case is submitted to the jury."

The rule has four requirements before it can be invoked:

First, the original writings, recordings, or photographs must be too voluminous for convenient examination in court, a determination committed to the sound discretion of the court (see *Von Sachs*, 72 NY at 552 ["It would not have been error for the referee to have allowed a witness, with the books before him, to give a summary of their contents; but this was a question of convenience simply, and a matter within his discretion"]; *People v Potter*, 255 AD2d 763, 767 [3d Dept 1998]; *People v Weinberg*, 183 AD2d 932, 934 [2d Dept 1992]). In exercising that discretion, the court can consider the number of originals involved

and their complexity (*Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 228 [1st Dept 1996]; see *Fagiola v National Gypsum Co. AC & S., Inc.*, 906 F2d 53, 57-59 [2d Cir 1990]).

Second, the rule requires that the originals on which the chart, summary, or calculation is based be admissible (*Matter of Thomma*, 232 AD2d 422, 422-423 [2d Dept 1996]; *Weinberg*, 183 AD2d at 934; *Matter of Dunn Garden Apts. v Commissioner of Assessment & Taxation of City of Troy*, 11 AD2d 879, 880 [3d Dept 1960]).

Third, the proponent of the chart, summary or calculation must establish that the summary is an accurate representation of the originals (see *Public Operating Corp.*, 257 App Div at 382).

Fourth, the party against whom the chart, summary, or calculation is being offered must be given an opportunity to challenge its accuracy (*People v Case*, 114 AD3d 1308, 1309 [4th Dept 2014] [summary exhibits were improperly admitted under the voluminous writings exception to the best evidence rule inasmuch as defendant was not provided with the data underlying those exhibits before trial]; *Weinberg*, 183 AD2d at 934; *Public Operating Corp.*, 257 App Div at 383). In this connection, the court may also order the originals to be produced in court.

Where the chart, summary or calculation is used only for demonstrative purposes, this rule does not apply (see *Sager Spuck Statewide Supply Co. v Meyer*, 298 AD2d 794, 795 [3d Dept 2002] [summary of plaintiff's sales while not admissible as business record was properly admitted for the limited purpose of aiding the jury in understanding the voluminous data already admitted]; *Lauro v Bradley*, 265 AD2d 875, 875 [4th Dept 1999] ["A witness testifying concerning hundreds of items may use a list of those items, and after the witness has testified the list may be admitted in evidence, 'not as proving anything of itself, but as a detailed statement of the items testified to by the witness' "]; *Potter*, 255 AD2d at 767 ["visual aids"]).

10.01. Best Evidence Rule; Definitions

The following definitions apply to this article:

(1) Writing. A “writing” consists of letters, words, numbers, or their equivalent set down in any form.

(2) Recording. A “recording” consists of letters, words, numbers, sounds, or their equivalent recorded in any manner.

(3) Photograph. A “photograph” consists of a photographic image or its equivalent stored in any form, electronic or otherwise, including still photographs, motion pictures, video or digital recordings, and diagnostic imaging.

(4) Original.

(a) The original of a writing or recording includes the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it.

(b) The original of electronically stored information includes any printout or other output that accurately reflects the information and is readable by sight.

(c) The original of a photograph includes any print or digital reproduction thereof or a negative.

Note

This rule sets forth definitions applicable to the best evidence rule and its exceptions, as set forth in this article.

Subdivision (1) broadly defines a “writing” that may be subject to the best evidence rule. This definition accords with New York law that recognizes that the best evidence rule applies to any form of communicating, memorializing, or

storing verbal or numeric evidence set down by handwriting or a mechanical process. Thus, all forms of documentary evidence, from a contract, deed, or business record to letters or memoranda, are subject to the best evidence rule (*e.g. Trombley v Seligman*, 191 NY 400, 403 [1908] [shipping bill]; *Taft v Little*, 178 NY 127, 133 [1904] [contract]; *Butler v Mail & Express Publ. Co.*, 171 NY 208, 211 [1902] [stipulation]; *Foot v Bentley*, 44 NY 166, 171 [1870] [letter]; *Shanmugam v SCI Eng'g, P.C.*, 122 AD3d 437, 438 [1st Dept 2014] [business records]; *Dhillon v Bryant Assoc.*, 26 AD3d 155, 157 [1st Dept 2006] [tax returns]; *Matter of Marks*, 33 AD2d 1029, 1029 [2d Dept 1970] [plot plan for real estate parcel]). The term “writing” also includes verbal or numeric information that is stored digitally and can be read on a screen or printed out (*e.g. Ed Guth Realty v Gingold*, 34 NY2d 440, 451-452 [1974] [computer printouts]).

Inscriptions on physical objects, so-called “inscribed chattels,” are not considered to be writings for purposes of the best evidence rule when they merely identify the object (*Carroll v Gimbel Bros., New York*, 195 App Div 444, 451 [1st Dept 1921] [testimony that merchandise allegedly shoplifted by plaintiff bore tags and marks of the defendant’s store erroneously excluded on best evidence grounds; court noted the best evidence rule applied only to “documentary evidence”]; *see United States v Duffy*, 454 F2d 809, 812 [5th Cir 1972] [witness could testify about three-letter “D-U-F” laundry mark on shirt collar without producing the shirt as “the shirt with a laundry mark would not, under ordinary understanding, be considered a writing” for purposes of the best evidence rule]).

Subdivision (2) parallels subdivision (1), likewise broadly defining a “recording” subject to the best evidence rule. That definition accords with New York law (*see People v Harding*, 44 AD2d 800, 801 [1st Dept 1974] [“The fact that the transcript made of the recorded telephone conversation was concededly correct fails to ameliorate the fact that the tape and not the transcript constitutes the best evidence of the nature of the conversation”]; *People v Graham*, 57 AD2d 478, 480 [4th Dept 1977], *affd* 44 NY2d 768 [1978]).

Subdivision (3) defines “photograph,” which New York courts have recognized may have multiple meanings in the application of the best evidence rule in the electronic age. For example, the best evidence rule may apply to still photographs (*e.g. People v Byrnes*, 33 NY2d 343, 347-348 [1974]; *People v Farbman*, 231 AD2d 588 [2d Dept 1996]); videotapes, including surveillance tapes (*see e.g. People v Cyrus*, 48 AD3d 150, 159 [1st Dept 2007]; *People v Fondal*, 154 AD2d 476, 477 [2d Dept 1989]); motion pictures (*see* Martin, Capra & Rossi, NY Evidence Handbook § 10.1.2 at 920 [2d ed]); and diagnostic imaging (*see e.g. Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 644-645 [1994] [X ray film]; *Wagman v Bradshaw*, 292 AD2d 84, 88 [2d Dept 2002] [MRI film]).

Subdivision (4) restates the separate definitions of an “original,” “writing or recording,” computer printout, and “photograph,” as provided in New York decisional law.

Subdivision (4) (a) sets forth what constitutes an “original” for purposes of the best evidence rule (*Sarasohn v Kamaiky*, 193 NY 203, 215 [1908]; *Hubbard v Russell*, 24 Barb 404, 408 [Sup Ct 1857]). Where the parties make two or more copies of a document and each party retaining one, both copies are considered an “original” if that is what the parties intended; and any one copy is admissible as the “original” without accounting for the absence of the other copy (*Sarasohn*, 193 NY at 215-216; *People v Sims*, 127 AD2d 712, 713 [2d Dept 1987]). A different rule, however, applies when multiple copies of a will are executed, as all copies must be accounted for before one is probated (see *Crossman v Crossman*, 95 NY 145 [1884]; *Matter of Robinson*, 257 App Div 405, 406-407 [4th Dept 1939]; see also SCPA 1407 [proof of lost or destroyed will]).

The Third Department has noted that carbon copies of written statements are originals for purposes of the best evidence rule (see *People v Chaplin*, 134 AD3d 1148, 1152 [3d Dept 2015]; *People v Kolp*, 49 AD2d 139, 141 [3d Dept 1975]). The First Department has taken a contrary position (*Rosenberg v People’s Sur. Co. of N.Y.*, 140 App Div 436, 437 [1st Dept 1910]). In *Foot v Bentley* (44 NY 166 [1870]), the Court of Appeals held the best evidence rule barred the admission of a “letter press” copy of a letter.

Subdivision (4) (b) sets forth New York law that treats any printout or other readable output of electronically stored information as the “original” of the stored data (*Ed Guth Realty*, 34 NY2d at 452).

Subdivision (4) (c) restates New York law recognizing that an original of a photograph includes any print or digital reproduction thereof or a negative (*Byrnes*, 33 NY2d at 348; *People v Fort*, 146 AD3d 1017, 1018 [3d Dept 2017] [still photographs from a surveillance video]; see *People v Fraser*, 96 NY2d 318, 327 [2001] [holding that the term “photograph” used in the definition of a crime (Penal Law § 263.00 [4]) included a digital computer image]).

10.03. Best Evidence Rule

When a party seeks to prove the contents of a writing, recording, or photograph that is in dispute, the writing, recording, or photograph must be proved by production of the original, except when the production is excused as provided in this article.

Note

This rule restates New York’s long-standing best evidence rule, which provides that, when a party is seeking to prove the disputed contents of a writing, recording, or photograph, as defined in rule 10.01 of the Guide to New York Evidence, the party must produce the original, as also defined in rule 10.01, unless nonproduction is excused for reasons allowed by decisional law or by statute (*e.g. People v Haggerty*, 23 NY3d 871, 876 [2014] [“The best evidence rule requires the production of an original writing where its contents are in dispute and sought to be proven” (internal quotation marks omitted)]; *Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643 [1994] [“(B)est evidence rule simply requires the production of an original writing where its contents are in dispute and sought to be proven”]; *Foot v Bentley*, 44 NY 166, 171 [1870] [Rule violated when trial court admitted letter-press copies of letters as the copies did not “obviate the necessity of producing the originals” of the letters])).

As to the rule’s underlying rationale, the Court of Appeals explained in *Schozer*: “At its genesis, the rule was primarily designed to guard against ‘mistakes in copying or transcribing the original writing.’ Given the technological advancements in copying, in modern day practice the rule serves mainly to protect against fraud, perjury and ‘inaccuracies . . . which derive from faulty memory’ ” (84 NY2d at 643-644 [citations omitted]; *see also People v Haggerty*, 23 NY3d 871, 876 [2014] [“The rule protects against fraud, perjury, and inaccurate recollection by allowing the jury to judge a document by its own literal terms”])).

The rule does not apply, however, when a party seeks to prove a fact that is memorialized in a writing, recording, or photograph if that fact has an existence independent of a writing, recording, or photograph (*McRorie v Monroe*, 203 NY 426, 429-430 [1911] [oral testimony may be proved without reference to the stenographer’s minutes]; *Steele v Lord*, 70 NY 280, 283-284 [1877] [payment may be proved without producing the written receipt provided]; *Grieshaber v City of Albany*, 279 AD2d 232, 235 [3d Dept 2001] [“Where, as here, a party seeks to prove the content of a conversation, which is a fact existing independently of an available recording of that conversation, an individual who heard the conversation may testify as to its content despite the existence of the tape recording”]; *Universal Grain Corp. v Lamport & Holt Line*, 54 NYS2d 53, 53-54 [App Term, 1st Dept 1945] [“The best evidence rule has no application to the instant case.

When a party seeks to prove a fact which has an existence independently of any writing, he may do so by parol, even though the fact has been reduced to, or is evidenced by, a writing. Here plaintiff relied on the positive and direct testimony of witnesses having independent knowledge” (citation omitted)). Similarly, it is not necessary to use certificates to prove such facts as marriage, birth, age, and death (see *Commonwealth v Dill*, 156 Mass 226, 227, 30 NE 1016, 1017 [1892, Holmes, J.] [(T)he record of a marriage . . . is a mere memorandum or declaration of the fact which effected the result, not itself the fact, nor that which has been constituted the only evidence of the fact. There is no reason why the oath of the person who did the act should be deemed inferior evidence to a written statement by him or another” (citation omitted))). In these instances, the proof is directed to the occurrence of an event and not to the contents of the writing or recording.

The core element of the best evidence rule is “proof of content.” The rule requires the production of the original of a writing, recording, or photograph only when a party is seeking to prove the contents of the writing, recording, or photograph (e.g. *Flynn v Manhattan & Bronx Surface Tr. Operating Auth.*, 61 NY2d 769, 771 [1984]; *Clarke v New York City Tr. Auth.*, 174 AD2d 268, 273 [1st Dept 1992]). Thus, the rule will apply when under the governing substantive law a fact required to be proved is a written transaction, e.g., a deed, will, or written contract (see *Mahaney v Carr*, 175 NY 454, 461-462 [1903]; *Curran v Newport Assoc.*, 57 AD2d 882, 883 [2d Dept 1977]; *Matter of Hamilton*, 182 App Div 908, 908-909 [4th Dept 1918]), and a party chooses to prove a relevant fact by evidence of a writing or recording even though the substantive law does not require the writing or recording to be proved (see Barker & Alexander, *Evidence in New York State and Federal Courts* § 10.1 [2d ed]; Martin, Capra & Rossi, *New York Evidence Handbook* § 10.1.3 [2d ed]).

There are exceptions to the best evidence rule, however, as set forth in the ensuing rules:

- 10.05 Exception for Certain Reproductions and Copies
- 10.07 Exception when Original Missing or Collateral
- 10.09 Exception for Admission of Contents
- 10.11 Exception for Summary of Voluminous Material

10.05. Exception for Certain Reproductions and Copies

(1) When an original writing, recording, or photograph is required, a reproduction or copy is not admissible to prove its contents, except as provided in subdivisions two, three, and four, and rule 10.07 (Exception when Original Missing or Collateral).

(2) If any business, institution, or member of a profession or calling, in the regular course of business or activity has made, kept or recorded any writing, entry, print or representation and in the regular course of business has recorded, copied, or reproduced it by any process, including reproduction, which accurately reproduces or forms a durable medium for reproducing the original, such reproduction, when satisfactorily identified, is as admissible in evidence as the original, whether the original is in existence or not, and an enlargement or facsimile of such reproduction is admissible in evidence if the original reproduction is in existence and available for inspection under direction of the court. The introduction of a reproduction does not preclude admission of the original.

(3) A reproduction created by any process which stores an image of any writing, entry, print or representation and which does not permit additions, deletions, or changes without leaving a record of such additions, deletions, or changes, when authenticated by competent testimony or affidavit which shall include the manner or method by which tampering or degradation of the reproduction is prevented, shall be as admissible in evidence as the original.

(4) A reproduction or copy of a record or report is admissible to prove its contents when specifically permitted by statute.

Note

This rule addresses the circumstances when a reproduction or copy of a writing, recording, or photograph is admissible to prove the contents of the original.

Subdivision (1) restates New York law that provides the contents of a writing, recording, or photograph cannot be proved by a copy except when permitted by a statute or decisional law (*e.g. Richardson v Tanner*, 140 App Div 372, 377 [1st Dept 1910]; *Guilfoyle v Pierce*, 125 App Div 504, 507 [1st Dept 1908], *affd* 196 NY 499 [1909]; *Dhillon v Bryant Assoc.*, 26 AD3d 155, 157 [1st Dept 2006]; *People v Hamilton*, 3 AD3d 405, 405 [1st Dept 2004], *mod on other grounds* 4 NY3d 654 [2005]; *see* Prince, *Richardson on Evidence* § 10-110 [Farrell 11th ed]).

Subdivision (2) restates verbatim CPLR 4539 (a). This statutory provision creates an exception to the best evidence rule set forth in Guide to New York Evidence rule 10.03 for a copy of any “writing, entry, print or representation” made by any “business, institution, or member of a profession or calling” by an accurate reproduction process, provided the copy was made in the regular course of business (*e.g. Grand Manor Health Related Facility, Inc. v Hamilton Equities, Inc.*, 122 AD3d 481, 482 [1st Dept 2014] [copy of assignment document was properly admitted: “The testimony of a witness for plaintiff that he retrieved the document from the company’s files, where it was plaintiff’s practice to keep photocopies of outgoing correspondence, satisfies CPLR 4539 (a)”]; *People v May*, 162 AD2d 977, 978 [4th Dept 1990] [two photocopies and fax copy of documents properly admitted when they were made in the regular course of business]). This exception is based on the legislative recognition that the “modern business practice is to make photographic reproductions in the regular course of business and also of the fact that photographic reproductions so made are sufficiently trustworthy to be treated as originals for the purpose of the best evidence rule” (*People v Flores*, 138 AD2d 512, 513 [2d Dept 1988]).

This exception does not encompass copies of documents not made in the regular course of business, even if made by an accurate reproduction process (*see Toho Bussan Kaisha, Ltd. v American President Lines, Ltd.*, 265 F2d 418, 423 [2d Cir 1959] [applying predecessor to CPLR 4539: “The provisions of those acts permitting use of photostats refer only to situations where photostats, microfilms, or the like, have been made in the ordinary course of business and not in preparation for trial”]; *Dipace v Hertz Corp.*, 30 AD2d 515, 516 [1st Dept 1968] [citing *Toho Bussan Kaisha, Ltd.*]). The legislature has not enacted a statute similar to Federal Rules of Evidence rule 1003 which provides that copies are generally admissible in all cases except where there is a genuine question of the authenticity of the original or where admission of the duplicate instead of the original would be unfair.

As noted by the Appellate Division: “[CPLR 4539 (a)] makes it unnecessary to establish that the exhibit was compared to the original and found to be an accurate copy. It is enough that the document is identified as a photocopy of the original or the product of some similarly accurate copying process” (*May*, 162 AD2d at 978).

CPLR 4539 (a) permits the introduction of the reproduced copy even if the original of the document exists. It also permits an enlargement of the reproduced copy to be admitted if the original document still exists and is available for inspection.

Subdivision (3) restates verbatim CPLR 4539 (b). It, too, creates an exception to the best evidence rule set forth in rule 10.03 for any “writing, entry, print or representation” produced by electronic data imaging, e.g., optically scanned images that are stored on a computer disc (*e.g. People v Gunther*, 172 AD3d 1403, 1404 [2d Dept 2019] [computer reproduction of scanned original withdrawal slips properly admitted]). The underlying legislative intent is to “expressly provide for the admissibility in evidence of business records produced by new technologies, including electronic data imaging, to remove the legal uncertainties that currently require businesses and governments that adopt such technologies to maintain dual record systems” (Senate Introducer’s Mem in Support, Bill Jacket, L 1996, ch 27 at 7).

Two conditions are imposed: the imaging process utilized does not allow “additions, deletions, or changes without leaving a record” of such alterations; and a description as to how “tampering or degradation of the reproduction is prevented” is presented by testimony or affidavit.

Of note, unlike CPLR 4539 (a), CPLR 4539 (b) is not limited to reproductions made in the regular course of business. Thus, CPLR 4539 (b) encompasses scanned documents that were converted to electronic form as part of a wholesale conversion of documents maintained in storage.

In *People v Kangas* (28 NY3d 984 [2016]), the Court of Appeals held that CPLR 4539 (b) does not apply to documents that were originally created in electronic form. Rather, it “applies only when a document that originally existed in hard copy form is scanned to store a digital ‘image’ of the hard copy document” (*id.* at 985). The Court expressly noted that an electronic business record offered into evidence as a true and accurate tangible exhibit under CPLR 4518 (a) can be admitted without the additional foundation elements of CPLR 4539 (b) (*id.* at 986).

Subdivision (4) refers to many statutes, other than CPLR 4539, that authorize the admission in evidence of reproductions or copies of specific types of records and reports in lieu of the original. They encompass both public and private records and reports. These statutes address specific types of writings (*see*

e.g. Banking Law § 11 [2] [b] [banking reports required to be kept by superintendent]; Banking Law § 256 [records of savings bank relating to accounts of depositors and relating to its business operations]; CPLR 3122-a [certification of copies of business records]; CPLR 4518 [c] [certified copies of hospital and medical records of a municipal corporation and the state; and records of a library, municipal corporation and the state]; CPLR 4525 [certified copies of statements made pursuant to UCC 9-523]; CPLR 4540 [copies of an official publication, official record of a court or government office of the United States and any state]; CPLR 4542 [a] [certified copies of foreign records and documents]; County Law § 208 [certified copies or transcripts of county records]; Education Law § 106 [copies of records made by the regents of a university and commissioner of education under their seal]; Public Service Law § 17 [certified copies of records filed or deposited in office of Public Service Commission]; Real Property Law § 399 [certified certificate of title]; Transportation Law § 69 [copies of records of Utica Transit Authority]; Transportation Law § 88 [certified copies of records filed or deposited in Transportation Department]).

10.07. Exception when Original Missing or Collateral

(1) Evidence, other than the original of a writing, recording, or photograph, may be admissible pursuant to subdivision two when:

(a) all originals are lost or destroyed unless the proponent caused or procured their loss or destruction in bad faith;

(b) an original cannot be obtained by any available judicial process; or

(c) the party against whom the original would be offered has control of the original and fails to produce it after having been notified by pleadings or otherwise that the original will be a subject of proof in the action or proceeding.

(2) Competent and reliable secondary evidence of the contents of an unproduced original is admissible when the court is satisfied that the proponent has, pursuant to subdivision one, sufficiently explained the unavailability of the original writing, recording, or photograph.

(3) Evidence, other than the original of a writing, recording, or photograph, may be admissible when the writing, recording, or photograph is not directly in issue.

Note

This rule restates New York law that establishes exceptions to the best evidence rule, excusing the nonproduction of the original of a writing, recording, or photograph; and, correspondingly, permits other evidence, referred to as secondary evidence, to prove the contents of a writing, recording, or photograph.

Subdivision (1) sets forth three judicially recognized exceptions to the best evidence rule under which production of the original writing, recording or photograph is excused.

Subdivision (1) (a) restates New York’s well-established “excuse of good faith loss or destruction” exception to the best evidence rule. As stated by the Court of Appeals in *Schozer v William Penn Life Ins. Co. of N.Y.*:

“Under a long-recognized exception to the best evidence rule, secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith” (84 NY2d 639, 644 [1994] [citations omitted]; *cf. Trombley v Seligman*, 191 NY 400, 403 [1908] [trial court erred in permitting testimony to establish the contents of shipping bills without any proper attempt to procure these bills on the trial and without any sufficient evidence of their loss or destruction]; *Butler v Mail & Express Publ. Co.*, 171 NY 208, 211 [1902] [trial court erred in permitting testimony to establish an alleged stipulation between the parties without satisfactorily explaining the absence of the stipulation entered into]).

Loss may be established upon a showing of a diligent search where the document was last known to have been kept and through the testimony of the person who last had custody of the original (*Schozer*, 84 NY2d at 644; *see Kearney v Mayor of City of N.Y.*, 92 NY 617, 621 [1883] [“The general rule is that the party alleging the loss of a material paper, where such proof is necessary for the purpose of giving secondary evidence of its contents, must show that he has in good faith exhausted, to a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him”]; *Kliamovich v Kliamovich*, 85 AD3d 867, 869 [2d Dept 2011]).

As to destruction of an original, proof that the destruction was made in the ordinary course of business, or there was no reason for its continued preservation, will excuse the original’s non-production (*Steele v Lord*, 70 NY 280, 283-284 [1877]). On the other hand, the exception will not apply when the destruction was made in bad faith by a party against whom secondary evidence of content is sought (*People v Grasso*, 237 AD2d 741, 742 [3d Dept 1997]).

Subdivision (1) (b) restates New York law that excuses production of an original writing, recording, or photograph and allows secondary evidence to prove the original’s contents when the original is not obtainable by any available judicial process (*see e.g. People v Burgess*, 244 NY 472, 479 [1927] [“Secondary evidence of the contents of a written document may ordinarily be introduced where the original document is in the custody of a person without the jurisdiction of the courts, and its production has been refused and cannot be compelled. ‘The books being out of the State and beyond the jurisdiction of the court, secondary

evidence to prove their contents was admissible’ ” (citation omitted)). This exception recognizes that an unobtainable original is analogous to it being lost or destroyed, and no principled reason dictates treating the situations differently.

The unobtainability of an original for purposes of this exception can be shown by evidence that the original cannot be subpoenaed or the subpoena when properly served was not obeyed (*Burgess*, 244 NY at 479; *Chanler v Manocherian*, 151 AD2d 432, 435 [1st Dept 1989]).

Subdivision (1) (c) restates New York law that the production of the original of a writing, recording, or photograph is excused when the party in control of the original is on notice that the contents of the original will be the subject of proof and the party fails to produce it (see e.g. *People v Dolan*, 186 NY 4, 11 [1906]; *Glatter v Borten*, 233 AD2d 166, 168 [1st Dept 1996] [A recognized “excuse is that the original is in the possession of an adversary who, after due notice, has failed to produce it; evidence of such adverse possession is required”]; *Briar Hill Apts. Co. v Teperman*, 165 AD2d 519, 521-522 [1st Dept 1991]). In these circumstances, that party cannot complain that the party who requested the original is proving its contents by secondary evidence.

Proof of notice is a basic foundational element for invoking this exception. There is, however, no mandated form of notice. Any reasonable means of giving notice will suffice (see *Dolan*, 186 NY at 11-13; *Gardam & Son v Batterson*, 198 NY 175 [1910] [mail]; *Lawson v Bachman*, 81 NY 616, 618 [1880] [pleadings], *affd* 109 US 659 [1884]).

Subdivision (2) restates New York law that, once the failure to produce the original of a writing, recording, or photograph is excused, any admissible evidence, referred to as secondary evidence, can be used to prove the contents of the original (see e.g. *Schozer*, 84 NY2d at 645 [“(O)nce the absence of (the original) is excused, all competent secondary evidence is generally admissible to prove its contents”]; *Chanler v Manocherian*, 151 AD2d 432, 435 [1st Dept 1989] [“The contents of a document may be proved by secondary evidence if the absence of the original writing can be satisfactorily accounted for” (internal quotation marks and citations omitted)]). In short, “[n]o categorical limitations are placed on the types of secondary evidence that are admissible” (*Schozer*, 84 NY2d at 645).

Thus, the contents of an original can be proved: (1) by testimony (see *Schozer*, 84 NY2d at 645-646 [“(W)hen oral testimony is received to establish the contents of an unavailable writing, the proponent of that proof must establish that the witness is able to recount or recite, from personal knowledge, ‘substantially and with reasonable accuracy’ all of its contents”]); (2) by documentary evidence (*Kliamovich v Kliamovich*, 85 AD3d 867 [2d Dept 2011]; cf. *Lipschitz v Stein*, 10 AD3d 634, 637 [2d Dept 2004]); (3) by copies of the original (see *People v Hamilton*, 3 AD3d 405, 405 [1st Dept 2004], *mod on other grounds* 4 NY3d 654

[2005]; *People v Sims*, 257 AD2d 582, 582 [2d Dept 1999]; *People v McCargo*, 144 AD2d 496 [2d Dept 1988]); or (4) by oral admissions (*Mandeville v Reynolds*, 68 NY 528, 536 [1877]; *Dependable Lists v Malek*, 98 AD2d 679, 680 [1st Dept 1983]; *Cociancich v Vazzoler*, 48 App Div 462, 467 [2d Dept 1900]).

In *Schozer*, the Court of Appeals explained the procedure to be followed to admit “secondary evidence.”

“[T]he proponent of such [secondary] proof has the heavy burden of establishing, preliminarily to the court’s satisfaction, that it is a reliable and accurate portrayal of the original. Thus, as a threshold matter, the trial court must be satisfied that the proffered evidence is authentic and correctly reflects the contents of the original before ruling on its admissibility. For example, when oral testimony is received to establish the contents of an unavailable writing, the proponent of that proof must establish that the witness is able to recount or recite, from personal knowledge, substantially and with reasonable accuracy all of its contents. Once a sufficient foundation for admission is presented, the secondary evidence is subject to an attack by the opposing party not as to admissibility but to the weight to be given the evidence, with [the] final determination left to the trier of fact” (84 NY2d at 645-646 [internal quotation marks and citations omitted]; see *Kearney v Mayor of City of N.Y.*, 92 NY 617, 620 [1883] [issue of whether proponent had lost writing and diligently tried to find it “presented a question to be determined by (the court) as matter of fact”]; *Mason v Libbey*, 90 NY 683, 685 [1882] [issue of whether the letters had been destroyed in bad faith and the “sufficiency of the explanation presented a question of fact for the trial judge”]).

The Court further noted in *Schozer* that “the more important the document to the resolution of the ultimate issue in the case, the stricter becomes the requirement of the evidentiary foundation [establishing loss] for the admission of secondary evidence” (84 NY2d at 644 [internal quotation marks and citations omitted]).

“Placement of this heavy foundational burden on the proponent of secondary evidence to prove its accuracy as a derivative source of proof,” the Court has observed, “serves to reduce the dangers of fraud and prejudice” (*Schozer*, 84 NY2d at 646).

In a criminal proceeding, where photographs viewed in an identification procedure are not produced at a *Wade* hearing, the secondary evidence must rebut a presumption of suggestiveness that arose from the nonproduction of the photographs (see *People v Holley*, 26 NY3d 514, 521-522 [2015] [the failure of the People to preserve and thus produce a record of photographs viewed in an

identification procedure gives rise to a rebuttable presumption that the array was suggestive]; *People v Castello*, 176 AD3d 730, 732 [2d Dept 2019] [“The presumption of suggestiveness may be overcome by presenting sufficient evidence of nonsuggestiveness, such as by reconstructing the photo array from related materials or through the testimony of a police witness detailing the manner in which the photo manager system was utilized to arrive at the identification. If the People meet their burden . . . the burden shifts to the defendant to persuade the hearing court that the procedure was improper” (internal quotation marks and citations omitted)]).

Subdivision (3) restates New York’s “collateral matters” exception to the best evidence rule. This exception excuses the production of an original writing, recording, or photograph where its contents are not directly in issue but are only incidental or collateral to a controlling issue in the action or proceeding, i.e., the contents are of minor significance to the issue so that no useful purpose would be served in requiring the original’s production (*e.g. People v Jones*, 106 NY 523, 526 [1887]; *Grover v Morris*, 73 NY 473, 480 [1878]; *Clover Crest Stock Farm, Inc. v New York Cent. Mut. Fire Ins. Co.*, 189 App Div 548, 555 [4th Dept 1919]). While the exception is well established, the cases do not provide meaningful guidance about when the contents are considered “collateral.”

10.09. Exception for Admission of Contents

The contents of a writing, recording, or photograph may be proved by the testimony, deposition, or admission of the party against whom offered, without accounting for the production of the original of the writing, recording, or photograph.

Note

This rule restates well established New York law that permits, as an exception to the best evidence rule, the contents of a writing, recording, or photograph to be proved by the testimony, deposition, or admission of the party against whom the contents are offered without the need for producing the original, regardless of its availability (*see e.g. Thomson v Rubenstein*, 31 AD3d 434, 436 [2d Dept 2006] [“plaintiff’s inability to produce the original note (does not) raise a triable issue of fact under the best evidence rule, since the appellants do not dispute the contents of the original note, which was drafted by their attorney”]; *Chamberlain v Amato*, 259 AD2d 1048, 1048-1049 [4th Dept 1999] [“Defendant admitted the existence and essential terms of the note in his pleadings and testimony, and he and another witness identified defendant’s writing and signature on the copy of the note. Under the circumstances, the best evidence rule does not apply”]; *Matter of La Rue v Crandall*, 254 AD2d 633, 635 [3d Dept 1998] [“(I)t appears from the record that during cross-examination petitioner was shown the photocopy of the letter, admitted that he wrote it to respondent and acknowledged making the statements contained therein. Under these circumstances, we find no violation of the best evidence rule”]; *Haas v Storner*, 21 Misc 661, 662-663 [App Term, 5th Jud Dist 1897] [“(T)he paper admitted was a letter-press copy of an agreement signed by the defendant, and the defendant herself while upon the stand admitted that it was a true copy of the original paper which she had signed. This certainly bound the defendant as an admission against interest, and made the evidence primary in its nature”]; *but see* SCPA 1407 [proof of lost or destroyed will]).

The rationale for this rule is that production of an original is unnecessary and the opposing party cannot complain about its absence where the party has admitted its contents (*see Haas*, 21 Misc at 662-663). The party’s admission in these circumstances is viewed as reliable evidence of the contents (*id.* at 662; *see* Guide to NY Evid rule 8.03 [1]).

The rule encompasses an admission by a party while testifying at a hearing or trial in the action or proceeding or at a deposition (*Matter of La Rue*, 254 AD2d at 635). The rule also encompasses written admissions made during pendency of the action or proceeding, or before (*Chamberlain*, 259 AD2d at 1048-1049).

Federal Rules of Evidence rule 1007, the federal equivalent of this rule, does not authorize the admission of an “oral, out-of-court admission,” without accounting for the original writing, recording, or photograph. No New York decision has expressly adopted that view; to the contrary, in accord with New York’s exception to hearsay for admissions, the Appellate Division, Second Department, in an alternative holding, appeared to accept an oral out-of-court admission without accounting for the original (*see Falcone v EDO Corp.*, 141 AD2d 498, 499 [2d Dept 1988]).

10.11. Exception for Summary of Voluminous Material

The content of voluminous writings, recordings, or photographs may be proved by the use of a summary, chart, or calculation of the contents, provided the writings, recordings, or photographs are accurate, otherwise admissible, and cannot be conveniently examined in court. The party offering such evidence must make the originals available for examination, copying, or both, by other parties at a reasonable time and place. The party against whom the item is being offered must be given an opportunity to challenge its admission. And, the court may order the offering party to produce the underlying originals in court.

Note

This rule restates New York’s “voluminous writings” exception to the best evidence rule by permitting the contents of a large number of writings, recordings, or photographs to be admitted in the form of a chart, summary, or calculation of their contents (*e.g. Ed Guth Realty v Gingold*, 34 NY2d 440, 451-452 [1974]; *Von Sachs v Kretz*, 72 NY 548, 552 [1878]). As stated by the First Department in *Public Operating Corp. v Weingart* (257 App Div 379, 382 [1st Dept 1939]):

“When documents introduced in evidence at a trial are voluminous and of such a character as to render it difficult for the jury to comprehend material facts without schedules containing abstracts thereof, it is within the discretion of the judge to admit such schedules provided they are based on facts in evidence, verified by the testimony of the person by whom they were prepared, and provided that the adverse party is permitted to examine them to test their correctness and to cross-examine upon them before the case is submitted to the jury.”

The rule has four requirements before it can be invoked:

First, the original writings, recordings, or photographs must be too voluminous for convenient examination in court, a determination committed to the sound discretion of the court (*see Von Sachs*, 72 NY at 552 [“It would not have been error for the referee to have allowed a witness, with the books before him, to give a summary of their contents; but this was a question of convenience simply, and a matter within his discretion”]; *People v Potter*, 255 AD2d 763, 767 [3d Dept 1998]; *People v Weinberg*, 183 AD2d 932, 934 [2d Dept 1992]). In exercising that discretion, the court can consider the number of originals involved

and their complexity (*Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 228 [1st Dept 1996]; see *Fagiola v National Gypsum Co. AC & S., Inc.*, 906 F2d 53, 57-59 [2d Cir 1990]).

Second, the rule requires that the originals on which the chart, summary, or calculation is based be admissible (*Matter of Thomma*, 232 AD2d 422, 422-423 [2d Dept 1996]; *Weinberg*, 183 AD2d at 934; *Matter of Dunn Garden Apts. v Commissioner of Assessment & Taxation of City of Troy*, 11 AD2d 879, 880 [3d Dept 1960]).

Third, the proponent of the chart, summary or calculation must establish that the summary is an accurate representation of the originals (see *Public Operating Corp.*, 257 App Div at 382).

Fourth, the party against whom the chart, summary, or calculation is being offered must be given an opportunity to challenge its accuracy (*People v Case*, 114 AD3d 1308, 1309 [4th Dept 2014] [summary exhibits were improperly admitted under the voluminous writings exception to the best evidence rule inasmuch as defendant was not provided with the data underlying those exhibits before trial]; *Weinberg*, 183 AD2d at 934; *Public Operating Corp.*, 257 App Div at 383). In this connection, the court may also order the originals to be produced in court.

Where the chart, summary or calculation is used only for demonstrative purposes, this rule does not apply (see *Sager Spuck Statewide Supply Co. v Meyer*, 298 AD2d 794, 795 [3d Dept 2002] [summary of plaintiff's sales while not admissible as business record was properly admitted for the limited purpose of aiding the jury in understanding the voluminous data already admitted]; *Lauro v Bradley*, 265 AD2d 875, 875 [4th Dept 1999] ["A witness testifying concerning hundreds of items may use a list of those items, and after the witness has testified the list may be admitted in evidence, 'not as proving anything of itself, but as a detailed statement of the items testified to by the witness' "]; *Potter*, 255 AD2d at 767 ["visual aids"]).

GUIDE TO NEW YORK EVIDENCE
ARTICLE 11 REAL AND DEMONSTRATIVE EVIDENCE

TABLE OF CONTENTS

11.01 Real Evidence	
11.03 Demonstrative Evidence	
11.05 Anatomically Correct Dolls	
11.07 Child's Age	
11.09 Demonstrations and Experiments	
11.11 Personal Appearance & Capability	
11.13 Photographs	
11.15 Viewing of Premises	
11.17 Exhibits to the Jury	

11.01. Real Evidence

(1) Definition. “Real Evidence” refers to any tangible object or sound recording of a conversation that is offered in evidence.

(2) Admissibility. Real evidence is admissible upon a showing that it is relevant to an issue in the proceeding, is what it purports to be, and has not been tampered with. Proof that an object has not been tampered with and is what it purports to be depends on the nature of the object and, in particular, whether the object is “patently identifiable,” or “fungible.”

(a) Patently identifiable evidence. When real evidence possesses unique or distinctive characteristics or markings and is not subject to material alteration that is not readily apparent, evidence identifying the object normally will constitute the requisite proof.

(b) Fungible evidence. When real evidence is fungible, capable of being altered, contaminated, or replaced, or is a sound recording, in addition to testimony identifying the object, proof that the proffered evidence has not been tampered with is required and may be satisfied by:

(i) a “chain of custody” (i.e. testimony of those persons who handled the object or recording from the time it was obtained or recorded to the time it is presented in court to identify the object or recording and attest to its unchanged condition); or

(ii) proof of circumstances that provide reasonable assurances of the identity and unchanged condition of the object or recording.

(c) Sound recording. A sound recording of a conversation is admissible:

(i) upon testimony of a participant in, or a witness to, the conversation that the recording is unaltered and completely and accurately reproduces the conversation at issue; or

(ii) by a combination of testimony of a participant and an expert establishing the completeness, accuracy, and absence of alteration of the recording; or

(iii) in addition to evidence concerning the making of the recording and identification of the speakers, by establishing a “chain of custody” (i.e. testimony of those who handled the recording from the time it was made to the time it is presented in court to identify the recording and attest to its custody and unaltered condition).

(3) The Court may, in the exercise of its discretion, pursuant to Guide to New York Evidence rule 4.07, exclude real evidence.

Note

Subdivision (1) sets forth the definition of “real evidence.” Often, the tangible object or sound recording referred to in the definition of “real evidence” will have “played an actual role in the occurrence that is the subject matter of the litigation” (Barker & Alexander, *Evidence in New York State and Federal Courts* § 11:2 [2d ed]) and is introduced in evidence as proof of what it depicts or represents (*see e.g. People v Damiano*, 87 NY2d 477, 487 [1996] [52-pound boulder as the murder weapon]; *People v McGee*, 49 NY2d 48, 58-60 [1979] [tape recordings of conversations between defendants and police officers]; *Uss v Town of Oyster Bay*, 37 NY2d 639 [1975] [street sign that fell on plaintiff’s head]; *People v Mirenda*, 23 NY2d 439, 452-454 [1969] [sunglasses connected to

defendant]; *People v Flanigan*, 174 NY 356, 368 [1903] [iron bar used in escape from prison]).

By contrast, demonstrative evidence refers to a visual, graphic, or sound aid used to explain or illustrate a witness's testimony or the presentation of the proponent's case, but which does not by itself prove a fact at issue (*see* Guide to NY Evid rule 11.3). Although decisional law draws a distinction between real and demonstrative evidence, in practice, an object may in one instance be real evidence and in another demonstrative evidence. For example, a photograph may in one instance depict the occurrence at issue and in another simply illustrate the scene of the occurrence; and in some instances, the photograph may both depict the occurrence and provide an illustration of a witness's testimony about the occurrence. The Guide seeks to accommodate the intersecting aspects of real and demonstrative evidence by setting forth separate rules for specific types of evidence, such as photographs.

Subdivision (2) sets forth the requirements for the admissibility of real evidence derived from Court of Appeals decisional law (*People v McGee*, 49 NY2d 48, 59 [1979]; *People v Julian*, 41 NY2d 340, 342-343 [1977]; *People v Connelly*, 35 NY2d 171, 174 [1974]).

The core requirements of admissibility of real evidence as set forth in the rule are: (1) a showing that it is relevant to an issue in the proceeding (*see* Guide to NY Evid rule 4.01, Relevant Evidence); (2) that it is what it purports to be (*see* Guide to NY Evid rule 9.01 [1]); and (3) that it has not been tampered with.

As explained by *Julian*:

“To be admissible, any piece of real evidence must be shown to accurately portray a relevant and material element of the case. When real evidence is purported to be the actual object associated with a crime, the proof of accuracy has two elements. The offering party must establish, first, that the evidence is identical to that involved in the crime; and, second, that it has not been tampered with. In *People v Flanigan* (174 NY 356, 368), our court held that an iron bar was admissible because ‘[a]ll the witnesses who spoke upon the subject testified that it was the same bar and in substantially the same condition.’ When an ‘object possesses unique characteristics or markings and is not subject to material alteration which is not readily apparent’, a simple identification is sufficient to warrant admission. (*People v Connelly*, 35 NY2d 171, 174.) While a fungible item, such as a package of white powder, presents special difficulties in proving the necessary authenticity, the offering party is required to establish only the same two elements, namely, that it is the identical evidence and has not been tampered with” (41 NY2d at 342-343).

McGee followed *Julian*, adding that “the accuracy of the object itself is the focus of inquiry, which must be demonstrated by clear and convincing evidence” (*McGee* at 59). *McGee* reiterated *Julian*’s requirement that the “[a]ccuracy or authenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it,” explaining further that the foundation necessary to establish these elements “may differ according to the nature of the evidence sought to be admitted” (*id.* at 59-60; *see* Barker & Alexander, Evidence in New York State and Federal Courts § 11:2 [2d ed]). The differing methods of proof stem from whether the real evidence is patently identifiable or not, as explained in the note to subdivision (2) (a) and (b).

When the reason for offering the real evidence is to connect it to a party, included in the requirement of relevance is a showing that it is in fact connected to that party.

In *People v Mirenda* (23 NY2d 439 [1969]), for example, the People offered into evidence sunglasses found near the crime scene, arguing that they had been in the defendant’s possession. Admissibility of the sunglasses thus required “an evaluation of how close is the connection between the object and the defendant. If it is not so tenuous as to be improbable, it is admissible as is any other evidence which is relevant to an issue in the prosecution” (*id.* at 453; *see* Guide to NY Evid rule 4.01 [1]). The sunglasses were admissible in *Mirenda* because an accomplice testified that the glasses resembled ones he had once kept in his car, had offered to give to defendant prior to the crime while defendant was in the car, and had later discovered missing (*see People v Miller*, 17 NY2d 559, 560 [1966] [admission of a revolver was proper upon testimony that a revolver found on the person of one of three defendants “looks like” the revolver he held during the robbery]; *People v Neufeld*, 165 NY 43, 47 [1900] [a dark suit belonging to the defendant and found in his closet was properly admitted upon the testimony of witnesses that he wore a dark suit on the day of the crime]; *compare with People v Deverow*, 180 AD3d 1064, 1066 [2d Dept 2020] [“the Supreme Court should not have admitted into evidence a revolver that was recovered by the police from underneath a vehicle five to seven blocks away from the scene of the crime and approximately seven hours after the shooting”]; *People v Cherry*, 46 AD3d 1234, 1237 [3d Dept 2007] [error in a murder prosecution where the victims were killed by shotgun blasts to admit a bulletproof vest and ammunition seized from defendant’s grandmother’s house because those items “were not adequately connected to defendant”]).

Subdivision (2) (a) sets forth the foundational requirements of a patently identifiable tangible object. Again, *Julian* and *McGee* are the primary sources of the rule (*Julian*, 41 NY2d at 342-343 [“When an ‘object possesses unique characteristics or markings and is not subject to material alteration which is not readily apparent’, a simple identification is sufficient to warrant admission” (citation omitted)]; *McGee*, 49 NY2d at 59-60 [“Mere identification by one

familiar with the object, however, will be sufficient ‘when the object possesses unique characteristics or markings’ and any material alteration would be readily apparent” (citation omitted)]; see *People v Price*, 29 NY3d 472, 476 [2017] [“We have explained that ‘(t)he foundation necessary to establish (authenticity) may differ according to the nature of the evidence sought to be admitted’. For example, mere identification by one familiar with an item of evidence may suffice where the item is distinct or unique” (internal quotation marks and citations to *McGee* and *Julian* omitted)]; *Connelly* at 174 [“If the object was taken from the defendant or found at the scene of the crime, the foundation is laid once it is shown that the thing offered is the one recovered and that its condition is substantially unchanged”]; *Johnson v Michelin Tire Corp.*, 110 AD2d 824, 824 [2d Dept 1985] [a tire was admissible “ ‘merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition’ (McCormick, Evidence § 212, at 667 [3d ed])”].

When the offered evidence “possesses unique characteristics or markings and is not subject to material alteration which is not readily apparent,” the fact that it may have been possessed by several individuals who do not testify does not render it inadmissible if it has been sufficiently identified (*Connelly* at 174).

When the appellate courts refer to an object as being “substantially” in the same condition, they are undoubtedly referring to minor changes that do not affect the integrity and probative value of an object, e.g., a gun marked with police officer’s initials (see *People v Capers*, 105 AD2d 842 [2d Dept 1984]).

Examples of unique or distinctive items that have been admitted on the basis of a witness’s in-court identification include: 52-pound boulder that was alleged to be the murder weapon (*People v Damiano*, 87 NY2d 477 [1996]); a street sign that fell on plaintiff’s head (*Uss v Town of Oyster Bay*, 37 NY2d 639 [1975]); an iron bar (*Flanigan* at 358); a broken piece of machinery that caused plaintiff’s injury (*King v New York Cent. & Hudson Riv. R.R. Co.*, 72 NY 607 [1878]; see Evidence in New York State and Federal Courts § 11:2 [collecting cases]).

Subdivision (2) (b) is also derived from *Julian* where the Court of Appeals set forth a stricter foundation requirement for real evidence which is fungible and capable of being altered, contaminated, or replaced. In such a situation, the Court, concerned about the possibility of the condition of the object being changed to the prejudice of a party, required that the foundation be established by a chain of custody or other evidence providing “ ‘reasonable assurances of identity and unchanged condition’ ” (*Julian*, 41 NY2d at 343, quoting *People v Porter*, 46 AD2d 307, 311 [1974]; *Amaro v City of New York*, 40 NY2d 30, 35-36 [1976]; *People v Connelly* at 174 [a chain of custody is employed when “the evidence itself (such as drugs) is not patently identifiable or is capable of being replaced or altered”]).

The chain of custody requirement may be satisfied by testimony from all persons who have handled the object identifying the object and testifying to its custody and unchanged condition (*see Connelly*, 35 NY2d at 174). A complete chain of custody, however, is not always required. Gaps in the chain may be excused when “circumstances provide reasonable assurances of the identity and unchanged condition of the evidence” (*People v Hawkins*, 11 NY3d 484, 494 [2008]). Furthermore, any perceived weakness in the chain of custody goes to the weight of the evidence and not its admissibility (*People v Sarmiento*, 77 NY2d 976 [1991], *affg for reasons stated in mem at App Div 168 AD2d 328* [1st Dept 1990]; *People v White*, 40 NY2d 797, 799-800 [1976]). “[R]easonable assurance[s] of the unchanged condition and identity of the [evidence]” can be established through expert testimony (*Palestrant v Garcia*, 244 AD2d 199, 200 [1st Dept 1997]) or circumstantial evidence (*see People v Beverly*, 5 AD3d 862 [3d Dept 2004] [seized bag of cocaine was sealed and seals remained intact]). Illustrative cases are collected in William C. Donnino, *New York Court of Appeals on Criminal Law* § 17:3 (3d ed), *Evidence in New York State and Federal Courts* § 11:2 and Martin, Capra & Rossi, *New York Evidence Handbook* § 4.2 (chain of custody) (2d ed).

Subdivision (2) (c) is derived from *People v Ely* (68 NY2d 520 [1986]). There, the Court stated:

“The necessary foundation may be provided in a number of different ways. Testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered or of a witness to the conversation or to its recording, such as the machine operator, to the same effect are two well-recognized ways. Testimony of a participant in the conversation together with proof by an expert witness that after analysis of the tapes for splices or alterations there was, in his or her opinion, no indication of either is a third available method.

“A fourth, chain of custody, though not a requirement as to tape recordings, is also an available method. It requires, in addition to evidence concerning the making of the tapes and identification of the speakers, that within reasonable limits those who have handled the tape from its making to its production in court identify it and testify to its custody and unchanged condition” (*id.* at 527-528 [internal quotation marks and citations omitted]; *see People v Guidice*, 83 NY2d 630, 633-634 [1994] [“linesheet” entries (records related to intercepted phone conversations) made in the course of a police surveillance operation were admissible in evidence as business records to establish a “chain of custody” of the surveillance tapes]).

Any infirmity concerning a chain of custody goes to the weight of the evidence and not its admissibility (*McGee*, 49 NY2d at 60). Likewise, inaudibility

that is not so substantial that the accuracy of the recording is questionable goes to the weight to be given to the recording (*id.*).

Identification of the voices on the conversation is also required as part of the authentication process (*see* Guide to NY Evid rule 9.07 [2], [6], [7], [8]).

The Court of Appeals in *Ely* stated that the foundation requirement for the admissibility of sound recordings must be made by “clear and convincing” proof (68 NY2d at 522, 527). No rationale was provided for this stricter burden. In *Grucci v Grucci* (20 NY3d 893, 896-897 [2012]) the Court applied its rule in *Ely* to civil actions. At issue in *Grucci*, an action to recover damages for malicious prosecution, was the admissibility of an audiotape of a telephone conversation a witness had with the defendant. Quoting *Ely*, the Court stated: “The predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered” (*id.* at 897).

The admissibility of a recording of sounds, other than a conversation, such as noises, is not governed by subdivision (2) (c) but rather by subdivision (2) (b) (*see* Evidence in New York State and Federal Courts § 11:11 n 3).

Subdivision (3) makes clear that the admission of real evidence is subject to the discretion of the court and that such discretion may be exercised to exclude the proffered real evidence when its probative value is outweighed by countervailing factors as set forth in Guide to New York Evidence rule 4.07 (*see* *People v Acevedo*, 40 NY2d 701, 704 [1976] [observing that although non-testimonial proof may “play a positive and helpful role in the ascertainment of truth, courts must be alert to the danger that, when ill-designed or not properly relevant to the point at issue, instead of being helpful they may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial”]; *Hudson v Lansingburgh Cent. School Dist.*, 27 AD3d 1027, 1030 [3d Dept 2006] [admission of machine involved in accident in which portion of plaintiff’s finger was cut off was not error as there was no showing of prejudice to defendant]).

11.03. Demonstrative Evidence

(1) Definition. “Demonstrative evidence” refers to a visual, graphic, or sound aid used to explain or illustrate a witness’s testimony or the presentation of the proponent’s case.

(2) Admissibility. A visual or graphic aid proffered as demonstrative evidence may be exhibited to the trier of fact provided:

(a) it is a fair and accurate depiction or representation of what it purportedly depicts or represents; and

(b) it helps the factfinder to better understand the testimony of a witness or the presentation of a party’s case.

(3) The court may, in the exercise of its discretion, exclude the offered demonstrative evidence pursuant to Guide to New York Evidence rule 4.07.

Note

Subdivision (1) broadly defines “demonstrative evidence.” Any type of visual, graphic, or sound aid that is capable of explaining or illustrating oral testimony or the presentation of the proponent’s case may constitute demonstrative evidence. In particular, New York has long approved the admission in evidence of a map, diagram, drawing, photograph, model and similar demonstrative evidence when the evidence is properly authenticated, is relevant to a particular issue, and would assist the finder of fact in understanding the case (*see People v Del Vermo*, 192 NY 470, 482-483 [1908] [model of knife]; *Hinlicky v Dreyfuss*, 6 NY3d 636, 645-647 [2006] [flow diagram]; *People v Russell*, 79 NY2d 1024, 1025 [1992] [bank surveillance photographs]; *People v Acevedo*, 40 NY2d 701, 704-705 [1976] [voice identification test]; *People v Mariner*, 147 AD2d 659 [2d Dept 1989] [in-court demonstration as to ability to observe drug transaction at a distance with binoculars]; *Norfleet v New York City Tr. Auth.*, 124 AD2d 715 [2d Dept 1986] [out-of-court reconstruction of accident]; *Feaster v New York City Tr. Auth.*, 172 AD2d 284, 285 [1st Dept 1991] [computer generated animation of accident]).

In *Del Vermo*, the Court of Appeals recognized the general usefulness of demonstrative evidence. The Court held that the trial court ruling allowing the People to place before the jury a knife as a “model” of the knife allegedly owned by the defendant was not error. The Court reasoned that the “district attorney was not restricted to verbal descriptions by the various witnesses in a case where the construction of the instrument was somewhat exceptional, and a much more accurate idea of its true character could be conveyed to the jury by means of a model than by word of mouth” (192 NY at 482). “It is a common practice in the courts of this state and probably throughout the Union to furnish such assistance to jurors by the employment of maps, diagrams, drawings and photographs as well as by models, the purpose being to enable the jury to use their eyes as well as their ears in order to gain an intelligent comprehension of the case” (*id.*).

Normally, “real evidence” is admitted for the truth of what it represents; on the other hand, “demonstrative evidence,” while probative, is not necessarily admitted for its truth but rather as an “aid used to explain or illustrate a witness’s testimony or the presentation of the proponent’s case” (Guide to NY Evid rule 11.03 [1]; *see e.g. Hinlicky*, 6 NY3d at 645-646).

Subdivision (2) sets forth the foundation requirements for demonstrative evidence.

Subdivision (2) (a) requires authentication of the demonstrative evidence, that is, the proffered demonstrative evidence must fairly and accurately represent what its proponent claims it represent (*see People v Byrnes*, 33 NY2d 343, 347 [1974] [sufficient authentication shown where witness with personal knowledge identified the subjects and verified that the photographs accurately represented the subjects]; *People v Del Vermo*, 192 NY 470, 482-483 [1908] [(“It is enough to render a model receivable for purposes of illustration if it fairly represents the original object”]; *Archer v New York, New Haven & Hartford R.R. Co.*, 106 NY 589, 603 [1887] [(“D)rawings are uniformly received and are useful, if not indispensable, to enable courts and juries to comprehend readily the question in dispute as affected by evidence”]; *People v Kendall*, 254 AD2d 809 [4th Dept 1998] [expert witness was properly allowed to demonstrate mechanics of Shaken Baby Syndrome to explain how an infant could sustain massive brain injury with no apparent external body trauma]).

Notably, the offered demonstrative evidence need not be identical in all respects to what it illustrates or explains (*Del Vermo*, 192 NY at 482-483; *Flah’s, Inc. v Rosette Elec.*, 155 AD2d 772, 773 [3d Dept 1989] [(“In our view, the subject diagram was, at a minimum, a fair representation of the electrical system and was therefore admissible to explain or illustrate the testimony in order to aid the jury in comprehending the disputed issue”]; *Norfleet v New York City Tr. Auth.*, 124 AD2d 715, 716-717 [2d Dept 1986] [(“The circumstances under which the (accident reconstruction) was conducted were sufficiently similar to those existing at the time of the incident to make the result achieved by the test relevant to the

issues”]). Variations or differences which are minor and inconsequential are not a basis for exclusion (*see Bolm v Triumph Corp.*, 71 AD2d 429, 438-439 [4th Dept 1979]).

Differences that cannot be explained or shown to be inconsequential, however, may preclude the proffered demonstrative evidence (*see People v Cohen*, 50 NY2d 908, 910 [1980] [trial court erred in admitting results of test-firing of a weapon at animal skins where there was no proof that the skins of the test subjects and that of the human victim were similar]; *but see Uss v Town of Oyster Bay*, 37 NY2d 639, 641 [1975] [the trial court “might have been justified in forbidding (defendants’ counsel’s) demonstration since it can be argued that the conditions in the courtroom were not substantially similar to those at the scene of the accident. On the other hand it was not error as a matter of law for the court, after the demonstration had taken place, to determine that plaintiffs’ legitimate interests could be sufficiently protected by affording plaintiffs’ counsel unrestricted opportunity for cross-examination. By effective exploitation of the dissimilarities between the model and the original it was thus open to counsel to minimize the significance to be attached to the demonstration”])).

Subdivision (2) (b) restates Court of Appeals precedent that requires a court to determine that the demonstrative evidence will be helpful to the trier of fact in better understanding the testimony of a witness or the presentation of the proponent’s case (*People v Mirenda*, 23 NY2d 439, 453 [1969] [Court indicated that proffered demonstrative evidence is unnecessary where the trier of fact does not need its assistance in understanding the admitted evidence; thus, in the case before it, the Court noted “there was no need to offer a model because the particular object being discussed—to wit sunglasses—is not so difficult to visualize that a model is required to assist the jury in understanding the witness’ testimony”]; *Archer v New York, New Haven & Hartford R.R. Co.*, 106 NY 589, 603 [1887] [maps, diagrams and drawing are “uniformly received . . . to enable courts and juries to comprehend readily the question in dispute”]; *Goldner v Kemper Ins. Co.*, 152 AD2d 936, 937 [4th Dept 1989] [“The trial court has broad discretion with respect to the admission of such evidence, especially with reference to the question of the similarity of conditions. The most broadly stated or recognized standard is whether the evidence tends to enlighten rather than to mislead the jury”]; *Kane v Triborough Bridge & Tunnel Auth.*, 8 AD3d 239, 242 [2d Dept 2004] [the Court held that the trial court erred “in failing to instruct the jury that the computer-generated animation was being admitted for the limited purpose of illustrating the expert’s opinion as to the cause of the accident and that it was not to consider the computer-generated animation itself in determining what actually caused the accident”])).

Subdivision (3) makes clear that the admission of demonstrative evidence is subject to the discretion of the court and that such discretion may be exercised to exclude the proffered demonstrative evidence when its probative value is outweighed by countervailing factors as set forth in Guide to New York Evidence

rule 4.07 (*People v Acevedo*, 40 NY2d 701, 704 [1976] [(T)hough tests and demonstrations in the courtroom are not lightly to be rejected when they would play a positive and helpful role in the ascertainment of truth, courts must be alert to the danger that, when ill-designed or not properly relevant to the point at issue, instead of being helpful they may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial. When there is such a threat, the trial court itself must decide in the exercise of a sound discretion . . . whether the value of the evidence outweighs its potential for prejudice”]; *Uss*, 37 NY2d at 641 [where the proffered demonstrative evidence is “deceptive, sensational, disruptive of the trial, or purely conjectural” it should be precluded])).

11.05. Anatomically Correct Dolls

Any person who is less than 16 years old may, in the discretion of the court and where helpful and appropriate, use an anatomically correct doll in testifying in a criminal proceeding based upon conduct prohibited by article 130 (Sex Offenses), article 260 (Offenses Relating to Children, Disabled Persons and Vulnerable Elderly Persons), or sections 255.25, 255.26, or 255.27 (Incest) of the Penal Law.

Note

This section reproduces verbatim CPL 60.44, while adding the text in parentheses (*see People v McGuire*, 152 AD2d 945 [4th Dept 1989] [approving use of anatomically correct dolls]; *People v Guce*, 164 AD2d 946, 950 [2d Dept 1990] [same]).

The statute has been held not to preclude the use of anatomically correct dolls for persons more than 16 years of age (*People v Herring*, 135 Misc 2d 487 [Sup Ct, Queens County 1987] [73-year-old aphasic victim of a sex offense]; *People v Rich*, 137 Misc 2d 474, 480 [Sup Ct, Monroe County 1987] [a victim of a sex offense over 16 years old]).

Irrespective of the statute, New York has long approved the admission in evidence of a map, diagram, drawing, photograph, model and similar demonstrative evidence when the evidence is properly authenticated, is relevant to a particular issue, and would assist the finder of fact in understanding of the case. (Guide to NY Evid rule 11.03; *People v Del Vermo*, 192 NY 470, 482-483 [1908]; *see People v Feld*, 305 NY 322, 331-332 [1953] [although a recording is the best evidence of its contents, permitting the jurors to hold a transcript of the recording to assist their understanding “was no different than allowing them to have . . . a photograph, a drawing, a map or a mechanical model”]; *People v Acevedo*, 40 NY2d 701, 704-705 [1976] [“both courts and commentators have noted, with respect to demonstrative evidence, that, when validly and carefully used, there is no class of evidence so convincing and satisfactory to a court or a jury. However, though tests and demonstrations in the courtroom are not lightly to be rejected when they would play a positive and helpful role in the ascertainment of truth, courts must be alert to the danger that, when ill-designed or not properly relevant to the point at issue, instead of being helpful they may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial” [internal citations omitted]).

11.07. Child's Age

Whenever it becomes necessary to determine the age of a child, he (or she) may be produced and exhibited to enable the court or jury to determine his (or her) age by a personal inspection.

Note

This rule restates verbatim CPLR 4516 (*see People v Kaminsky*, 208 NY 389, 394 [1913] [the rule (formerly a Penal Law statute) “is the general rule prevailing in nearly all jurisdictions apart from any statutory provision on the subject”]). The CPLR provision applies to the determination of the age of a “child,” not an “adult” (*People v Blodgett*, 160 AD2d 1105, 1106 [3d Dept 1990]).

Penal Law § 263.25 allows for other methods of determining the age of a child, but only applies to a determination of the age of a child for the purposes of Penal Law article 263 (Sexual Performance by a Child). That statute states:

“Whenever it becomes necessary for the purposes of this article to determine whether a child who participated in a sexual performance was under an age specified in this article, the court or jury may make such determination by any of the following: personal inspection of the child; inspection of a photograph or motion picture which constituted the sexual performance; oral testimony by a witness to the sexual performance as to the age of the child based upon the child's appearance; expert medical testimony based upon the appearance of the child in the sexual performance; and any other method authorized by any applicable provision of law or by the rules of evidence at common law.”

11.09. Demonstration or Experiment

An in-court demonstration or experiment may, in the discretion of the court, be authorized when the result of the demonstration or experiment will be probative of an issue in the case; can reasonably be conducted in court under conditions substantially similar to the conditions at the time of the occurrence at issue; will not unreasonably delay or disrupt the trial; and will be helpful to, and will not mislead or confuse, the jury.

Note

This section is derived from decisional law (*see Uss v Town of Oyster Bay*, 37 NY2d 639, 641 [1975] [“the principles of mechanics involved in this demonstration were well within the experience and comprehension of an average juror. Thus its probative worth could be independently weighed by the jurors themselves. Nor was the demonstration deceptive, sensational, disruptive of the trial, or purely conjectural”]; *People v Buchanan*, 145 NY 1, 26 [1895] [“As the theory of the prosecution was that morphine was then given (to kill the deceased), it was competent to show, by one experienced in the art, how the morphine could be combined with the prescription of the physician; that there would be no change in color; (and) that the taste would be bitter (accounting for the victim’s reaction on taking the drug)”]; *see also* Barker & Alexander, Evidence in New York State and Federal Courts § 11:18, Experiments and Demonstrations (2d ed); Michael J. Hutter, *Admissibility of Demonstrations and Experiments*, NYLJ, Apr. 1, 2020).

In general, as *People v Acevedo* (40 NY2d 701, 704-705 [1976] [citations omitted]) explained, “though tests and demonstrations in the courtroom are not lightly to be rejected when they would play a positive and helpful role in the ascertainment of truth, courts must be alert to the danger that, when ill-designed or not properly relevant to the point at issue, instead of being helpful they may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial. When there is such a threat, the trial court itself must decide in the exercise of a sound discretion based on the nature of the proffered proof and the context in which it is offered, whether the value of the evidence outweighs its potential for prejudice.”

In *Acevedo*, the identification of the defendant as a masked robber was based on the complainant’s recognition of his voice on the day of the robbery, based on “her excellent prior knowledge of his voice but also on 20 to 25 minutes of conversation during the robbery itself” (40 NY2d at 705). The court properly denied a defense proposal for a voice identification “test” of the complainant’s ability to identify the voice of the defendant’s brother. The test “would not have duplicated

the circumstances which surrounded [the complainant's] voice identification of the defendant" (*id.*). The test of the complainant's ability to recognize the voice of defendant's brother "was to take place two years after she had last heard it"; there was no proffer of the number of interchanges the complainant had with the brother; and the identification of the brother's voice was "to depend on the sound of two short sentences alone" (*id.*).

The probative value of the evidence may outweigh any potential for prejudice from inconsequential dissimilarities; in that instance the dissimilarities affect the weight of the evidence, not its admissibility (*see Uss v Town of Oyster Bay*, 37 NY2d 639, 641 [1975] [the trial court "might have been justified in forbidding (defendants' counsel's) demonstration since it can be argued that the conditions in the courtroom were not substantially similar to those at the scene of the accident. On the other hand it was not error as a matter of law for the court, after the demonstration had taken place, to determine that plaintiffs' legitimate interests could be sufficiently protected by affording plaintiffs' counsel unrestricted opportunity for cross-examination. By effective exploitation of the dissimilarities between the model and the original it was thus open to counsel to minimize the significance to be attached to the demonstration"]).

Care must be taken, however, in determining that the dissimilarities are inconsequential (*see Styles v General Motors Corp.*, 20 AD3d 338, 341 [1st Dept 2005, concurring op] ["While the test conditions need not be identical, there must be sufficient similarity to permit the inference that the results of the experiment shed light on what occurred. . . . Where (the proponent of the test) fails to make the necessary showing of similarity, the experimental evidence must be excluded"]; *People v Cohen*, 50 NY2d 908, 910 [1980] ["If at the new trial the People offer (again) to show the effects of a gun shot from this weapon on animal tissue, they must first establish that there is a substantial similarity between the skin and tissue of the test subject and that of a human victim"]).

11.11. Person's Appearance or Capability

When a person's appearance, condition, or capability is relevant to an issue in a proceeding, the appropriate aspect of the person's appearance, condition, or capability may, subject to the discretion of the court, be exhibited to the trier of fact.

Note

This rule is derived from long-standing Court of Appeals precedent (*Harvey v Mazal Am. Partners*, 79 NY2d 218, 223-228 [1992] [exhibiting brain-damaged plaintiff, who was not sworn as witness, and asking him questions to show his condition]; *de Baillet-Latour v de Baillet-Latour*, 301 NY 428, 433-434 [1950] [in annulment action wife was allowed to exhibit conspicuous scars on her body, the existence of which her husband had denied]; *Clark v Brooklyn Hgts. R.R. Co.*, 177 NY 359 [1904] [no error present where trial court permitted the plaintiff, who had been injured in a collision, to leave the witness stand assisted and to exhibit himself to the jury in the act of writing his name and taking a drink of water as the display was designed to illustrate the plaintiff's testimony that he was afflicted by a tremor and could use his hands only with difficulty]; *Mulhado v Brooklyn City R.R. Co.*, 30 NY 370, 372 [1864] [exhibition of injured arm "tended to make the description of the injury more intelligible"]; *compare People v Scarola*, 71 NY2d 769, 778 [1988] ["(T)he trial courts did not abuse their discretion in denying defendants permission to give the proposed exemplars (of their voice). In neither case did the victim rely on defendant's voice to identify him. Moreover, the foundation for the admission of the evidence, in each case did not rule out the possibility that defendants could feign the existence of a speech defect"]).

In *Harvey*, the Court was concerned that an exhibition of a party's injuries "when ill-designed or not properly relevant to the point at issue, instead of being helpful" could "mislead, confuse, divert or otherwise prejudice the purposes of the trial" (*Harvey* at 224). In that instance, the Court instructed that "the trial court itself must decide in the exercise of a sound discretion based on the nature of the proffered proof and the context in which it is offered, whether the value of the evidence outweighs its potential for prejudice" (*id.*).

The trial court in *Harvey* permitted the plaintiff, who was not sworn, to appear before the jury and answer a series of questions that were designed to demonstrate the plaintiff's loss of cognitive abilities. Most of the questions asked of the plaintiff were of a general nature and did not touch upon any of the issues involved at trial. The plaintiff's answers did illustrate the extent to which the underlying accident had affected his cognitive abilities. In deciding to permit the questioning, the trial judge noted that she had balanced the value of showing the

jury the plaintiff's injuries against the potential for prejudice and emotional response. The Court of Appeals held that this balancing was without question an exercise of judicial discretion, and there was no basis to disturb that decision. "Although . . . the preferred practice would have been for the Trial Judge to examine the plaintiff in camera, outside the presence of the jury, before permitting the questioning," the failure to do so did not constitute an abuse of discretion in *Harvey* (*id.* at 227).

Critically, as stated in the rule, before a person's appearance, condition, or capability may be exhibited, that appearance, condition, or capability must be "relevant" to an issue in the proceeding (*see* Guide to NY Evid rule 4.01; *People v Rodriguez*, 64 NY2d 738, 741 [1984] [where an eyewitness apparently did not describe the perpetrator as having tattooed hands, the defendant's request to display tattooed hands was properly denied in the absence of proof that he had the tattoos on day of crime]).

11.13. Photographs

(1) A photograph may be admitted in evidence upon a showing that it is relevant and properly identified and authenticated as a fair and accurate representation of what it purportedly depicts.

(2) An authenticated photograph of a deceased or of an injury is admissible in the discretion of the court if it tends to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove other evidence offered or to be offered, and if its probative value outweighs the danger of undue prejudice.

Note

Subdivision (1) is derived from *People v Byrnes* (33 NY2d 343, 347 [1974]) where the photographs were authenticated and admitted into evidence because the “complainant, a competent witness possessing knowledge of the matter, identified the subjects and verified that the photographs accurately represented the subject matter depicted.” Further, in a proper case, a photograph may constitute “independent probative evidence of what it shows” (*Byrnes* at 348, citing as an example *People v Webster*, 139 NY 73, 83 [1893] [photograph admitted to show physique of deceased where defendant pleaded self-defense]).

While an appropriate witness’s testimony normally will establish the foundation, where “no witnesses are available who have viewed the subject matter portrayed, valid alternative grounds may exist for authenticating the photograph and admitting it into evidence, such as testimony, especially that by an expert, tending to establish that the photograph truly and accurately represents what was before the camera.” (*Byrnes* at 349; see *People v Price*, 29 NY3d 472, 477 [2017] [“ ‘since the ultimate object of the authentication requirement is to insure the accuracy of the photograph sought to be admitted into evidence, any person having the requisite knowledge of the facts may verify,’ or an expert may testify that the photograph has not been altered” (citation omitted)].)

In *Price*, the People failed to authenticate a photograph “from an Internet profile page allegedly belonging to defendant” by any of the traditional methods, “as the victim was unable to identify the weapon as that which was used in the robbery, and no other witnesses testified that the photograph was a fair and accurate representation of the scene depicted or that it was unaltered” (*Price*, 29 NY3d at 474, 477-478 [citations omitted]). Instead, the People argued that the photograph’s authenticity had been proved by evidence “that the printout of the

web page is an accurate depiction thereof, and that the web page is attributable to and controlled by . . . the defendant” (*id.* at 478). The Court, however, held that “[a]ssuming without deciding that a photograph may be authenticated through the method proposed” or “some variation thereof,” the People failed in their proof “of defendant’s connection to the website or the particular profile.” (*Id.* at 478-480.)

Subdivision (2) is derived primarily from *People v Poblner* (32 NY2d 356, 369-370 [1973]), and its progeny. In *Poblner*, the Court held:

“The general rule is that photographs of the deceased are admissible if they tend to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove some other evidence offered or to be offered. Admission of photographs of homicide victims is generally within the discretion of the trial court. Where they are otherwise properly admitted as having a tendency to prove or disprove some material fact in issue, photographs of a corpse are admissible even though they portray a gruesome spectacle and may tend to arouse passion and resentment against the defendant in the minds of the jury. There are many cases in which photographs of a homicide victim have been held admissible to show, for example, the position of the victim’s body, the wounds of the victim, or to illustrate expert testimony. Photographic evidence should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant.” (*Id.* at 369-370 [internal quotation marks and citations omitted].)

In *Poblner*, the defendant told a friend that his wife was asleep when he shot her. Four photographs were properly admitted to show that the deceased “was in her bed, in a sleeping position, when shot, thus tending to confirm” the defendant’s friend’s testimony; and two photographs taken at the morgue were properly admitted to “show the three clustered bullet holes near the left temple, indicating marksmanship and deliberateness in the killing.” (*Poblner* at 370; *see People v Bell*, 63 NY2d 796, 797 [1984] [photographs of a victim being attended in the hospital were admissible given that “(t)hey were not gory, the lacerations they show having either been cleaned up or bandaged, and while the knife remaining imbedded in the victim’s back was startling in the sense of being unusual, the picture it presented of the knife was less unnerving than the oral testimony concerning it”]; *People v Stevens*, 76 NY2d 833, 836 [1990] [“The photographs of the victim’s body showed the nature of the injury and therefore tended to prove that the assailant acted with intent to inflict serious injury, an essential element of the manslaughter count. The People were not bound to rely entirely on the testimony of the medical expert to prove this point and the photographs were admissible to elucidate and corroborate that testimony”]; *People v Wood*, 79 NY2d 958, 960 [1992] [“The nature and manner of the killing were material and relevant to prosecution of the murder indictment and the defendant could not

make it otherwise by admitting that he had killed the victim but contending that he had done so under the influence of an extreme emotional disturbance. The questioned exhibits illustrated the severity and calculated nature of the wounds and tended to disprove defendant's claim that he was totally out of control at the time of the killing"]; *Mazella v Beals*, 27 NY3d 694, 709 [2016] [in action for malpractice by a psychiatrist, a photograph of the deceased who committed suicide "was relevant to plaintiff's theory that the violent nature of the suicide—death by self-inflicted knife wounds—was a result of decedent's extreme mental and emotional condition, induced by the long-term use of prescription drugs," and its admission was not "unduly prejudicial" because there was testimony and the autopsy report describing the body's condition].)

A portrait or photograph of a deceased taken when the deceased was alive may "arouse the jury's emotions, particularly when they are presented in a before-and-after format, and thus should not be admitted unless relevant to a material fact to be proved at trial. In addition, the relevance of the portraits must be independently established; the fact that photographs of the victim after death have been found to be relevant does not necessarily establish the relevance, and hence admissibility, of portraits of the victim while alive." (*People v Stevens*, 76 NY2d 833, 835-836 [1990]; *Smith v Lehigh Val. R.R. Co.*, 177 NY 379, 384 [1904] [in an action to recover for pecuniary damages resulting from the decedent's death, the introduction in evidence of the photograph of the deceased as a handsome woman when she was alive was improper]; *compare People v Ramsaran*, 154 AD3d 1051, 1053-1054 [3d Dept 2017] [photographs of the deceased prior to her murder "were relevant to and probative of the People's central theory that defendant disapproved of the victim's appearance and was motivated to kill her, in part, by his desire to be with (another woman), whose appearance he perceived as more attractive"].)

11.14 Video Recording

(1) In general.

A video recording of a scene, person or persons, or an occurrence is admissible in the discretion of a trial judge provided it is shown to be relevant to an issue in the proceeding and is properly authenticated.

(2) Authentication.

(a) A video recording may be authenticated by any of the following:

(i) the testimony of a witness to the recorded events, or of an operator or installer or maintainer of the equipment, that the video accurately represents the subject matter depicted;

(ii) the testimony, expert or otherwise, that a video truly and accurately represents what was before the camera;

(iii) the testimony of a witness and other evidence that demonstrates that the video accurately represents the subject matter depicted.

(b) Evidence establishing the chain of custody of the video may buttress its authenticity and integrity and even allow for acceptable inferences of its reasonable accuracy and freedom from tampering.

Note

Subdivision (1) is derived from *People v Patterson* (93 NY2d 80, 84 [1999])
[“At the outset, we emphasize that relevant videotapes . . . are ordinarily admissible under standard evidentiary rubrics. Some reliable authentication and foundation . .

. are, however, also still necessary. The decision to admit or exclude videotape evidence generally rests, to be sure, within a trial court's founded discretion”)).

In the exercise of its discretion, the trial court may consider whether the trial would be “unduly delayed by exhibiting” the video or whether the video is “sensational only and unnecessary,” particularly where the evidence may be “submitted in another form”; or whether the video unfairly exaggerates any of the true features which are sought to be proved (*Boyarsky v Zimmerman Corp.*, 240 App Div 361, 365, 367 [1st Dept 1934]); or whether a photograph of a video image rather than the video with its audio should more properly be admitted. (See *People v Jin Cheng Lin*, 26 NY3d 701, 727 [2016] [a court properly exercised its discretion to authorize the admission of a photograph of the defendant to show his physical appearance after interrogation rather than a video with self-serving audio].)

A compilation of portions of footage drawn from numerous surveillance cameras is equally admissible when properly authenticated and the trial court is satisfied that there is no reason to believe the compilation was incomplete or otherwise unsatisfactory (*People v Cabrera*, 137 AD3d 707, 707-708 [1st Dept 2016] [the witness “explained that she viewed several hours of videotape and created a 30-minute disc that included all the footage that was relevant to the case, that is, all views of any persons involved in this case” and there was “no reason to believe that the compilation was incomplete or otherwise unsatisfactory”]).

A video recording may be relevant for what it does not show, as well as for what it does show (e.g. *People v Ruiz*, 7 AD3d 737, 737 [2d Dept 2004] [The Supreme Court properly admitted security videotapes from a certain hospital into evidence to rebut the defendant's claim that he was at that hospital during the time of the robbery]). In a criminal case, a surveillance video that plainly shows the defendant committing a criminal act is direct evidence and thus does not require a circumstantial evidence charge (*People v Hardy*, 26 NY3d 245 [2015]; see *People v Gee*, 99 NY2d 158, 162 [2002] [videotape of a robbery of a store clerk]).

Other examples of a properly admitted video recording include: *People v Edmonson* (75 NY2d 672, 674 [1990] [“evidence of a prior extrajudicial identification made by the complaining witness from a videotape taken by the police, canvassing a particular neighborhood and focusing on numerous passersby,” is admissible]); *People v Tunstall* (63 NY2d 1, 10 [1984] [a videotape of the lineup in which a defendant was identified is admissible]); *People v Scullion* (137 AD3d 645 [1st Dept 2016] [video of the purportedly intoxicated defendant performing coordination tests was admissible]); *Matter of Burack* (201 AD2d 561, 561 [2d Dept 1994] [video of the execution of a will was properly admitted as evidence of the decedent’s testamentary capacity]); *People v Fondal* (154 AD2d 476, 476-477 [2d Dept 1989] [video showing the defendant and accomplice “in the act of shoplifting” was admissible]); *Caprara v Chrysler Corp.* (71 AD2d 515, 522-523 [3d Dept 1979] [a video showing the “impact the injury has had on plaintiff’s life” was admissible], *aff* 52 NY2d 114 [1981]); and *Boyarsky v Zimmerman Corp.*

(240 App Div 361, 365 [1st Dept 1934] [video of plaintiff conducting himself as a “perfectly well man instead of the invalid which he claimed to be” was admissible]).

Technical flaws in a video recording that do not impact on the fairness of what the video depicts go to the “weight” of the evidence, not its admissibility. In *People v Davis* (28 NY3d 294, 303 [2016]), for example, the “authenticating witness, who maintained the surveillance system, testified that during the computerized process of compressing and archiving the digital video files, certain images may overlap. However, he further testified that the process, which he personally conducted, does not conjure up persons that were not originally present in the camera shot. As such, the trial court did not abuse its discretion in concluding that the image-overlap issue went to weight, but not admissibility, of the video evidence.” Other examples include: *People v Yanez* (180 AD3d 816, 816 [2d Dept 2020] [that a time stamp on a video differed from the time the videos were actually recorded went to “the weight of the evidence, not its admissibility”]) and *People v McEachern* (148 AD3d 565, 566 [1st Dept 2017] [the “alleged uncertainty about whether the videotape depicted the events at issue went to the weight to be accorded the evidence rather than its admissibility”]).

Once a video is properly admitted, a court may allow the jury to utilize an accurate, typewritten transcript of the audio portion, if necessary, to aid the jury in understanding the audio (*People v Dyla*, 169 AD2d 777, 778 [2d Dept 1991] [the court properly allowed the jury “to utilize typewritten transcripts as an aid to understanding the defendant’s videotaped statement”]).

Subdivision (2) (a) (i) and (ii) and (b) is derived from the language of *Patterson* (93 NY2d 80, 84 [1999]), which stated:

“a videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted. Testimony, expert or otherwise, may also establish that a videotape ‘truly and accurately represents what was before the camera.’ Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering” (citations omitted).

Patterson concluded, however, that “[t]hese illustratively noted methods of authentication are not exclusive” (*Patterson* at 84; see Barker & Alexander, Evidence in New York State and Federal Courts § 1104.1 [d] [2d ed West’s NY Prac Series]; Guide to NY Evid rule 9:07, Methods of Authentication and Identification, subds [1] [Admission of authenticity], [2] [Testimony of witness], [6] [Circumstantial evidence], [7] [Voice identification]).

Subdivision (2) (iii) is thus designed to encompass those additional methods of authentication. For example, in *People v Goldman* (35 NY3d 582, 588 [2020]), a YouTube video that depicted the defendant rapping about “ ‘run[ning] up’ into a rival crew’s ‘house’ ” was properly authenticated and admitted as evidence of the defendant’s motive for driving with three others into a rival crew’s territory and shooting and killing a teenage boy. The proof of authentication of the video included evidence that the defendant was the undisputed person in the video singing; that the video showed the defendant and two of the other individuals who were in the car with the defendant during the shooting “in similar attire to what they were wearing on the night of the homicide”; that the “background demonstrated that it was evidently filmed in defendant’s neighborhood” (*id.* 595); and a fair inference from a prosecution witness’s testimony and the uploading of the video after the homicide that the video was made after the homicide.

Other examples of properly authenticated video recording include: *Zegarelli v Hughes* (3 NY3d 64, 69 [2004] [“Testimony from the videographer that he took the video, that it correctly reflects what he saw, and that it has not been altered or edited is normally sufficient to authenticate a videotape”]) and *People v Scullion* (137 AD3d 645, 645 [1st Dept 2016] [Although the police officer who administered the coordination tests did not testify, “the videotape was authenticated by the arresting officer, who was a witness to the recorded events”]).

There is “no requirement that a video recording have audio to be admissible” (*Belton v Lal Chicken, Inc.*, 138 AD3d 609, 610 [1st Dept 2016]).

The “chain of custody” method of authentication requires, “in addition to evidence concerning the making of the [video]tape[] and identification of the [participants], that within reasonable limits those who have handled the [video]tape from its making to its production in court ‘identify it and testify to its custody and unchanged condition’ ” (*People v Roberts*, 66 AD3d 1135, 1136 [3d Dept 2009]). Any “gaps in the chain of custody” go to the “weight that was to be accorded to the video recordings, not their admissibility” (*People v Edmonds*, 165 AD3d 1494, 1497 [3d Dept 2018]).

11.15. Viewing of Premises

(1) Civil proceeding.

When during the course of a trial the court is of the opinion that a viewing or observation by the jury of the premises or place where alleged injuries to person or property were sustained in an accident or occurrence claimed to have been the cause thereof or of any other premises or place involved in the case will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the commencement of the summations, order that the jury be conducted to such premises or place for such purpose in accordance with the provisions of this rule.

(2) Criminal proceeding.

When the court is of the opinion that a viewing or observation by the jury of the premises or place where an offense on trial was allegedly committed, or of any other premises or place involved in the case, will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the commencement of the summations, order that the jury be conducted to such premises or place for such purpose in accordance with the provisions of this rule.

(3) Common Procedural Requirements.

(a) The jury must be kept together throughout under the supervision of an appropriate public servant or servants appointed by the court, and the court itself must be present throughout. *In a civil proceeding*, the parties to the action and counsel for them may as a matter of right be present throughout, but such right may be waived. *In a criminal proceeding*, the

prosecutor, the defendant, and counsel for the defendant may as a matter of right be present throughout, but such right may be waived.

(b) The purpose of such an inspection is solely to permit visual observation by the jury of the premises or place in question, and neither the court, the parties, counsel nor the jurors may engage in discussion or argumentation concerning the significance or implications of anything under observation or concerning any issue in the case.

Note

This rule reproduces CPLR 4110-c and CPL 270.50. Subdivision (1) of each statute is reproduced in subdivisions (1) and (2) of this rule, except that the last word, “rule,” in each subdivision is substituted for the word “section” in each statute. Subdivision (2) of each statute is reproduced in subdivision (3) (a) of this rule, with two minor exceptions: the opening words, “In such case,” are omitted and the words in italics are added. Subdivision (3) of each statute is reproduced in subdivision (3) (b) of this rule.

Rule 11.15 authorizes the court in both civil and criminal proceedings to order in its discretion that the jury be taken to a physical site that is at issue in a case, and given the opportunity to observe that site, with parties and counsel present, but without discussion or argument at the site. The court may order an inspection upon a finding that it “will be helpful to the jury in determining any material factual issue.” (*See People v Alston*, 24 AD3d 391, 391 [1st Dept 2005] [court properly exercised its discretion in denying defendant’s request for a visit to the crime scene; “(p)hotographs of the scene, as well as the testimony of the eyewitnesses and defendant’s investigator, permitted the jury to determine whether the eyewitnesses were able to make reliable identifications of defendant from their nearby vantage point”]; *People v Wilson*, 225 AD2d 497, 498 [1st Dept 1996] [the trial court properly denied a deliberating jury’s request to see the apartment window through which an eyewitness viewed the crime scene when the court discovered that there had been a “substantial change” in the condition of the window by “the addition of an air conditioner and the partial destruction of the window bars”]; *People v Rao*, 107 AD2d 720, 720 [2d Dept 1985] [denial of a request to view the scene of the crime was not an abuse of discretion as the crime had occurred in late November and the trial took place in late June;

consequently, there were alterations in the natural light and artificial illumination from street lamps and store fronts, and the foliage on trees was substantially different]; *People v Hamel*, 96 AD2d 644, 645 [3d Dept 1983] [ordering a view of the apartment where murder occurred was a proper exercise of discretion as “layout of (shooting victim’s) apartment was sufficiently uncommon that reconstruction of the location of each room from verbal descriptions and photographs alone would create a perplexing image for the jurors”].)

11.17. Exhibits to the Jury

Upon retiring to deliberate, the jurors may take with them any exhibits received in evidence at the trial which the court, after according the parties an opportunity to be heard upon the matter, in its discretion permits them to take.

Note

This rule reproduces verbatim CPL 310.20 (1).

While there is no statute on the subject relating to civil proceedings, decisional law, albeit sparse, supports the application of the rule set forth in CPL 310.20 (1) in civil proceedings as well (*see Howland v Willetts*, 9 NY 170, 175 [1853] [when the jury retired to deliberate, it was not error for the trial court to allow them to take a “deposition” into the jury room]; *Levy v Corn*, 191 App Div 56, 57 [1st Dept 1920] [“Whether exhibits are to be taken by the jury rests in the sound discretion of the trial judge”]; in this civil case, the consent of the defendant “was not necessary”]; *Raynolds v Vinier*, 125 App Div 18, 20 [4th Dept 1908] [The jury over the objection of the defendant was properly permitted to take to the jury room the pleadings in the action which were in evidence because “(w)here a document is in evidence it rests in the sound discretion of the court whether it is to be taken by the jurors when in their deliberations”]).

Rule 11.17 permits the trial court, in its discretion, to provide a deliberating jury with “any exhibits received in evidence.” (*See People v Bouton*, 50 NY2d 130, 137 [1980] [“CPL 310.20 (subd 1) grants the trial court discretion to allow the jury to view any exhibit received in evidence at trial, but no provision authorizes submission of unadmitted exhibits. Departure from that rule affects important rights”]; *but see People v Martell*, 91 NY2d 782, 785 [1998] [no error in submitting to the jury, at its request, a list specifying which exhibit was relevant to each of the counts in the indictment].)

Although trial judges normally wait for a deliberating jury to request an exhibit before sending them any exhibit, there is no requirement that the court must do so. The only statutory predicate to giving exhibits to the jury is to provide the parties an opportunity to be heard as to whether it should be done.

A court’s careful exercise of its discretion may be particularly warranted when one or more exhibits include a weapon or drugs. While either item may be given to a deliberating jury, with respect to a weapon, a trial court may consider whether, given the nature of the weapon and circumstances, a “safer alternative” would be appropriate, such as allowing the jurors to see the weapon in court, “with a court officer exhibiting the weapon to each juror, one at a time” (William

C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 310.20). The same alternative procedure may be appropriate when the exhibit contains drugs that "are not in a sealed container." (*Id.*)

Electronic evidence that needs equipment and an operator to view or listen to presents special issues. The Appellate Division approved "permitting the jury to view the store videotape in the jury room during deliberations with the technical assistance of court officers." (*People v Sampson*, 289 AD2d 1022, 1023 [4th Dept 2001].) An alternative, particularly if the evidence can be presented on a laptop and does not contain inadmissible portions, is to send the laptop into the jury room and designate one juror to operate it. "Using a juror to operate the laptop rather than a court officer avoids the potential error of an impermissible communication" (William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 310.20).

11.01. Real Evidence

(1) Definition. “Real Evidence” refers to any tangible object or sound recording of a conversation that is offered in evidence.

(2) Admissibility. Real evidence is admissible upon a showing that it is relevant to an issue in the proceeding, is what it purports to be, and has not been tampered with. Proof that an object has not been tampered with and is what it purports to be depends on the nature of the object and, in particular, whether the object is “patently identifiable,” or “fungible.”

(a) Patently identifiable evidence. When real evidence possesses unique or distinctive characteristics or markings and is not subject to material alteration that is not readily apparent, evidence identifying the object normally will constitute the requisite proof.

(b) Fungible evidence. When real evidence is fungible, capable of being altered, contaminated, or replaced, or is a sound recording, in addition to testimony identifying the object, proof that the proffered evidence has not been tampered with is required and may be satisfied by:

(i) a “chain of custody” (i.e. testimony of those persons who handled the object or recording from the time it was obtained or recorded to the time it is presented in court to identify the object or recording and attest to its unchanged condition); or

(ii) proof of circumstances that provide reasonable assurances of the identity and unchanged condition of the object or recording.

(c) Sound recording. A sound recording of a conversation is admissible:

(i) upon testimony of a participant in, or a witness to, the conversation that the recording is unaltered and completely and accurately reproduces the conversation at issue; or

(ii) by a combination of testimony of a participant and an expert establishing the completeness, accuracy, and absence of alteration of the recording; or

(iii) in addition to evidence concerning the making of the recording and identification of the speakers, by establishing a “chain of custody” (i.e. testimony of those who handled the recording from the time it was made to the time it is presented in court to identify the recording and attest to its custody and unaltered condition).

(3) The Court may, in the exercise of its discretion, pursuant to Guide to New York Evidence rule 4.07, exclude real evidence.

Note

Subdivision (1) sets forth the definition of “real evidence.” Often, the tangible object or sound recording referred to in the definition of “real evidence” will have “played an actual role in the occurrence that is the subject matter of the litigation” (Barker & Alexander, *Evidence in New York State and Federal Courts* § 11:2 [2d ed]) and is introduced in evidence as proof of what it depicts or represents (*see e.g. People v Damiano*, 87 NY2d 477, 487 [1996] [52-pound boulder as the murder weapon]; *People v McGee*, 49 NY2d 48, 58-60 [1979] [tape recordings of conversations between defendants and police officers]; *Uss v Town of Oyster Bay*, 37 NY2d 639 [1975] [street sign that fell on plaintiff’s head]; *People v Mirenda*, 23 NY2d 439, 452-454 [1969] [sunglasses connected to

defendant]; *People v Flanigan*, 174 NY 356, 368 [1903] [iron bar used in escape from prison]).

By contrast, demonstrative evidence refers to a visual, graphic, or sound aid used to explain or illustrate a witness's testimony or the presentation of the proponent's case, but which does not by itself prove a fact at issue (see Guide to NY Evid rule 11.3). Although decisional law draws a distinction between real and demonstrative evidence, in practice, an object may in one instance be real evidence and in another demonstrative evidence. For example, a photograph may in one instance depict the occurrence at issue and in another simply illustrate the scene of the occurrence; and in some instances, the photograph may both depict the occurrence and provide an illustration of a witness's testimony about the occurrence. The Guide seeks to accommodate the intersecting aspects of real and demonstrative evidence by setting forth separate rules for specific types of evidence, such as photographs.

Subdivision (2) sets forth the requirements for the admissibility of real evidence derived from Court of Appeals decisional law (*People v McGee*, 49 NY2d 48, 59 [1979]; *People v Julian*, 41 NY2d 340, 342-343 [1977]; *People v Connelly*, 35 NY2d 171, 174 [1974]).

The core requirements of admissibility of real evidence as set forth in the rule are: (1) a showing that it is relevant to an issue in the proceeding (see Guide to NY Evid rule 4.01, Relevant Evidence); (2) that it is what it purports to be (see Guide to NY Evid rule 9.01 [1]); and (3) that it has not been tampered with.

As explained by *Julian*:

“To be admissible, any piece of real evidence must be shown to accurately portray a relevant and material element of the case. When real evidence is purported to be the actual object associated with a crime, the proof of accuracy has two elements. The offering party must establish, first, that the evidence is identical to that involved in the crime; and, second, that it has not been tampered with. In *People v Flanigan* (174 NY 356, 368), our court held that an iron bar was admissible because ‘[a]ll the witnesses who spoke upon the subject testified that it was the same bar and in substantially the same condition.’ When an ‘object possesses unique characteristics or markings and is not subject to material alteration which is not readily apparent’, a simple identification is sufficient to warrant admission. (*People v Connelly*, 35 NY2d 171, 174.) While a fungible item, such as a package of white powder, presents special difficulties in proving the necessary authenticity, the offering party is required to establish only the same two elements, namely, that it is the identical evidence and has not been tampered with” (41 NY2d at 342-343).

McGee followed *Julian*, adding that “the accuracy of the object itself is the focus of inquiry, which must be demonstrated by clear and convincing evidence” (*McGee* at 59). *McGee* reiterated *Julian*’s requirement that the “[a]ccuracy or authenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it,” explaining further that the foundation necessary to establish these elements “may differ according to the nature of the evidence sought to be admitted” (*id.* at 59-60; *see* Barker & Alexander, Evidence in New York State and Federal Courts § 11:2 [2d ed]). The differing methods of proof stem from whether the real evidence is patently identifiable or not, as explained in the note to subdivision (2) (a) and (b).

When the reason for offering the real evidence is to connect it to a party, included in the requirement of relevance is a showing that it is in fact connected to that party.

In *People v Mirenda* (23 NY2d 439 [1969]), for example, the People offered into evidence sunglasses found near the crime scene, arguing that they had been in the defendant’s possession. Admissibility of the sunglasses thus required “an evaluation of how close is the connection between the object and the defendant. If it is not so tenuous as to be improbable, it is admissible as is any other evidence which is relevant to an issue in the prosecution” (*id.* at 453; *see* Guide to NY Evid rule 4.01 [1]). The sunglasses were admissible in *Mirenda* because an accomplice testified that the glasses resembled ones he had once kept in his car, had offered to give to defendant prior to the crime while defendant was in the car, and had later discovered missing (*see People v Miller*, 17 NY2d 559, 560 [1966] [admission of a revolver was proper upon testimony that a revolver found on the person of one of three defendants “looks like” the revolver he held during the robbery]; *People v Neufeld*, 165 NY 43, 47 [1900] [a dark suit belonging to the defendant and found in his closet was properly admitted upon the testimony of witnesses that he wore a dark suit on the day of the crime]; *compare with People v Deverow*, 180 AD3d 1064, 1066 [2d Dept 2020] [“the Supreme Court should not have admitted into evidence a revolver that was recovered by the police from underneath a vehicle five to seven blocks away from the scene of the crime and approximately seven hours after the shooting”]; *People v Cherry*, 46 AD3d 1234, 1237 [3d Dept 2007] [error in a murder prosecution where the victims were killed by shotgun blasts to admit a bulletproof vest and ammunition seized from defendant’s grandmother’s house because those items “were not adequately connected to defendant”]).

Subdivision (2) (a) sets forth the foundational requirements of a patently identifiable tangible object. Again, *Julian* and *McGee* are the primary sources of the rule (*Julian*, 41 NY2d at 342-343 [“When an ‘object possesses unique characteristics or markings and is not subject to material alteration which is not readily apparent’, a simple identification is sufficient to warrant admission” (citation omitted)]; *McGee*, 49 NY2d at 59-60 [“Mere identification by one

familiar with the object, however, will be sufficient ‘when the object possesses unique characteristics or markings’ and any material alteration would be readily apparent” (citation omitted)]; see *People v Price*, 29 NY3d 472, 476 [2017] [“We have explained that ‘(t)he foundation necessary to establish (authenticity) may differ according to the nature of the evidence sought to be admitted’. For example, mere identification by one familiar with an item of evidence may suffice where the item is distinct or unique” (internal quotation marks and citations to *McGee* and *Julian* omitted)]; *Connelly* at 174 [“If the object was taken from the defendant or found at the scene of the crime, the foundation is laid once it is shown that the thing offered is the one recovered and that its condition is substantially unchanged”]; *Johnson v Michelin Tire Corp.*, 110 AD2d 824, 824 [2d Dept 1985] [a tire was admissible “ ‘merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition’ (McCormick, Evidence § 212, at 667 [3d ed])”].

When the offered evidence “possesses unique characteristics or markings and is not subject to material alteration which is not readily apparent,” the fact that it may have been possessed by several individuals who do not testify does not render it inadmissible if it has been sufficiently identified (*Connelly* at 174).

When the appellate courts refer to an object as being “substantially” in the same condition, they are undoubtedly referring to minor changes that do not affect the integrity and probative value of an object, e.g., a gun marked with police officer’s initials (see *People v Capers*, 105 AD2d 842 [2d Dept 1984]).

Examples of unique or distinctive items that have been admitted on the basis of a witness’s in-court identification include: 52-pound boulder that was alleged to be the murder weapon (*People v Damiano*, 87 NY2d 477 [1996]); a street sign that fell on plaintiff’s head (*Uss v Town of Oyster Bay*, 37 NY2d 639 [1975]); an iron bar (*Flanigan* at 358); a broken piece of machinery that caused plaintiff’s injury (*King v New York Cent. & Hudson Riv. R.R. Co.*, 72 NY 607 [1878]; see Evidence in New York State and Federal Courts § 11:2 [collecting cases]).

Subdivision (2) (b) is also derived from *Julian* where the Court of Appeals set forth a stricter foundation requirement for real evidence which is fungible and capable of being altered, contaminated, or replaced. In such a situation, the Court, concerned about the possibility of the condition of the object being changed to the prejudice of a party, required that the foundation be established by a chain of custody or other evidence providing “ ‘reasonable assurances of identity and unchanged condition’ ” (*Julian*, 41 NY2d at 343, quoting *People v Porter*, 46 AD2d 307, 311 [1974]; *Amaro v City of New York*, 40 NY2d 30, 35-36 [1976]; *People v Connelly* at 174 [a chain of custody is employed when “the evidence itself (such as drugs) is not patently identifiable or is capable of being replaced or altered”]).

The chain of custody requirement may be satisfied by testimony from all persons who have handled the object identifying the object and testifying to its custody and unchanged condition (*see Connelly*, 35 NY2d at 174). A complete chain of custody, however, is not always required. Gaps in the chain may be excused when “circumstances provide reasonable assurances of the identity and unchanged condition of the evidence” (*People v Hawkins*, 11 NY3d 484, 494 [2008]). Furthermore, any perceived weakness in the chain of custody goes to the weight of the evidence and not its admissibility (*People v Sarmiento*, 77 NY2d 976 [1991], *affg for reasons stated in mem at App Div 168 AD2d 328* [1st Dept 1990]; *People v White*, 40 NY2d 797, 799-800 [1976]). “[R]easonable assurance[s] of the unchanged condition and identity of the [evidence]” can be established through expert testimony (*Palestrant v Garcia*, 244 AD2d 199, 200 [1st Dept 1997]) or circumstantial evidence (*see People v Beverly*, 5 AD3d 862 [3d Dept 2004] [seized bag of cocaine was sealed and seals remained intact]). Illustrative cases are collected in William C. Donnino, *New York Court of Appeals on Criminal Law* § 17:3 (3d ed), *Evidence in New York State and Federal Courts* § 11:2 and Martin, Capra & Rossi, *New York Evidence Handbook* § 4.2 (chain of custody) (2d ed).

Subdivision (2) (c) is derived from *People v Ely* (68 NY2d 520 [1986]). There, the Court stated:

“The necessary foundation may be provided in a number of different ways. Testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered or of a witness to the conversation or to its recording, such as the machine operator, to the same effect are two well-recognized ways. Testimony of a participant in the conversation together with proof by an expert witness that after analysis of the tapes for splices or alterations there was, in his or her opinion, no indication of either is a third available method.

“A fourth, chain of custody, though not a requirement as to tape recordings, is also an available method. It requires, in addition to evidence concerning the making of the tapes and identification of the speakers, that within reasonable limits those who have handled the tape from its making to its production in court identify it and testify to its custody and unchanged condition” (*id.* at 527-528 [internal quotation marks and citations omitted]; *see People v Guidice*, 83 NY2d 630, 633-634 [1994] [“linesheet” entries (records related to intercepted phone conversations) made in the course of a police surveillance operation were admissible in evidence as business records to establish a “chain of custody” of the surveillance tapes]).

Any infirmity concerning a chain of custody goes to the weight of the evidence and not its admissibility (*McGee*, 49 NY2d at 60). Likewise, inaudibility

that is not so substantial that the accuracy of the recording is questionable goes to the weight to be given to the recording (*id.*).

Identification of the voices on the conversation is also required as part of the authentication process (*see* Guide to NY Evid rule 9.07 [2], [6], [7], [8]).

The Court of Appeals in *Ely* stated that the foundation requirement for the admissibility of sound recordings must be made by “clear and convincing” proof (68 NY2d at 522, 527). No rationale was provided for this stricter burden. In *Grucci v Grucci* (20 NY3d 893, 896-897 [2012]) the Court applied its rule in *Ely* to civil actions. At issue in *Grucci*, an action to recover damages for malicious prosecution, was the admissibility of an audiotape of a telephone conversation a witness had with the defendant. Quoting *Ely*, the Court stated: “The predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered” (*id.* at 897).

The admissibility of a recording of sounds, other than a conversation, such as noises, is not governed by subdivision (2) (c) but rather by subdivision (2) (b) (*see* Evidence in New York State and Federal Courts § 11:11 n 3).

Subdivision (3) makes clear that the admission of real evidence is subject to the discretion of the court and that such discretion may be exercised to exclude the proffered real evidence when its probative value is outweighed by countervailing factors as set forth in Guide to New York Evidence rule 4.07 (*see* *People v Acevedo*, 40 NY2d 701, 704 [1976] [observing that although non-testimonial proof may “play a positive and helpful role in the ascertainment of truth, courts must be alert to the danger that, when ill-designed or not properly relevant to the point at issue, instead of being helpful they may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial”]; *Hudson v Lansingburgh Cent. School Dist.*, 27 AD3d 1027, 1030 [3d Dept 2006] [admission of machine involved in accident in which portion of plaintiff’s finger was cut off was not error as there was no showing of prejudice to defendant]).

11.03. Demonstrative Evidence

(1) Definition. “Demonstrative evidence” refers to a visual, graphic, or sound aid used to explain or illustrate a witness’s testimony or the presentation of the proponent’s case.

(2) Admissibility. A visual or graphic aid proffered as demonstrative evidence may be exhibited to the trier of fact provided:

(a) it is a fair and accurate depiction or representation of what it purportedly depicts or represents; and

(b) it helps the factfinder to better understand the testimony of a witness or the presentation of a party’s case.

(3) The court may, in the exercise of its discretion, exclude the offered demonstrative evidence pursuant to Guide to New York Evidence rule 4.07.

Note

Subdivision (1) broadly defines “demonstrative evidence.” Any type of visual, graphic, or sound aid that is capable of explaining or illustrating oral testimony or the presentation of the proponent’s case may constitute demonstrative evidence. In particular, New York has long approved the admission in evidence of a map, diagram, drawing, photograph, model and similar demonstrative evidence when the evidence is properly authenticated, is relevant to a particular issue, and would assist the finder of fact in understanding the case (see *People v Del Vermo*, 192 NY 470, 482-483 [1908] [model of knife]; *Hinlicky v Dreyfuss*, 6 NY3d 636, 645-647 [2006] [flow diagram]; *People v Russell*, 79 NY2d 1024, 1025 [1992] [bank surveillance photographs]; *People v Acevedo*, 40 NY2d 701, 704-705 [1976] [voice identification test]; *People v Mariner*, 147 AD2d 659 [2d Dept 1989] [in-court demonstration as to ability to observe drug transaction at a distance with binoculars]; *Norfleet v New York City Tr. Auth.*, 124 AD2d 715 [2d Dept 1986] [out-of-court reconstruction of accident]; *Feaster v New York City Tr. Auth.*, 172 AD2d 284, 285 [1st Dept 1991] [computer generated animation of accident]).

In *Del Vermo*, the Court of Appeals recognized the general usefulness of demonstrative evidence. The Court held that the trial court ruling allowing the People to place before the jury a knife as a “model” of the knife allegedly owned by the defendant was not error. The Court reasoned that the “district attorney was not restricted to verbal descriptions by the various witnesses in a case where the construction of the instrument was somewhat exceptional, and a much more accurate idea of its true character could be conveyed to the jury by means of a model than by word of mouth” (192 NY at 482). “It is a common practice in the courts of this state and probably throughout the Union to furnish such assistance to jurors by the employment of maps, diagrams, drawings and photographs as well as by models, the purpose being to enable the jury to use their eyes as well as their ears in order to gain an intelligent comprehension of the case” (*id.*).

Normally, “real evidence” is admitted for the truth of what it represents; on the other hand, “demonstrative evidence,” while probative, is not necessarily admitted for its truth but rather as an “aid used to explain or illustrate a witness’s testimony or the presentation of the proponent’s case” (Guide to NY Evid rule 11.03 [1]; *see e.g. Hinlicky*, 6 NY3d at 645-646).

Subdivision (2) sets forth the foundation requirements for demonstrative evidence.

Subdivision (2) (a) requires authentication of the demonstrative evidence, that is, the proffered demonstrative evidence must fairly and accurately represent what its proponent claims it represent (*see People v Byrnes*, 33 NY2d 343, 347 [1974] [sufficient authentication shown where witness with personal knowledge identified the subjects and verified that the photographs accurately represented the subjects]; *People v Del Vermo*, 192 NY 470, 482-483 [1908] [(“It is enough to render a model receivable for purposes of illustration if it fairly represents the original object”]; *Archer v New York, New Haven & Hartford R.R. Co.*, 106 NY 589, 603 [1887] [(“D)rawings are uniformly received and are useful, if not indispensable, to enable courts and juries to comprehend readily the question in dispute as affected by evidence”]; *People v Kendall*, 254 AD2d 809 [4th Dept 1998] [expert witness was properly allowed to demonstrate mechanics of Shaken Baby Syndrome to explain how an infant could sustain massive brain injury with no apparent external body trauma]).

Notably, the offered demonstrative evidence need not be identical in all respects to what it illustrates or explains (*Del Vermo*, 192 NY at 482-483; *Flah’s, Inc. v Rosette Elec.*, 155 AD2d 772, 773 [3d Dept 1989] [(“In our view, the subject diagram was, at a minimum, a fair representation of the electrical system and was therefore admissible to explain or illustrate the testimony in order to aid the jury in comprehending the disputed issue”]; *Norfleet v New York City Tr. Auth.*, 124 AD2d 715, 716-717 [2d Dept 1986] [(“The circumstances under which the (accident reconstruction) was conducted were sufficiently similar to those existing at the time of the incident to make the result achieved by the test relevant to the

issues”]). Variations or differences which are minor and inconsequential are not a basis for exclusion (see *Bolm v Triumph Corp.*, 71 AD2d 429, 438-439 [4th Dept 1979]).

Differences that cannot be explained or shown to be inconsequential, however, may preclude the proffered demonstrative evidence (see *People v Cohen*, 50 NY2d 908, 910 [1980] [trial court erred in admitting results of test-firing of a weapon at animal skins where there was no proof that the skins of the test subjects and that of the human victim were similar]; but see *Uss v Town of Oyster Bay*, 37 NY2d 639, 641 [1975] [the trial court “might have been justified in forbidding (defendants’ counsel’s) demonstration since it can be argued that the conditions in the courtroom were not substantially similar to those at the scene of the accident. On the other hand it was not error as a matter of law for the court, after the demonstration had taken place, to determine that plaintiffs’ legitimate interests could be sufficiently protected by affording plaintiffs’ counsel unrestricted opportunity for cross-examination. By effective exploitation of the dissimilarities between the model and the original it was thus open to counsel to minimize the significance to be attached to the demonstration”])).

Subdivision (2) (b) restates Court of Appeals precedent that requires a court to determine that the demonstrative evidence will be helpful to the trier of fact in better understanding the testimony of a witness or the presentation of the proponent’s case (*People v Mirenda*, 23 NY2d 439, 453 [1969] [Court indicated that proffered demonstrative evidence is unnecessary where the trier of fact does not need its assistance in understanding the admitted evidence; thus, in the case before it, the Court noted “there was no need to offer a model because the particular object being discussed—to wit sunglasses—is not so difficult to visualize that a model is required to assist the jury in understanding the witness’ testimony”]; *Archer v New York, New Haven & Hartford R.R. Co.*, 106 NY 589, 603 [1887] [maps, diagrams and drawing are “uniformly received . . . to enable courts and juries to comprehend readily the question in dispute”]; *Goldner v Kemper Ins. Co.*, 152 AD2d 936, 937 [4th Dept 1989] [“The trial court has broad discretion with respect to the admission of such evidence, especially with reference to the question of the similarity of conditions. The most broadly stated or recognized standard is whether the evidence tends to enlighten rather than to mislead the jury”]; *Kane v Triborough Bridge & Tunnel Auth.*, 8 AD3d 239, 242 [2d Dept 2004] [the Court held that the trial court erred “in failing to instruct the jury that the computer-generated animation was being admitted for the limited purpose of illustrating the expert’s opinion as to the cause of the accident and that it was not to consider the computer-generated animation itself in determining what actually caused the accident”])).

Subdivision (3) makes clear that the admission of demonstrative evidence is subject to the discretion of the court and that such discretion may be exercised to exclude the proffered demonstrative evidence when its probative value is outweighed by countervailing factors as set forth in Guide to New York Evidence

rule 4.07 (*People v Acevedo*, 40 NY2d 701, 704 [1976] [(T)hough tests and demonstrations in the courtroom are not lightly to be rejected when they would play a positive and helpful role in the ascertainment of truth, courts must be alert to the danger that, when ill-designed or not properly relevant to the point at issue, instead of being helpful they may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial. When there is such a threat, the trial court itself must decide in the exercise of a sound discretion . . . whether the value of the evidence outweighs its potential for prejudice”]; *Uss*, 37 NY2d at 641 [where the proffered demonstrative evidence is “deceptive, sensational, disruptive of the trial, or purely conjectural” it should be precluded]).

11.05. Anatomically Correct Dolls (CPL 60.44)

Any person who is less than 16 years old may, in the discretion of the court and where helpful and appropriate, use an anatomically correct doll in testifying in a criminal proceeding based upon conduct prohibited by article 130 (Sex Offenses), article 260 (Offenses Relating to Children, Disabled Persons and Vulnerable Elderly Persons), or sections 255.25, 255.26, or 255.27 (Incest) of the Penal Law.

Note

This section reproduces verbatim CPL 60.44, while adding the text in parentheses (*see People v McGuire*, 152 AD2d 945 [4th Dept 1989] [approving use of anatomically correct dolls]; *People v Guce*, 164 AD2d 946, 950 [2d Dept 1990] [same]).

The statute has been held not to preclude the use of anatomically correct dolls for persons more than 16 years of age (*People v Herring*, 135 Misc 2d 487 [Sup Ct, Queens County 1987] [73-year-old aphasic victim of a sex offense]; *People v Rich*, 137 Misc 2d 474, 480 [Sup Ct, Monroe County 1987] [a victim of a sex offense over 16 years old]).

Irrespective of the statute, New York has long approved the admission in evidence of a map, diagram, drawing, photograph, model and similar demonstrative evidence when the evidence is properly authenticated, is relevant to a particular issue, and would assist the finder of fact in understanding of the case. (Guide to NY Evid rule 11.03; *People v Del Vermo*, 192 NY 470, 482-483 [1908]; *see People v Feld*, 305 NY 322, 331-332 [1953] [although a recording is the best evidence of its contents, permitting the jurors to hold a transcript of the recording to assist their understanding “was no different than allowing them to have . . . a photograph, a drawing, a map or a mechanical model”]; *People v Acevedo*, 40 NY2d 701, 704-705 [1976] [“both courts and commentators have noted, with respect to demonstrative evidence, that, when validly and carefully used, there is no class of evidence so convincing and satisfactory to a court or a jury. However, though tests and demonstrations in the courtroom are not lightly to be rejected when they would play a positive and helpful role in the ascertainment of truth, courts must be alert to the danger that, when ill-designed or not properly relevant to the point at issue, instead of being helpful they may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial” [internal citations omitted]).

11.07. Child's Age (CPLR 4516)

Whenever it becomes necessary to determine the age of a child, he (or she) may be produced and exhibited to enable the court or jury to determine his (or her) age by a personal inspection.

Note

This rule restates verbatim CPLR 4516 (*see People v Kaminsky*, 208 NY 389, 394 [1913] [the rule (formerly a Penal Law statute) “is the general rule prevailing in nearly all jurisdictions apart from any statutory provision on the subject”]). The CPLR provision applies to the determination of the age of a “child,” not an “adult” (*People v Blodgett*, 160 AD2d 1105, 1106 [3d Dept 1990]).

Penal Law § 263.25 allows for other methods of determining the age of a child, but only applies to a determination of the age of a child for the purposes of Penal Law article 263 (Sexual Performance by a Child). That statute states:

“Whenever it becomes necessary for the purposes of this article to determine whether a child who participated in a sexual performance was under an age specified in this article, the court or jury may make such determination by any of the following: personal inspection of the child; inspection of a photograph or motion picture which constituted the sexual performance; oral testimony by a witness to the sexual performance as to the age of the child based upon the child's appearance; expert medical testimony based upon the appearance of the child in the sexual performance; and any other method authorized by any applicable provision of law or by the rules of evidence at common law.”

11.09. Demonstration or Experiment

An in-court demonstration or experiment may, in the discretion of the court, be authorized when the result of the demonstration or experiment will be probative of an issue in the case; can reasonably be conducted in court under conditions substantially similar to the conditions at the time of the occurrence at issue; will not unreasonably delay or disrupt the trial; and will be helpful to, and will not mislead or confuse, the jury.

Note

This section is derived from decisional law (*see Uss v Town of Oyster Bay*, 37 NY2d 639, 641 [1975] [“the principles of mechanics involved in this demonstration were well within the experience and comprehension of an average juror. Thus its probative worth could be independently weighed by the jurors themselves. Nor was the demonstration deceptive, sensational, disruptive of the trial, or purely conjectural”]; *People v Buchanan*, 145 NY 1, 26 [1895] [“As the theory of the prosecution was that morphine was then given (to kill the deceased), it was competent to show, by one experienced in the art, how the morphine could be combined with the prescription of the physician; that there would be no change in color; (and) that the taste would be bitter (accounting for the victim’s reaction on taking the drug)”]; *see also* Barker & Alexander, Evidence in New York State and Federal Courts § 11:18, Experiments and Demonstrations (2d ed); Michael J. Hutter, *Admissibility of Demonstrations and Experiments*, NYLJ, Apr. 1, 2020).

In general, as *People v Acevedo* (40 NY2d 701, 704-705 [1976] [citations omitted]) explained, “though tests and demonstrations in the courtroom are not lightly to be rejected when they would play a positive and helpful role in the ascertainment of truth, courts must be alert to the danger that, when ill-designed or not properly relevant to the point at issue, instead of being helpful they may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial. When there is such a threat, the trial court itself must decide in the exercise of a sound discretion based on the nature of the proffered proof and the context in which it is offered, whether the value of the evidence outweighs its potential for prejudice.”

In *Acevedo*, the identification of the defendant as a masked robber was based on the complainant’s recognition of his voice on the day of the robbery, based on “her excellent prior knowledge of his voice but also on 20 to 25 minutes of conversation during the robbery itself” (40 NY2d at 705). The court properly denied a defense proposal for a voice identification “test” of the complainant’s ability to identify the voice of the defendant’s brother. The test “would not have duplicated

the circumstances which surrounded [the complainant's] voice identification of the defendant" (*id.*). The test of the complainant's ability to recognize the voice of defendant's brother "was to take place two years after she had last heard it"; there was no proffer of the number of interchanges the complainant had with the brother; and the identification of the brother's voice was "to depend on the sound of two short sentences alone" (*id.*).

The probative value of the evidence may outweigh any potential for prejudice from inconsequential dissimilarities; in that instance the dissimilarities affect the weight of the evidence, not its admissibility (*see Uss v Town of Oyster Bay*, 37 NY2d 639, 641 [1975] [the trial court "might have been justified in forbidding (defendants' counsel's) demonstration since it can be argued that the conditions in the courtroom were not substantially similar to those at the scene of the accident. On the other hand it was not error as a matter of law for the court, after the demonstration had taken place, to determine that plaintiffs' legitimate interests could be sufficiently protected by affording plaintiffs' counsel unrestricted opportunity for cross-examination. By effective exploitation of the dissimilarities between the model and the original it was thus open to counsel to minimize the significance to be attached to the demonstration"]).

Care must be taken, however, in determining that the dissimilarities are inconsequential (*see Styles v General Motors Corp.*, 20 AD3d 338, 341 [1st Dept 2005, concurring op] ["While the test conditions need not be identical, there must be sufficient similarity to permit the inference that the results of the experiment shed light on what occurred. . . . Where (the proponent of the test) fails to make the necessary showing of similarity, the experimental evidence must be excluded"]; *People v Cohen*, 50 NY2d 908, 910 [1980] ["If at the new trial the People offer (again) to show the effects of a gun shot from this weapon on animal tissue, they must first establish that there is a substantial similarity between the skin and tissue of the test subject and that of a human victim"]).

11.11. Person's Appearance or Capability

When a person's appearance, condition, or capability is relevant to an issue in a proceeding, the appropriate aspect of the person's appearance, condition, or capability may, subject to the discretion of the court, be exhibited to the trier of fact.

Note

This rule is derived from long-standing Court of Appeals precedent (*Harvey v Mazal Am. Partners*, 79 NY2d 218, 223-228 [1992] [exhibiting brain-damaged plaintiff, who was not sworn as witness, and asking him questions to show his condition]; *de Baillet-Latour v de Baillet-Latour*, 301 NY 428, 433-434 [1950] [in annulment action wife was allowed to exhibit conspicuous scars on her body, the existence of which her husband had denied]; *Clark v Brooklyn Hgts. R.R. Co.*, 177 NY 359 [1904] [no error present where trial court permitted the plaintiff, who had been injured in a collision, to leave the witness stand assisted and to exhibit himself to the jury in the act of writing his name and taking a drink of water as the display was designed to illustrate the plaintiff's testimony that he was afflicted by a tremor and could use his hands only with difficulty]; *Mulhado v Brooklyn City R.R. Co.*, 30 NY 370, 372 [1864] [exhibition of injured arm "tended to make the description of the injury more intelligible"]; *compare People v Scarola*, 71 NY2d 769, 778 [1988] ["(T)he trial courts did not abuse their discretion in denying defendants permission to give the proposed exemplars (of their voice). In neither case did the victim rely on defendant's voice to identify him. Moreover, the foundation for the admission of the evidence, in each case did not rule out the possibility that defendants could feign the existence of a speech defect"]).

In *Harvey*, the Court was concerned that an exhibition of a party's injuries "when ill-designed or not properly relevant to the point at issue, instead of being helpful" could "mislead, confuse, divert or otherwise prejudice the purposes of the trial" (*Harvey* at 224). In that instance, the Court instructed that "the trial court itself must decide in the exercise of a sound discretion based on the nature of the proffered proof and the context in which it is offered, whether the value of the evidence outweighs its potential for prejudice" (*id.*).

The trial court in *Harvey* permitted the plaintiff, who was not sworn, to appear before the jury and answer a series of questions that were designed to demonstrate the plaintiff's loss of cognitive abilities. Most of the questions asked of the plaintiff were of a general nature and did not touch upon any of the issues involved at trial. The plaintiff's answers did illustrate the extent to which the underlying accident had affected his cognitive abilities. In deciding to permit the questioning, the trial judge noted that she had balanced the value of showing the

jury the plaintiff's injuries against the potential for prejudice and emotional response. The Court of Appeals held that this balancing was without question an exercise of judicial discretion, and there was no basis to disturb that decision. "Although . . . the preferred practice would have been for the Trial Judge to examine the plaintiff in camera, outside the presence of the jury, before permitting the questioning," the failure to do so did not constitute an abuse of discretion in *Harvey* (*id.* at 227).

Critically, as stated in the rule, before a person's appearance, condition, or capability may be exhibited, that appearance, condition, or capability must be "relevant" to an issue in the proceeding (*see* Guide to NY Evid rule 4.01; *People v Rodriguez*, 64 NY2d 738, 741 [1984] [where an eyewitness apparently did not describe the perpetrator as having tattooed hands, the defendant's request to display tattooed hands was properly denied in the absence of proof that he had the tattoos on day of crime]).

11.13. Photographs

(1) A photograph may be admitted in evidence upon a showing that it is relevant and properly identified and authenticated as a fair and accurate representation of what it purportedly depicts.

(2) An authenticated photograph of a deceased or of an injury is admissible in the discretion of the court if it tends to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove other evidence offered or to be offered, and if its probative value outweighs the danger of undue prejudice.

Note

Subdivision (1) is derived from *People v Byrnes* (33 NY2d 343, 347 [1974]) where the photographs were authenticated and admitted into evidence because the “complainant, a competent witness possessing knowledge of the matter, identified the subjects and verified that the photographs accurately represented the subject matter depicted.” Further, in a proper case, a photograph may constitute “independent probative evidence of what it shows” (*Byrnes* at 348, citing as an example *People v Webster*, 139 NY 73, 83 [1893] [photograph admitted to show physique of deceased where defendant pleaded self-defense]).

While an appropriate witness’s testimony normally will establish the foundation, where “no witnesses are available who have viewed the subject matter portrayed, valid alternative grounds may exist for authenticating the photograph and admitting it into evidence, such as testimony, especially that by an expert, tending to establish that the photograph truly and accurately represents what was before the camera.” (*Byrnes* at 349; see *People v Price*, 29 NY3d 472, 477 [2017] [“ ‘since the ultimate object of the authentication requirement is to insure the accuracy of the photograph sought to be admitted into evidence, any person having the requisite knowledge of the facts may verify,’ or an expert may testify that the photograph has not been altered” (citation omitted)].)

In *Price*, the People failed to authenticate a photograph “from an Internet profile page allegedly belonging to defendant” by any of the traditional methods, “as the victim was unable to identify the weapon as that which was used in the robbery, and no other witnesses testified that the photograph was a fair and accurate representation of the scene depicted or that it was unaltered” (*Price*, 29 NY3d at 474, 477-478 [citations omitted]). Instead, the People argued that the photograph’s authenticity had been proved by evidence “that the printout of the

web page is an accurate depiction thereof, and that the web page is attributable to and controlled by . . . the defendant” (*id.* at 478). The Court, however, held that “[a]ssuming without deciding that a photograph may be authenticated through the method proposed” or “some variation thereof,” the People failed in their proof “of defendant’s connection to the website or the particular profile.” (*Id.* at 478-480.)

Subdivision (2) is derived primarily from *People v Poblner* (32 NY2d 356, 369-370 [1973]), and its progeny. In *Poblner*, the Court held:

“The general rule is that photographs of the deceased are admissible if they tend to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove some other evidence offered or to be offered. Admission of photographs of homicide victims is generally within the discretion of the trial court. Where they are otherwise properly admitted as having a tendency to prove or disprove some material fact in issue, photographs of a corpse are admissible even though they portray a gruesome spectacle and may tend to arouse passion and resentment against the defendant in the minds of the jury. There are many cases in which photographs of a homicide victim have been held admissible to show, for example, the position of the victim’s body, the wounds of the victim, or to illustrate expert testimony. Photographic evidence should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant.” (*Id.* at 369-370 [internal quotation marks and citations omitted].)

In *Poblner*, the defendant told a friend that his wife was asleep when he shot her. Four photographs were properly admitted to show that the deceased “was in her bed, in a sleeping position, when shot, thus tending to confirm” the defendant’s friend’s testimony; and two photographs taken at the morgue were properly admitted to “show the three clustered bullet holes near the left temple, indicating marksmanship and deliberateness in the killing.” (*Poblner* at 370; *see People v Bell*, 63 NY2d 796, 797 [1984] [photographs of a victim being attended in the hospital were admissible given that “(t)hey were not gory, the lacerations they show having either been cleaned up or bandaged, and while the knife remaining imbedded in the victim’s back was startling in the sense of being unusual, the picture it presented of the knife was less unnerving than the oral testimony concerning it”]; *People v Stevens*, 76 NY2d 833, 836 [1990] [“The photographs of the victim’s body showed the nature of the injury and therefore tended to prove that the assailant acted with intent to inflict serious injury, an essential element of the manslaughter count. The People were not bound to rely entirely on the testimony of the medical expert to prove this point and the photographs were admissible to elucidate and corroborate that testimony”]; *People v Wood*, 79 NY2d 958, 960 [1992] [“The nature and manner of the killing were material and relevant to prosecution of the murder indictment and the defendant could not

make it otherwise by admitting that he had killed the victim but contending that he had done so under the influence of an extreme emotional disturbance. The questioned exhibits illustrated the severity and calculated nature of the wounds and tended to disprove defendant's claim that he was totally out of control at the time of the killing"]; *Mazella v Beals*, 27 NY3d 694, 709 [2016] [in action for malpractice by a psychiatrist, a photograph of the deceased who committed suicide "was relevant to plaintiff's theory that the violent nature of the suicide—death by self-inflicted knife wounds—was a result of decedent's extreme mental and emotional condition, induced by the long-term use of prescription drugs," and its admission was not "unduly prejudicial" because there was testimony and the autopsy report describing the body's condition].)

A portrait or photograph of a deceased taken when the deceased was alive may "arouse the jury's emotions, particularly when they are presented in a before-and-after format, and thus should not be admitted unless relevant to a material fact to be proved at trial. In addition, the relevance of the portraits must be independently established; the fact that photographs of the victim after death have been found to be relevant does not necessarily establish the relevance, and hence admissibility, of portraits of the victim while alive." (*People v Stevens*, 76 NY2d 833, 835-836 [1990]; *Smith v Lehigh Val. R.R. Co.*, 177 NY 379, 384 [1904] [in an action to recover for pecuniary damages resulting from the decedent's death, the introduction in evidence of the photograph of the deceased as a handsome woman when she was alive was improper]; *compare People v Ramsaran*, 154 AD3d 1051, 1053-1054 [3d Dept 2017] [photographs of the deceased prior to her murder "were relevant to and probative of the People's central theory that defendant disapproved of the victim's appearance and was motivated to kill her, in part, by his desire to be with (another woman), whose appearance he perceived as more attractive"].)

11.14 Video Recording

(1) In general.

A video recording of a scene, person or persons, or an occurrence is admissible in the discretion of a trial judge provided it is shown to be relevant to an issue in the proceeding and is properly authenticated.

(2) Authentication.

(a) A video recording may be authenticated by any of the following:

(i) the testimony of a witness to the recorded events, or of an operator or installer or maintainer of the equipment, that the video accurately represents the subject matter depicted;

(ii) the testimony, expert or otherwise, that a video truly and accurately represents what was before the camera;

(iii) the testimony of a witness and other evidence that demonstrates that the video accurately represents the subject matter depicted.

(b) Evidence establishing the chain of custody of the video may buttress its authenticity and integrity and even allow for acceptable inferences of its reasonable accuracy and freedom from tampering.

Note

Subdivision (1) is derived from *People v Patterson* (93 NY2d 80, 84 [1999])
[“At the outset, we emphasize that relevant videotapes . . . are ordinarily admissible under standard evidentiary rubrics. Some reliable authentication and foundation . .

. are, however, also still necessary. The decision to admit or exclude videotape evidence generally rests, to be sure, within a trial court's founded discretion”)).

In the exercise of its discretion, the trial court may consider whether the trial would be “unduly delayed by exhibiting” the video or whether the video is “sensational only and unnecessary,” particularly where the evidence may be “submitted in another form”; or whether the video unfairly exaggerates any of the true features which are sought to be proved (*Boyarsky v Zimmerman Corp.*, 240 App Div 361, 365, 367 [1st Dept 1934]); or whether a photograph of a video image rather than the video with its audio should more properly be admitted. (See *People v Jin Cheng Lin*, 26 NY3d 701, 727 [2016] [a court properly exercised its discretion to authorize the admission of a photograph of the defendant to show his physical appearance after interrogation rather than a video with self-serving audio].)

A compilation of portions of footage drawn from numerous surveillance cameras is equally admissible when properly authenticated and the trial court is satisfied that there is no reason to believe the compilation was incomplete or otherwise unsatisfactory (*People v Cabrera*, 137 AD3d 707, 707-708 [1st Dept 2016] [the witness “explained that she viewed several hours of videotape and created a 30-minute disc that included all the footage that was relevant to the case, that is, all views of any persons involved in this case” and there was “no reason to believe that the compilation was incomplete or otherwise unsatisfactory”]).

A video recording may be relevant for what it does not show, as well as for what it does show (e.g. *People v Ruiz*, 7 AD3d 737, 737 [2d Dept 2004] [The Supreme Court properly admitted security videotapes from a certain hospital into evidence to rebut the defendant's claim that he was at that hospital during the time of the robbery]). In a criminal case, a surveillance video that plainly shows the defendant committing a criminal act is direct evidence and thus does not require a circumstantial evidence charge (*People v Hardy*, 26 NY3d 245 [2015]; see *People v Gee*, 99 NY2d 158, 162 [2002] [videotape of a robbery of a store clerk]).

Other examples of a properly admitted video recording include: *People v Edmonson* (75 NY2d 672, 674 [1990] [“evidence of a prior extrajudicial identification made by the complaining witness from a videotape taken by the police, canvassing a particular neighborhood and focusing on numerous passersby,” is admissible]); *People v Tunstall* (63 NY2d 1, 10 [1984] [a videotape of the lineup in which a defendant was identified is admissible]); *People v Scullion* (137 AD3d 645 [1st Dept 2016] [video of the purportedly intoxicated defendant performing coordination tests was admissible]); *Matter of Burack* (201 AD2d 561, 561 [2d Dept 1994] [video of the execution of a will was properly admitted as evidence of the decedent’s testamentary capacity]); *People v Fondal* (154 AD2d 476, 476-477 [2d Dept 1989] [video showing the defendant and accomplice “in the act of shoplifting” was admissible]); *Caprara v Chrysler Corp.* (71 AD2d 515, 522-523 [3d Dept 1979] [a video showing the “impact the injury has had on plaintiff’s life” was admissible], *aff* 52 NY2d 114 [1981]); and *Boyarsky v Zimmerman Corp.*

(240 App Div 361, 365 [1st Dept 1934] [video of plaintiff conducting himself as a “perfectly well man instead of the invalid which he claimed to be” was admissible]).

Technical flaws in a video recording that do not impact on the fairness of what the video depicts go to the “weight” of the evidence, not its admissibility. In *People v Davis* (28 NY3d 294, 303 [2016]), for example, the “authenticating witness, who maintained the surveillance system, testified that during the computerized process of compressing and archiving the digital video files, certain images may overlap. However, he further testified that the process, which he personally conducted, does not conjure up persons that were not originally present in the camera shot. As such, the trial court did not abuse its discretion in concluding that the image-overlap issue went to weight, but not admissibility, of the video evidence.” Other examples include: *People v Yanez* (180 AD3d 816, 816 [2d Dept 2020] [that a time stamp on a video differed from the time the videos were actually recorded went to “the weight of the evidence, not its admissibility”]) and *People v McEachern* (148 AD3d 565, 566 [1st Dept 2017] [the “alleged uncertainty about whether the videotape depicted the events at issue went to the weight to be accorded the evidence rather than its admissibility”]).

Once a video is properly admitted, a court may allow the jury to utilize an accurate, typewritten transcript of the audio portion, if necessary, to aid the jury in understanding the audio (*People v Dyla*, 169 AD2d 777, 778 [2d Dept 1991] [the court properly allowed the jury “to utilize typewritten transcripts as an aid to understanding the defendant’s videotaped statement”]).

Subdivision (2) (a) (i) and (ii) and (b) is derived from the language of *Patterson* (93 NY2d 80, 84 [1999]), which stated:

“a videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted. Testimony, expert or otherwise, may also establish that a videotape ‘truly and accurately represents what was before the camera.’ Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering” (citations omitted).

Patterson concluded, however, that “[t]hese illustratively noted methods of authentication are not exclusive” (*Patterson* at 84; see Barker & Alexander, Evidence in New York State and Federal Courts § 1104.1 [d] [2d ed West’s NY Prac Series]; Guide to NY Evid rule 9:07, Methods of Authentication and Identification, subds [1] [Admission of authenticity], [2] [Testimony of witness], [6] [Circumstantial evidence], [7] [Voice identification]).

Subdivision (2) (iii) is thus designed to encompass those additional methods of authentication. For example, in *People v Goldman* (35 NY3d 582, 588 [2020]), a YouTube video that depicted the defendant rapping about “ ‘run[ning] up’ into a rival crew’s ‘house’ ” was properly authenticated and admitted as evidence of the defendant’s motive for driving with three others into a rival crew’s territory and shooting and killing a teenage boy. The proof of authentication of the video included evidence that the defendant was the undisputed person in the video singing; that the video showed the defendant and two of the other individuals who were in the car with the defendant during the shooting “in similar attire to what they were wearing on the night of the homicide”; that the “background demonstrated that it was evidently filmed in defendant’s neighborhood” (*id.* 595); and a fair inference from a prosecution witness’s testimony and the uploading of the video after the homicide that the video was made after the homicide.

Other examples of properly authenticated video recording include: *Zegarelli v Hughes* (3 NY3d 64, 69 [2004] [“Testimony from the videographer that he took the video, that it correctly reflects what he saw, and that it has not been altered or edited is normally sufficient to authenticate a videotape”]) and *People v Scullion* (137 AD3d 645, 645 [1st Dept 2016] [Although the police officer who administered the coordination tests did not testify, “the videotape was authenticated by the arresting officer, who was a witness to the recorded events”]).

There is “no requirement that a video recording have audio to be admissible” (*Belton v Lal Chicken, Inc.*, 138 AD3d 609, 610 [1st Dept 2016]).

The “chain of custody” method of authentication requires, “in addition to evidence concerning the making of the [video]tape[] and identification of the [participants], that within reasonable limits those who have handled the [video]tape from its making to its production in court ‘identify it and testify to its custody and unchanged condition’ ” (*People v Roberts*, 66 AD3d 1135, 1136 [3d Dept 2009]). Any “gaps in the chain of custody” go to the “weight that was to be accorded to the video recordings, not their admissibility” (*People v Edmonds*, 165 AD3d 1494, 1497 [3d Dept 2018]).

11.15. Viewing of Premises (CPLR 4110-c; CPL 270.50)

(1) Civil proceeding.

When during the course of a trial the court is of the opinion that a viewing or observation by the jury of the premises or place where alleged injuries to person or property were sustained in an accident or occurrence claimed to have been the cause thereof or of any other premises or place involved in the case will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the commencement of the summations, order that the jury be conducted to such premises or place for such purpose in accordance with the provisions of this rule.

(2) Criminal proceeding.

When the court is of the opinion that a viewing or observation by the jury of the premises or place where an offense on trial was allegedly committed, or of any other premises or place involved in the case, will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the commencement of the summations, order that the jury be conducted to such premises or place for such purpose in accordance with the provisions of this rule.

(3) Common Procedural Requirements.

(a) The jury must be kept together throughout under the supervision of an appropriate public servant or servants appointed by the court, and the court itself must be present throughout. *In a civil proceeding*, the parties to the action and counsel for them may as a matter of right be present throughout, but such right may be waived. *In a criminal proceeding*, the

prosecutor, the defendant, and counsel for the defendant may as a matter of right be present throughout, but such right may be waived.

(b) The purpose of such an inspection is solely to permit visual observation by the jury of the premises or place in question, and neither the court, the parties, counsel nor the jurors may engage in discussion or argumentation concerning the significance or implications of anything under observation or concerning any issue in the case.

Note

This rule reproduces CPLR 4110-c and CPL 270.50. Subdivision (1) of each statute is reproduced in subdivisions (1) and (2) of this rule, except that the last word, “rule,” in each subdivision is substituted for the word “section” in each statute. Subdivision (2) of each statute is reproduced in subdivision (3) (a) of this rule, with two minor exceptions: the opening words, “In such case,” are omitted and the words in italics are added. Subdivision (3) of each statute is reproduced in subdivision (3) (b) of this rule.

Rule 11.15 authorizes the court in both civil and criminal proceedings to order in its discretion that the jury be taken to a physical site that is at issue in a case, and given the opportunity to observe that site, with parties and counsel present, but without discussion or argument at the site. The court may order an inspection upon a finding that it “will be helpful to the jury in determining any material factual issue.” (*See People v Alston*, 24 AD3d 391, 391 [1st Dept 2005] [court properly exercised its discretion in denying defendant’s request for a visit to the crime scene; “(p)hotographs of the scene, as well as the testimony of the eyewitnesses and defendant’s investigator, permitted the jury to determine whether the eyewitnesses were able to make reliable identifications of defendant from their nearby vantage point”]; *People v Wilson*, 225 AD2d 497, 498 [1st Dept 1996] [the trial court properly denied a deliberating jury’s request to see the apartment window through which an eyewitness viewed the crime scene when the court discovered that there had been a “substantial change” in the condition of the window by “the addition of an air conditioner and the partial destruction of the window bars”]; *People v Rao*, 107 AD2d 720, 720 [2d Dept 1985] [denial of a request to view the scene of the crime was not an abuse of discretion as the crime had occurred in late November and the trial took place in late June;

consequently, there were alterations in the natural light and artificial illumination from street lamps and store fronts, and the foliage on trees was substantially different]; *People v Hamel*, 96 AD2d 644, 645 [3d Dept 1983] [ordering a view of the apartment where murder occurred was a proper exercise of discretion as “layout of (shooting victim’s) apartment was sufficiently uncommon that reconstruction of the location of each room from verbal descriptions and photographs alone would create a perplexing image for the jurors”].)

11.17. Exhibits to the Jury (CPL 310.20 [1])

Upon retiring to deliberate, the jurors may take with them any exhibits received in evidence at the trial which the court, after according the parties an opportunity to be heard upon the matter, in its discretion permits them to take.

Note

This rule reproduces verbatim CPL 310.20 (1).

While there is no statute on the subject relating to civil proceedings, decisional law, albeit sparse, supports the application of the rule set forth in CPL 310.20 (1) in civil proceedings as well (*see Howland v Willetts*, 9 NY 170, 175 [1853] [when the jury retired to deliberate, it was not error for the trial court to allow them to take a “deposition” into the jury room]; *Levy v Corn*, 191 App Div 56, 57 [1st Dept 1920] [“Whether exhibits are to be taken by the jury rests in the sound discretion of the trial judge”]; in this civil case, the consent of the defendant “was not necessary”]; *Raynolds v Vinier*, 125 App Div 18, 20 [4th Dept 1908] [The jury over the objection of the defendant was properly permitted to take to the jury room the pleadings in the action which were in evidence because “(w)here a document is in evidence it rests in the sound discretion of the court whether it is to be taken by the jurors when in their deliberations”]).

Rule 11.17 permits the trial court, in its discretion, to provide a deliberating jury with “any exhibits received in evidence.” (*See People v Bouton*, 50 NY2d 130, 137 [1980] [“CPL 310.20 (subd 1) grants the trial court discretion to allow the jury to view any exhibit received in evidence at trial, but no provision authorizes submission of unadmitted exhibits. Departure from that rule affects important rights”]; *but see People v Martell*, 91 NY2d 782, 785 [1998] [no error in submitting to the jury, at its request, a list specifying which exhibit was relevant to each of the counts in the indictment].)

Although trial judges normally wait for a deliberating jury to request an exhibit before sending them any exhibit, there is no requirement that the court must do so. The only statutory predicate to giving exhibits to the jury is to provide the parties an opportunity to be heard as to whether it should be done.

A court’s careful exercise of its discretion may be particularly warranted when one or more exhibits include a weapon or drugs. While either item may be given to a deliberating jury, with respect to a weapon, a trial court may consider whether, given the nature of the weapon and circumstances, a “safer alternative” would be appropriate, such as allowing the jurors to see the weapon in court, “with a court officer exhibiting the weapon to each juror, one at a time” (William

C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 310.20). The same alternative procedure may be appropriate when the exhibit contains drugs that "are not in a sealed container." (*Id.*)

Electronic evidence that needs equipment and an operator to view or listen to presents special issues. The Appellate Division approved "permitting the jury to view the store videotape in the jury room during deliberations with the technical assistance of court officers." (*People v Sampson*, 289 AD2d 1022, 1023 [4th Dept 2001].) An alternative, particularly if the evidence can be presented on a laptop and does not contain inadmissible portions, is to send the laptop into the jury room and designate one juror to operate it. "Using a juror to operate the laptop rather than a court officer avoids the potential error of an impermissible communication" (William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 310.20).

GUIDE TO NEW YORK EVIDENCE
ARTICLE 12: APPELLATE REVIEW

TABLE OF CONTENTS

12.01 PRESERVATION OF ERROR FOR APPELLATE REVIEW

12.05 EFFECT OF ERRONEOUS RULING

12.01. Preservation of Error for Appellate Review

(1) In general

(a) A party has the right to object to the introduction of evidence either in limine, before the evidence is offered for introduction in the presence of the trier of fact, or in the presence of the trier of fact at the time the evidence is offered.

(b) An objection that specifies the ground for the objection is known as a “specific objection.” An objection that does not specify the ground for the objection is known as a “general objection.”

(c) The failure to make a timely and proper objection to a ruling normally precludes appellate review of a claimed error in the ruling as a question of law.

(2) Making a timely and proper objection

(a) To preserve a specific error in the introduction of evidence as a question of law for appellate review, a party must timely object to the ruling admitting the evidence and state a specific ground for the objection, unless it was apparent to the court from the context. An objection is timely when the objection was raised by the party claiming error at a time when it is apparent the purported error occurred, or

at the time of a ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing a ruling or instruction.

(b) To preserve a specific error in the exclusion of evidence as a question of law for appellate review, a party must have informed the court of the substance of the evidence by an offer of proof, unless the substance is apparent to the court from the context. The court may specify the form of the offer of proof.

(c) An objection that does not state a specific ground for the objection (i.e. a “general objection”) preserves for appellate review only the question whether the evidence objected to is inherently incompetent, that is, it would not have been admissible for any purpose.

(d) An objection that is sustained and followed by a curative instruction to which there is no objection does not preserve the purported prior error for appellate review as a question of law.

(e) A party who fails to make a timely objection cannot rely on an objection to the purported error by another party to the action to preserve the error as a question of law for appellate review.

(3) In a jury trial, to the extent practicable, the court must ensure that the proceedings are conducted to prevent evidence which should not be admitted from coming to the jury’s attention, and the court must take appropriate steps to cure any reference to inadmissible evidence.

(4) Before the commencement of a trial, a court must make any pre-trial evidentiary rulings required by statute, court rule, or judicial decision and may, in its discretion, request or entertain a motion to determine the admissibility of evidence reasonably anticipated to be offered at trial.

(5) An intermediate appellate court may review an error as a matter of discretion in the interest of justice in the absence of an objection.

(6) A mode of proceedings error is reviewable as a question of law in the absence of an objection.

Note

Subdivision (1). Subdivision (1) restates the traditional role of the parties in the litigation to make objections to offered evidence in order to preclude its admission. (*See People v Lawrence*, 64 NY2d 200, 206 [1984] [“Generally, parties to litigation, even parties to a criminal prosecution, may adopt their own rules at trial by the simple expedient of failing to object to evidence offered or to except to instructions given the jury”]; *Matter of Findlay*, 253 NY 1, 11 [1930] [“Whatever was received . . . was without objection and exception, and must, therefore, be considered, whether competent or incompetent”].)

Subdivision (2). Subdivision (2) sets forth the general rules for preserving appellate review of a claimed evidentiary error as a matter of law.

The rules are derived from CPLR 4017, CPLR 5501 (a) (3), and CPL 470.05 (2).

CPLR 4017 provides:

“Formal exceptions to rulings of the court are unnecessary. At the time a ruling or order of the court is requested or made a party shall make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court. Failure to so make known objections, as prescribed in this section or in section 4110-b, may restrict review upon appeal in accordance with paragraphs three and four of subdivision (a) of section 5501.”

CPLR 5501 (a) (3) provides:

“An appeal from a final judgment brings up for review: . . . any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant.”

CPL 470.05 (2) provides:

“For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an ‘exception’ but is sufficient if

the party made his position with respect to the ruling or instruction known to the court, or if in response to a protest by a party, the court expressly decided the question raised on appeal. In addition, a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered."

These provisions apply to objections made on constitutional as well as non-constitutional grounds. (See *People v Grant*, 7 NY3d 421, 423 [2006].)

Subdivision (2) (a) provides that, to preserve for appeal an argument that evidence was as a matter of law erroneously admitted, a party must timely object and state the specific ground for the objection. (See e.g. *People v Jackson*, 29 NY3d 18, 23 [2017]; *People v Cantave*, 21 NY3d 374, 378 [2013]; *Parkhurst v Berdell*, 110 NY 386, 393 [1888].) A specific ground for the objection need not be stated, however, when the specific ground is apparent from the context. (See *People v Riback*, 13 NY3d 416, 420 [2009] [Court held that claimed error with respect to the expert's testimony on the meaning of "sexual fetish" and "pedophilia" was preserved because, although the defense objections were "general in nature," the "judge's rulings only make sense as a response to arguments that [the expert's] testimony about 'sexual fetish' and 'pedophilia' would not be helpful to the jury and was potentially very prejudicial"].) The Court of Appeals has also noted that when the requisite specificity is not present, the claimed error is nonetheless preserved if it "was expressly decided by that court." (*People v Prado*, 4 NY3d 725, 726 [2004]); see also *People v Feingold*, 7 NY3d 288, 290 [2006].)

As explained by former Chief Judge Judith Kaye in *People v Hawkins* (11 NY3d 484, 492 - 493 [2008]):

"Sound reasons underlie this preservation requirement. As we stated in [*People v*] *Gray* [86 NY2d 10 (1995)], a specific motion brings the claim to the trial court's attention, alerting all parties in a timely fashion to any alleged deficiency in the evidence, thereby advancing both the truth-seeking purpose of the trial and the goal of swift and final determination of guilt or nonguilt of a defendant (86 NY2d at 20-21). . . .

"Viewing the preservation requirement in the context of the individual trial, it is defense counsel who is charged with the single-minded, zealous representation of the client and thus, of all the trial participants, it is defense counsel who best knows the argument to be advanced on the client's behalf. Viewing the preservation requirement systemically, intermediate appellate court review is potentially comprehensive, including not only law questions but also fact issues and the interest of justice. This Court's second level of review—"to authoritatively declare and settle the law uniformly throughout the state"—is best accomplished when the

Court determines legal issues of statewide significance that have first been considered by both the trial and the intermediate appellate court.”

The definition of when an objection is timely is drawn from CPL 470.05 (2); *People v Cantave* (21 NY3d at 378 [2013]); *Parkhurst v Berdell* (110 NY 386, 393 [1888] [The defendant could not lie by, tacitly consent to the examination [of a witness], and take his chances as to the evidence [adduced], and, when it proved unsatisfactory to him, [by a motion to strike the testimony] complain of its admissibility. But if the objection to the evidence had been timely, it would not have been available”]); and *Quin v Lloyd* (41 NY 349, 354 [1869] [“A party against whom a witness is called and examined, cannot lie by and speculate on the chances, first learn what the witness testifies, and then when he finds the testimony unsatisfactory, object either to the competency of the witness or to the form or substance of the testimony”]).

Subdivision (2) (b) provides that an offer of proof must be made to preserve for appeal an argument that evidence was as a matter of law erroneously excluded, unless the substance of the evidence was apparent to the court from its context. The Court of Appeals has recognized that offers of proof may be made orally by counsel (*see People v Williams*, 6 NY2d 18, 22-24 [1959]) or by question and answer form (*see Lehigh Stove & Mfg. Co. v Colby*, 120 NY 640, 641 [1890]). Regardless of the form, an offer of proof must be clear and unambiguous. (*Daniels v Patterson*, 3 NY 47, 51 [1849] [“Before a party excepts on account of the rejection of evidence, he should make the offer in such plain and unequivocal terms as to leave no room for debate about what was intended. If he fail to do so, and leave the offer fairly open to two constructions, he has no right to insist, in a court of review, upon that construction which is most favorable to himself, unless it appears that it was so understood by the court which rejected the evidence”].)

Subdivision (2) (c) is derived from *People v Vidal* (26 NY2d 249, 254 [1970]) which held that: “A general objection, in the usual course, is to no avail when overruled if not followed by a specific objection directing the court, and the adversary, to the particular infirmity of the evidence. . . . To this there is the general exception, that if the proffered evidence is inherently incompetent, that is, there appears, without more, no purpose whatever for which it could have been admissible, then a general objection, though overruled, will be deemed to be sufficient.”

Denying defense counsel “an opportunity for specification or enlargement of [an] objection” may constitute a denial of a fair trial and accordingly warrant reversal of the judgment. (*People v De Jesus*, 42 NY2d 519, 526 [1977].)

Subdivision (2) (d) restates well-settled law. (*See e.g. People v Santiago*, 52 NY2d 865, 866 [1981] [“if defendant was of the view that the curative instructions which were given were insufficient, he should have immediately made an application seeking further or more complete instructions. In the absence of such an application, he may not assert the inadequacy of such instructions as error on appeal”]; *People v Broady*, 5 NY2d 500, 514 - 515 [1959] [the “defense attorney’s objection was sustained, the jury was instructed to disregard the statement, and the defense attorney not only failed to move for a mistrial but apparently acquiesced in the court’s handling of matter”]; *People v Berg*, 59 NY2d 294, 299 - 300 [1983] [“the court’s careful curative

instruction . . . was sufficient to dispel . . . an unwarranted inference. The importance, as well as the effect, of curative instructions in such a case cannot be underestimated, as we depend, for the integrity of the jury system itself, upon the willingness of jurors to follow the court's instructions in such matters"].)

Subdivision (2) (e). Given that parties to the same action may have different tactical and strategic reasons for not objecting to a purported error, a party who remains silent in the face of a purported error cannot rely on the objection of another party to preserve the error as a question of law for appellate review. (*People v Buckley*, 75 NY2d 843 [1990] ["Defendant cannot rely on the request of a codefendant to preserve the claimed charge error"]; *People v Cantave*, 21 NY3d 374, 378 [2013] [an issue is not preserved for appellate review, "notwithstanding a defendant's failure to expressly present the matter to the trial court, merely because another party or codefendant protested or objected"]; *People v Bailey*, 32 NY3d 70, 78 - 79 [2018] ["counsel's failure to join another codefendant's request for a *Buford* inquiry after the court denied the mistrial motion makes plain the singular course set by counsel"].)

Subdivision (3). Subdivision (3) is derived from *People v Ventimiglia* (50 NY2d 350, 362 [1981]) where the Court of Appeals expressed concern about a jury hearing evidence that the court then rules to be inadmissible and urged that steps be taken to minimize that possibility.

Subdivision (4). Subdivision (4) recognizes that the law, or a court in its discretion may require some motions to determine evidentiary issues at a trial be made before a trial commences. (See e.g. *People v Sandoval*, 34 NY2d 371, 375 [1974] [admissibility of defendant's prior convictions for impeachment purposes]; see also *Ventimiglia*, 52 NY2d at 362 [recommending a determination of the admissibility of uncharged crimes before trial or "just before the witness testifies"].) While there is no general statutory authority granted to a court to hear such motions in limine, Court of Appeals decisions have not only upheld their use, but also encouraged the practice. (See e.g. *People v Brewer*, 28 NY3d 271, 276 n 1 [2016]; *Coopersmith v Gold*, 89 NY2d 957, 958 - 959 [1997].)

Subdivision (5) states the broad power of an intermediate appellate court in both criminal and civil cases to review a claimed error, in the absence of an objection in the "interest of justice." (See CPL 470.15 [3] [c]; [6] [a]; *People v Patterson*, 39 NY2d 288, 295 [1976], *aff'd* 432 US 197 [1977]; CPLR 4404 [a]; *Hecker v State of New York*, 20 NY3d 1087 [2013]; *Morency v Horizon Transp. Servs., Inc.*, 139 AD3d 1021 [2d Dept 2016].) The Court of Appeals, on the other hand, does not possess the power to review in the "interest of justice" and accordingly may not review an issue to which no objection was made, or the objection was not timely or otherwise properly made, unless a "mode of proceedings" claimed error is present. (See e.g. *People v Mack*, 27 NY3d 534, 540 - 541 [2016].)

Subdivision (6). This subdivision incorporates Court of Appeals decisional law where:

"in a very narrow category of cases, we have recognized so-called 'mode of proceedings' errors that go to the essential validity of the process and are so

fundamental that the entire trial is irreparably tainted (*see generally People v Agramonte*, 87 NY2d 765, 770 [1996]). Errors within this tightly circumscribed class are immune from the requirement of preservation. Outside the context described by these cases, however, we have repeatedly held that a court's failure to adhere to a statutorily or constitutionally grounded procedural protection does not relieve the defendant of the obligation to protest." (*People v Kelly*, 5 NY3d 116, 119-120 [2005]; *see also People v Silva*, 24 NY3d 294, 299 [2014].)

Kelly cites examples of those cases where the Court of Appeals declined to recognize a mode of proceedings error, namely: *Pierson v People* (79 NY 424 [1880] [involving a formal irregularity in drawing jurors]); *People v Gray* (86 NY2d 10 [1995] [allegation that the prosecution failed to prove each element of the crime charged]); *People v Webb* (78 NY2d 335 [1991] [failure to sequester the jury]); *People v Irizarry* (83 NY2d 557 [1994] [dual juries, with failure to seal the first jury's verdict until the second verdict was returned]); *People v Buford* (69 NY2d 290 [1987] [excusal of a sworn juror as "grossly unqualified"]); *People v Cosmo* (205 NY 91 [1912] [juror lacked property qualifications required by statute]). (*See generally People v Thomas*, 50 NY2d 467 [1980] [noting that, in many instances, constitutional rights are waived if not preserved]; *Kelly* at 116, n 2; Arthur Karger, *The Powers of the Court of Appeals* § 21:11 [3d ed rev 2005].)

Examples of what constitutes a mode of proceedings error include: a failure to share a note from a deliberating jury with the defense, which thereby deprives the defense of an opportunity to participate in the formation of a response (*People v O'Rama*, 78 NY2d 270 [1991]); an instruction to the jury that "expressly or at least unambiguously conveys to the jury that the defendant should have testified" (*People v Autry*, 75 NY2d 836, 839 [1990]); a "charge so deficient as to amount to no charge at all" (*People v Williams*, 50 NY2d 996, 998 [1980]); an instruction that improperly shifts the burden of proof to the defendant, without an instruction to the contrary included in the charge to the jury (*People v Patterson*, 39 NY2d 288 [1976]; *People v Thomas*, 50 NY2d 467, 472 [1980]); and "[w]ant of [a trial court's subject matter] jurisdiction is a basic defect, not a trial error; it may be raised at any time and can never be waived" (*People v Nicometi*, 12 NY2d 428, 431 [1963]).

12.05. Effect of Erroneous Rulings on Evidence

Error may not be predicated upon a ruling admitting or excluding evidence unless a substantial right of a party is affected and the requirements of law regarding a protest or objection have been satisfied.

Note

This section restates present law. (*See e.g.* CPLR 2002 [“An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced”]; CPL 470.05 [1] [“An appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties”].)

For the rule on the preservation of an error for appellate review, see rule 12.01.

12.01. Preservation of Error for Appellate Review¹

(1) In general

(a) A party has the right to object to the introduction of evidence either in limine, before the evidence is offered for introduction in the presence of the trier of fact, or in the presence of the trier of fact at the time the evidence is offered.

(b) An objection that specifies the ground for the objection is known as a “specific objection.” An objection that does not specify the ground for the objection is known as a “general objection.”

(c) The failure to make a timely and proper objection to a ruling normally precludes appellate review of a claimed error in the ruling as a question of law.

(2) Making a timely and proper objection

(a) To preserve a specific error in the introduction of evidence as a question of law for appellate review, a party must timely object to the ruling admitting the evidence and state a specific ground for the objection, unless it was apparent to the court from the context. An objection is timely when the objection was raised by the party claiming error at a time when it is apparent the purported error occurred, or at the time of a ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing a ruling or instruction.

¹ Formerly Rule 1.15

(b) To preserve a specific error in the exclusion of evidence as a question of law for appellate review, a party must have informed the court of the substance of the evidence by an offer of proof, unless the substance is apparent to the court from the context. The court may specify the form of the offer of proof.

(c) An objection that does not state a specific ground for the objection (i.e. a “general objection”) preserves for appellate review only the question whether the evidence objected to is inherently incompetent, that is, it would not have been admissible for any purpose.

(d) An objection that is sustained and followed by a curative instruction to which there is no objection does not preserve the purported prior error for appellate review as a question of law.

(e) A party who fails to make a timely objection cannot rely on an objection to the purported error by another party to the action to preserve the error as a question of law for appellate review.

(3) In a jury trial, to the extent practicable, the court must ensure that the proceedings are conducted to prevent evidence which should not be admitted from coming to the jury’s attention, and the court must take appropriate steps to cure any reference to inadmissible evidence.

(4) Before the commencement of a trial, a court must make any pre-trial evidentiary rulings required by statute, court rule, or judicial decision and may, in its discretion, request or entertain a motion to determine the admissibility of evidence reasonably anticipated to be offered at trial.

(5) An intermediate appellate court may review an error as a matter of discretion in the interest of justice in the absence of an objection.

(6) A mode of proceedings error is reviewable as a question of law in the absence of an objection.

Note

Subdivision (1). Subdivision (1) restates the traditional role of the parties in the litigation to make objections to offered evidence in order to preclude its admission. (See *People v Lawrence*, 64 NY2d 200, 206 [1984] [“Generally, parties to litigation, even parties to a criminal prosecution, may adopt their own rules at trial by the simple expedient of failing to object to evidence offered or to except to instructions given the jury”]; *Matter of Findlay*, 253 NY 1, 11 [1930] [“Whatever was received . . . was without objection and exception, and must, therefore, be considered, whether competent or incompetent”].)

Subdivision (2). Subdivision (2) sets forth the general rules for preserving appellate review of a claimed evidentiary error as a matter of law.

The rules are derived from CPLR 4017, CPLR 5501 (a) (3), and CPL 470.05 (2).

CPLR 4017 provides:

“Formal exceptions to rulings of the court are unnecessary. At the time a ruling or order of the court is requested or made a party shall make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court. Failure to so make known objections, as prescribed in this section or in section 4110-b, may restrict review upon appeal in accordance with paragraphs three and four of subdivision (a) of section 5501.”

CPLR 5501 (a) (3) provides:

“An appeal from a final judgment brings up for review: . . . any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant.”

CPL 470.05 (2) provides:

“For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is

presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an ‘exception’ but is sufficient if the party made his position with respect to the ruling or instruction known to the court, or if in response to a protest by a party, the court expressly decided the question raised on appeal. In addition, a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court’s ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered.”

These provisions apply to objections made on constitutional as well as non-constitutional grounds. (*See People v Grant*, 7 NY3d 421, 423 [2006].)

Subdivision (2) (a) provides that, to preserve for appeal an argument that evidence was as a matter of law erroneously admitted, a party must timely object and state the specific ground for the objection. (*See e.g. People v Jackson*, 29 NY3d 18, 23 [2017]; *People v Cantave*, 21 NY3d 374, 378 [2013]; *Parkhurst v Berdell*, 110 NY 386, 393 [1888].) A specific ground for the objection need not be stated, however, when the specific ground is apparent from the context. (*See People v Riback*, 13 NY3d 416, 420 [2009] [Court held that claimed error with respect to the expert’s testimony on the meaning of “sexual fetish” and “pedophilia” was preserved because, although the defense objections were “general in nature,” the “judge’s rulings only make sense as a response to arguments that [the expert’s] testimony about ‘sexual fetish’ and ‘pedophilia’ would not be helpful to the jury and was potentially very prejudicial”].) The Court of Appeals has also noted that when the requisite specificity is not present, the claimed error is nonetheless preserved if it “was expressly decided by that court.” (*People v Prado*, 4 NY3d 725, 726 [2004]); *see also People v Feingold*, 7 NY3d 288, 290 [2006].)

As explained by former Chief Judge Judith Kaye in *People v Hawkins* (11 NY3d 484, 492 - 493 [2008]):

“Sound reasons underlie this preservation requirement. As we stated in [*People v*] *Gray* [86 NY2d 10 (1995)], a specific motion brings the claim to the trial court’s attention, alerting all parties in a timely fashion to any alleged deficiency in the evidence, thereby advancing both the truth-seeking purpose of the trial and the goal of swift and final determination of guilt or nonguilt of a defendant (86 NY2d at 20-21). . . .

“Viewing the preservation requirement in the context of the individual trial, it is defense counsel who is charged with the single-minded, zealous representation of the client and thus, of all the trial participants, it is defense counsel who best knows the argument to be advanced on the client’s behalf. Viewing the preservation requirement systemically, intermediate appellate court review is potentially comprehensive, including not only law questions but also fact issues and the interest of justice. This Court’s second level of review—‘to authoritatively declare and settle the law uniformly throughout the state’—is best accomplished when the Court determines legal issues of statewide significance that have first been considered by both the trial and the intermediate appellate court.”

The definition of when an objection is timely is drawn from CPL 470.05 (2); *People v Cantave* (21 NY3d at 378 [2013]); *Parkhurst v Berdell* (110 NY 386, 393 [1888] [The defendant could not lie by, tacitly consent to the examination [of a witness], and take his chances as to the evidence [adduced], and, when it proved unsatisfactory to him, [by a motion to strike the testimony] complain of its admissibility. But if the objection to the evidence had been timely, it would not have been available”]); and *Quin v Lloyd* (41 NY 349, 354 [1869] [“A party against whom a witness is called and examined, cannot lie by and speculate on the chances, first learn what the witness testifies, and then when he finds the testimony unsatisfactory, object either to the competency of the witness or to the form or substance of the testimony”]).

Subdivision (2) (b) provides that an offer of proof must be made to preserve for appeal an argument that evidence was as a matter of law erroneously excluded, unless the substance of the evidence was apparent to the court from its context. The Court of Appeals has recognized that offers of proof may be made orally by counsel (see *People v Williams*, 6 NY2d 18, 22-24 [1959]) or by question and answer form (see *Lehigh Stove & Mfg. Co. v Colby*, 120 NY 640, 641 [1890]). Regardless of the form, an offer of proof must be clear and unambiguous. (*Daniels v Patterson*, 3 NY 47, 51 [1849] [“Before a party excepts on account of the rejection of evidence, he should make the offer in such plain and unequivocal terms as to leave no room for debate about what was intended. If he fail to do so, and leave the offer fairly open to two constructions, he has no right to insist, in a court of review, upon that construction which is most favorable to himself, unless it appears that it was so understood by the court which rejected the evidence”].)

Subdivision (2) (c) is derived from *People v Vidal* (26 NY2d 249, 254 [1970]) which held that: “A general objection, in the usual course, is to no avail when overruled if not followed by a specific objection directing the court, and the adversary, to the particular infirmity of the evidence. . . . To this there is the general exception, that if the proffered evidence is inherently incompetent, that is, there appears, without more, no purpose whatever for which it could have been

admissible, then a general objection, though overruled, will be deemed to be sufficient.”

Denying defense counsel “an opportunity for specification or enlargement of [an] objection” may constitute a denial of a fair trial and accordingly warrant reversal of the judgment. (*People v De Jesus*, 42 NY2d 519, 526 [1977].)

Subdivision (2) (d) restates well-settled law. (See *e.g. People v Santiago*, 52 NY2d 865, 866 [1981] [“if defendant was of the view that the curative instructions which were given were insufficient, he should have immediately made an application seeking further or more complete instructions. In the absence of such an application, he may not assert the inadequacy of such instructions as error on appeal”]; *People v Broady*, 5 NY2d 500, 514 - 515 [1959] [the “defense attorney’s objection was sustained, the jury was instructed to disregard the statement, and the defense attorney not only failed to move for a mistrial but apparently acquiesced in the court’s handling of matter”]; *People v Berg*, 59 NY2d 294, 299 - 300 [1983] [“the court’s careful curative instruction . . . was sufficient to dispel . . . an unwarranted inference. The importance, as well as the effect, of curative instructions in such a case cannot be underestimated, as we depend, for the integrity of the jury system itself, upon the willingness of jurors to follow the court’s instructions in such matters”].)

Subdivision (2) (e). Given that parties to the same action may have different tactical and strategic reasons for not objecting to a purported error, a party who remains silent in the face of a purported error cannot rely on the objection of another party to preserve the error as a question of law for appellate review. (*People v Buckley*, 75 NY2d 843 [1990] [“Defendant cannot rely on the request of a codefendant to preserve the claimed charge error”]; *People v Cantave*, 21 NY3d 374, 378 [2013] [an issue is not preserved for appellate review, “notwithstanding a defendant’s failure to expressly present the matter to the trial court, merely because another party or codefendant protested or objected”]; *People v Bailey*, 32 NY3d 70, 78 - 79 [2018] [“counsel’s failure to join another codefendant’s request for a *Buford* inquiry after the court denied the mistrial motion makes plain the singular course set by counsel”].)

Subdivision (3). Subdivision (3) is derived from *People v Ventimiglia* (50 NY2d 350, 362 [1981]) where the Court of Appeals expressed concern about a jury hearing evidence that the court then rules to be inadmissible and urged that steps be taken to minimize that possibility.

Subdivision (4). Subdivision (4) recognizes that the law, or a court in its discretion may require some motions to determine evidentiary issues at a trial be made before a trial commences. (See *e.g. People v Sandoval*, 34 NY2d 371, 375 [1974] [admissibility of defendant’s prior convictions for impeachment purposes]; see also *Ventimiglia*, 52 NY2d at 362 [recommending a determination of the admissibility of uncharged crimes before trial or “just before the witness

testifies”).) While there is no general statutory authority granted to a court to hear such motions in limine, Court of Appeals decisions have not only upheld their use, but also encouraged the practice. (See *e.g. People v Brewer*, 28 NY3d 271, 276 n 1 [2016]; *Coopersmith v Gold*, 89 NY2d 957, 958 - 959 [1997].)

Subdivision (5) states the broad power of an intermediate appellate court in both criminal and civil cases to review a claimed error, in the absence of an objection in the “interest of justice.” (See CPL 470.15 [3] [c]; [6] [a]; *People v Patterson*, 39 NY2d 288, 295 [1976], *affd* 432 US 197 [1977]; CPLR 4404 [a]; *Hecker v State of New York*, 20 NY3d 1087 [2013]; *Morency v Horizon Transp. Servs., Inc.*, 139 AD3d 1021 [2d Dept 2016].) The Court of Appeals, on the other hand, does not possess the power to review in the “interest of justice” and accordingly may not review an issue to which no objection was made, or the objection was not timely or otherwise properly made, unless a “mode of proceedings” claimed error is present. (See *e.g. People v Mack*, 27 NY3d 534, 540 - 541 [2016].)

Subdivision (6). This subdivision incorporates Court of Appeals decisional law where:

“in a very narrow category of cases, we have recognized so-called ‘mode of proceedings’ errors that go to the essential validity of the process and are so fundamental that the entire trial is irreparably tainted (see generally *People v Agramonte*, 87 NY2d 765, 770 [1996]). Errors within this tightly circumscribed class are immune from the requirement of preservation. Outside the context described by these cases, however, we have repeatedly held that a court’s failure to adhere to a statutorily or constitutionally grounded procedural protection does not relieve the defendant of the obligation to protest.” (*People v Kelly*, 5 NY3d 116, 119-120 [2005]; see also *People v Silva*, 24 NY3d 294, 299 [2014].)

Kelly cites examples of those cases where the Court of Appeals declined to recognize a mode of proceedings error, namely: *Pierson v People* (79 NY 424 [1880] [involving a formal irregularity in drawing jurors]); *People v Gray* (86 NY2d 10 [1995] [allegation that the prosecution failed to prove each element of the crime charged]); *People v Webb* (78 NY2d 335 [1991] [failure to sequester the jury]); *People v Irizarry* (83 NY2d 557 [1994] [dual juries, with failure to seal the first jury’s verdict until the second verdict was returned]); *People v Buford* (69 NY2d 290 [1987] [excusal of a sworn juror as “grossly unqualified”]); *People v Cosmo* (205 NY 91 [1912] [juror lacked property qualifications required by statute]). (See generally *People v Thomas*, 50 NY2d 467 [1980] [noting that, in many instances, constitutional rights are waived if not preserved]; *Kelly* at 116, n 2; Arthur Karger, *The Powers of the Court of Appeals* § 21:11 [3d ed rev 2005].)

Examples of what constitutes a mode of proceedings error include: a failure to share a note from a deliberating jury with the defense, which thereby deprives the defense of an opportunity to participate in the formation of a response (*People v O’Rama*, 78 NY2d 270 [1991]); an instruction to the jury that “expressly or at least unambiguously conveys to the jury that the defendant should have testified” (*People v Autry*, 75 NY2d 836, 839 [1990]); a “charge so deficient as to amount to no charge at all” (*People v Williams*, 50 NY2d 996, 998 [1980]); an instruction that improperly shifts the burden of proof to the defendant, without an instruction to the contrary included in the charge to the jury (*People v Patterson*, 39 NY2d 288 [1976]; *People v Thomas*, 50 NY2d 467, 472 [1980]); and “[w]ant of [a trial court’s subject matter] jurisdiction is a basic defect, not a trial error; it may be raised at any time and can never be waived” (*People v Nicometi*, 12 NY2d 428, 431 [1963]).

12.05 Effect of Erroneous Rulings on Evidence¹

Error may not be predicated upon a ruling admitting or excluding evidence unless a substantial right of a party is affected and the requirements of law regarding a protest or objection have been satisfied.

Note

This section restates present law. (See *e.g.* CPLR 2002 [“An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced”]; CPL 470.05 [1] [“An appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties”].)

For the rule on the preservation of an error for appellate review, see rule 12.01.

¹ Formerly Rule 1.17